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

U.S. Citizenship and Immigration Services

H5

[redacted]

Date: [redacted] Office: MEMPHIS, TN FILE: [redacted]

IN RE: MAR 2 1 2012 Applicant: [redacted]

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

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Michael Shumway

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Memphis, Tennessee, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of India who was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for seeking admission into the United States by fraud or willful misrepresentation. The applicant sought a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), so as to immigrate to the United States. The director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. The applicant filed a timely appeal.

On appeal, counsel asserts that U.S. Citizenship and Immigration Services (USCIS) abused its discretion in denying the waiver application. Counsel maintains that USCIS failed to consider positive factors such as the applicant's having committed only one crime, which occurred more than 15 years ago; the applicant's respect for the law; his paying taxes; and his assisting in the prosecution of two attorneys who violated the law. Counsel maintains that USCIS erred in stating that the applicant did not depart the United States in accord with a Board of Immigration Appeals (Board) decision and worked without employment authorization. Counsel states that the applicant was granted employment authorization after admitting his Applications for Status as a Temporary Resident application was fraudulent, and did not depart because he appealed the Board's decision.

Counsel indicates that it is not clear that USCIS concluded that the applicant failed to demonstrate extreme hardship to the applicant's wife. Counsel maintains that the applicant's wife will suffer extreme economic, physical, and emotional hardship if the applicant is barred admission to the United States. Counsel states that the livelihood of the applicant and the applicant's wife is provided by their beauty salons. Counsel indicates that the applicant handles the salon's business aspects such as paperwork, banking, advertising, and other daily activities because the applicant's wife has no understanding of this, and that the business cannot function without the applicant. Counsel conveys that for 10 years the applicant's wife has trying to become pregnant and has recently undergone fertility treatments, which requires the applicant's presence. Counsel declares that if the applicant's wife loses her business and income she will not be able to afford fertility treatments.

Counsel declares that if the applicant's wife joined the applicant to live in India she will have to relinquish her business and income, and that it will be difficult for her to acquire or start a salon in India due to her long residence and business contacts in the United States. Counsel states that *in vitro* fertilization services are available in India, but health services are substandard compared to those in the United States. Counsel indicates that the U.S. Department of State conveys that the quality of medical care in India varies considerably and does not have the same regulatory requirements as in the United States. Counsel states that the applicant's wife is at higher risk for pregnancy complications such as a miscarriage or tubal pregnancy. Counsel maintains that the applicant's wife has suffered emotionally due to a miscarriage and difficult in conceiving. Counsel indicates that the applicant's wife will have a lower standard of living in India.

Then finally, counsel asserts that USCIS is biased against the applicant's wife, violating her U.S. equal protection rights, because of the fact that she is a naturalized citizen. Counsel states that USCIS wrongly finds that it should be easy for the applicant's wife to return to India since she became a legal permanent resident in 2003 and a U.S. citizen in 2009. Counsel conveys that the applicant's wife lived in the United States for 8 years before becoming a lawful permanent resident and resided here for the last 16 years. Counsel states that the applicant's wife has worked here and established a home, family, business, and social ties, all of which the applicant's wife does not have in India.

Upon review of the record, we find that the applicant also has a conviction for false claims and statements and that the director did not address whether this offense renders the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the field office or service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), aff'd, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a de novo basis).

Inadmissibility for having been convicted of committing a crime involving moral turpitude is under section 212(a)(2)(A)(i)(I) of the Act, which 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 . . . 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.)

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 cooperation agreement dated May 22, 1992, reflects that in the United States District Court for the Eastern District of New York the applicant was to plea guilty to "an information charging him with knowingly and willfully making false, fictitious and fraudulent statements and representations as to a matter within the jurisdiction of the Immigration and Naturalization Service . . . in violation of Title 18, United States Code, Section 1001." The guilty plea related to an Application for Status as a Temporary Resident. The applicant was placed on probation for a period of three years and ordered to pay a fine.

At the time of the applicant's conviction, 18 U.S.C. § 1001 provided, in pertinent part:

> Statements or entries generally
>
> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined under this title or imprisoned not more than five years, or both.

In *Matter of P-*, 6 I&N Dec. 193 (BIA 1954), the Board held that a conviction under the first part of the statute, the offense of falsifying, concealing, or covering up a material fact by any trick or scheme, involves moral turpitude. (*Matter of P-*, holding modified by *Matter of B-M-*, 6 I&N Dec. 806 (BIA 1955)). The Board in *Matter of B-M-*, 6 I&N Dec. 806 (BIA 1955), stated that 18 U.S.C. § 1001 includes three separate offenses: (1) the offense of falsifying, concealing, or covering up a material fact by any trick or scheme; or (2) the making of any false, fictitious, or fraudulent statements or representations; or (3) the making or use of any false writing or document knowing it to contain a false, fictitious, or fraudulent statement or entry. The Board reasoned that making false statements in violation of section 1001 is not categorically morally turpitudinous as such statements do not necessarily involve the element of fraud.

