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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: NOV 0 6 2013 OFFICE: HIALEAH 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), section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i)

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,

for Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Hialeah, Florida denied the waiver application and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Jamaica 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 committed a crime involving moral turpitude. The applicant was also found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for attempting to procure an immigration benefit by fraud or willful misrepresentation. The applicant seeks a waiver of inadmissibility in order to remain in the United States with his U.S. citizen spouse and child.

The Field Office Director concluded that the applicant does not merit a favorable grant of discretion and denied the application accordingly. *See Decision of the Field Office Director*, dated December 14, 2012.

On appeal, counsel for the applicant asserts that the applicant did not make a misrepresentation concerning his criminal history on his Form I-485, Application to Register Permanent Residence or Adjust Status. Counsel further asserts that he is not in possession of evidence indicating that the applicant made a misrepresentation on a nonimmigrant visa application. Counsel contends that even if the applicant made such a misrepresentation, he has not demonstrated a pattern of untruthfulness.

In support of the waiver application and appeal, the applicant submitted identity documents, financial documentation, a psychological evaluation of the applicant's spouse and child, and documents concerning the applicant's criminal history. The entire record was reviewed and considered in rendering a decision on the appeal.

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 –
>
> > (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.
>
> (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....
>
> 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." 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. 24 I&N Dec. 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 reflects that the applicant was convicted of simple larceny in [redacted] Magistrate's Court, on November 7, 1985, and sentenced to three months hard labor or a fine of $150. On the same date, the applicant was convicted of unlawful wounding and sentenced to three months hard labor or a fine of $500.[1] The applicant's conviction record indicates that he stole two sheets of zinc and used a knife to wound another in the side. The Field Office Director found the applicant to be inadmissible to the United States for having been convicted of crimes involving moral turpitude. As the applicant has not disputed inadmissibility on appeal and the record does not show the Field Office Director's finding of inadmissibility to be erroneous, the AAO will not disturb the inadmissibility finding.

Section 212(a)(6)(C) of the Act provides, in pertinent part:

> (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Section 212(i) of the Act provides:

> (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General (Secretary), waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant who is the spouse, son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General (Secretary) that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien…

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[1] The record reflects that the applicant was charged with manslaughter on March 12, 1998 and scheduled for a court hearing on the same date. According to a letter from the clerk of courts, [redacted] Magistrate's Court, a search was conducted for relevant court documents, but could not be located due to rodent and water damage. The applicant asserts that there was no conviction in this case.

The record reflects that the applicant signed a Form DS-156, Nonimmigrant Visa Application, on October 27, 2009. Question 38 on the application asks whether the applicant has been arrested or convicted for any offense or crime, even though subject of a pardon amnesty or other similar legal action. In response to this question, the applicant marked "No." As such, the applicant is also inadmissible under section 212(a)(6)(C)(i) of the Act for attempting to procure an immigration benefit under the Act through fraud or misrepresentation.[2]

Counsel for the applicant asserts that a copy of the derogatory evidence against the applicant has not been provided to him, citing 8 C.F.R. § 103.2(b)(16). 8 C.F.R. § 103.2(b)(16) concerns permission for an applicant to inspect the record of proceeding that constitutes the basis for a decision. It is noted that the derogatory evidence in this matter, the applicant's Form DS-156, does not contain information unknown to the applicant, as he is the signatory of this form. Further, there is no indication that the applicant would not be permitted to inspect his record of proceeding, pursuant to a Freedom of Information Act (FOIA) request.

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

> (h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), . . . of subsection (a)(2) . . . if –
>
> (1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General that-
>
> (i) the alien is inadmissible only under subparagraph (D)(i) or (D)(ii) of such subsection or 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.
>
> (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

[2] Counsel for the applicant asserts that the applicant did not misrepresent his criminal history in his Form I-485, Application to Register Permanent Residence or Adjust Status. The AAO notes that the applicant's Form I-485 indicates markings of "No," and "Yes," in response to whether the applicant has been arrested, cited, charged, indicted, convicted, fined, or imprisoned for breaking or violating any law or ordinance, excluding traffic violations. As the AAO finds that the applicant misrepresented his criminal history on his Form DS-156, it will not make any findings concerning the origins of the markings on his Form I-485 or whether the applicant made any timely retraction.

> hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . . .

