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



U.S. Citizenship
and Immigration
Services



Hq

FILE:



Office: MANILA

Date:

AUG 03 2009

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer-in-Charge (OIC), Manila, Philippines, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Fiji 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 crimes involving moral turpitude. The applicant seeks 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 with his U.S. citizen mother and U.S. citizen father.

The OIC concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on his qualifying relatives, his U.S. citizen parents, and denied the Application for Waiver of Ground of Excludability (Form I-601) accordingly.

On appeal, the applicant asserts that he feels a deep sense of embarrassment and regret for committing the offenses. The applicant states that he is unemployed and relying on his mother for financial assistance. He states that he had intended to care for his parents in their old age. He states that he is displeased and concerned about the levels of abuse on basic human rights issues in Fiji. As corroborating evidence the applicant furnished letters from his family and friends, newspaper articles on Fiji, a letter from his former employer, and a letter from his church pastor. The entire record has been reviewed and considered in rendering a decision on the appeal.

Section 212(a)(2)(A) of the Act states, in pertinent parts:

(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

(ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

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

[M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general....

In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

In the recently decided *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. Finally, in all such inquiries, the burden is on the alien to establish “clearly and beyond doubt” that he is “not inadmissible.” *Id.* at 709 (citing *Kirong v. Mukasey*, 529 F.3d 800 (8th Cir. 2008))

The record shows that the applicant has been convicted of the following offenses:

- On November 19, 1992, the applicant was convicted of burglary in violation of section 299 of the Fiji Penal Code and sentenced to 12 months probation (Suva Magistrate Court, [REDACTED]).
- On September 1, 1995, the applicant was convicted of larceny in violation of section 262 of the Fiji Penal Code and damaging property in violation of section 324 of the Fiji Penal Code and sentenced for each count to a fine of \$70.00 (Suva Magistrate Court, [REDACTED]).
- On September 12, 1996, the applicant was convicted of house breaking entering and larceny in violation of section 300 of the Fiji Penal Code and sentenced to a fine of \$260.00 (Suva Magistrate Court, [REDACTED]).

Fiji Penal Code § 299 provides, in pertinent part:

Burglary – Any person who in the night – (a) breaks and enters the dwelling-house of another with intent to commit any, felony therein; or (b) breaks out of the dwelling-house of another, having – (i) entered the said dwelling-house with intent to commit any felony therein; or (ii) committed any felony in the said dwelling-house, is guilty of the felony called burglary, and is liable to imprisonment for life, with or without corporal punishment.

The 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). In *Matter of Moore*, the BIA noted that since moral turpitude inheres in the intent, the crime of breaking and entering with intent to commit larceny involves moral turpitude. 13 I&N Dec. 711, 712 (BIA 1971). Conversely, the Second Circuit Court of Appeals held in *Wala v. Mukasey* that burglary with intent to commit larceny is not a crime involving moral turpitude where there was no intent to deprive the victim permanently of his property. 511 F.3d 102, 110 (2d Cir. 2007). Thus, based solely on the statutory language, it appears that Fiji Penal Code § 299 encompasses (hypothetically) conduct that involves moral turpitude and conduct that does not.

However, in accordance with *Silva-Trevino*, the AAO must determine if an actual case exists in which these criminal statutes were applied to conduct that did not involve moral turpitude. The applicant has not presented and the AAO is unaware of any prior case in which a conviction has been obtained under the Fiji Penal Code § 299 for conduct not involving moral turpitude. Further, the record does not establish that this statute was applied to conduct not involving moral turpitude in the applicant's own criminal case. The AAO notes that the record contains a statement of conviction/disposition from the Fiji Police Criminal Records Office, but does not contain other documents comprising the record of conviction, such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. Therefore, the AAO must find the applicant's November 19, 1992 conviction for burglary under the Fiji Penal Code § 299 to be a

crime involving moral turpitude, and the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

Fiji Penal Code § 262 provides, in pertinent part:

Larceny – (1) Stealing for which no special punishment is provided under this Code or any other Act for the time being in force is simple larceny and a felony punishable with imprisonment for five years.

Fiji Penal Code § 259 provides, in pertinent part:

Definition of theft – (1) A person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof.

