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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
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Services**

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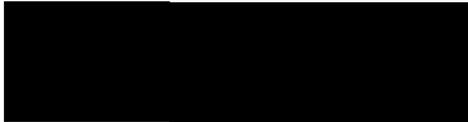
Office: LONDON

Date: **AUG 20 2010**

IN RE: Applicant: 

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h)

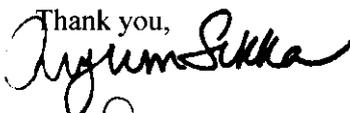
ON BEHALF OF PETITIONER:



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,

for

Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native of Jamaica and citizen of the United Kingdom who was 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 committed crimes involving moral turpitude. The record also shows that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for procuring admission into the United States by willful misrepresentation. The applicant seeks waivers of inadmissibility pursuant to sections 212(h) and (i) of the Act, 8 U.S.C. § 1182(h), (i), in order to remain in the United States with his U.S. citizen wife.

The Field Office Director denied the Application for Waiver of Ground of Inadmissibility (Form I-601) as a matter of discretion.

On appeal, counsel asserts that the applicant has shown that he has been rehabilitated and he warrants a favorable exercise of discretion. *Brief from Counsel*, submitted March 2008.

In support of the application, the record contains, but is not limited to: a brief from counsel; statements from the applicant and his wife; employment and financial documents for the applicant and his wife; a copy of the applicant's wife's naturalization certificate; medical documentation for the applicant's wife; birth records for the applicant, the applicant's adult stepdaughter, and the applicant's granddaughter; an account of the applicant's wife's household expenses; a copy of the applicant's marriage certificate, and; documentation relating to the applicant's criminal convictions. The entire record was reviewed and considered in arriving at a decision on the appeal.

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

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.

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.

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

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.)

In *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 where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. First, 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).

However, if a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, “the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude.” 24 I&N Dec. at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage inquiry in which the adjudicator reviews the “record of conviction” to determine if the conviction was based on conduct involving moral turpitude. *Id.* at 698-699, 703-704, 708. The record of conviction consists of documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.* at 698, 704, 708.

If review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. 24 I&N Dec. at 699-704, 708-709. However, this “does not mean that the parties would be free to present any and all evidence bearing on an alien’s conduct leading to the conviction. (citation omitted). The sole purpose of the inquiry is to ascertain the nature of the prior conviction; it is not an invitation to relitigate the conviction itself.” *Id.* at 703.

The record shows that on October 27, 1977 the applicant was convicted in the Magistrates Court in the County of Bedfordshire, United Kingdom, for taking a motor vehicle without the consent of the owner or other lawful authority under section 12 of the Theft Act of 1968, as well as three related miscellaneous traffic violations, for which he received fines and “points” on his driving record (driving licensed endorsed). *Register of the Magistrates Court, In the County of Bedfordshire*, dated October 27, 1977.

On September 10, 1992 the applicant was further convicted in the Crown Court at Luton, United Kingdom, of Unlawful Wounding under section 20 of the Offences Against the Person Act of 1861 for which he was sentenced to three years of imprisonment, and two counts of Assault Occasioning Actual Bodily Harm under section 47 of the Offences Against the Person Act of 1861 for which he was sentenced to six months and three months of imprisonment. *Certificate of Conviction, In the Crown Court at Luton*, dated June 17, 2005. The applicant's sentences were combined into a single sentence of three years of imprisonment, including an order to destroy a machete he utilized in committing the unlawful wounding. *Id.* at 1.

At the time of the applicant's convictions on September 10, 1992, section 20 of the Offences Against the Person Act of 1861 provided:

Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be kept in penal servitude.

The AAO is not aware of any actual cases, including the applicant's, in which section 20 of the Offences Against the Person Act of 1861 was applied to conduct that did not involve moral turpitude.

In the context of section 20 of the Offences Against the Person Act of 1861, in order to find that a defendant acted "maliciously" it must be found that, at a minimum, the defendant foresaw the risk that some bodily harm would result from what he or she did. *R v Savage; DPP v Parmenter* [1992] 1 A.C 699. This standard is equivalent to common notions of recklessness in U.S. criminal law. Recklessness, as defined by *Black's Law Dictionary, Seventh Edition, 1277 (1999)*, constitutes "[c]onduct whereby the actor does not desire harmful consequences but nonetheless foresees the possibility and consciously takes the risk."