Thus, by its terms, there is a "realistic probability" that the statute at issue here would be applied to reach conduct that does not involve moral turpitude. Since a conviction under 18 U.S.C. § 1001 is not categorically a crime involving moral turpitude, we will engage in a second-stage inquiry and review the "record of conviction" to determine if the conviction was based on conduct involving moral turpitude. *Matter of Silva-Trevino*, 24 I&N Dec. 687, 698-699, 703-704, 708 (A.G. 2008). 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. 24 I&N Dec. at 698, 704, 708. The record in the instant case contains the criminal docket of the applicant's conviction, which reflects that between October 1989 and March 27, 1990 the applicant and others did "knowingly & intentionally conspire & agree to aid & abet in the filing of false Amnesty Applications with the US Immigration & Naturalization Service in violation of 18:1001." The cooperation agreement stated that the applicant was to agree to "an information charging him with knowingly and willfully making false, fictitious and fraudulent statements and representations". Since the applicant was convicted for the knowing and willful making of fraudulent statements, we find that the applicant's crime involved moral turpitude, rendering him inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude.

The director found the applicant to be inadmissible for seeking admission into the United States by fraud or willful misrepresentation. Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

> (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.

The record of conviction and the letter by the United States Attorney dated March 28, 1996 reflects that the applicant filed a false Application for Status as a Temporary Resident on his own behalf. Thus, we find that the record demonstrates that the applicant willfully misrepresented the material fact of his eligibility for a benefit provided under the Act, rendering him inadmissible under section 212(a)(6)(C) of the Act.

Section 212(i) of the Act provides a waiver for fraud and material misrepresentation. That section states that:

> (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 alien 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.

A waiver of inadmissibility under section 212(i) 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 or parent of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. The applicant's U.S. citizen spouse is the only qualifying relative in this case. If extreme hardship to a qualifying relative is established, USCIS then assesses whether an 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. *See Salcido-Salcido*, 138 F.3d at 1293 (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.

In rendering this decision, the AAO will consider all of the evidence in the record.

The applicant's wife stated in her letters that she and her husband have been married since July 2000. She conveyed that they started a beauty salon in 2005, and that her husband handles the part of the business that she does not understand, which are daily activities and banking and business matters. The applicant's wife expressed distress about her husband's removal and not having someone that she can trust to manage such matters. The applicant's wife indicated that she is trying to become pregnant and has a fertility doctor. The applicant's wife declares that returning to India will ruin her life and take away her salons, her only source of income.

The asserted hardships to the applicant's spouse if she remains in the United States without her husband are financial and emotional in nature. The applicant's wife asserts that she depends on her husband for managing their salons. However, her claim is contradicted by the Biographic Information (Form G-325) dated April 5, 2002, which reflects that the applicant's wife managed a beauty salon from September 1999 to April 2002, and managed another type of business from November 1995 to 1999. The record contains a letter dated April 2, 2002 from the president of [redacted] This letter stated that the company filed an employment-based immigrant petition on the applicant's wife's behalf, and that the applicant's wife managed their business operations, directed personal service functions, handled appointments and assigned patrons, maintained schedules, handled customer requests and complaints, kept accounts of receipts, and supervised others. Furthermore, the record contains a letter from [redacted] dated January 12, 2005 stating that the applicant's wife was employed as a manager. Her duties are described as similar to those in the April 2, 2002 letter. The record indicates that the applicant's wife engaged fertility doctors. [redacted] stated in the letter dated June 1, 2011 that the applicant's wife was to undergo *in vitro* fertilization in July or August for a two to three month treatment and that this treatment was also available in India. [redacted]

conveyed that the applicant's presence is required for a few days and for the day of egg retrieval. [redacted] stated in the letter dated June 10, 2011 that the applicant's wife had undergone *in vitro* fertilization in India. We acknowledge that the applicant's wife states that she has a close relationship with her husband and that she is trying to become pregnant. When the emotional and financial hardships are considered collectively, we find that the applicant has not fully demonstrated that the hardship that his spouse will experience as a result of separation is more than the common result of inadmissibility or removal.

In regard to joining the applicant to live in India, the asserted hardship factors are loss of the salons and their income, not having comparable medical care to what the applicant's wife presently has, having a lower standard of living, losing business contacts, and enduring the difficulties of starting or acquiring a salon in India. We acknowledge that the leaving her business will likely result in a some hardship, but the loss of U.S. employment is a common result of relocation abroad, and the applicant has not demonstrated that she could not continue operation of her U.S. business while residing abroad, or the prospective financial gains or losses disposing of the business. The record reflects that the applicant and his wife have family members in India; the applicant is educated, holding a bachelor's degree in commerce; and the applicant and his wife are entrepreneurial and possess business acumen. Thus, we find the applicant has not demonstrated that they will experience financial hardship in India, or the extent to which this hardship could be considered extreme, or that suitable medical care is not available and affordable for his wife in India. In sum, when the hardships are considered together, the applicant has not fully demonstrated that his wife will experience extreme hardship if she joined him to live in India.

Furthermore, even were we to determine that the applicant has demonstrated extreme hardship to his spouse, we would still deny the waiver as a matter of discretion in view of the applicant's participation in a criminal scheme involving the filing of at least 500 false amnesty applications. Although the applicant pled guilty to only one offense in exchange for this testimony, the record shows that he had a larger participation in the criminal activity. The magnitude of the scheme threatened the integrity of the legal immigration system from which the applicant now seeks a benefit, and we deem it an adverse factor of such great weight that it outweighs the favorable factors in the present case, including the hardship, the positive references regarding the applicant's character, his business ownership, his assisting the prosecution, and the passage of approximately 20 years since the criminal conviction.

In proceedings for application for waiver of grounds of inadmissibility under sections 212(h) and 212(i) of the Act, the burden of proving eligibility rests with the applicant. *See* section 291 of the Act. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed and the waiver application will be denied.

ORDER: The appeal is dismissed.