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



**U.S. Citizenship
and Immigration
Services**

H₂

[REDACTED]

FILE:

[REDACTED]

Office: ST. PAUL, MN

Date: **AUG 16 2010**

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. section 1182(h), and Section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i).

ON BEHALF OF APPLICANT:

[REDACTED]

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).

Michael Shumway

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, St. Paul, Minnesota, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of China who was found to be inadmissible under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I) for having been convicted of a Crime Involving Moral Turpitude (CIMT), and section 212(a)(6)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C), for having willfully misrepresented material facts in order to receive an immigration benefit. The director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on February 12, 2008.

On appeal, counsel for the applicant asserts the Field Office Director abused his discretion and that additional evidence would be submitted. The applicant subsequently submitted additional evidence that his mother has been diagnosed as having a brain tumor.

Section 212(a)(2) of the Act states 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.

A waiver is available for inadmissibility 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) . . . 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 . . .

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.

Section 212(a)(6)(C)(iii) authorizes a waiver, in the discretion of the Attorney General, as proscribed by Section 212(i):

- (1) The Attorney General may, in the discretion of the Attorney General, waive the application of clause (i) of subsection (a)(6)(C) of this section in the case of an immigrant who is the spouse, 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 that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien

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. 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).

The record shows that on November 16, 2001, the applicant was convicted of Forcible Confinement in violation of section 279.2 of the Consolidated Statutes of Canada (CSC). The applicant was detained for a period of seven months, then, upon conviction, was sentenced to an additional two months confinement. Forcible confinement under CSC § 279.2(a) is punishable by a term of imprisonment not exceeding ten years, and is consequently not eligible for a petty offense exception under section 212(a)(2)(A)(ii)(II) of the Act .

Consolidated Statutes of Canada § 279.(2) states, in relevant part:

Forcible Confinement

- (2) Every person who, without lawful authority, confines, imprisons or forcibly seizes another person is guilty. . . .

The AAO is unaware of any published federal cases addressing whether the crime of false confinement under Canadian law is a crime of moral turpitude. However, in *People v. Cornelio*, 207 Cal.App.3d 1580, 255 Cal.Rptr. 775 (1989), the court stated that the addition of one or more of the elements of violence, menace, fraud or deceit to the simple violation of personal liberty of another makes the crime one involving moral turpitude. *Cf. Chen v. INS*, 87 F.3d 5 (1st Cir. 1996)(acknowledging that an applicant’s conviction for second degree robbery and false imprisonment under California law were considered to involve moral turpitude by the Board of Immigration Appeals). The AAO has adopted the rationale articulated in *Cornelio* in prior cases.

The AAO also finds *Matter of Nokoi*, 14 I&N Dec. 208 (BIA 1972) instructive because it categorizes kidnapping as a crime involving moral turpitude, and cites to *Matter of P - -*, 5 I&N Dec. 444 (BIA 1953). In *Matter of P - -*, the BIA found that the statute in question was a CIMT because it contained the two primary elements of kidnapping necessary to render such a crime morally reprehensible act, to wit: (1) “unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted or carried away by any means whatsoever [any person]” and (2) “held for ransom or reward or otherwise.” The AAO would also note that in *Sharpe v. Wiley*, 271 F.Supp. 2d 631 (E.D. Pa. 2003) the court found an unlawful restraint conviction under Pennsylvania law to constitute a crime involving moral turpitude. In Pennsylvania a conviction under the unlawful restraint statute requires that a person either: 1) restrains another unlawfully in circumstances exposing him to risk of serious bodily injury; or (2) holds another in a condition of involuntary servitude. *Id.*

While the applicant’s conviction is labeled a “forcible confinement” under Canadian law, the AAO would note that it contains a blend of the elements of kidnapping and unlawful restraint, each of which has been categorized as involving moral turpitude. Here, unlike the broad statute reviewed under *People v. Cornelio*, *supra*, the Canadian code section specifies “without lawful authority,” and also specifies a nature of confinement - “confines, imprisons or forcibl[y] seizes” – that implies an element of force. It is also worth noting that the statute is entitled *forcible* confinement. More importantly, non-resistance is an affirmative defense under CSC § 279.2 only where the accused proves that the failure to resist was not caused by threats, duress, force or exhibition of force. CSC § 279.3. The fact that non-resistance is a defense only when threats, duress, force or exhibition of force are not used indicates that the terms of the statute imply some cognizable force or threat of force. Therefore, a plain reading of the statute reveals that the first primary element of kidnapping is required for a forcible confinement conviction, and it is not unreasonable to presume that a person must have held the victim for *some* reason, which is encompassed within the term “otherwise” in the second basic element of kidnapping. *Matter of P- -*, *supra*. Regardless, the forcible confinement statute requires restraining another unlawfully, and that the confinement is accomplished by means of force or a threat of force is implied by the terms of the statute. We find that the combination of these elements is sufficient to constitute moral turpitude.

