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U.S. Department of Homeland Security
20 Mass. Ave. N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date:

JUL 25 2008

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:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in black ink that reads "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director of the California Service Center denied the waiver application. The matter is now on appeal before the Administrative Appeals Office (AAO) in Washington, DC. The appeal will be dismissed.

The applicant, [REDACTED] is a native and citizen of Cuba who was found inadmissible to the United States pursuant to section 212(a)(2)(A)(i) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i), for committing a crime involving moral turpitude. The applicant is the son of a lawful permanent resident of the United States. The applicant sought a waiver of inadmissibility under section 212(h) of the Act, which the director denied, finding the applicant failed to establish extreme hardship to a qualifying relative. *Decision of the Director*, dated August 1, 2006.

In the notice of appeal, the applicant indicated that he would send a brief and/or evidence to the AAO within 30 days. As of this date no brief or evidence as been provided; therefore, the record as constituted is complete.

The AAO will first address the finding of inadmissibility.

Section 212(a)(2) of the Act states that:

- (A)(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.

Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines “conviction” for immigration purposes as:

A formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where –

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.

The record reflects that the applicant was convicted in the United States District Court of the Virgin Islands of fraud and misuse of documents in violation of 18 U.S.C. § 1546(a) in 2002. The judge sentenced him to three months of imprisonment in the custody of the U.S. Bureau of Prisons, placed him on supervised release for three years, and ordered him to pay a fine.

The statute at 18 U.S.C. § 1546(a), Fraud and misuse of visas, permits, and other documents, states the following:

(a) Whoever knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, or utters, uses, attempts to use, possesses, obtains, accepts, or receives any such visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained; or

Whoever, except under direction of the Attorney General or the Commissioner of the Immigration and Naturalization Service, or other proper officer, knowingly possesses any blank permit, or engraves, sells, brings into the United States, or has in his control or possession any plate in the likeness of a plate designed for the printing of permits, or makes any print, photograph, or impression in the likeness of any immigrant or nonimmigrant visa, permit or other document required for entry into the United States, or has in his possession a distinctive paper which has been adopted by the Attorney General or the Commissioner of the Immigration and Naturalization Service for the printing of such visas, permits, or documents; or

Whoever, when applying for an immigrant or nonimmigrant visa, permit, or other document required for entry into the United States, or for admission to the United States personates another, or falsely appears in the name of a deceased individual, or evades or attempts to evade the immigration laws by appearing under an assumed or fictitious name without disclosing his true identity, or sells or otherwise disposes of, or offers to sell or otherwise dispose of, or utters, such visa, permit, or other document, to any person not authorized by law to receive such document; or

Whoever knowingly makes under oath, or as permitted under penalty of perjury under section 1746 of title 28, United States Code, knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other or other document which contains any such false statement or which fails to contain any reasonable basis in law or fact –

Shall be fined under this title or imprisoned not more than 25 years (if the offense was committed to facilitate an act of international terrorism (as defined in section 2331 of this title)), 20 years (if the offense was committed to facilitate a drug trafficking crime (as defined in section 929(a) of this title)), 10 years (in the case of the first or second such offense, if the offense was not committed to facilitate such an act of international terrorism or a drug trafficking crime), or 15 years (in the case of any other offense), or both.

The question in this case is whether the applicant's violation of 18 U.S.C. § 1546(a) constitutes a crime of moral turpitude.

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

[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.

The Supreme Court in *Jordan v. DeGeorge*, 341 U.S. 223 (1951), stated:

Whatever else the phrase "crime involving moral turpitude" may mean in peripheral cases, the decided cases make it plain that crimes in which fraud was an ingredient have always been regarded as involving moral turpitude.... Fraud is the touchstone by which this case should be judged. The phrase "crime involving moral turpitude" has without exception been construed to embrace fraudulent conduct.

341 U.S. at 232.

Before one can be convicted of a crime of moral turpitude, the statute in question by its terms, must necessarily involve moral turpitude. *Matter of Esfandiary*, 16 I&N Dec. 659 (BIA 1979); *Matter of L-V-C*, 22 I&N Dec. 594, 603 (BIA 1999). If a statute is divisible and it encompasses both acts that do and do not involve moral turpitude, deportability cannot be sustained. *Hernandez-Martinez v. Ashcroft*, 329 F.3d 1117 (9th Cir. 2003).

In the present case, the statute is divisible, containing both acts that do and do not involve moral turpitude. A person can be convicted under 18 U.S.C. § 1546(a) for possessing a "visa, permit, border crossing card, alien registration receipt card, or other document . . . knowing it to be forged, counterfeited, altered, or falsely made . . ." Since possession of an altered immigrant visa with the knowledge that it had been altered was found not to be an offense involving moral turpitude in *In re Serna*, 20 I. & N. Dec. 579, 586 (BIA 1992), a conviction under 18 U.S.C. § 1546(a) for possession of an immigration document knowing it to be forged, counterfeited, altered, or falsely made would not involve moral turpitude.

The analysis of whether the applicant's conviction involves moral turpitude does not stop here. The next step is to determine whether the actual crime committed by the applicant involves moral turpitude. In making this determination, courts look to the "record of conviction," which includes the indictment, plea, verdict, and sentence. *Matter of Ajami*, 22 I&N Dec. 949, 950 (BIA 1999). Because the record before the AAO does not contain any of these documents, the AAO is unable to determine whether the applicant's conviction under 18 U.S.C. § 1546(a) involved moral turpitude.

