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U.S. Citizenship
and Immigration
Services

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FILE:

Office: BALTIMORE

Date:

NOV 03 2008

IN RE:

Applicant:

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:

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.


Robert P. Wiemann, Chief
Administrative Appeals Office

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

The applicant, [REDACTED] is a native and citizen of the Ivory Coast 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 sought a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h), which the district director denied, finding the applicant failed to establish that extreme hardship would be imposed on a qualifying relative, *Decision of the District Director*, dated April 28, 2005.

The AAO will first address the finding of inadmissibility.

The record reflects that on July 7, 1998, the applicant plead guilty and was found guilty of the charge of harass, a course of conduct, in the District Court of Maryland, and was ordered to serve 90 days in jail (suspended) and to pay a fine and costs. On April 14, 1998, the applicant was arrested for the crime of burglary, fourth degree, for which he was found guilty and sentenced to one-year probation.

Section 212(a)(2) of the Act states in pertinent part, 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 applicant’s convictions are within the meaning of section 101(a)(48)(A) of the Act, constituting convictions for immigration purposes because his sentences for burglary and harassment involved probation or jail, which is a restraint on liberty, and for harassment he was required to pay a fine, a penalty.

In determining whether the applicant’s convictions involve moral turpitude, the Board of Immigration Appeals (BIA) in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), held 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. Assault may or may not involve moral turpitude. Simple assault is generally not considered to be a crime involving moral turpitude.

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.

Whether a particular crime involves moral turpitude is determined by the “categorical approach” and the “modified categorical approach.” The “categorical approach requires looking to the elements of the criminal statute and the nature of the offense, rather than to the particular facts relating to the crime, to determine whether an offense involves moral turpitude. *Leocal v. Ashcroft*, 543 U.S. 1, 7, 125 S. Ct. 377, 160 L.Ed.2d 271 (2004). A court considers only the fact of conviction and the statutory definition of the criminal offense. *Matter of Tobar-Lobo*, 24 I&N Dec. 143 (BIA 2007). If necessary, one may look to authoritative court decisions in the convicting jurisdiction that elucidate the meaning of equivocal statutory language. *See Matter of Olquin*, 23 I&N Dec. 896, 897 (BIA 2006). Although evil intent signifies a crime involving moral turpitude, willfulness in the commission of the crime does not, by itself, suggest that it involves moral turpitude. *Goldeshtein v. INS*, 8 F.3d 645 (9th Cir. 1993). Under the statute, evil intent must be explicit or implicit given the nature of the crime. *Gonzalez-Alvarado, v. INS*, 39 F.3d 245, 246 (9th Cir. 1994). Neither the seriousness of the criminal offense nor the severity of the sentence imposed determines whether a crime involves moral turpitude. *Matter of Serna*, 20 I&N Dec. 579, 581 (BIA 1992). “If the statute defines a crime in which moral turpitude necessarily inheres, then the conviction is for a crime involving moral turpitude for immigration purposes, and our analysis ends.” *Matter of Ajami*, 22 I&N Dec. 949 (BIA 1999).

When a statute contains offenses that do and do not involve moral turpitude, the modified categorical approach is applied. *See, e.g., Neely v. U.S.*, 300 F.2d 67 (9th Cir. 1962). With this approach a narrow, specific set of documents comprises the record: “[the] charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.” *Shepard v. U.S.*, 125 S.Ct. 1254, 1257 (2005). The court looks to the “record of conviction” to determine if the crime involves moral turpitude. *Matter of Ajami*, 22 I&N Dec. 949, 950 (BIA 1999) (look to indictment, plea, verdict, and sentence). The charging document, or information, is not reliable where the plea was to an offense other than the one charged. *Martinez-Perez v. Gonzales*, 417 F.3rd 1022, 1028-29 (9th Cir. 2005). The record of conviction does not include the arrest report. *See In re Teixeira*, 21 I&N Dec. 316, 319-20 (BIA 1996).

The applicant was convicted of harassment. *Reyes-Marales v. Gonzales*, 435 F.3d 937, 944-45 (8th Cir. 2006) holds that harassing phone calls under Minnesota law is not a crime involving moral turpitude because it encompasses threatening behavior without intent. The record does not indicate under which of the criminal codes the applicant was convicted. Nevertheless, the AAO finds harassment would not involve moral turpitude as harassing a person would not be “inherently base, vile, or depraved,” and “accompanied by a vicious motive or corrupt mind.”