U.S. courts have held that the crime of theft or larceny, whether grand or petty, involves moral turpitude. See *Matter of Scarpulla*, 15 I&N Dec. 139, 140 (BIA 1974)(stating, “It is well settled that theft or larceny, whether grand or petty, has always been held to involve moral turpitude . . .”); *Morasch v. INS*, 363 F.2d 30, 31 (9th Cir. 1966)(stating, “Obviously, either petty or grand larceny, i.e., stealing another’s property, qualifies [as a crime involving moral turpitude].”). The conviction for larceny is considered to involve moral turpitude only when a permanent taking is intended. *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973). In the present case, theft under Fiji Penal Code § 259 is defined as a permanent taking. The AAO notes that the applicant’s record of conviction contains a charging document, which reflects that on May 2, 1995, he stole a car stereo valued at \$380.00. The court transcript reflects that on September 1, 1995, the applicant pled guilty to this offense. Since the applicant’s crime involved a permanent taking, the AAO finds the applicant’s September 1, 1995 conviction for larceny under the Fiji Penal Code § 262 to be a crime involving moral turpitude, and the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

Fiji Penal Code § 324 provides, in pertinent part:

Damaging Property – Any person who willfully and unlawfully destroys or damages any property is guilty of an offence, which, unless otherwise stated, is a misdemeanor, and he is liable, if no other punishment is provided, to imprisonment for two years.

The BIA has held that the malicious destruction of property is not a crime involving moral turpitude when the statute under which the alien was convicted does not require base or depraved conduct. See *Matter of M*, 2 I&N Dec. 686 (BIA 1946)(unlawful destruction of railway telegraph equipment found not to involve moral turpitude); *Matter of C-*, 2 I&N Dec. 716 (BIA 1947)(no moral turpitude in damaging a glass door of private property); *Matter of B*, 2 I&N Dec. 867 (BIA 1947)(willfully damaging mailboxes and other private property found not to involve moral turpitude). Fiji Penal Code § 324 provides that any person who willfully and unlawfully destroys or damages any property is guilty of the offense. The AAO does not find that the statutory language pertains to conduct that is inherently base, vile, or depraved. Accordingly, the applicant’s September 1, 1995 conviction for damaging property under Fiji Penal Code § 324 is not a crime involving moral turpitude.

Fiji Penal Code § 300 provides, in pertinent part:

House Breaking and Committing Felony – Any person who – (a) breaks and enters any dwelling-house, or any building within the curtilage thereof and occupied therewith, or any school-house, shop, warehouse, counting-house, office, store, garage, pavilion, factory, or workshop, or any building belonging to Her Majesty, or to any Government department or to any municipal or other public authority, and commits any felony therein; or (b) breaks out of the same, having committed any felony therein, is guilty of a felony, and is liable to imprisonment for 14 years.

The applicant was convicted on September 12, 1996 for house breaking entering and larceny. As previously discussed, the 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). U.S. courts have held that the crime of theft or larceny, whether grand or petty, involves moral turpitude when a permanent taking is intended. *See Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973). As discussed, theft under Fiji Penal Code § 259 is defined as a permanent taking. The applicant's record of conviction contains a court transcript, which reflects that on May 13, 1996, he pled guilty to breaking and entering into a dwelling house and stealing a Panasonic Laser Disc valued at \$2,000.00. The transcript indicates that this property was not recovered by the police. Since the applicant's crime involved a permanent taking, the AAO finds the applicant's September 12, 1996 conviction for house breaking entering and larceny under Fiji Penal Code § 300 to be a crime involving moral turpitude, and the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

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

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

(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

The AAO notes that section 212(h) of the Act provides that a waiver of inadmissibility is dependent first upon a showing that the bar to admission imposes an extreme hardship on a qualifying family member. In this case, the relatives that qualify are the applicant's parents. Hardship to the applicant himself is not relevant under the statute and will be considered only insofar as it results in hardship to a qualifying relative. If extreme hardship is established, the Secretary then assesses whether an exercise of discretion is warranted.

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999), the BIA provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 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. The BIA added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not an exclusive list. *See id.*

Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact 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. *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996). (Citations omitted).

The AAO notes that in *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998), the Ninth Circuit Court of Appeals held that, "the most important single hardship factor may be the separation of the alien from family living in the United States", and that, "[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." (Citations omitted). Although the present case did not arise in the Ninth Circuit, separation of family will be given appropriate weight in the assessment of hardship factors.

