U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Office of Administrative Appeals
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: JUL 23 2013 Office: DETROIT FILE:

IN RE:

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Detroit, Michigan, and a subsequent appeal was rejected as untimely by the AAO. On service motion, the AAO will reopen the appeal and the appeal will be dismissed.

The applicant, a native of Lebanon and a citizen of Canada, is inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. The applicant is applying for a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), to reside in the United States with his U.S. citizen spouse and children. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by his U.S. citizen spouse.

In a decision dated April 10, 2012, the Field Office Director concluded that the applicant did not establish extreme hardship to a qualifying relative and the waiver was denied accordingly. The applicant appealed that decision and the AAO dismissed the appeal as untimely. Subsequently, counsel submitted proof of timely delivery of the appeal and the AAO will reopen the appeal on service motion.

On appeal, counsel for the applicant states that the applicant has not been convicted of a crime involving moral turpitude or if he has, that he has established extreme hardship to his U.S. citizen spouse as a result of his inadmissibility.

In support of the waiver application, the record includes, but is not limited to: a legal briefs from counsel; a letter from the applicant's spouse; biographical information for the applicant, his spouse, and their children; documentation of the applicant's spouse's education; federal and state income tax returns for the applicant's spouse from 2008 and prior; reference letters for the applicant; documentation regarding the applicant's professional career; and documentation of the applicant's criminal and immigration history.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(2) of the Act provides, in pertinent part:

> (A)(i) Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-
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> (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or…
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> is inadmissible.

> (ii) Exception.-Clause (i)(I) shall not apply to an alien who committed only one crime if-
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> . . . .
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> (II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

The record establishes that on September 27, 2010, before the U.S. District Court, District of Arizona, the applicant pled guilty to Misprision of a Felony, 18 U.S.C. § 4. On February 28, 2011, the applicant was placed on probation for a period of five years. He was also ordered to pay restitution to American Express in the amount of $200,000, to be paid jointly and severally with his co-defendants, in addition to $200,100.00 in monetary penalties.

18 U.S.C. § 4 states that:

> Misprision of felony
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> Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.

The Board of Immigration Appeals (BIA) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

> [M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general....
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> In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

Misprision of a felony has been found to be a crime of moral turpitude "because it necessarily involves an affirmative act of concealment or participation in a felony, behavior that runs contrary to accepted societal duties and involves dishonest or fraudulent activity." *See Itani v. Ashcroft* 298 F.3d 1213, 1216 (11th Cir. 2002). In *Itani*, the Court cites the Supreme Court's observation that:

> Concealment of crime has been condemned throughout our history.... Although the term "misprision of felony" now has an archaic ring, gross indifference to the duty to report known criminal behavior remains a badge of irresponsible citizenship. This deeply rooted social obligation is not diminished when the witness to crime is involved in illicit activities himself. Unless his silence is protected by the privilege against self-incrimination ... the criminal defendant no less than any other citizen is obliged to assist the authorities.

Id. (citing *Roberts v. United States,* 445 U.S. 552, 557–58 (1980).

On appeal, counsel challenges the Field Office Director's decision that the applicant's conviction for misprision of a felony in violation of 18 U.S.C. § 4 is a crime involving moral turpitude citing *Robles-Urrea v. Holder*, 678 F.3d 702 (9th Cir. 2012) (holding that a violation of 18 U.S.C. § 4 does not categorically constitute a crime involving moral turpitude). The Court in *Robles-Urrea* found "a realistic probability, not [just] a theoretical possibility," that the misprision of a felony statute will encompass conduct that is not morally turpitudinous and remanded the case for a modified categorical analysis of the conviction. *Id.* (citing *Gonzales v. Duenas–Alvarez, 549 U.S. 183, 193 (2007)).* The AAO notes that this case arises in the jurisdiction of the Sixth Circuit Court of Appeals, not the Ninth Circuit Court of Appeals; however, even were the AAO to conduct a modified categorical analysis of the applicant's conviction, the record of conviction in this case, which includes the plea agreement, indicates that the applicant had taken an affirmative step to conceal from federal authorities the crime of Wire Fraud, in violation of 18 U.S.C. § 1343, a felony, had been committed. Accordingly, the AAO affirms that the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act.[1]

Section 212(h) of the Act provides, in pertinent part, that:

> The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana . . . .

