



U.S. Citizenship
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FILE:

Office: MIAMI, FLORIDA

Date:

JAN 12 2009

IN RE:

Applicant:

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under sections 212(i) and 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i) and § 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, Miami, Florida, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant, _____ is a native and citizen of Nicaragua who was found to be inadmissible to the United States under section 212(a)(6)(C)(i), 8 U.S.C. § 1182(a)(6)(C)(i), of the Immigration and Nationality Act (the Act), for seeking to procure entry into the United States by fraud or willful misrepresentation; and under section 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having committed a crime involving moral turpitude. She seeks a waiver of inadmissibility pursuant to sections 212(i), 8 U.S.C. § 1182(i), and 212(h), 8 U.S.C. § 1182(h) of the Act, which the district director denied, finding the applicant failed to establish extreme hardship would be imposed on a qualifying relative. *Decision of the District Director*, dated July 21, 2006.

The AAO will first address the director's finding that the applicant is inadmissible pursuant to section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i).

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

- (i) 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 Act is inadmissible.

In the denial letter, the district director stated that the applicant's false claim to Guatemalan citizenship enabled her to receive an immigration benefit, which was, instead of deportation, the release on her own recognizance on November 3, 1992, and the issuance of an order to appear for a hearing before an immigration judge.

The record reflects that on October 12, 1992, the applicant entered the United States near Brownsville, Texas, and it shows that she stated that she was a citizen of Guatemala to a border patrol agent. The record further shows that in a sworn statement the applicant claimed Guatemalan citizenship because the person who was helping her enter the United States told her to claim Guatemalan citizenship because Nicaraguans were sent back to Nicaragua.

On appeal, counsel states that the applicant, who entered the United States without inspection at Brownsville, Texas, on October 13, 1992, stated to an immigration officer her true name and date of birth, but falsely claimed to be Guatemalan so as to remain in the United States. Counsel asserts that under *Kungys v. US*, 485 U.S. 759 (1988), misrepresentation of one's date and place of birth is not material. Counsel states that the applicant presented no documentation of her nationality and no evidence shows her statements were made under oath. Counsel claims that the record does not reflect that the immigration officer believed the applicant's misrepresentation, and if it does, the applicant was not permitted to remain in the United States based upon her false citizenship claim. Counsel states that under 9 Foreign Affairs Manual 40.63, N6.3-3, misrepresentations of residence and identity are material only when the alien is excludable on the facts or the misrepresentation tends to cut off a relevant line of inquiry which might have led to a proper finding of ineligibility. Counsel

states that the applicant's misrepresentation would not have made any difference to the immigration officer; the applicant did not have the proper documents to enter the country and was excludable as either a Guatemalan or a Nicaraguan, and her misrepresentation did not cut off a line of inquiry that would have led to a finding of ineligibility. According to counsel, the claim of Guatemalan nationality resulted in an Order to Show Cause and deportation proceedings. Counsel states that under the Nicaraguan Adjustment and Central American Relief Act (NACARA) the applicant is eligible to adjust status.

The AAO finds that the record establishes that the applicant made a false statement, claiming she was a Guatemalan citizen, in an attempt to gain admission or remain in the United States. The record does not indicate that she presented any entry documents in connection with her false statement. Even though the border patrol agent believed her false statement, the false statement did not entitle her to gain admission to or remain in the United States any more than if she had disclosed her true citizenship. A benefit under the Act has been procured by the misrepresentation, according to the district director, because instead of being deported as she would have been as a Nicaraguan, the applicant was released on her own recognizance and had a hearing before an immigration judge. However, nothing in the record suggests that had the applicant disclosed her true citizenship to the border patrol agent, he would not have released her on her own recognizance and would not have had a hearing before an immigration judge. Based on the foregoing, the applicant's misrepresentation was not material within the meaning of section 212(a)(6)(C) of the Act, and she is therefore not inadmissible under section 212(a)(6)(C) of the Act.

The AAO will now address the director's finding that the applicant is inadmissible pursuant to section 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I), of the Act.

The record reflects that on July 28, 2000, in the State of Florida, the applicant was arrested for the following four counts:

- Count 1: Child Abuse/No Great Bodily Harm, Fla. Stat. § 827.03(1), third-degree felony
- Count 2: Battery, Fla. Stat. § 784.03, first-degree misdemeanor
- Count 3: Burglary/with Assault or Battery, Fla. Stat. § 810.02(2)(A), first-degree felony
- Count 4: Criminal Mischief/over \$200, under \$1,000, Fla. Stat. § 80613(1)(B)2, first-degree misdemeanor

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

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

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

Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines “conviction” for immigration purposes as:

A formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where –

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.

