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

U.S. Citizenship and Immigration Services

(b)(6)

Date: JUL 25 2013 Office: HOUSTON 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.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Houston, Texas and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Cambodia who was found to be 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 the spouse of a U.S. citizen, has one U.S. citizen stepson, two U .S. citizen daughters, and one U.S. citizen son. He seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with his family.

In a decision, dated November 29, 2012, the field office director found that the applicant was convicted on August 30, 2000 of giving false information to a police officer, which he found to be a crime involving moral turpitude rendering the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act. He then found that the applicant had failed to show that his spouse and/or children would suffer hardship rising to the level of extreme as a result of his inadmissibility. The application was denied accordingly.

In an appeal, filed on December 27, 2012 and received by the AAO on January 23, 2013, counsel states that the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act because he has only been convicted of one crime involving moral turpitude and that crime qualifies for the petty offense exception. Counsel also states that the field office director erred in failing to issue a Notice of Intent to Deny before denying the applicant's waiver application. Finally, counsel asserts that the applicant has established that his spouse and children would suffer extreme hardship if his waiver application was denied.

Section 212(a)(2)(A) of the Act states, in pertinent parts:

> (i) [A]ny 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 . . . is inadmissible.
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> (ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-
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> > (I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or

> (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 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.)

In *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. First, in evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a "realistic probability, not a theoretical possibility," that the statute would be applied to reach conduct that does not involve moral turpitude. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability exists where, at the time of the proceeding, an "actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien's own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude." *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

However, if a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, "the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude." *Silva-Trevino*, 24 I&N Dec. at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage inquiry in which the adjudicator reviews the "record of conviction" to determine if the conviction was based on conduct involving moral turpitude. *Id.* at 698-699, 703-704, 708. The record of

conviction consists of documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.* at 698, 704, 708.

If review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. *Id.* at 699-704, 708-709. However, this "does not mean that the parties would be free to present any and all evidence bearing on an alien's conduct leading to the conviction. (citation omitted). The sole purpose of the inquiry is to ascertain the nature of the prior conviction; it is not an invitation to relitigate the conviction itself." *Id.* at 703.

The record indicates that the applicant has been convicted of two crimes. On March 18, 1998, the applicant was arrested and charged with Attempted Theft I under sections 164.015 and 164.405 of the Oregon Revised Statutes (ORS). The applicant pled guilty to this offense on February 16, 2001 and was sentenced to one year probation, twenty hours of community service, and theft counseling. Counsel does not dispute on appeal that this conviction is a crime involving moral turpitude.

On August 15, 1999, the applicant was charged with giving false information to a police officer. On August 20, 2000 he pled guilty to this charge and was sentenced to 18 months probation. We note that the applicant has numerous other arrests on his record stemming from his failure to appear in court and/or his violating the terms of his probation. The record does not indicate that the applicant has been convicted of any other crimes.

Contrary to counsel's assertions, we find that the applicant's conviction for giving false information to a police officer under ORS §807.620 is also a crime involving moral turpitude.

ORS §807.620 states:

> (1) A person commits the offense of giving false information to a police officer if the person knowingly uses or gives a false or fictitious name, address or date of birth to any police officer who is enforcing motor vehicle laws.

In *Blanco v. Mukasey*, 518 F.3d 714 (9th Cir. 2008), the Ninth Circuit Court of Appeals held that giving false identification to a peace officer under California Penal Code (CPC) § 148.9(a) did not require fraudulent intent and was not categorically a crime involving moral turpitude. The Court stated that giving false information to a police officer under CPC § 148.9(a) required a showing that the individual knowingly misrepresented his or her identity to a peace officer, but did not require that the individual thereby knowingly attempted to obtain anything of value, thus indicating that fraud was not implicit in the nature of the crime. *Id.* The Ninth Circuit has also held that crimes where the benefit gained is the impediment of law enforcement and avoidance of arrest do not involve moral turpitude. *Navarro-Lopez v. Gonzales*, 503 F. 3d 1063 (9th Cir. 2007). However, the applicant resides within the jurisdiction of the Fifth Circuit, so Ninth Circuit case law is not controlling in this case.