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[1] The AAO notes that the applicant was also found to be inadmissible under section 212(a)(2)(A)(i)(I) of the Act as a result of 1996 conviction for theft in Canada. On appeal, counsel states that there is no record of the applicant's conviction before USCIS and the applicant did not make a formal admission to the crime. As the applicant is separately inadmissible under section 212(a)(2)(A)(i)(I) of the Act as the result of his 2011 conviction for misprision of a felony, the AAO does not need to make a final determination on this matter at this time. The AAO notes, however, that it is the applicant's burden of proof in these proceedings and the applicant has failed to produce the court records for this stated offense in Canada or, in the alternative, proof that these court records are unavailable. *See* section 291 of the Act, 8 U.S.C. § 1361.

> (1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that –
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> (i) … the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,
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> (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
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> (iii) the alien has been rehabilitated; or
>
> (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . .; and
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> (2) the Attorney General [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

As 15 years have not passed since the activities that led to the applicant's conviction, a waiver of inadmissibility in his case, under section 212(h)(1)(B) of the Act, is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. The applicant's spouse and children are qualifying relatives in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996).

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez,* the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative

would relocate. *Id.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. *See generally Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

The Board has made it clear that "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator "must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation." *Id.*

The actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. *See, e.g.*, *Matter of Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. *See Salcido-Salcido*, 138 F.3d 1292, 1293 (9th Cir. 1998) (quoting *Contreras-Buenfil v. INS,* 712 F.2d 401, 403 (9th Cir. 1983)); *but see Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

We will first consider the hardship claimed to the applicant's U.S. citizen spouse if she were to remain in the United States and be separated from the applicant. The record indicates that the applicant's spouse is 35 years old, was born in the United States in Dearborn, Michigan where she currently resides with the applicant and her children. The record indicates that the applicant and

his spouse have two young children, ages 3 and 2. Counsel states that the couple was expecting a third child, but no additional information was provided to support that assertion. The applicant's spouse states that the applicant assists her in raising the children "from diapers to discipline." She also states that the applicant assists in supporting her immediate family, especially her parents, "with work around the house." Counsel for the applicant indicates that the applicant's spouse's immediate family is "most[ly] concentrated in the Michigan area." A list provided by counsel indicates that the applicant's spouse has seven immediate family members in Michigan including her parents, brothers and sisters. Although the applicant's spouse states in her letter that she "cannot imagine being separated" from the applicant, the record does not make clear what hardships she would suffer as a result of separation that would amount to extreme hardship, when considered in the aggregate. The applicant's spouse has multiple family members in the immediate area and has not indicated why she couldn't rely, if needed, on her family members.

The record indicates that the applicant's spouse has worked for since August 2002. A letter in the record dated February 9, 2009 from the Director of Human Resources for indicates that the applicant was working as a counselor earning an annual salary of $31,082.40. On the applicant's spouse's 2008 Federal Income Tax returns she claimed an adjusted gross income of $39,756. The record does not contain more current information regarding the applicant or his spouse's incomes. The record does not make clear what financial contribution, if any, the applicant makes to the family. Although the record contains copies of the applicant's license as an Optometrist, there is no documentation provided to indicate if he is currently working or licensed. Although the applicant's spouse's assertions are relevant and have been taken into consideration, little weight can be afforded them in the absence of supporting evidence. *See Matter of Kwan*, 14 I&N Dec. 175 (BIA 1972) ("Information in an affidavit should not be disregarded simply because it appears to be hearsay; in administrative proceedings, that fact merely affects the weight to be afforded it."). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Similarly, without supporting evidence, the assertions of counsel will not satisfy the applicant's burden of proof. The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The AAO recognizes the applicant's spouse's difficult position; however the hardships presented, even when considered in the aggregate, do not rise to the level of extreme hardship.

Although counsel states that the applicant's U.S. citizen children would suffer extreme hardship as a result of separation from the applicant, no further statements or documentary evidence were provided regarding what hardships the children would suffer. As stated above, the unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. at 534 n.2; *Matter of Laureano*, 19 I&N Dec. at 3 n.2; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. In her statement, the applicant's spouse states that the applicant assists in the care of the children and will set an extraordinary example for her children. Based on this limited information, the record does not establish that the hardships to the applicant's children can be distinguished from

common hardships. Although the AAO notes that the applicant's children would likely endure hardship as a result of separation from the applicant, the record does not establish that the hardships either of them would face, each considered in the aggregate, rise to the level of "extreme."

