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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**

HR

[REDACTED]

FILE: [REDACTED]

Office: NEWARK, NJ

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)

ON BEHALF OF APPLICANT:

[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Michael Shumway

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Newark, New Jersey. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Costa Rica. He was found to be inadmissible to the United States pursuant to 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). The applicant is the spouse of a naturalized U.S. citizen. 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.

The Field Office Director concluded that the applicant had failed to establish that the bar to his admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on December 13, 2008.

On appeal, counsel for the applicant contends the director's decision was in error, and asserts that the record establishing extreme hardship to a qualifying relative.

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) of the Act provides, 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 -

....

(1) (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 reflects that the applicant was convicted of Criminal Simulation, New Jersey Revised Statutes (NJRS) § 2C:21-2.1c, on June 10, 2005, in the New Jersey Superior Court for Hunterdon County. The Supreme Court has held that crimes that involve fraud categorically fall into the definition of crimes involving moral turpitude. *See Jordan v. De George*, 341 U.S. 223, at 227, (U.S. 1951) (noting that, without exception, a crime in which fraud is an ingredient involves moral

turpitude.); *see also* *Cerezo v. Mukasey*, 512 F.3d 1163, at 1167 (9th Cir. 2008); *Carty v. Ashcroft*, 395 F.3d 1081, 1083 (9th Cir.2005). The director determined that the applicant's conviction constituted a CIMT.

This case arises under the jurisdiction of the Third Circuit Court of Appeals. The Third Circuit has adopted the traditional categorical approach to determine whether a crime constitutes a CIMT. *See Jean-Louis v. Holder*, 582 F.3d 462, 473-82 (3rd Cir. 2009) (declining to follow the "realistic probability approach" put forth by the Attorney General in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)). The categorical inquiry in the Third Circuit consists of looking "to the elements of the statutory offense . . . to ascertain that least culpable conduct necessary to sustain a conviction under the statute." *Id.* at 465-66. The "inquiry concludes when we determine whether the least culpable conduct sufficient to sustain conviction under the statute 'fits' within the requirements of a CIMT." *Id.* at 470. However, if the "statute of conviction contains disjunctive elements, some of which are sufficient for conviction of [a CIMT] and other which are not . . . [an adjudicator] examin[es] the record of conviction for the narrow purpose of determining the specific subpart under which the defendant was convicted." *Id.* at 466. This is true even where clear sectional divisions do not delineate the statutory variations. *Id.* In so doing, an adjudicator may only look at the formal record of conviction. *Id.*

In this case, New Jersey Statute § 2C:21-2.1c states:

A person who knowingly exhibits, displays or utters a document or other writing which falsely purports to be a driver's license, birth certificate, or other document issued by a government agency and which could be used as a means of verifying a person's identity or age or any other personal identifying information is guilty of a crime of the third degree.

Before reaching an analysis under the Third Circuit's minimum conduct test, it is necessary to examine the plain language of the statute under which the applicant was convicted in order to determine if it covers conduct deemed to be morally turpitudinous by the Board of Immigration Appeals. An examination of the plain language of this statute indicates that fraud is not an element necessary to be convicted, and the AAO is not aware of any federal case which has determined that criminal simulation under this or another similarly worded statute has been categorized as a CIMT.

The New Jersey statute at issue here is unquestionably broad, and involves conduct which is similar to a number of crimes deemed to involve moral turpitude by the BIA. *See Matter of Flores*, 17 I&N Dec. 225, 228-29 (BIA 1980) (holding that the respondent's conviction for uttering or selling false or counterfeit paper relating to registry of aliens was a CIMT although intent to defraud was not an element of the crime); *Zaitona v. INS*, 9 F.3d 432 (6th Cir. 1993)(reviewing a conviction for making a false statement to obtain a driver's license); *Calvo-Ahumada v. Rinaldi*, 435 F.2d 544, 546 (3d Cir.1970) (making false statement under oath in application for permanent residence); *Kabongo v. INS*, 837 F.2d 753, 758 (6th Cir.1988) (making a false statement on a student loan application); In the *Matter of B--*, 3 I&N Dec. 270 (1948)(impersonating a federal officer).

The AAO also finds *Blanco v. Mukasey*, 518 F.3d 714 (9th Cir. 2008), informative in this matter, as it relates to the use of a false I.D. without fraudulent intent. In *Blanco*, the court reasoned that when a crime involved a mere attempt to impede enforcement of the law, such as presenting a fake I.D. to a police officer, and not intent to induce another to act to his or her detriment, there is no element of fraud and it does not constitute a CIMT. *See also Tall v. Mukasey*, 517 F.3d 1115 (9th Cir. 2008) (reasoning that to be inherently fraudulent a crime must involve knowingly false representations made in order to gain something of value); *but see Ferreira v. Ashcroft*, 390 F.3d 1091 (9th Cir. 2004) (holding that a conviction for receiving state welfare benefits via impersonation involved the element of fraud or deceit and was a CIMT). In this case, NJRS § 2C:21-2.1c does not require intent to deprive another of something of value.

