



U.S. Citizenship  
and Immigration  
Services

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

PUBLIC COPY

Tt2

FILE:

Office: FRANKFURT, GERMANY

Date: AUG 10 2009

IN RE:

Applicant:

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), Frankfurt, Germany, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Benin 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 spouse and daughter.

The record reflects that the applicant first applied for a waiver of inadmissibility (Form I-601) on April 19, 2004. On July 9, 2004, the OIC denied the waiver, concluding that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative. The applicant appealed the denial to the AAO, and on February 2, 2006, the AAO dismissed the appeal. On March 8, 2007, the applicant filed a second application for a waiver of inadmissibility. On March 20, 2007, the OIC denied the waiver, again concluding that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative. That denial is now before the AAO on appeal.

On appeal, the applicant asserts that the waiver denial imposes extreme hardship on her spouse and autistic daughter, extreme financial hardship on her spouse, and mental anguish through a marital separation that will eventually destroy their marriage. As supporting evidence, the record contains letters from the applicant's spouse and school records for the applicant's child. The entire record was 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 on August 22, 2001, the applicant was convicted of *bodily injury* in violation of section 223 of the German Penal Code and sentenced to pay a fine of 4,800 Deutsche Marks (Municipal Court of Heidelberg, Reference number: 11Js 11635/01).

German Penal Code § 223 provides:

- (1) Whoever physically maltreats or harms the health of another person, shall be punished with imprisonment for not more than five years or a fine.
- (2) An attempt shall be punishable.

\* \* \*

German Penal Code § 15 provides:

Only intentional conduct is punishable, unless the law expressly provides punishment for negligent conduct.

The BIA has held that an assault statute must involve a meaningful level of harm or injury to constitute moral turpitude. In the case *In Re Ernst Solon*, the BIA noted that intentional conduct resulting in a meaningful level of harm, which must be more than mere offensive touching, may be considered morally turpitudinous. 24 I&N Dec. 239, 242 (BIA 2007). Similarly, in the case *In Re Sanudo*, the BIA held that an intentional touching of another without consent, without injury or an aggravating factor, does not constitute a crime involving moral turpitude. 23 I&N Dec. 968, 972 (BIA 2006). The BIA has also found that causing another to feel great fear is a crime involving moral turpitude. In *Matter of Ajami*, the BIA held that the intentional transmission of threats is evidence of a vicious motive or a corrupt mind, and thus is a crime involving moral turpitude. 22 I&N Dec. 949, 952 (BIA 1999).

The AAO notes that a violation of section 223 of the German Penal Code includes physically maltreating and harming the health of an individual as well as an attempt to engage in such conduct. Thus, based solely on the statutory language, it appears that German Penal Code § 223 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 the criminal statute was 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 German Penal Code § 223 for conduct not involving moral turpitude. Nevertheless, in accordance with the language of *Silva-Trevino*, the AAO will review the record as part of its categorical inquiry to determine if the statute was applied to conduct not involving moral turpitude in the applicant’s own criminal case. The record contains the criminal indictment, dated July 18, 2001, which provides:

1. On May 24, 2001 the accused hit his wife . . . with his fists into her face indiscriminately without any ground of justification in the flat rented by the accused at [REDACTED]. Furthermore, he hit with his knees against her body, striking a heavy bunch of keys into her face and at her neck, resulting in her face receiving scratches and her neck having lacerations, which the accused had accepted at least by approval. [The wife] incurred pains and hematomata [sic] at the left breast, at the left shoulder-blade and at the left cheek.
2. On May 30 around 2 p.m. the accused hit his wife . . . without any ground of justification, with a chair, at the [REDACTED] resulting in her whole body having hematomata, in particular at the back.
3. The same day the accused went to Wurzburg to the flat of his wife . . . at the [REDACTED] attacking her without any ground of justification after 8 p.m., pulling her hair and hitting her with the fists on the head, resulting in her incurring pains.

Child and spousal abuse has been found to be a crime involving moral turpitude where the perpetrator willfully commits an act of baseness or depravity contrary to accepted moral standards. *See Grageda v. INS*, 12 F.3d 919, 922 (9<sup>th</sup> Cir. 1993); *see also Guerrero de Nodahl v. INS*, 407 F.2d 1405, 1406-07 (9<sup>th</sup> Cir. 1969) (stating, “we rule that inflicting ‘cruel or inhuman corporal punishment or injury’ upon a child is so offensive to American ethics that the fact that it was done purposely or willingly ends debate on whether moral turpitude was involved. When the crime is this heinous, willful conduct and moral turpitude are synonymous terms.”). Based upon the evidence in the record, the AAO finds that the applicant has been convicted of causing intentional harm and injury to his spouse, a crime involving moral turpitude. He is therefore 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 spouse and daughter. 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 record reflects that the applicant wed [REDACTED] a U.S. citizen, on September 6, 2002. At the time of their marriage, the applicant's spouse was residing in Germany as a U.S. Department of Defense civilian employee with her 10 year old U.S. citizen child, [REDACTED] (now 17 years old). The applicant's spouse and stepchild are qualifying family members for section 212(h) of the Act extreme hardship purposes.