As the applicant's convictions took place on November 7, 1985, well over fifteen years prior to the date of the applicant's instant appeal, he is eligible to apply for a waiver pursuant to section 212(h)(1)(A) of the Act. The applicant asserts that his only other criminal arrest, for manslaughter on March 12, 1998, ended in a dismissal. Counsel for the applicant contends that the applicant has been rehabilitated since his criminal convictions, over 27 years ago.

The applicant submitted a police clearance letter from the police department indicating no arrests and there is no other indication that the applicant has a record of criminal history in the United States. The record reflects that in the years since his criminal conviction, the applicant has married and divorced his ex-spouse and married his current spouse, with whom he fathered a child.

However, even if the AAO found that this applicant had demonstrated rehabilitation pursuant to section 212(h)(1)(A) of the Act, he would still be required to demonstrate that the denial of his application would result in exceptional and extremely unusual hardship. The applicant has been convicted of unlawful wounding, a dangerous and violent crime.

8 C.F.R. § 212.7(d) provides, in pertinent part:

> Criminal grounds of inadmissibility involving dangerous or violent crimes. The Attorney General [Secretary], in general, will not favorably exercise discretion under section 212(h)(2) of the Act . . .in cases involving violent or dangerous crimes, except...in cases in which the alien clearly demonstrates that the denial of the application for adjustment of status or an immigrant visa or admission as an immigrant would result in exceptional and extremely unusual hardship. . . .

Section 22 of the Offences Against the Person Act provides:

> Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanour, and, being convicted thereof, shall be liable to be imprisoned for a term not exceeding three years, with or without hard labour.

The AAO notes that the words "violent" and "dangerous" and the phrase "violent or dangerous crimes" are not further defined in the regulation, and the AAO is aware of no precedent decision or other authority containing a definition of these terms as used in 8 C.F.R. § 212.7(d). A similar phrase, "crime of violence," is found in section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F). It provides that a "crime of violence," as defined under 18 U.S.C. § 16, for which the term of imprisonment is at least one year, is an aggravated felony. As such, "crime of violence" is limited to those crimes specifically listed in 18 U.S.C. § 16. It is not a generic term with application to any crime involving violence, as that term may be commonly defined. Indeed, counsel asserts that the applicant's conviction cannot be deemed a violent and dangerous crime as

it does not fit the statutory definition of a crime of violence. However, that the DOJ chose not to use the language of section 101(a)(43)(F) of the Act or 18 U.S.C. § 16 in promulgating 8 C.F.R. § 212.7(d) indicates that "violent or dangerous crimes" and "crime of violence" are not synonymous. The Department of Justice clarified the relationship between these distinct terms in the interim final rule codifying 8 C.F.R. § 212.7(d):

> [I]n general, individuals convicted of aggravated felonies would not warrant the Attorney General's use of this discretion. In fact, the proposed regulations stated that even if the applicant can meet the "exceptional and extremely unusual hardship" standard for the exercise of discretion, depending upon the severity of the offense, this might "still be insufficient" to obtain the waiver. See 67 FR at 45407. That language would substantially limit the circumstances under which an individual convicted of an aggravated felony would be granted a waiver as a matter of discretion. Therefore, the Department believes that this language achieves the goal of the commenter while not unduly constraining the Attorney General's discretion to render waiver decisions on a case-by-case basis.

67 Fed. Reg. 78675, 78677-78 (December 26, 2002).

Therefore, the fact that a conviction constitutes an aggravated felony under the Act may be indicative that an alien has also been convicted of a violent or dangerous crime, but it is not dispositive. Decisions to deny waiver applications on the basis of discretion under 8 C.F.R. § 212.7(d) are made on a factual "case-by-case basis." The AAO interprets the phrase "violent or dangerous crimes" in accordance with the plain or common meaning of its terms, consistent with any published precedent decisions addressing discretionary denials under 8 C.F.R. § 212.7(d) or the standard originally set forth in *Matter of Jean*. Given the plain language of the statute under which the applicant was convicted, maliciously wounding or inflicting grievous bodily harm upon any other person, the AAO finds that the applicant's conviction renders him subject to the heightened discretion standard of 8 C.F.R. § 212.7(d).

