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

U.S. Citizenship and Immigration Services

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IN RE:

APPLICATION: Application for Waiver of Grounds of Inadmissibility under § 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, as required by 8 C.F.R. 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Philadelphia, Pennsylvania. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of the Poland who has been 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 been arrested and convicted of crimes involving moral turpitude (CIMT) and under section 212(6)(C)(i) for having attempted to gain an immigration benefit through fraud or willful misrepresentation of a material fact. The record indicates that the applicant has a naturalized U.S. citizen wife. He seeks a waiver of inadmissibility in order to reside with his wife in the United States.

The District Director concluded that the applicant had failed to establish that the bars to his admission would impose extreme hardship on a qualifying relative, his U.S. citizen spouse, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on July 1, 2004.

On appeal, counsel for the applicant asserts that the District Director failed to give proper weight to the evidence presented, did not properly apply the legal standard for determining extreme hardship, and that he erred in finding there was fraud or misrepresentation with regard to the applicant's entry to the United States. He further asserts that the District Director failed to give adequate consideration to the mental health concerns of the applicant's spouse.

Section 212(a)(6)(C) Misrepresentation, states in pertinent part:

> (i) **In general.** Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this chapter is inadmissible.

In his June 6, 2005 denial of the applicant's Form I-485, Application to Register Permanent Resident or Adjust Status, the District Director found the applicant to have perjured himself at his February 11, 2005 adjustment interview. The District Director based his finding on a written statement provided by the applicant in response to a request for evidence in which the applicant indicated that a friend had presented the applicant's passport to an immigration inspector at a U.S. port of entry, thereby contradicting his prior claim that he had entered the United States without inspection. The District Director did not find the applicant's claim to have been confused with regard to the meaning of entry without inspection to be persuasive.

While the AAO notes the District Director's findings, it does not find the record to offer sufficient evidence to determine that the applicant willfully misrepresented a material fact in seeking adjustment of status. It does not find the record to contain a sworn statement taken from the applicant at the time of his February 11, 2005 interview or thereafter that addresses his manner of entry into the United States. Neither does the record contain officer interview notes that indicate what the applicant testified to during his interview. The AAO does not find the record to offer a clear picture of how the applicant

entered the United States or what he understood or stated at the time of his February 2005 interview. Accordingly, it does not find the record to establish that the applicant willfully misrepresented a material fact to obtain an immigration benefit under the Act.[1]

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

> (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-
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> > (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 212(h) states in pertinent part that:

> (h) The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) . . . if-
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> > (1)(A) [I]t is established to the satisfaction of the Attorney General that-
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> > > (i) [T]he activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,
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> > > (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
> > >
> > > (iii) the alien has been rehabilitated; or
> >
> > (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 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 record establishes that, on November 27, 2001, in the Criminal Section of the Common Pleas Court of Philadelphia, the applicant was convicted of 1) Criminal Trespass, section 3503 of the Pennsylvania Criminal Code (PCC), a second degree felony; 2) Terroristic Threats, section 2706 of the PCC; 3) Simple Assault, Section 2701 of the PCC; 4) and Criminal Conspiracy, section 0903 of the PCC, a first

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[1] The AAO notes, however, that the applicant's claim to extreme hardship under section 212(h) of the Act is based on his U.S. citizen spouse. Therefore, the applicant's eligibility for a waiver under section 212(h) of the Act would also serve to waive any ineligibility under section 212(a)(6)(C)(i) of the Act.

degree felony. Based on these convictions, the District Director concluded that the applicant was inadmissible under section 212(a)(2)(i)(I) of the Act for having committed a crime involving moral turpitude. In response to the applicant's motion to reopen the Form I-485 decision, filed on July 6, 2005, the District Director indicated that the applicant had failed to establish that the offenses of terroristic threats and criminal conspiracy were not crimes involving moral turpitude.

The AAO first turns to a consideration of the applicant's conviction for the crime of terroristic threats under section 2706 (a) of the PCC, which states:

> (a) . . . A person commits the crime of terroristic threats if the person communicates, either directly or indirectly, a threat to:
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> 1. commit any crime of violence with intent to terrorize another;
> 2. cause evacuation of a building, place of assembly or facility of public transportation; or
> 3. otherwise causes serious public inconvenience, or cause terror or serious public inconvenience with reckless disregard of the risk of causing such terror or inconvenience.