In *Omagah v. Ashcroft*, 288 F.3d 254 (5th Cir. 2002), the Fifth Circuit Court of Appeals found that crimes including dishonesty or lying as an essential element involve moral turpitude. The Court went on to note that the courts of appeals have interpreted "moral turpitude" as including a wide variety of crimes that involve some fraud or deceit. See *In Jordan v. DeGeorge*, 341 U.S. 223, 229, 71 S.Ct. 703, 95 L.Ed. 886 (1951); *United States ex rel. Sollazzo v. Esperdy*, 285 F.2d 341, 342 (2d Cir.1961) (classifying bribery of a person involved in amateur athletics as a crime involving moral turpitude); *United States ex rel. Popoff v. Reimer*, 79 F.2d 513, 515 (2d Cir.1935) (crime of encouraging alien to lie to obtain citizenship); *United States ex rel. Karpay v. Uhl*, 70 F.2d 792, 792–93 (2d Cir.1934) (perjury); *Calvo–Ahumada v. Rinaldi*, 435 F.2d 544, 546 (3d Cir.1970) (making false statement under oath in application for permanent residence); *Iredia v. INS*, 981 F.2d 847, 849 (5th Cir.1993) (credit card fraud); *Balogun v. Ashcroft*, 270 F.3d 274, 278–79 & n. 1 (5th Cir.2001) (interpreting Alabama law making illegal the forgery, possession, or use of fake credit cards); *United States ex rel. Flores v. Savoretti*, 205 F.2d 544, 547 (5th Cir.1953) (perjury); *Kabongo v. INS*, 837 F.2d 753, 758 (6th Cir.1988) (lying on a student loan application). Furthermore, in *Matter of Flores,* 17 I. & N. Dec. 225, 230 (BIA 1980), the BIA held that fraud was implicit in a statute when the crime inherently involved a deliberate deception of the government and an impairment of its lawful functions.

In the applicant's case, the statutory language requires that a person convicted under ORS §807.620 knowingly use or give a false or fictitious name, address or date of birth to any police officer who is enforcing motor vehicle laws. ORS § 807.620 includes dishonesty as an essential element of the crime. Moreover, the Plea Agreement in the record of conviction indicates that the applicant gave false information to a police officer to avoid arrest because he was aware that there was a warrant issued for his arrest and by providing his true identity he would have been immediately arrested. Thus, we will not disturb the finding that the applicant's conviction is a crime involving moral turpitude. Accordingly, the applicant has been convicted of two crimes involving moral turpitude, is not eligible for the petty offense exception as a result, and is inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Act.

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) (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

(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

(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.

Although the events which led to the applicant's conviction for attempted theft occurred on March 18, 1998, more than 15 years ago, the events which led to his conviction for giving false information to a police officer occurred on August 15, 1999, less than 15 years ago. Therefore, at the present time, the applicant's second conviction cannot be waived under section 212(h)(1)(A) of the Act and the applicant must establish extreme hardship to a qualifying relative under section 212(h)(1)(B) for his inadmissibility to be waived.

A waiver of inadmissibility under section 212(h) 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 wife and four 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).

However, though hardships may not be extreme when considered abstractly or individually, 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. *Salcido-Salcido v. I.N.S., 138 F.3d 1292 (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.

The record of hardship includes: a statement from the applicant's spouse, a statement from the applicant, financial documentation, documentation relating to the applicant's spouse's education, letters from the applicant's children, academic reports for the applicant's children, documentation indicating strong family ties in the United States, and numerous articles and reports on conditions in Cambodia.

We find that the applicant's spouse and children will suffer extreme emotional and financial hardship as a result of separation and has a result of relocation to Cambodia. The record indicates

that the applicant currently earns approximately 50-65% of the household income, with the applicant's spouse earning only $25,000 per year. If the applicant and his family are separated, his spouse would be raising four children on $25,000 per year, which is below the poverty line for a family of five. The record also indicates that the applicant's loss of income would result in the loss of the family home and the ability for the applicant's spouse to pursue her nursing degree.

