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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

H2

FILE:

Office: CHICAGO, IL

Date:

AUG 13 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:

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 District Director, Chicago, Illinois and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico 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 her lawful permanent resident spouse and child.

In a decision, dated November 15, 2006, the district director found the applicant inadmissible for having been convicted of two counts of financial identity theft. The district director concluded that the applicant had failed to establish extreme hardship to her spouse and denied the waiver application accordingly.

In a Notice of Appeal to the AAO (Form I-290B), dated December 15, 2006, counsel states that the district director erred in applying a higher standard of hardship in the applicant's case than that required by section 212(h) of the Act. Counsel states that the district director erroneously applied the standard of "exceptional and extremely unusual hardship" to the applicant's case. Counsel also states that the district director erred in relying on *Perez v. INS* when deciding the applicant's case, the district director failed to properly consider all of the hardship and the totality of the circumstances in the applicant's case, and the district director did not correctly apply the standard in *Matter of Cervantes-Gonzalez* to the applicant's case.

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 was arrested on June 4, 2003 and convicted under Illinois Compiled Statutes Act 5 §16G-15 for two counts of Financial Identity Theft in Illinois. She was sentenced to one-year probation and had her record expunged on September 23, 2004. The AAO notes that a state expungement does not erase a conviction for immigration purposes. *See Matter of Roldan-Santoyo*, 22 I&N Dec. 512 (BIA 1999).

At the time of the applicant’s conviction, Illinois Compiled Statutes Act 5 §16G-15 provided, in pertinent part:

(a) A person commits the offense of financial identity theft when he or she knowingly uses any personal identifying information or personal identification document of another person to fraudulently obtain credit, money, goods, services, or other property.

The AAO notes that the crime the applicant was convicted of involved fraud and, generally, any crime involving fraud is a CIMT. *Burr v. INS*, 350 F.2d 87 (9th Cir.1965); *cert. denied*, 383 U.S. 915 (1966); *see also Jordan v. De George*, 341 U.S. 223 (1951); *Matter of A-*, 5 I. & N. Dec. 52 (BIA 1953). Thus, the AAO finds that the applicant has been convicted of two crimes involving moral turpitude and is inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The applicant has not disputed her inadmissibility on appeal.

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 child. Hardship to the applicant 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 accompanies the applicant to Mexico and in the event that he 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 of hardship in the applicant's case includes: counsel's brief; a 2005 U.S. Individual Income Tax Return for the applicant and her spouse; copies of the applicant's son's school records; a letter from the applicant's employer; documentation concerning the mortgage for the home owned by the applicant and her spouse; photographs with the applicant and her family; country condition reports for Mexico; and affidavits from the applicant, the applicant's spouse, the applicant's son, and seven of the applicant's family members.

The AAO finds that the record indicates that the applicant's son would suffer extreme hardship upon relocation to Mexico, but fails to include sufficient evidence to show that the applicant's spouse and/or son would face extreme hardship upon being separated from the applicant.

In her statement, dated October 31, 2005, the applicant states that her son has lived in the United States since the age of four and received all of his schooling in the United States. In addition, he has been raised with the applicant's spouse's family and knows nothing of life in Mexico. In his statement, dated October 31, 2005, the applicant's spouse states that relocating to Mexico would mean that his son would have to leave everyone he knows and that he cannot imagine hurting him like this. The AAO notes that the applicant's son is now sixteen years old. U.S. courts have held that "imposing on *grade school age citizen children, who have lived their entire lives in the United States*, the alternatives of either . . . separation from both parents or removal to a country of a vastly different culture" must be considered in a determination of whether extreme hardship has been shown (*Ramos v. INS*, 695 F.2d 181, 186 (5<sup>th</sup> Cir. 1983) (emphasis added), noting that "there is, of course, a great difference between the adjustment required of . . . infants and that of grade school age children." *Id.* at 187, fn 16; *see also Matter of Kao & Lin*, 23 I & N Dec. 45 (BIA 2001) (finding extreme hardship for a 15 year old, who had lived her entire life in the United States and was completely integrated into her American lifestyle, if she were uprooted upon her parent's deportation). Thus, the AAO finds that the applicant's son would suffer extreme hardship from being taken out of school and separated from his extended family in the United States and the only life that he has known.

However, as stated above, the current record does not establish that the applicant's spouse and/or son would experience extreme hardship upon being separated from the applicant. In his statement, dated October 31, 2005, the applicant's spouse states that he cannot imagine being a single father and having to raise his son alone. He states that his son desperately needs both parents and that he works long hours to be able to pay the bills. The AAO notes that the record includes seven statements from family members of the applicant and her spouse attesting to the

applicant's good moral character and the sadness that would be felt if the family was separated. The AAO also notes that the record includes documentation of wage earnings for the applicant and her spouse for 2005. These documents show that the applicant earned approximately \$14,000 in 2005 and the applicant's spouse earned approximately \$30,000 in 2005. The record also shows that the applicant and her spouse own property together in the United States, but the record does not show that without the applicant's income, the family would face extreme financial hardship.

The AAO recognizes that the applicant's spouse and child will suffer hardships as a result of being separated from the applicant. However, the current record does not contain sufficient evidence to show that the hardships faced by the applicant's spouse and/or son, 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 she 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 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.