Furthermore, the AAO is not aware of any case which applies the statute to conduct which does not involve moral turpitude. Based on the presence of essential elements of kidnapping and the fact that unlawful restraint, which has been held to constitute a CIMT, is an element of the Canadian crime of forcible confinement, we find that the crime of forcible confinement under Canadian law is one that categorically involves moral turpitude.

A waiver of inadmissibility under section 212(h) is dependent upon a showing that the bar to admission imposes an extreme hardship on a qualifying relative, *i.e.*, the U.S. citizen or lawfully resident spouse, parent or child of the applicant. Hardship to the applicant is not directly relevant to the determination of extreme hardship under the statute and will be considered only insofar as it results in hardship to a qualifying relative in the application. The applicant’s U.S. citizen mother is the only qualifying relative, as the record fails to establish that the applicant’s son, who is living in the United States, is either a U.S. citizen or a lawful permanent resident. If extreme hardship to a qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. The AAO would note that, although the applicant’s waiver application is being evaluated

under the criteria for section 212(h), any determination of extreme hardship would also cover his inadmissibility under section 212(a)(6)(C).

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 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 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 any evaluation of extreme hardship to a qualifying relative should discuss the impacts on that qualifying relative whether he or she relocates with the applicant or 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 includes, but is not limited to: statements from counsel for the applicant; statements from the applicant's mother; a statement from the applicant; statements from acquaintances of the applicant; a statement from the Chinese Community Association; copies of the birth certificates for the applicant's children; a picture drawing from the applicant's daughter; tax returns submitted by the applicant; court records pertaining to the applicant's conviction; photographs of the applicant and his family; and an employment letter from the applicant's current employer. The entire record was reviewed and all relevant evidence considered in rendering this decision.

As noted above, extreme hardship should include a consideration of the impacts of relocation on the applicant's qualifying relative. Neither counsel nor the applicant has articulated the impacts, if any, on the applicant's qualifying relatives if they were to relocate with the applicant. As such, the record fails to establish extreme hardship to a qualifying relative upon relocation to China with the applicant.

On appeal, counsel for the applicant asserts that the applicant's mother is now experiencing a serious medical condition, that she is totally dependent on the applicant for emotional and financial support, and will experience extreme hardship due to the applicant's inadmissibility. Counsel further states that if the applicant is removed, the burden of caring for his mother will fall on his spouse. He also

states that the applicant's son has asthma which requires constant attention, and that the applicant's spouse will experience severe financial and emotional hardship. The record contains a recent medical evaluation of the applicant's mother which is sufficient to establish that a tumor has been detected in her brain. In her statement the applicant's mother indicates that she resides with the applicant's spouse and their children.

Based on these facts it can be determined that the applicant's mother would experience significant hardship, and in light of her residence with the applicant's spouse, the burdens of those impacts would also affect the applicant's spouse. Although the record fails to document any medical condition of the applicant's son, and what impact it has on his daily life, the AAO acknowledges that the applicant's children will experience emotional hardship due to the applicant's inadmissibility. With regard to the financial hardship experienced upon separation, the record contains tax documentation for the years 2003 – 2006. They indicate that the applicant earned a substantial portion of the household income, and that, without his income, his spouse would experience a significant financial impact. When these impacts are weighed in the aggregate they rise above the normal impacts associated with the separation, and as such, constitute an extreme hardship.

Although the record indicates that a qualifying relative of the applicant will experience extreme hardship upon separation, as discussed above, the record does not establish that a qualifying relative would experience extreme hardship upon relocation, as the issue was not addressed in any detail by the applicant. On that basis, the record does not establish extreme hardship. The burden of proof in this proceeding lies with the applicant, and "while an analysis of a given application includes a review of all claims put forth in light of the facts and circumstances of a case, such analysis does not extend to discovery of undisclosed negative impacts." *Matter of Ngai*, 19 I&N Dec. 245, 247 (Comm'r 1984).

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors cited above, does not support a finding that the applicant's qualifying relatives face extreme hardship if he is refused admission. The AAO recognizes that the applicant's spouse, children and mother would experience extreme hardship due to the financial, physical and emotional impacts resulting from separation. However, the record does not contain sufficient evidence to establish that they would experience impacts which rise above the common results of removal upon relocation with the applicant. 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 therefore finds that the applicant has failed to establish extreme hardship to his qualifying relatives 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(h) of the Act, the burden of proving eligibility rests with the applicant. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.