The applicant's spouse also claims emotional hardship as a result of separation because she would have to raise her children on her own, as she cannot rely on help from family members. The record indicates that most the applicant's and his spouse's family live in Oregon. The record also indicates that the applicant and his spouse chose to move to Texas to move away from their family and what they describe as problems in their upbringing.

We find further that the applicant's spouse and children would suffer extreme hardship as a result of relocating to Cambodia. The record shows that the applicant and/or his spouse would not be likely to find employment in Cambodia. The applicant's spouse cannot speak the language, and neither the applicant nor his spouse have experience in the main sources of employment: subsistence farming in rural areas and garment manufacturing in urban areas. The record also indicates that the minimum wages in Cambodia and the minimum wages in the garment industry would make it very difficult to raise a family of six.

The record also indicates that the applicant's children would suffer educationally as a result of relocation. The record shows that Cambodia ranks 134th for educational standards in the world (the United States ranks 13th). The United Nations Human Development Index ranks Cambodia as 139th. We note that the applicant's children are 6, 9, 10, and 13 years old, with two girls and two boys. Country condition reports in the record indicate that discrimination against women and girls regarding access to high education, under-development, a poor human rights record, and human trafficking are other serious problems facing Cambodia. We also note the significant hardships involved in adjusting to a different language and culture for children acculturated in the United States. Thus, in giving careful consideration to the totality of the hardships that would be faced by the applicant's children as well as the applicant's spouse, we find that the applicant has shown his qualifying family members would suffer extreme hardship as a result of relocation. Considered in the aggregate, the applicant has established that his spouse and children would face extreme hardship if the applicant's waiver request is denied.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Id.* at 299. The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

The AAO notes that *Matter of Marin*, 16 I & N Dec. 581 (BIA 1978), involving a section 212(c) waiver, is used in waiver cases as guidance for balancing favorable and unfavorable factors and this

cross application of standards is supported by the Board of Immigration Appeals (BIA). In *Matter of Mendez-Moralez*, the BIA, assessing the exercise of discretion under section 212(h) of the Act, stated:

> We find this use of *Matter of Marin, supra*, as a general guide to be appropriate. For the most part, it is prudent to avoid cross application, as between different types of relief, of particular principles or standards for the exercise of discretion. *Id.* However, our reference to *Matter of Marin, supra,* is only for the purpose of the approach taken in that case regarding the balancing of favorable and unfavorable factors within the context of the relief being sought under section 212(h)(1)(B) of the Act. *See, e.g., Palmer v. INS*, 4 F.3d 482 (7th Cir.1993) (balancing of discretionary factors under section 212(h)). We find this guidance to be helpful and applicable, given that both forms of relief address the question of whether aliens with criminal records should be admitted to the United States and allowed to reside in this country permanently.

Matter of Mendez-Moralez at 300.

In *Matter of Mendez-Moralez*, in evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the BIA stated that:

> The factors adverse to the applicant include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature, recency and seriousness, and the presence of other evidence indicative of an alien's bad character or undesirability as a permanent resident of this country. . . . The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where the alien began his residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value and service to the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends, and responsible community representatives). . . .

Id. at 301.

The BIA further states that upon review of the record as a whole, a balancing of the equities and adverse matters must be made to determine whether discretion should be favorably exercised. The equities that the applicant for section 212(h)(1)(B) relief must bring forward to establish that he merits a favorable exercise of administrative discretion will depend in each case on the nature and circumstances of the ground of exclusion sought to be waived and on the presence of any additional adverse matters, and as the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence. *Id.* at 301.

The favorable factors in the applicant's case include the extreme hardship his spouse and children would suffer as a result of his inadmissibility and the applicant's attributes as a loving and supportive husband and father. The unfavorable factors in the applicant's case include his criminal record and his unlawful residence in the United States.

Although the applicant's criminal record cannot be condoned, the positive factors in this case outweigh the negative factors. 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 met her burden and the appeal will be sustained.

ORDER: The appeal is sustained.