U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office
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(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: JUL 28 2014 Office: ATLANTA, GA FILE: [redacted]

IN RE: [redacted]

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:

SELF-REPRESENTED

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
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting Field Office Director, Atlanta, Georgia and a subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The waiver application is now before the AAO on motion. The motion will be granted and the appeal sustained.

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 been convicted of a crime involving moral turpitude. The applicant is the spouse of a U.S. citizen and the father to two U.S. citizen children. Heseeks 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.

In a decision, dated January 28, 2013, the acting field office director found that the applicant had failed to establish that his U.S. citizen spouse would suffer extreme hardship as a result of his inadmissibility. The application was denied accordingly.

On appeal, counsel stated that the acting field office director's decision contained incorrect information, particularly in reference to the applicant's sentence in his criminal proceeding. In addition, she stated that she was submitting new evidence of hardship to the applicant which would result in hardship to the applicant's spouse. We indicated on appeal that although counsel had stated that certain hardship documents were submitted, these documents were not in the record.

On appeal, we asserted that the record did not contain documentation to support counsel's assertions regarding hardship. Nothing in the record indicated that the applicant's stepchildren would not be able to relocate and the record indicated the applicant's spouse had ties to Jamaica.

On motion, dated September 24, 2013 and received by our office on March 7, 2014, the applicant's spouse states that she will suffer extreme emotional, financial, physical, and professional hardship if the applicant is found inadmissible to the United States. She submits additional evidence of hardship on motion, including: a letter from her daughter's biological father, letters from her son and daughter, character reference letters for the applicant, a mortgage statement, medical records for the applicant's spouse and daughter, information regarding gestational diabetes and hypertension, and country conditions information for Jamaica.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

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.

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.)

The applicant's case arises within the jurisdiction of the Eleventh Circuit Court of Appeals, which has reaffirmed the traditional categorical and modified categorical approach for determining whether a crime involves moral turpitude, declining to follow the framework set forth by the Attorney General in *Matter of Silva-Trevino,* 24 I&N Dec. 24 I&N Dec. 687 (A.G. 2008). *See Fajardo v. Attorney General*, 659 F.3d 1301, 1310 (11th Cir. 2011). In rejecting the Attorney General's approach in *Silva-Trevino*, the Eleventh Circuit found that section 212(a)(2)(A)(i)(I) of the Act unambiguously requires courts to apply only the categorical and modified categorical approaches, which do not permit an evaluation of information outside the record of conviction, in determining whether a crime involves moral turpitude. *Id.* at 1307-08; *see also Vuksanovic v. U.S. Att'y Gen.*, 439 F.3d 1308, 1311 (11th Cir. 2006) ("[T]he determination that a crime involves moral turpitude is made categorically based on the statutory definition or nature of the crime, not the specific conduct predicating a particular conviction.").

The Eleventh Circuit defines the categorical approach as "looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." *Id.* at 1305 (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990)); *see also Itani v. Ashcroft*, 298 F.3d 1213, 1215-16 (11th Cir. 2002) ("Whether a crime involves . . . moral turpitude depends upon the inherent nature of the offense, as defined in the relevant statute, rather than the circumstances surrounding a defendant's particular conduct."); *Sosa-Martinez v. U.S. Att'y Gen.*, 420 F.3d 1338, 1342 (11th Cir. 2004) ("[W]e must determine whether an . . . offense . . . is a crime involving moral turpitude without reference to the

facts underlying [the] conviction.")However, where the statute under which an alien was convicted is "'divisible'—that is, it contains some offenses that are [crimes involving moral turpitude] and others that are not[,] . . . the fact of conviction and the statutory language alone are insufficient to establish . . . under which subpart [the alien] was convicted." *Jaggernauth v. U.S. Att'y Gen.*, 432 F.3d 1346, 1354-55 (11th Cir. 2005). Under such circumstances, "the record of conviction – i.e., the charging document, plea, verdict, and sentence – may also be considered." *Fajardo*, 659 F.3d at 1305 (citing *Jaggernauth*, 432 F.3d at 1354-55).

The record indicated that on March 21, 2007, the applicant pled guilty to Burglary under O.C.G.A. 16-7-1 and Possession of Criminal Tools for the Commission of a Crime under O.C.G.A. 16-7-20. The applicant was sentenced to 5 years imprisonment, but only served 6 months in detention and 90-120 days in a probation boot camp.

At the time of the applicant's conviction, O.C.G.A. 16-7-1 stated, in pertinent part:

> A person commits the offense of burglary when, without authority and with the intent to commit a felony or theft therein, he enters or remains within the dwelling house of another or any building, vehicle, railroad car, watercraft, or other such structure designed for use as the dwelling of another or enters or remains within any other building, railroad car, aircraft, or any room or any part thereof. A person convicted of the offense of burglary, for the first such offense, shall be punished by imprisonment for not less than one nor more than 20 years....

The Board of Immigration Appeals (BIA) has maintained that the determinative factor in assessing whether burglary involves moral turpitude is whether the crime intended to be committed at the time of entry or prior to the breaking out involves moral turpitude. *Matter of M-*, 2 I&N Dec. 721, 723 (BIA 1946). For example, the BIA has held that burglary with intent to commit theft is a crime involving moral turpitude. *See Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982); *see, e.g., Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1020 (9th Cir. 2005)("Because the underlying crime of theft or larceny is a crime of moral turpitude, unlawfully entering a residence with intent to commit theft or larceny therein is likewise a crime involving moral turpitude.").