The applicant's inadmissibility under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for seeking

admission into the United States by fraud or willful misrepresentation, is supported by the record, however. 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 reflects that on May 5, 2002, the applicant applied for admission into the United States at the seaport in the St. Thomas, United States Virgin Islands, by applying for entry under the Visa Waiver Program as a citizen and national of Spanish. The applicant was referred to secondary inspection, where he admitted to being Cuban and declared that he wanted to apply for political asylum. The applicant's seeking to gain admission into the United States by misrepresenting a material fact, his identity, makes him inadmissible under section 212(a)(6)(C) of the Act.

The section 212(i) waiver for fraud and misrepresentation 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.

The waiver under section 212(i) of the Act requires the applicant show that the bar to admission imposes an extreme hardship to the citizen or lawfully resident spouse or parent of the applicant. Hardship to an applicant is not a consideration under the statute, and will be considered only to the extent that it results in hardship to a qualifying relative, who in this case is the applicant's naturalized citizen mother. Once extreme hardship is established, it is but one favorable factor to be considered in determining whether the Secretary should exercise discretion. See *Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996).

"Extreme hardship" is not a definable term of "fixed and inflexible meaning"; establishing extreme hardship is "dependent upon the facts and circumstances of each case." *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). The Board of Immigration Appeals (BIA) in *Matter of Cervantes-Gonzalez* lists the factors it considers relevant in determining whether an applicant has established extreme hardship pursuant to section 212(i) of the Act. 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.* at 565-566. The BIA indicated that these factors relate to the applicant's "qualifying relative." *Id.* at 565-566.

In *Matter of O-J-O*, 21 I&N Dec. 381, 383 (BIA 1996), the BIA stated that the factors to consider in determining whether extreme hardship exists “provide a framework for analysis,” and that the “[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists.” It further stated that “the trier of fact must consider the entire range of factors concerning hardship in their totality” and then “determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation.” (citing *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994).

Extreme hardship to the applicant’s mother must be established in the event that she remains in the United States without the applicant, and in the alternative, that she joins the applicant to live in Cuba. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant’s waiver request.

The record contains, among other documents, letters, birth certificates, and court documents.

The letter by the applicant’s mother stated that she is 68 years old and that she arrived in the United States in December 2001. She stated that the applicant arrived in the United States in May 2002, and since then she has lived with him in Florida. She stated that she cannot find employment due to her age and relies on her son for rent and household expenses and for emotional support since her husband’s death in 2001. She stated that she would be devastated without her son’s financial support and would lose her home.

On appeal, the applicant stated that his mother relies on him for financial support and that his absence would exacerbate his mother’s diabetes. The applicant stated that his mother’s mental condition is being evaluated by doctors. He stated that the Fidel regime in Cuba is repressive and liberties are not enjoyed there.

The AAO finds that the record fails to establish extreme hardship to the applicant’s mother if she remained in the United States without the applicant.

The applicant’s mother asserts that without the applicant’s income she cannot to pay rent and household expenses. However, the applicant submitted no documentation, such as records of household expenses and of the applicant’s income, to corroborate this assertion. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Furthermore, the waiver application shows that the applicant’s mother is not alone, she lives with her daughter. No documentation conveys that the applicant’s sister is unable to provide financial and emotional support to their mother.

The record contains no evaluation of the mental condition of the applicant’s mother. The record does contain laboratory results relating to the applicant’s mother, but the findings and conclusions reached by a physician relating to the tests are not contained in the record. Consequently, the AAO cannot conclude by the tests whether the applicant’s mother has diabetes, and if she does, what are the implications of such a diagnosis.

The applicant's mother stated that she relies on her son for emotional support. Family separation is important in determining hardship. Courts have stated that "the most important single hardship factor may be the separation of the alien from family living in the United States," and also, "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion." *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted); *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to BIA) ("We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.") (citations omitted).

However, in *Guadarrama-Rogel v. INS*, 638 F.2d 1228, 1230 (9th Cir.1981), separation of parents from their alien son was found not to be extreme hardship where other sons are available to provide assistance. Because the record here shows the applicant's sister is available for their mother, extreme hardship is not established.

The record conveys that the applicant's mother is very concerned about separation from her son. The AAO is mindful of and sympathetic to the emotional hardship that is undoubtedly endured as a result of separation from a loved one. After a careful and thoughtful consideration of the record, however, the AAO finds that the situation of the applicant's mother, if she remains in the United States, is typical to individuals separated as a result of removal and does not rise to the level of extreme hardship as required by the Act. The record before the AAO is insufficient to show that the emotional hardship, which she will experience, is unusual or beyond that which is normally to be expected upon removal. *See Guadarrama-Rogel, supra*.

In considering the hardship factors raised here, both individually and cumulatively, the AAO finds that they fail to extreme hardship to the applicant's mother in the event that she remained in the United States without her son.

The applicant makes no claim of extreme hardship to his mother if she were to join him to live in Cuba.

Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

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

ORDER: The appeal is dismissed.