

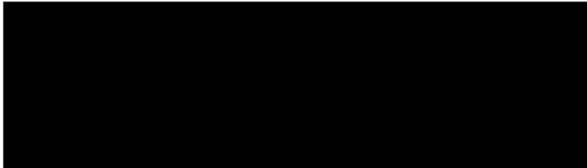
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
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MAY 06 2009

FILE: [REDACTED] Office: VERMONT SERVICE CENTER

Date:

IN RE: [REDACTED]

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 PETITIONER:

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, 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 Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Canada who was found to be inadmissible to the United States under 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 convicted of crimes involving moral turpitude (attempt to obstruct justice by assault and threats, assault with bodily harm, theft, possession of stolen property). The applicant is the husband of a U.S. Citizen and the beneficiary of an approved Petition for Alien Relative. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to return to the United States and reside with his wife.

The service center director concluded that the applicant had failed to establish extreme hardship would be imposed on a qualifying relative. The application was denied accordingly. *See Decision of the Service Center Director* dated July 24, 2006.

On appeal, the applicant states that his wife and daughter are suffering extreme emotional and financial hardship as a result of being separated from the applicant. *See Statement in Support of Appeal* dated August 19, 2006. Specifically he states that his wife is “on the verge of a nervous breakdown” due to stress she is experiencing from having to raise their daughter on her own without the applicant's emotional and financial support. *Id.* He further states that his daughter, who was three years old when the appeal was filed, is exhibiting signs of stress that her teachers and doctor attribute to being separated from the applicant and not spending enough time with her mother. *Id.* He further states that he is aware of the mistakes that he has made in the past, but he is rehabilitated and his family should not be held responsible for these past mistakes. *Id.* In support of the waiver application and appeal, the applicant submitted letters from himself, his wife, his sister-in-law, and his wife’s employer. He also submitted a copy of a 2004 income tax return and a statement from his wife’s checking account. The entire record was reviewed and considered in arriving at a decision on the appeal.

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

- (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 212(h) states in pertinent part:

- (h) The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) . . . if-

(1)(A) [I]t is established to the satisfaction of the Attorney General that-

(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,

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

[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.)

The record indicates that the applicant has several criminal convictions, four of which the service center director found to be crimes involving moral turpitude. The applicant was convicted on May 3, 1990 in Toronto, Canada of possession of property with a value exceeding \$1000 with knowledge that it was obtained by commission of a crime in violation of section 354(1)(a) of the Criminal Code of Canada. The BIA found that possession of property with knowledge it was obtained through a crime, in violation of a predecessor statute to section 354 of the Criminal Code of Canada constitutes a crime involving moral turpitude because knowledge that the property was obtained through commission of a crime was an element of the offense. *See Matter of Salvail*, 17 I&N Dec. 19, 20 (BIA 1979). The applicant was also convicted on December 29, 1994 of loitering with the purpose of engaging in prostitution, an offense that the service center director determined was a crime involving moral turpitude. Although crimes relating to the practice of prostitution, such as maintaining a house of prostitution or securing another for employment as a prostitute, have been

found to be crimes involving moral turpitude, the AAO is unaware of any legal precedent holding that solicitation of prostitution is a crime involving moral turpitude under the Act. *See, e.g., Matter of W-*, 4 I&N Dec. 401 (C.O. 1951); *Matter of A-*, 5 I&N Dec. 546 (BIA 1953) (Knowingly permitting premises to be used as a brothel); *Matter of Lambert*, 11 I&N Dec. 340 (BIA 1965) (securing another for prostitution). In the absence of legal authority to the contrary, the AAO does not find that mere loitering with the purpose of engaging in prostitution involves a "vicious motive or corrupt mind" and is "conduct that shocks the public conscience as being inherently base, vile, or depraved" such that it must be considered a crime involving moral turpitude. Accordingly, the applicant is not inadmissible as a result of violating Section 240.37(2) of the New York Penal Law, and the district director's finding regarding this conviction is withdrawn.

Since the applicant was last convicted of a crime involving moral turpitude in 1990, he would be eligible to apply for a waiver under section 212(h)(1)(A) of the Act and would not be required to demonstrate extreme hardship to a qualifying relative. The AAO notes, however, that the applicant stated on his immigrant visa application that he resided in New York from about June 1995 to December 2003, and was self-employed there from August 1999 to 2003. *See Form DS-230 signed by the applicant* dated February 10, 2004. Although the applicant indicated that his status was "visitor," he was not authorized to live and work in the United States during this time.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

- (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who –
  - (II) Has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.
- ....
- (v) Waiver. – The Attorney General [now Secretary, Homeland Security, "Secretary"] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d

Cir. 1989). An application or petition that fails to comply with the requirements of the law may be denied by the AAO even if the field office does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

In the present case, the record reflects that the applicant resided in the United States without authorization from June 1995 until December 2003. The applicant is therefore inadmissible under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States from April 1, 1997, the date section 212(a)(9)(B)(i) of the Act entered into effect, until December 2003. The applicant may seek a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act through the same application submitted to seek a waiver under section 212(h) of the Act, which is the subject of this appeal.