On appeal, the applicant's spouse asserts that her daughter was diagnosed with autism in August 1995. She states that having the applicant help her with her daughter's intensive treatment has been extremely crucial and a major factor in treatment success. She states that the applicant helped her cope with emotions about her daughter's autism, and eased her burden as her support system. She notes that her daughter's treatment targeted specific deficits in learning, language, imitation, attention, motivation, compliance, and initiative of social interaction. She states that her joint parenting with the applicant is an integral part of her daughter's success with treatment. She indicates that her overseas tour in Germany is coming to an end after seven years, and she would suffer extreme difficulty in transitioning her daughter to the U.S. without the applicant. The applicant's spouse states in her letter filed with the instant waiver application that her daughter has been diagnosed with Pervasive Developmental Disorder Not Otherwise Specified. She states that her daughter has difficulties with everyday household living, and requires a great deal of structure in the educational setting and home environment. The applicant's spouse states in the letter she filed with the initial waiver application that her daughter's verbal IQ is in the range consistent with Mild Mental Retardation and she functions below average with age appropriate children. She states that 20% of her employment requires business travel, and she relies on the applicant to care for her daughter in her absence. As corroborating evidence, the applicant's spouse furnished copies of her daughter's Mannheim Middle School, Department of Defense Education Activity, Individualized Education Program (IEP), dated February 21, 2007, and Patrick Henry Elementary School Case Study Eligibility Report, dated February 3, 2003.

The AAO finds that the applicant's spouse's assertions of hardship are not demonstrated by the record. The applicant's daughter's Individualized Education Program and Case Study Eligibility Report are limited to discussions of her daughter's performance and behavior in school and the school accommodations for her daughter's special needs. The applicant's spouse has not demonstrated the effects her daughter's condition has on her activities of daily life. Nor has she illustrated the type of structure her daughter requires for daily household living. In addition, the record does not demonstrate the degree to which the applicant has been involved in his stepdaughter's treatment. Although the applicant's spouse asserts that the applicant assisted her daughter with treatment for autism, she fails to document or provide details on the treatment plan, how the applicant was engaged in the treatment, and whether her daughter continues to require treatment. Further, she does not demonstrate that she would be unable to maintain her employment if she had to care for her daughter alone. The applicant's spouse states that the applicant's presence is required during her business travel. However, she has not discussed the possibility and practicality of finding suitable childcare. The record reflects that on June 6, 1999, the applicant's spouse moved to Germany for employment as a civilian U.S. Department of Defense employee with her then seven year old daughter, indicating that she was able to support and care for her daughter alone while maintaining full time employment. For these reasons, the AAO does not find that the applicant's daughter's medical condition contributes to a finding of extreme hardship.

The applicant's spouse asserts in her letter filed with the instant waiver application that the bar to her husband's admission to the United States would cause him to be deported from Germany because he is residing in the country as her dependent. She states that deportation would cause a severe decline in her husband's social, economic, mental, and physical health conditions. The applicant's spouse asserts in the letter she filed with the initial waiver application that if her husband is deported she would have to financially support him in his home country. She states that she would be stressed, worried, and depressed all the time about his quality of life issues. She states that the opportunity for

her husband to find a good paying job is scarce and medical care is given only to people that can afford it. She states that it would be financially difficult to send the applicant money and support her daughter and herself. She states that because of financial hardship, her daughter would not be able to frequently visit the applicant, causing severe emotional trauma and stress.

The AAO will consider financial hardship as a factor contributing to extreme hardship. However, the hardship in the present case is not demonstrated by the record. The applicant's spouse's assertion that the applicant would be unable to support himself in Benin is not corroborated by the record. The applicant indicated on his immigrant visa application (DS-230 Part 1) that he was employed in Benin for seven years as a warehouse supervisor. There is nothing in the record to indicate that he would be unable to find employment in Benin. The applicant's spouse has not provided any country condition reports on the current economic climate in Benin and level of unemployment. Further, she has not presented documentation of her income and expenses to support her claim that it would be financially difficult to send remittances to the applicant, travel to Benin, and support her household in the United States. 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)).

The AAO acknowledges that the applicant's spouse and stepdaughter will experience emotional hardship if they remain in the United States without the applicant, but the applicant has failed to demonstrate that this hardship, when combined with other hardship factors, will be extreme. The AAO recognizes the significance of family separation as a hardship factor, but concludes that the hardship described by the applicant's spouse, and as demonstrated by the evidence in the record, is the common result of removal or inadmissibility and does not rise to the level of extreme hardship. U.S. court decisions have repeatedly held that the common results of removal or inadmissibility are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). In addition, *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined extreme hardship as hardship that was unusual or beyond that which would normally be expected upon deportation.

The AAO notes that the applicant's spouse's assertions regarding hardship are based on her continued residence in the United States with her daughter, and she has not addressed the possibility of moving to Benin with the applicant. As previously stated, 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. The applicant's spouse has not asserted, or submitted evidence to demonstrate, that she and her daughter would suffer extreme hardship in Benin if they relocated there. Accordingly, the AAO cannot determine that the applicant's spouse and stepdaughter would suffer extreme hardship if they relocated to Benin.

In this case, the record does not contain sufficient evidence to show that the hardships faced by the applicant's spouse and stepdaughter, 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.

Page 9

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.