Accordingly, the applicant must show that "extraordinary circumstances" warrant approval of the waiver. 8 C.F.R. § 212.7(d). Extraordinary circumstances may exist in cases involving national security or foreign policy considerations, or if the denial of the applicant's admission would result in exceptional and extremely unusual hardship. *Id.* Finding no evidence of foreign policy, national security, or other extraordinary equities, the AAO will consider whether the applicant has "clearly demonstrate[d] that the denial of . . . admission as an immigrant would result in exceptional and extremely unusual hardship" to a qualifying relative. *Id.*

The exceptional and extremely unusual hardship standard is more restrictive than the extreme hardship standard. *Cortes-Castillo v. INS*, 997 F.2d 1199, 1204 (7th Cir. 1993). Since the applicant is subject to 8 C.F.R. § 212.7(d), merely showing extreme hardship to his qualifying relatives under section 212(h) of the Act is not sufficient. He must meet the higher standard of exceptional and extremely unusual hardship.

The applicant is a 55-year-old native and citizen of Jamaica. The applicant's spouse is a 53-year-old native of Jamaica and citizen of the United States. The applicant's daughter is a 19-year-old native and citizen of the United States. The applicant is currently residing with his family in Florida.

Counsel for the applicant asserts that the applicant's spouse would suffer extreme emotional and physical hardship if she were separated from the applicant. The record contains a psychological evaluation of the applicant's spouse stating that she suffers from high blood pressure and high cholesterol, for which she is taking medication. The evaluation also states that the applicant's spouse suffers from a sleep disorder due to her work schedule, 11 p.m. to 8 a.m., and worry over the applicant's future. The applicant's spouse was found to have met the diagnostic criteria for undifferentiated somatoform disorder and dependent personality disorder. The psychologist states that the applicant's spouse could become even more dependent on others in response to stressors.

The evaluation states that the applicant's spouse would suffer financial hardship in the absence of the applicant. The record reflects that the applicant's spouse is employed as a certified nursing assistant. It is noted that the applicant's Form G-325A, Biographic Information, does not indicate an employer. There is insufficient evidence in the record to demonstrate that the applicant's spouse would be unable to meet her financial obligations upon separation from the applicant.

Counsel for the applicant asserts that the applicant's daughter would suffer emotional and physical hardship upon separation from the applicant. The record contains a psychological evaluation of the applicant's daughter stating that her testing profiles are within normal limits and there are no relevant diagnostic considerations. The evaluation notes that the applicant's daughter states that she relies upon the applicant during the daytime, when her mother is asleep. The applicant's daughter also reports feeling depressed and having lost sleep since learning of the applicant's immigration issues.

It is acknowledged that separation from a spouse or child nearly always creates a level of hardship for both parties. However, there is insufficient evidence in the record, in the aggregate, to find that the applicant's qualifying relatives would suffer exceptional and extremely unusual hardship upon separation from the applicant.

The psychological evaluation of the applicant's spouse states that her psychiatric symptoms could worsen and she would suffer financial hardship upon relocation to Jamaica. The evaluation states that the applicant's spouse would also suffer from a lower quality of health care and exposure to crime if she resided in Jamaica. It is initially noted that the applicant's spouse is a native of Jamaica, and there is no information regarding any ties she retains to Jamaica. The applicant's mother currently resides in Jamaica, and there is no information concerning the extent to which she would and could assist the applicant's family upon relocation. The U.S. Department of State Country Specific Information for Jamaica, dated June 21, 2013, states that medical care is more limited in Jamaica than in the United States. However, the record does not contain information specifically addressing the availability of treatment for the applicant's spouse's current condition in Jamaica. Going on record without supporting documentary evidence generally is not sufficient for purposes of meeting the burden of proof in these proceedings. *See 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)). The Country Specific Information for Jamaica indicates that crime is a problem, but it is noted that the U.S. Department of State has not issued a travel warning to recommend that Americans consider the risk of travel to that country.

The psychological evaluation of the applicant's daughter states that she, like the applicant's spouse, would face a lower standard of living, inadequate health care, and safety concerns should she relocate to Jamaica. The evaluation also states that the applicant's daughter would have difficulties in adapting to a new culture and enjoy fewer educational opportunities. As noted, the U.S. Department of State has not issued any travel warning concerning Jamaica and there is no indication that the applicant's daughter suffers from any ailments requiring medical attention. There is also no information concerning whether and how the applicant and his spouse were employed while residing in Jamaica. The applicant's daughter is currently 19 years of age and there is also no information concerning whether she has completed her online high school courses or plans to pursue higher education.

In this case, the record does not contain sufficient evidence to show that denial of the present waiver application would result in exceptional and extremely unusual hardship for the applicant's spouse or child. As the applicant has not established the requisite level of hardship, the applicant has not shown that he qualifies for a favorable exercise of discretion. 8 C.F.R. § 212.7(d).

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. The appeal will be dismissed.

ORDER: The appeal is dismissed.