The judge suspended entry of the applicant’s sentence and imposed three years of probation as to counts 1 and 3, and costs for all counts. The applicant’s convictions are therefore within the meaning of section 101(a)(48)(A) of the Act.

In determining whether the applicant’s convictions involve moral turpitude, the Board of Immigration Appeals (BIA) in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), held that:

[M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one’s fellow man or society in general. Assault may or may not involve moral turpitude. Simple assault is generally not considered to be a crime involving moral turpitude.

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

The AAO finds that there is no clear-cut definition of “moral turpitude.” In *Grageda*, the Ninth Circuit states that in “[d]escribing moral turpitude in general terms, courts have said that it is an “act of baseness or depravity contrary to accepted moral standards.” *Grageda v. INS*, 12 F.3d 919, 921 (9th Cir.1993)(quoting *Guerrero de Nodahl v. INS*, 407 F.2d 1405, 1406 (9th Cir. 1969)) See also *McNaughton v. INS*, 612 F.2d 457, 459 (9th Cir.1980)(“Whether a particular crime involves moral turpitude “is determined by the statutory definition or by the nature of the crime not by the specific conduct that resulted in the conviction.”) With regard to the crime of assault, courts generally have held that a conviction for simple assault does not involve moral turpitude. See, e.g., *Reyes-Morales v. Gonzales*, 435 F.3d 937, 945 n. 6 (8th Cir.2006) (observing that simple assault does not involve moral turpitude).

Courts have described two separate ways of analyzing crimes as the “categorical” and “modified categorical” approaches. The former looks solely to the structure of the statute of conviction to determine whether a person has been convicted of a designated crime; the latter looks to a limited set of documents in the record of conviction in cases where the statute of conviction was facially over inclusive. See, e.g., *Chang v. INS*, 307 F.3d 1185, 1189-92 (9th Cir. 2002).

The applicant was convicted of child abuse/no great bodily harm. Fla. Stat. § 827.03(1)(a) provides that “child abuse” is the “[i]ntentional infliction of physical or mental injury upon a child.” The knowing or willful abuse of a child without causing great bodily harm, permanent disability, or permanent disfigurement to the child is a third-degree felony. Fla. Stat. § 827.03(1)(c). A child is defined as being under the age of 18 years. Fla. Stat. § 827.01(2).

Society views a child, a domestic partner, or a peace officer as deserving of special protection because “the intentional or knowing infliction of injury on such persons reflects a degenerate willingness on the part of the offender to prey on the vulnerable or to disregard his social duty to those who are entitled to his care and protection.” *In re Sanudo*, 23 I&N Dec. 968 (BIA 2006). Many use-of-physical-force offenses, including those that have as an element the infliction of injury upon a person with whom the perpetrator has a particular, special relationship, have been found to be “grave acts of baseness or depravity,” involving moral turpitude. *Galeana-Mendoza v. Gonzalez*, 465 F.3d 1054, 1061 (9th Cir. 2006).

Child abuse was found to involve moral turpitude in *Guerrero de Nodahl v. INS*, 407 F.2d 1405, 1406-07 (9th Cir.1969), and in *Garcia v. Att’y Gen. of U.S.*, 329 F.3d 1212, 1222 (11th Cir. 2003). In *Guerrero de Nodahl v. INS*, 407 F.2d 1405, 1406-07 (9th Cir.1969), the court found that willful child beating in violation of section 273d of the California Penal Code was a crime involving moral turpitude. The court reasoned 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.”

In *Garcia v. Att’y Gen. of U.S.*, 329 F.3d 1212, 1222 (11th Cir. 2003), Garcia was convicted of aggravated child abuse in violation of §§ 827.03(1), (3) and 784.045(1) of the Florida Statutes. Under Florida law aggravated child abuse occurs when a person (a) commits an aggravated battery on a child; (b) willfully tortures a child; (c) maliciously punishes a child; or (d) willfully and unlawfully cages a child. Florida Stat. § 827.03(1) (1990). The court found that based upon the inherent nature of the crime of aggravated child abuse it qualified as a crime involving moral turpitude.

The applicant here was convicted of intentionally inflicting physical or mental injury upon a child without causing great bodily harm. The AAO finds that intentional infliction of physical injury upon a child would involve moral turpitude. See [REDACTED] and [REDACTED], *supra*. However, it is arguable that intentional infliction of a mental injury upon a child may not necessarily involve moral turpitude. In applying the “modified categorical” approach to determine the nature of the applicant’s crime, the record of conviction contains the Information, which conveys that the applicant willfully and knowingly pepper sprayed a minor child. The conduct of intentionally pepper spraying a child,

the AAO finds, would involve moral turpitude, rendering the applicant inadmissible under section 212(a)(2) of the Act.

Because the applicant's crime involved moral turpitude, the AAO need not consider whether her other convictions involve moral turpitude.¹

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

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

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

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . .

A section 212(h) waiver of the bar to admission resulting from violation of section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant is not a consideration under the statute and will be considered only to the extent that it results in hardship to a qualifying relative, who in this case is the applicant's 15-year-old U.S. citizen daughter. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Moralez*, 21 I&N Dec. 296 (BIA 1996).

The concept of extreme hardship to a qualifying relative "is not . . . fixed and inflexible," and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals (BIA) set forth a list of non-exclusive factors relevant to determining whether an applicant has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. These factors include, with respect to the qualifying

¹ The applicant's child abuse conviction is a third-degree felony. Under Florida law, a person who has been convicted of a third-degree felony may be punished for a term of imprisonment not exceeding five years. Fla. Stat. § 775.082(3).

relative, the presence of family ties to U.S. citizens or lawful permanent residents in the United States, family ties outside the United States, country conditions where the qualifying relative would relocate and family ties in that country, the financial impact of departure, and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 565-566.

In *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996), the BIA stated that the factors to consider in determining whether extreme hardship exists “provide a framework for analysis,” and that the “[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists.” It further stated that “the trier of fact must consider the entire range of factors concerning hardship in their totality” and then “determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation.” (citing *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994).

In support of the waiver application, the record contains letters, income tax records, records reflecting that the applicant is taking coursework, and school records of the applicant’s daughter.

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

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

The income tax records and employment letter demonstrate that the applicant financially supports her 15-year-old daughter, who, the Letter of Eligibility by the Central Service Center, Miami, Florida, indicates, receives Medicaid benefits and food stamps. In light of the age and financial condition of the applicant’s daughter, the AAO finds that she would experience extreme hardship if she were to remain in the United States without her mother’s financial assistance.

In her letter, the applicant’s daughter indicates that if she joined her mother in Nicaragua she would not be able to become an architect and the applicant conveys in her letter that it would be sad for her daughter to lose the educational opportunities she has in the United States.

In assessing whether the applicant’s daughter would experience hardship if she were to join her mother to live in Nicaragua, the AAO notes that *Matter of Kao & Lin*, 23 I&N Dec. 45, 50 (BIA 2001), *Ramos v. INS*, 695 F.2d 181, 186 (5th Cir. 1983), and *Prapavat v. I.N.S.*, 638 F. 2nd 87, 89 (9th Cir. 1980), convey that the consequences of deportation such as language capabilities and cultural differences imposed on children of school age must be assessed in determining extreme hardship. In *Matter of Kao & Lin* the BIA held that the language capabilities of the respondent’s 15-year-old daughter were not sufficient for her to transition to life in Taiwan; she had lived her entire life in the United States, was completely integrated into an American lifestyle, and uprooting her at this stage in her education and her social development would constitute extreme hardship. The Fifth Circuit in *Ramos* indicated that “imposing on grade school age citizen children, who have lived their entire

lives in the United States, the alternatives of . . . separation from both parents or removal to a country of a vastly different culture where they do not speak the language,” must be considered in determining whether “extreme hardship” has been shown. And the Ninth Circuit in *Prapavat* found the BIA abused its discretion in holding that extreme hardship had not been shown in light of the fact that the aliens' five-year-old citizen daughter, who was attending school, would be uprooted from the country where she lived her entire life and taken to a land whose language and culture were foreign to her.

In light of the aforementioned decisions, the AAO finds that the applicant's 15-year-old daughter, who the record suggests has always lived in the United States, would experience extreme hardship if she were to join her mother to live in Nicaragua, a country with a vastly different culture and where she would not be prepared to attend school where instruction is entirely in Spanish.

In conclusion, the AAO finds that the factors presented in this case do constitute extreme hardship to a qualifying family member for purposes of relief under section 212(h) of the Act, 8 U.S.C. § 212(h).

The grant or denial of the above waiver does not depend only on the issue of the meaning of "extreme hardship." Once extreme hardship is established, the Secretary then determines whether an exercise of discretion is warranted.

The favorable factors in this matter are the extreme hardship to the applicant's daughter, the applicant's history of employment as shown in the letter by her employer, the income tax records, and her wage statements; the letters commending her character; and her attendance at night school. The unfavorable factors in this matter are the applicant's criminal convictions and her initial entry without inspection and periods of unauthorized presence. The AAO notes that there are not further convictions since 2000.

While the AAO cannot emphasize enough the seriousness with which it regards the applicant's criminal convictions and immigration violations, it finds that the hardship imposed on the applicant's daughter as a result of her inadmissibility outweighs the unfavorable factors in the application. Therefore, a favorable exercise of the Secretary's discretion is warranted in this matter.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h), 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. The applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained. The waiver application is approved.