However, the BIA has also held that even where fraud is not specifically proscribed in a statute, it may be “so inextricably woven into the statute as to clearly be an ingredient of the crime.” *Matter of Flores*, 17 I&N Dec. 225, 228 (BIA 1980) (holding that the respondent’s conviction for uttering or selling false or counterfeit paper relating to registry of aliens was a CIMT although intent to defraud was not an element of the crime). The BIA noted that it had previously “held that the government need not have been cheated out of money or property in order for the crime to involve moral turpitude” as it is “enough to impair or obstruct an important function of a department of the government by defeating its efficiency or destroying the value of its operations by deceit, graft, trickery, or dishonest means.” *Id.* at 229. The BIA later clarified its holding in *Matter of Flores*, finding that “knowledge that [an] immigration document was altered . . . is not necessarily equated with the intention to use the document to defraud the United States Government.” *Matter of Serna*, 20 I&N Dec. 579, 585 (BIA 1992). Thus, mere “possession of an altered immigration document with the knowledge that it was altered, but without its use or proof of any intent to use it unlawfully, is not a crime involving moral turpitude.” *Id.* at 586.

Thus, the use of a document, with knowledge of the document’s counterfeit status or falsity, in a manner that impairs an important function of the government, is sufficient to infer a fraudulent intent and, consequently, moral turpitude.¹ Although *Flores* and *Serna* involved the application of a federal statute and involved fraud against a federal government agency, the AAO finds the principles set forth in those decisions informative.

Having determined that the statute in question covers conduct which may constitute a CIMT, the AAO must now examine the statute for the minimum conduct necessary to receive a conviction under the statute. *Jean-Louis, supra*.

¹ It is noted that the statement of conviction, part of the record of conviction, states that the applicant’s conduct involved fraudulent or deceptive practices perpetrated against a government agency. As this case resides in the third circuit, the record of conviction may be used only for the limited purposes of determining a sub-part, if any, under which an applicant was convicted. *Jean-Louis v. Holder*, 582 F.3d at 473-82.

In this case, as in *Jean-Louis*, knowledge that the document is counterfeit or false is included within the definition of the offense. Since knowledge is an element of the crime, the minimal conduct necessary for a conviction in this case is the level proscribed by the statute. Although the statute does not appear to be divisible based on scienter, the AAO notes that other elements are disjunctive. First, the statute may be violated by exhibition, display or uttering of a document. We note that the distinction between these three uses of the document is not clarified in the statute or in any other relevant authority. We find that each of these constitutes a "use" of the document that goes beyond mere possession to the type of conduct found to be morally turpitudinous by the BIA in *Matter of Serna*.

We make this finding in spite of the fact that the statute makes no distinction regarding the objective for which the document is used. It does not clarify to whom the document must be exhibited, displayed or uttered, or that its use must be to defraud another individual of property or money, or even to impede some function of a government agency. However, the statute clearly states that the document itself must be of the type issued by a government agency that can be used as a means of verifying a person's identity or age or any other personal identifying information. Thus, the minimal conduct necessary for a conviction under this statute involves the knowing presentation of a document falsely purporting to be issued by a government agency, and which could be used to verify a person's identity. Such documents can only be validly acquired from the government, and it is an important function of the government to issue identity documents for both the value of its own operations and the functioning of society as a whole. Misrepresenting a document to be a validly issued government I.D. allows a person, at a minimum, to circumvent the requirements for obtaining such a document properly, and conveys that the government has recognized the false information represented. It is likely that the motive for such a misrepresentation, as obviated by the fact that the person needed to present the false identification information to begin with, would involve obtaining either something of value or some benefit which could not otherwise have been obtained. The AAO concludes that the minimum conduct necessary for a conviction under this statute, in that it impairs the important government function of issuing identification documents that are used to establish identity, involves a fraudulent intent and thus 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 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 documents filed in relation to the applicant's Forms I-130, I-485 and I-864. In relation to the Form I-601, the record includes, but is not limited to: a brief from counsel; copies of a perscription receipt; and photographs of the applicant, his spouse and their child; and documents relating to the applicant's conviction. The entire record was reviewed and all relevant evidence considered in rendering this decision.

On appeal, counsel for the applicant asserts that the applicant's spouse would experience extreme hardship if she were to relocate to Costa Rica with the applicant. He asserts that she would be unable to find a job commensurate with her current level of earning, that she and her child would be at risk from the diseases present in Costa Rica, that she would be at risk of 'emotional decline' due to her mental health condition, that she would not have access to adequate health care facilities, that she would not be able to adjust culturally to Costa Rica, that she would be unable to visit her family in the United States due to the prohibitive cost, and that she and her child would not have access to the educational opportunities in the United States.

The only evidence which has been submitted to support these assertions is a perscription receipt and notice. This document is not sufficient to establish that the applicant's spouse has been diagnosed with Major Depression as asserted by counsel. None of the other assertions are supported by any evidence in the record. 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel has also asserted that without the applicant's presence in the United States the applicant would experience a decline in her mental health, as evidenced by the fact that she has been diagnosed with depression. She also states that she would be unable to support herself and her child financially without the applicant's presence in the United States, and that she would be unable to pay back his debts if he were removed to Costa Rica.

The AAO would note that there is no evidence the applicant's spouse is *incapable* of seeking employment, lacks job skills or that she is financially obligated to pay the debts of her husband. In fact there is no evidence at all which supports counsel's assertions. As noted above, 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)).

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. In that the record does not distinguish the hardship that would be suffered by the applicant's mother from the hardship normally experienced by others whose children have been excluded from the United States, the applicant has failed to establish extreme hardship under section 212(a)(9)(B)(v) of the Act. Having found the applicant statutorily 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/has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.