The Board of Immigration Appeals (BIA) has determined that an assault crime can properly be deemed a crime involving moral turpitude where the required *mens rea* is reckless. *Matter of Medina*, 15 I & N Dec. 611 (BIA 1976), *aff'd*, *Medina-Luna v. INS*, 547 F.2d 1171 (7th Cir. 1977).

Decisions of the BIA support that assault that results in serious injury is a crime involving moral turpitude where the statute requires a *mens rea* of reckless. In *Matter of Baker*, 15 I&N Dec. 50, 51 (BIA 1974), the BIA held that any assault resulting in great bodily harm involves moral turpitude. In *Matter of Perez-Contrearras*, 20 I&N Dec. 615, 619-20 (BIA 1992), the BIA withdrew from this finding in *Matter of Baker* to the extent that it held that "any assault resulting in great bodily harm involves moral turpitude, without regard to the existence of intentional conduct or the conscious disregard of a substantial and unjustifiable risk." However, the BIA left undisturbed the notion that assault with a reckless state of mind that results in great bodily harm constitutes a crime involving moral turpitude. *See Id.*

As noted above, section 20 of the Offences Against the Person Act of 1861 proscribes wounding or inflicting any grievous bodily harm upon any other person with a reckless state of mind. The decisions of the BIA support that such acts constitute crimes involving moral turpitude.

Further, the AAO lacks adequate records of the applicant's conviction in order to determine the precise conduct for which he was convicted under section 20 of the Offences Against the Person Act of 1861. However, the record notes that, as part of his sentence, the court issued an "order for the destruction of the machete." *Certificate of Conviction, In the Crown Court at Luton* at 1. This order suggests that the applicant utilized a machete when he wounded another person. There is ample support that assault with a deadly weapon constitutes a crime involving moral turpitude. *Matter of Logan*, 17 I&N Dec. 367 (BIA 1980). Thus, the applicant has not shown that his own conviction represents an instance in which section 20 of the Offences Against the Person Act of 1891 was applied to conduct that did not involve moral turpitude.

Based on the foregoing, the AAO can reasonably conclude that all convictions under section 20 of the Offences Against the Person Act of 1861 may categorically be treated as ones involving moral turpitude. *Matter of Silva-Trevino* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

As the applicant has been convicted of a crime involving moral turpitude, he was properly deemed inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The AAO need not reach an analysis of whether the applicant's remaining convictions in 1992 and 1977 are also for crimes involving moral turpitude. The applicant requires a waiver under section 212(h) of the Act.

The record supports that the applicant is further inadmissible under section 212(a)(6)(C)(i) of the Act for procuring admission into the United States by willful misrepresentation. On July 5, 2007, the applicant was interviewed at the U.S. Embassy in London in connection with his immigrant visa application. Due to his criminal history, he was informed that he was inadmissible and not eligible to travel to the United States. However, on or about August 26, 2007 the applicant entered the United States pursuant to the visa waiver program. He states that he was aware that he was not eligible to enter the United States at that time. *Statement from the Applicant*, undated. He asserts that, upon his inspection, an officer "carefully reviewed [his] file . . . and then allowed [him] to enter without ever advising [him] that [he] was violating any of the U.S. immigrations laws." *Id.* at 1.

An applicant who applies for admission pursuant to the visa waiver program must complete Form I-94w, Arrival/Departure Form. The reverse side of Form I-94w at Part B asks an applicant the following: "Have you ever been arrested or convicted for an offense or crime involving moral turpitude . . . ?" The applicant was aware that he had been found to have been convicted of a crime involving moral turpitude. Thus, he should have answered "yes" to the question at Part B on Form I-94w. Had the applicant revealed that he had been convicted for a crime involving moral turpitude, the inspecting officer would have made further inquiry into his admissibility, and determined that he was not eligible to enter pursuant to the visa waiver program. The fact that the applicant was admitted shows by a preponderance of the evidence that he did not complete Form I-94w truthfully and he did not reveal his criminal history to inspecting officers.