The record contains references to hardship the applicant's daughter would experience if the waiver application were denied. It is noted that Congress did not include hardship to an alien's children as a factor to be considered in assessing extreme hardship. In the present case, the applicant's spouse is the only qualifying relative for the waiver under section 212(a)(9)(B)(v) of the Act, and hardship to the applicant's child will not be separately considered, except as it may affect the applicant's spouse.

Section 212(a)(9)(B)(v) of the Act provides that a waiver of the bar to admission is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. See *Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999), the Board of Immigration Appeals (BIA) provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship. These factors included 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.

U.S. court decisions have additionally held that the common results of deportation or exclusion are insufficient to prove extreme hardship. See *Hassan v. INS*, 927 F.2d 465, 468 (9<sup>th</sup> 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 addition, in *Perez v. INS*, 96 F.3d 390 (9<sup>th</sup> Cir. 1996), the court 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. In *Matter of Shaughnessy*, 12 I&N Dec. 810 (BIA 1968), the BIA held that separation of family members and financial difficulties alone do not establish 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.

The record reflects that the applicant is a forty-one year-old native and citizen of Canada who resided in the United States from about June 1995 to January 2004, when he returned to Canada. He married his wife, a thirty-nine year-old native and citizen of the United States, on October 30, 2001. The applicant currently resides in Toronto, Canada and his wife and daughter reside in New York, New York.

The applicant asserts that his wife is suffering extreme emotional hardship as a result of being separated from him, and states that she “is on the verge on a nervous breakdown and is seeking medical attention for the stress that she is enduring” from having to support their daughter by herself. *See Letter from* [REDACTED] dated August 19, 2006. The applicant’s wife states that she and their daughter are suffering tremendously emotionally because the applicant is in Canada and her sister also states that they have been severely impacted emotionally by the separation. *See Letter from* [REDACTED] dated February 18, 2005 and *Letter from* [REDACTED] dated March 24, 2006.

The applicant asserts that his wife is suffering extreme emotional hardship due to their separation, but there is no evidence on the record concerning her mental health or the potential psychological effects of the separation. The evidence does not establish that any emotional difficulties the applicant’s wife is experiencing are more serious than the type of hardship an individual would normally suffer when faced with the prospect of her spouse’s deportation or exclusion. Although the depth of her distress caused by separation from her husband is not in question, a waiver of inadmissibility is available only where the resulting hardship would be unusual or beyond that which would normally be expected upon deportation or exclusion. The prospect of separation or involuntary relocation nearly always results in considerable hardship to individuals and families. But 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 applicant also asserts that his wife is suffering financial hardship due to the loss of the applicant’s income, and he states that he cannot send her money to help support their daughter because of the high cost of living in Toronto. *See Letter from* [REDACTED] dated March 17, 2006. The applicant states,

My wife earns a decent yearly income, however, New York City is the most expensive American city. My wife is responsible for paying the mortgage, condo maintenance, and our daughter’s preschool tuition. This large financial responsibility has caused a strain on my wife emotionally and financially. . . . Due to the expensive cost of living in Toronto, I am not able to assist my family. My wife has also spent thousands of dollars visiting me in the past years. *Id.*

The AAO notes that the record contains an income tax return for 2004 indicating that the applicant's wife earned \$75,335. Aside from one bank statement and one cancelled check for a mortgage payment, no other documentation concerning the expenses or overall financial situation of the applicant or his wife was submitted and there is no indication that there are any unusual circumstances that would cause financial hardship beyond what would normally be expected as a result of separation from the applicant. Any financial impact of the loss of the applicant's income therefore appears to be a common result of exclusion or deportation, and would not rise to the level of extreme hardship for the applicant's wife. *See INS v. Jong Ha Wang, supra* (holding that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship).

The applicant asserts that his wife could not relocate to Canada with the applicant because she is a registered nurse and would not be able to "move to Canada and maintain her profession." *See Letter from [REDACTED] dated March 17, 2006.* The applicant's wife states it would be "nearly impossible" to transfer her nursing license to Canada, and that it would be difficult or impossible to apply for a permanent visa in Canada. *See Letter from [REDACTED] dated February 18, 2005.* She further states that medicine in Canada is socialized and "provides no opportunities for growth as in the United States." *Id.* She further states that she is unable to work "on a floor as a Staff Nurse" because of unspecified medical conditions that prevent her from being on her feet for long periods of time. *Id.* No evidence was submitted to support these assertions concerning the possibility of becoming licensed as a nurse and obtaining a permanent visa in Canada or concerning a medical condition that would prevent the applicant's wife from working as a "staff nurse." Further, no evidence was submitted to establish that the applicant's wife would be unable to obtain other employment in Canada. 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 emotional and financial hardship the applicant's wife would experience if he is denied admission to the United States appears to be the type of hardship that a family member would normally suffer as a result of deportation or exclusion. U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. *See Perez v. INS*, 96 F.3d 390 (9<sup>th</sup> Cir. 1996) (defining "extreme hardship" as hardship that was unusual or beyond that which would normally be expected upon deportation); *Hassan v. INS*, 927 F.2d 465, 468 (9<sup>th</sup> Cir. 1991); *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).

In this case, the record does not contain sufficient evidence to show that any hardships faced by the qualifying relative, 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 extreme hardship to his U.S. citizen spouse as required under section 212(a)(9)(B)(v) of the Act.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of proving eligibility remains entirely with the applicant. 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.