In regards to the hardship to the applicant's spouse were she to relocate to Canada to reside with the applicant, the applicant's spouse states that "it would be a crushing blow to me and my family." In particular, the applicant's spouse states that she would lose tenure in her profession and would have to obtain new credentials in Canada. The AAO notes that no documentation was submitted in the record to support what effect losing tenure would have on the applicant's spouse's well-being. Additionally, no documentation was provided to indicate employment prospects, or the lack thereof, for the applicant's spouse in Canada. Again, the burden of proof is on the applicant in these proceedings. *See* Section 291 of the Act, 8 U.S.C. § 1361. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. Moreover, the AAO notes that the inability to pursue one's chosen profession has been found to be one of the common or typical results of inadmissibility and not the type of hardship that is considered extreme. *See generally Matter of Cervantes-Gonzalez,* 22 I&N Dec. at 568; *Matter of Pilch, 21 I&N Dec. at 632-33*; *Matter of Ige, 20 I&N Dec. at 885*; *Matter of Ngai,* 19 I&N Dec. at 246-47; *Matter of Kim,* 15 I&N Dec. at 89-90; *Matter of Shaughnessy,* 12 I&N Dec. at 813. The applicant's spouse also mentions her close relationship with her family in the United States, particularly the relationship between her mother and children. The AAO notes that [redacted] Michigan is very near the border with Canada. The record does not indicate why the applicant's spouse would be unable to maintain ties with her family in [redacted] were she to relocate to Canada. Based on the information provided, considered in the aggregate, the evidence does not illustrate that the hardship suffered in this case, should the applicant's spouse relocate to Canada, would be beyond what is normally experienced by families dealing with removal or inadmissibility. *Matter of O-J-O-*, 21 I&N Dec. at 383.

In regards to the applicant's children and the hardship that they would experience as a result of relocation to Canada, the applicant's spouse states that it would be a hardship to remove her eldest child from his pre-school. The AAO notes that the record does not contain any information about the applicant's child's preschool or the type of hardship that the child would suffer if he were removed from the preschool. Additionally, she states that her children are very attached to seeing her mother, their grandmother, on a daily basis. As noted above, the record indicates that the applicant's mother-in-law resides in [redacted] Michigan, which is very near the border with Canada. The record does not indicate that the applicant's children would be unable to maintain relationships with their grandmother and others in the United States were they to relocate to Canada. The AAO notes that the children would suffer some hardship upon relocation, but the record does not indicate that those hardships, considered in the aggregate for each child, are beyond the hardships normally experienced by individuals as a result of immigration inadmissibility.

Although the applicant's spouse concern for herself and her children over the applicant's immigration status is neither doubted nor minimized, the fact remains that Congress provided for a waiver of inadmissibility only under limited circumstances. In nearly every qualifying relationship, whether between husband and wife or parent and child, there is a deep level of affection and a certain amount of emotional and social interdependence. While, in common parlance, the prospect of separation or involuntary relocation nearly always results in considerable hardship to individuals and families, in specifically limiting the availability of a waiver of inadmissibility to cases of "*extreme* hardship," Congress did not intend that a waiver be granted in every case where a qualifying relationship, and thus the familial and emotional bonds, exist. The point made in this and prior decisions on this matter is that the current state of the law, viewed from a legislative, administrative, or judicial point of view, requires that the hardship, which meets the standard in section 212(h) of the Act**,** be above and beyond the normal, expected hardship involved in such cases.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that the applicant's U.S. citizen spouse will face extreme hardship if the applicant is not granted a waiver of inadmissibility. Although the AAO acknowledges that the applicant's U.S. citizen spouse will suffer some hardship, the record does not establish that the hardship rises to the level of "extreme" as contemplated by statute and case law. Having found the applicant statutorily ineligible for relief under section 212(h) of the Act, no purpose would be served in discussing whether the applicant merits a waiver as a matter of discretion.

In these proceedings, the burden of establishing eligibility for the waiver rests entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has not met his burden and the appeal will be dismissed.

ORDER: The appeal is dismissed.