Counsel asserts that a conviction under this section of the PCC is not a crime involving moral turpitude because it does not require the "[intentional]" transmission of a threat, and that the record does not contain evidence of which subsection the applicant was convicted of and that all subsections must be crimes involving moral turpitude for the applicant's conviction to be found a crime of moral turpitude.[2] The AAO notes, however, that it is the applicant's burden to establish eligibility in these proceedings and that he has failed to provide any evidence that the conduct for which he was convicted under the Pennsylvania statute did not constitute a crime involving moral turpitude. *See* section 291 of the Act, 8 U.S.C. § 1361.

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 for a crime of moral turpitude when the language of the criminal statute in question potentially encompasses conduct that involves moral turpitude and conduct that does not. To qualify as a crime involving moral turpitude for purposes of the Act, a crime must involve both reprehensible conduct and some degree of scienter, whether specific intent, deliberateness, willfulness, or recklessness. *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008). A statute under which an applicant has been convicted must be evaluated for the realistic probability that it could be applied to reach conduct that does not constitute moral turpitude, including the conduct that led to conviction in the present case. *Id.* at 698,

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[2] Counsel cites *Singh v. Ashcroft* 383 F.3d 144 (C.A 3 2004) and *Matter of Short* 20 I&N Dec. 136 (BIA 1989). However, *Singh*, involving the definition of aggravated battery, relies on *Taylor v. United States* 495 U.S. 575 (1990). The Attorney General has concluded that the evidentiary limitations of *Taylor* do not apply for purposes of making determinations of moral turpitude. *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008). *Matter of Short* is not in conflict with the District Director's decision because, in this case, it is the crime itself that is a CIMT, not an underlying charge.

(citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). If the statute has not been applied in such a manner, it is reasonable to conclude that all convictions under the statute may be categorized as crimes involving moral turpitude. *Id* at 697. In the event that the statute has been applied to conduct that does not involve moral turpitude, U.S. Citizenship and Immigration Services (USCIS) may then rely on an examination of the record of conviction to determine if the applicant's conduct involved a crime of moral turpitude. *Id.* at 698. If the record of conviction does not clearly establish conduct involving moral turpitude, USCIS may then examine any additional evidence deemed necessary to determine the nature of the conduct involved. *Id.* at 698. In all such inquiries, the burden is on the alien to establish "clearly and beyond doubt" that, despite a conviction under the statute in question, his or her conduct did not involve moral turpitude. *Matter of Cristoval Silva-Trevino*, 24 I&N Dec. 687, at 709 (A.G. 2008)(citing *Kirong v. Mukasey*, 529 F.3d 800 (8th Cir. 2008)).

Pursuant to *Silva-Trevino*, the AAO has reviewed the record in the present matter to determine whether the applicant's conviction covers conduct that may not constitute moral turpitude. The record of conviction contained in the record includes a court document, dated November 27, 2001, which establishes that the applicant was found guilty of committing terroristic threats and the criminal complaint filed against the applicant on November 22, 2001. The criminal complaint charges the applicant with having knowingly, intentionally or recklessly caused/attempted to cause serious bodily injury to another individual by forcing his way into that individual's apartment, beating that individual until he lost consciousness and threatening to kill that individual.

In *Chanmouny v. Ashcroft*, 376 F.3d 810 (8th Cir. 2004), the Eighth Circuit Court of Appeals found that a defendant who was convicted of making threats with the purpose of terrorizing another person had been convicted of a crime involving moral turpitude, based on his having threatened another individual with a meat cleaver. In the present case, the criminal complaint against the defendant reveals that he threatened to kill his victim after forcing his way into his apartment and assaulting him Counsel attempts to distinguish *Chanmouny*, but an examination of the Minnesota statute considered in *Chanmouny* reveals that its language is virtually identical to that of the Pennsylvania statute in question. Accordingly, the AAO finds the reasoning in *Chanmouny* to be applicable to the present case and to support a finding that the applicant's conviction for committing terroristic threats under section 2706 of the PCC is a conviction for a crime involving moral turpitude.

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 provides a list of factors relevant in 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 566.

> 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 extreme hardship to the applicant's spouse must be established whether they reside in Poland or the United States, as they are not required to reside outside the United States based on the denial of the applicant's waiver request.

The record contains the following relevant evidence: statements from both the applicant and his spouse; tax and employment records for the applicant and his spouse; copies of prescriptions and receipts for the applicant's spouse; bank records for the applicant and his spouse; copies of telephone, insurance and utility invoices; copies checks paying utility bills; a statement from regarding the health of the applicant's spouse's parents; a statement from psychologist regarding the applicant's mental health; a statement from Jerrold regarding the applicant's spouse's mental health; copies of prescriptions for the applicant's spouse signed by letters from friends and family attesting to the moral character of the applicant; a copy of the death certificate for the applicant's spouse's younger son; and copies of court dispositions and charging documents relating to the applicant's criminal convictions.