On appeal, the record did not indicate what crime the applicant intended to commit upon entry and the full record of conviction had not been submitted by the applicant. Accordingly, because the burden of proof in our proceedings is on the applicant to establish his admissibility for admission to the United States and the applicant had not contested his inadmissibility, we did not disturb the acting field office director's finding. *See* Section 291 of the Act, 8 U.S.C. § 1361. On motion, the applicant does not contest his inadmissibility.

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 . . . .

...

(1)(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

(1) 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.

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 children are the 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). *(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 on appeal included: counsel's brief and a letter from the applicant's doctor indicating that he had been diagnosed with bilateral scrotal masses. As stated above, on motion, the record of hardship includes: a letter from her daughter's biological father, letters from her son and daughter, character reference letters for the applicant, a mortgage statement, medical records for the applicant's spouse and daughter, information regarding gestational diabetes and hypertension, and country conditions information for Jamaica.

As stated above, on appeal, the record did not contain documentation to support counsel's assertions regarding hardship. Nothing in the record indicated that the applicant's stepchildren would not be able to relocate and the record indicated the applicant's spouse had ties to Jamaica.

The record on motion includes documentation to support the applicant's spouse's claims of hardship. The record indicates that the applicant and his spouse have been together for 8 years, that his spouse

has two children from a previous relationship and that these children were two and four years old when the applicant and his spouse began residing together. The applicant's stepchildren are now ten and twelve years old. The record establishes that the applicant's spouse will suffer extreme hardship as a result of relocating to Jamaica. The record shows that although the applicant's spouse was born and raised in Jamaica, she has lived in the United States since she was 11 years old and has developed substantial ties to this country. The applicant's spouse has two U.S. citizen children and the record includes a statement from the spouse's daughter's biological father stating that he would not consent to his daughter relocating to Jamaica. The record also indicates that the applicant's spouse, who has no college education and/or formal training, has been employed with since November 2006. The record shows that the applicant and his spouse own a home in Georgia with a mortgage payment that they will not be able to afford if they relocate. In addition to these significant ties to the United States, the applicant's spouse states that she does not want to relocate to Jamaica because of the crime, inability to find employment, and lack of access to good, free public education. Documentation in the record indicates that St. Catherine, where the applicant is from, did experience a majority of the violent crime committed in the country in and that increasing school costs are becoming a burden for many Jamaican families. The current U.S. State Department country description for Jamaica states that crime, including violent crime, is a serious problem in Jamaica, particularly in and that crime is exacerbated by the fact that police are understaffed and often ineffective. The description states that there have been frequent allegations of police corruption. The description also states that medical care is much more limited in Jamaica than in the United States. Moreover, in her statement, the applicant's spouse relates her personal experience in Jamaica in that she was abused by a family member and when this abuse was reported, the police did not pursue an investigation. The country description seems to support this description of events stating that each year the Embassy receives a number of reports of sexual assaults against U.S. citizens and that it is important to realize that sexual assault allegations generally do not receive the same type of law enforcement attention in Jamaica that they would in the United States. Thus, the applicant's spouse's substantial ties to the United States, including employment, owning a home, and two U.S. citizen children, combined with the country conditions she would face in Jamaica, establish that her hardship upon relocation would rise to the level of extreme hardship.

The record on motion also indicates that the applicant's spouse will suffer extreme hardship as a result of separation. She states that the applicant helps her emotionally and with childcare. She states that without his help she would not be able to work. Documentation in the record shows that the applicant's stepdaughter requires continued therapy for a mental health issue. The applicant's stepdaughter began seeing a therapist after a school guidance counselor saw her cutting herself with scissors and then she stated that a voice in her head told her to do the cutting. The record indicates that the applicant's step daughter's condition is improving, but that she is upset and concerned about the possibility of the applicant being removed. The record indicates that the applicant's stepdaughter will continue therapy every two weeks. The record establishes that the applicant's spouse will suffer extreme hardship as a result of separation because the applicant's spouse is the main income provider for the family and the applicant helps her with childcare. The record indicates that without the applicant, the applicant's spouse will be left to care for a child suffering a mental health problem on her own, while earning the income to sustain the family financially. Given these circumstance, the applicant's spouse will suffer extreme hardship as a result of separation. Considered in the

aggregate, the applicant has established that his U.S. citizen spouse would face extreme hardship if his 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 two stepchildren would face as a result of his inadmissibility and the support the applicant provides for his family while in the United States. The record also indicates, through character reference letters, that the applicant is seen in his community as a trustworthy, honest, and caring person. The letters state that the applicant volunteers to mow the lawns of veterans serving in Afghanistan and, as a person competent with computers and electronics, he is known to fix computers and cell phones free of charge. The unfavorable factors in the applicant's case include: the overstay of his visitor's visa when he entered the United States at 16 years old, his illegal residence in the United States, and his criminal conviction in the United States in .

Although the applicant's immigration violations are serious, 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 his burden. The motion will be granted and the appeal will be sustained.

ORDER: The motion is granted and the appeal sustained.