The AAO notes further, however, that U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). For example, in *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), the BIA held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), the Court defined "extreme hardship" as hardship that was unusual or beyond that which would normally be expected upon deportation. The Court emphasized that the common results of deportation are insufficient to prove extreme hardship. Moreover, the U.S. Supreme Court held in *INS v. Jong Ha Wang*, 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

An analysis under *Matter of Cervantes-Gonzalez* is appropriate. The AAO notes that extreme hardship to a qualifying relative must be established in the event that he or she accompanies the applicant or in the event that he or she remains in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

The applicant asserts in his letter filed on appeal that because of the economic situation in Fiji he is unemployed and relying on his mother for financial assistance. He states that he had intended to care for his parents in their old age. The applicant's spouse asserts in her letter, dated August 7, 2006, that she and the applicant have nothing else left in their possession as they had sold everything they had knowing their immigrant visa would be approved.

The AAO will consider financial hardship to the applicant's parents as one factor in establishing extreme hardship. However, in the present case, sufficient documentation has not been provided to demonstrate the applicant's parents' financial situation, such as evidence of their annual income and expenses or assets and liabilities. Further, the record does not demonstrate the applicant's parent's

source of financial support in the United States. Nor does it demonstrate the amount of financial assistance the applicant's mother is providing him. Moreover, the applicant does not discuss in his letter whether he is currently engaged in a search for employment, whether his spouse is employed, and the prospects of finding employment in Fiji. 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)). Although the applicant's unsupported assertions are relevant and have been considered, they can be afforded little weight in these proceedings.

The applicant asserts in his letter filed on appeal that he is displeased and concerned about the levels of abuse on basic human rights issues in Fiji, including the right of expressing opinion and protecting human life and dignity. The applicant furnished numerous newspaper articles from *The Fiji Times* regarding the political conditions in Fiji. Although extreme hardship to the applicant is not relevant for the purpose of establishing eligibility for a waiver under section 212(h) of the Act, it will be considered insofar as it results in emotional hardship to the qualifying relative. Accordingly, country conditions in Fiji will be considered insofar as they have resulted in hardship to the applicant and would result in hardship to his parents should they decide to return to Fiji. The applicant has stated that he is displeased and concerned about the human rights abuses in Fiji, but he has not explained how these abuses specifically impact his quality of life in Fiji. There is nothing in the record that would serve to link the issues discussed in the newspaper articles to the applicant or his parents. Neither the applicant nor his parents claim to have suffered from human rights abuses during their residence in Fiji. The AAO notes that the applicant's feeling of displeasure and concern about human rights abuses, does not, alone, rise to the level of extreme hardship. Therefore, the AAO cannot conclude that the political conditions in Fiji contribute to a finding of extreme hardship for the applicant's parents.

The applicant's parents state in their letter, dated April 17, 2007, that they miss the applicant very much. They state that they are getting older and every day that their son is not with them is getting harder to bear. They note that they have shed many tears and have great sadness in their hearts. The AAO recognizes that the applicant's parents are suffering emotionally as a result of their separation from the applicant. Their situation, however, is typical of individuals separated as a result of removal or inadmissibility and does not rise to the level of extreme hardship based on the record. While, in common parlance, the prospect of separation or involuntary relocation nearly always results in considerable hardship to individuals and families, in specifically limiting the availability of a waiver of inadmissibility to cases of "extreme hardship," Congress did not intend that a waiver be granted in every case where a qualifying relationship exists. The point made in this and prior decisions on this matter is that the current state of the law, viewed from a legislative, administrative, or judicial point of view, requires that the hardship be above and beyond the normal, expected hardship involved in such cases. U.S. court decisions have repeatedly held that the common results of removal are insufficient to prove extreme hardship. See *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991), *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996); *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996) (holding that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship); *Matter of Shaughnessy*, 12 I&N Dec. 810 (BIA 1968) (holding that separation of family members and financial difficulties alone do not establish extreme hardship). "[O]nly in cases of great actual or prospective injury . . . will the bar be removed." *Matter of Ngai*, 19 I&N Dec. 245, 246 (BIA 1984).

The remaining documentation in the record consists of letters from the applicant's family members, a friend, a former employer, a church pastor, and the parish manager at his parent's church. The letters discuss the applicant's good moral character, rehabilitation, and the importance of reuniting the applicant with his family members in the United States. However, none of these letters provide any additional information on the hardship the applicant's parents would suffer if the applicant is denied admission to the United States.

In this case, the record does not contain sufficient evidence to show that the hardships faced by the applicant's parents, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship. The AAO therefore finds that the applicant has failed to establish eligibility for a waiver of inadmissibility under section 212(h) of the Act. 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. Therefore, the AAO will not address the aforementioned letters from the applicant's family members and acquaintances, which discuss his character and rehabilitation.

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

ORDER: The appeal is dismissed.