On appeal, counsel for the applicant asserts that the applicant's spouse has Major Depressive Disorder, and that she would not survive a separation from the applicant. The record contains a statement from who indicates that the applicant's spouse is suffering from severe melancholy and that she is unable to function in any capacity. He attributes her mental status to the trauma of the death of her younger son and the simultaneous return of her only other son to Poland. reports that aggressive treatment with drugs, the support of the applicant and the applicant's own strength have resulted in the improvement of her condition but that she will have to be maintained on strong medication for at least one year. The record also includes a psychological evaluation prepared by , which concludes that the applicant's spouse has Major Depressive Disorder related to the drug overdose of her son, and that the exclusion of the applicant from the United States would drive the applicant's spouse to the point of suicidal ideation. The record contains a copy of the death certificate for the applicant's 21-year-old son that indicates he died from the adverse effect of a drug. It also includes copies of the applicant's spouse's prescriptions for medications used to treat major depression and anxiety. Counsel also asserts that the applicant's spouse depends on the applicant financially, and that it would be an extreme financial hardship for his spouse if the applicant were excluded. The applicant's spouse states that if the applicant were excluded her life would be devastated, and that without the applicant to help pay her bills and take care of her parents she would suffer extreme hardship.

The AAO notes the claims of financial hardship made by counsel and the applicant's spouse. However, the list of monthly expenses detailed by counsel is not corroborated by bills or invoices and appears to contain charges that would not recur on a monthly basis. The record also does not establish that the applicant would be unable to provide financially for his family from abroad. However, the AAO finds that the record does contain sufficient documentation to establish that the applicant's spouse has a pre-existing mental health condition and that, when combined with the normal disruptions and difficulties created by separation, it would result in hardship beyond that commonly experienced by the spouses of excluded aliens. Accordingly, the AAO concludes that the applicant's spouse would suffer extreme hardship if the applicant were to be excluded and she remained in the United States.

Extreme hardship must also be established if a spouse relocates with an applicant. In this case, the record contains little documentary evidence of the impact of relocation on the applicant's spouse. Counsel asserts that the District Director failed to consider the relationship the applicant's spouse has with her parents and the nature of the hardship on them if she were to relocate to Poland. However, the applicant's spouse's parents are not qualifying relatives in this proceeding and thus any hardship they might suffer as a result of the applicant's removal is not directly relevant to a determination of extreme hardship except as it effects a qualifying relative. The applicant's spouse states that she cannot leave her elderly U.S. citizen parents in the United States as they are sick and need her supervision, help and care, and do not speak English. She asserts that they would not survive in her absence. The record contains a letter from who states that his practice is treating the applicant's parents for cardiac arrhythmia, edema, advanced osteoarthritis and coronary insufficiency and that they require constant medical attention and supervision because of their conditions and language barriers. states that this medical attention is provided by their daughter, the applicant's spouse.

The AAO acknowledges the health problems of the applicant's mother-in-law and father-in-law and notes the applicant's spouse's claim that her parents would not survive without her as they need her supervision and care. However, it also observes that, in the psychological evaluation prepared by the applicant's spouse reported that she has a sister who lives close to her and to her parents. The record does not demonstrate that the applicant's spouse's sister would be unable or unwilling to assume responsibility for the care of their parents or that she would be unable to provide them with the same types of assistance as the applicant's spouse. Further, the record does not address how a separation from her parents would affect the applicant's spouse's mental/emotional health. The applicant's spouse is from Poland, speaks Polish and has stated that her older son now resides in Poland. In addition, the record contains no documentary evidence that the applicant's spouse would not be able to obtain adequate treatment for her mental health condition in Poland. Therefore, the AAO does not find the record to establish that the applicant's spouse would suffer extreme hardship upon relocation to Poland with the applicant.

When considered in the aggregate and in light of the *Cervantes-Gonzalez* factors cited above, the hardship factors discussed in the record do not support a finding that the applicant's spouse would face extreme hardship if he is refused admission. The AAO therefore finds that the applicant has failed to establish extreme hardship to his U.S. citizen spouse as required under section 212(h) of the

Act. Having found the applicant 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(a)(2)(A) 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.