The applicant was convicted of fourth-degree burglary in violation of Md. Crim. Law Code Ann. § 6-205, which statutory provision contains three pertinent subsections which state that: (a) a person may not break and enter the dwelling of another; or (b) break and enter the storehouse of another; or (c) with the intent to commit

theft, may not be in or on the dwelling or storehouse of another; or in a yard, garden, or other area belonging to the dwelling or storehouse of another.

The AAO finds that two BIA decisions are relevant, *Matter of M*, 2 I&N Dec. 721 (AG 1946), where the BIA held that breaking and entering without intent to commit larceny is not a crime involving moral turpitude; and *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982), where it held that burglary with intent to commit a theft was a crime involving moral turpitude.

A conviction under § 6–205 involves acts which do involve moral turpitude. A conviction under § 6–205(a) or (b) would not involve moral turpitude because there is no intent to commit theft. Conversely, a conviction under § 6–205(c) would involve moral turpitude as there is an intent to commit theft. The applicant submitted only the disposition of his conviction, and the AAO is, therefore, unable to determine whether the full record of conviction would demonstrate that the applicant was not convicted of burglary with intent to commit theft. As the burden is on the applicant to establish his admissibility to the United States, the AAO finds that, with regard to his burglary conviction, the applicant has failed to prove he is admissible pursuant to section 212(a)(2)(A)(i)(I) of the Act.

Furthermore, because the record indicates that the maximum penalty for the applicant's fourth-degree burglary conviction under Maryland law is imprisonment for 3 years, his conviction does not fall within the petty offense exception set forth under section 212(a)(2)(ii) of the Act.

The AAO will now consider whether granting the applicant's section 212(h) waiver is warranted.

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

The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if -

(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 . . .

A section 212(h) waiver of the bar to admission resulting from violation of section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the 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 U.S. citizen spouse, [REDACTED]** The AAO notes that no documentation has been provided to show that the applicant's step-daughter or his children from his prior marriage are lawful permanent residents or citizens of the United States. Thus, hardship to any of them will be considered only in so far as it results in hardship to the applicant's spouse. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. See *Matter of Mendez-Moralez*, 21 I&N Dec. 296 (BIA 1996).

The concept of extreme hardship to a qualifying relative “is not . . . fixed and inflexible,” and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals (BIA) set forth a list of non-exclusive factors relevant to determining whether an applicant has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. These factors include, with respect to the qualifying relative, the presence of family ties to U.S. citizens or lawful permanent residents in the United States, family ties outside the United States, country conditions where the qualifying relative would relocate and family ties in that country, the financial impact of departure, and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *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).

Applying the *Cervantes-Gonzalez* factors here, extreme hardship to the applicant’s spouse must be established if she joins the applicant, and alternatively, if she remains in the United States without him. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant’s waiver request.

On appeal, counsel states that the applicant and his wife have been married for five years and the applicant’s step-daughter attends a university in Baltimore. She states that he applicant has worked in the United States for ten years and earns \$35,000 annually as a driver. Counsel conveys that the applicant’s wife holds two jobs for which she earns \$35,000 annually. Counsel asserts that the applicant’s wife’s income is not sufficient to pay the mortgage, living expenses, and tuition and expenses for her daughter. Counsel claims that the applicant’s wife will experience economic detriment and emotional hardship if separated from her husband and she points to a psychological evaluation to substantiate the emotional hardship claim.

In addition to other documentation, the record contains the following evidence:

- A letter dated May 10, 2005, in which [REDACTED] states that her daughter is in college and she does not earn enough to make it on her own. She states that she earns \$35,000 annually, working two jobs. She states that after deducting for taxes, every two weeks she earns \$1,150 to \$1,050, which includes overtime; and that without overtime she nets \$875-\$770. Ms. [REDACTED] provides a list of her monthly expenses, which total \$3,305. The list is as follows: mortgage, \$1,500; electric, \$70; water, \$140 (3 months); food, \$320; trash, \$50; credit cards, \$250; car insurance, \$170; daughter’s college, \$450; cell phones, \$200; dishnet, \$45; IRS payment; \$200. She states that her husband holds two jobs.
- A psychological evaluation dated October 20, 2004, of [REDACTED] by [REDACTED]. In the evaluation, [REDACTED] indicates that the applicant is happily married and has a strong relationship

with his step-daughter, whom he supports financially. She indicates that the applicant pays the family's mortgage because he holds two jobs, one with Capitol Messenger and the other with Pizza Hut, working full-time; and his wife works 15 hours a week. Ms. [REDACTED] states that the applicant's 18-year-old stepdaughter has known the applicant for 8 years, and [REDACTED] conveys that the applicant's step-daughter indicates that her mother would be devastated if he were deported. Ms. [REDACTED] further states that the applicant's step-daughter indicates that the applicant encouraged her to attend college and is helping to finance her studies. Ms. [REDACTED] states that [REDACTED] has a history of severe childhood trauma and is now exhibiting symptoms of a moderate to severe depression and anxiety triggered by the stress of the potential separation from her husband. She states that given the marked emotional overload, she has begun to experience some symptoms of Post Traumatic Stress Disorder, which she was previously able to repress. Ms. [REDACTED] indicates that the applicant's wife relies upon her husband emotionally. She states that test data shows [REDACTED] as having moderate to severe symptoms of depression and debilitating and intense anxiety.

- In an undated letter the applicant's wife indicates that she would be lost and sad without her husband. She indicates that she was laid off in one of her two jobs and now works part-time at Pizza Hut, but does not earn enough money to support her and her daughter. She indicates that she does not know her father and the applicant has been the only father to her daughter. The applicant's wife states that her husband is the family's backbone. She provides a list of monthly bills, which total \$3,572. (The AAO notes that this letter by the applicant's wife is superseded by her letter dated May 10, 2005.)
- A wage statement by Pizza Hut with the check date October 4, 2004, reflecting the applicant's wife's net pay of \$467.84.
- The Biographic Information reflects the applicant is a driver with Capital Messenger since 1998 and a driver with Muddy Branch Pizza Hut since 1997. The letter dated October 7, 1997 by the restaurant general manager with Pizza Hut, Inc. conveys that the applicant has been employed there since 1996 as a driver, earning \$5.15 per hour.
- In the attachment to the waiver application the applicant conveys that he supports his wife and step-daughter as a driver for Pizza Hut and Capital Messenger, earning \$32,000 annually. He states that his removal would impact his spouse and step-child mentally, emotionally, and financially.

In rendering this decision, the AAO has carefully considered all of the evidence in the record.

In her most recent letter, the applicant's wife conveys that she earns \$35,000 annually and that her income is not sufficient to meet monthly household expenses, which she sets forth in a list. The AAO finds that the supporting documents in the record fail to show that the income of the applicant's wife is insufficient to meet her expenses. For example, the April 2004 credit card account summary shows a balance of \$2,504 with the minimum payment of \$54.99. There is no documentation substantiating the expenses of the applicant's step-daughter, the mortgage, cell phones, car insurance, or the IRS payment. Going on record without supporting documentary evidence is not sufficient for purposes 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 AAO notes that the U.S. Department of Health and Human Services Federal Poverty Guidelines for 2008 indicates the poverty threshold is \$14,000 for a family of two; the income of the applicant's wife far exceeds this threshold.

With regard to family separation, 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).

In light of the psychological evaluation of the applicant’s wife, which conveys that she has a history of severe childhood trauma, is exhibiting symptoms of a moderate to severe depression and anxiety and is experiencing some symptoms of post traumatic stress disorder, triggered by the stress of the potential separation from the applicant, the AAO finds that the situation of the applicant’s wife, if she remains in the United States without her husband, rises to the level of extreme hardship as required by the Act.

However, the AAO finds that the applicant makes no claim of extreme hardship to his spouse if she were to join him to live in the Ivory Coast.

In conclusion, the factors presented in this case do not constitute extreme hardship to a qualifying family member for purposes of relief under section 212(h) of the Act, 8 U.S.C. § 212(h). 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(h) 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.