Based on the foregoing, the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act for procuring admission into the United States by willful misrepresentation. Therefore, he also requires a waiver under section 212(i) of the Act.

The field office director did not indicate that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act. However, an application that fails to comply with the technical 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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a de novo basis).

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

- (h) The Attorney General [now Secretary, Homeland Security, “Secretary”] may, in his discretion, waive the application of subparagraphs (A)(i)(I) [or] (B) . . . of subsection (a)(2)

. . . if -

- (1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that –

- (i) . . . the 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

- (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 [now the Secretary of Homeland Security (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(i) of the Act provides, in pertinent part, that:

- (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) 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 [Secretary] 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 examining whether the applicant is eligible for a waiver under 212(h) of the Act, the AAO first assesses whether he meets the requirements of section 212(h)(1)(A) of the Act. The applicant’s most recent convictions occurred on September 10, 1992, and resulted from his conduct before that date. As this conduct took place over 15 years ago, he meets the threshold requirement of section 212(h)(1)(A)(i) of the Act. Thus, the AAO may consider whether admitting the applicant would be

contrary to the national welfare, safety, or security of the United States, and whether he has shown that he has been rehabilitated. Sections 212(h)(1)(A)(ii) and (iii) of the Act.

However, in order for the present waiver application to be approved, the applicant must show that he is eligible for waivers under both sections 212(h) and (i) of the Act. As the applicant requires a waiver under section 212(i) of the Act, he must establish that denial of the present waiver application would result in extreme hardship to a qualifying relative, irrespective of whether he has met the requirements for a waiver under section 212(h)(1)(A) of the Act. Therefore, the AAO will next address hardship to the applicant's qualifying relative under section 212(i) of the Act.

On appeal, the applicant states that he is in love with his wife and that she has a medical condition. *Statement from the Applicant* at 1. He notes that he has worked with the same employer for 12 years, and that he is raising four children. *Additional Statement from the Applicant*, undated. He provides that he owns an apartment in the United Kingdom, but that he plans to sell it to assist his wife before he can find employment in the United States. *Id.* at 2. He states that he can prepare food for his wife and help care for their granddaughter. *Id.*

The applicant's wife explains that she is a native of Jamaica and has been a U.S. citizen since 2002. *Statement from the Applicant's Wife*, dated August 28, 2007. She states that she resides with her 25-year-old daughter and her 21-month-old granddaughter. *Id.* at 1. She provides that she owns her home and pays a mortgage of \$865 per month. *Id.* She adds that she works as a nanny at a rate of \$650 per week, and as a cashier for a grocery store at a rate of \$787 per week. *Id.* She notes that her daughter works part-time as a nurse's aid and attends a community college. *Id.* She asserts that her daughter and granddaughter rely on her for support, and that she will endure emotional hardship if she relocates to the United Kingdom and is unable to assist them. *Id.* at 1-2.

The applicant's wife contends that she would be unable to obtain comparable employment in the United Kingdom. *Id.* at 2. She states that she would endure extreme hardship should she be separated from her daughter and granddaughter, particularly due to lacking the opportunity to help care for her granddaughter. *Id.*

The applicant's wife indicates that she suffers from high blood pressure and chronic idiopathic leucopenia, which require medical monitoring, medication, and a special diet. *Id.* She asserts that her condition makes it difficult for her to travel, and that she would endure hardship should she reside outside the United States due to the need to return to assist her family. *Id.* at 2-3. She states that she would endure hardship should she be compelled to change doctors, as she has been under the care of the same physician for six years. *Id.* at 3.

The applicant's wife expresses that she loves the applicant and that she wishes to be with him and have his support. *Id.*

The applicant's wife further indicates that she helps care for her elderly parents who have health problems, and that she would be unable to continue this in the United Kingdom. *Id.*

The applicant submits a letter from two of his wife's employers who attest that she has worked for them full-time for over 11 years. *Letter from the Applicant's Wife's Employers*, dated February 12,

2008. They provide that the applicant's wife owns her own home and an investment property, and that it would be difficult to make two mortgage payments from England. *Id.* at 1.

The applicant provides a letter from his wife's physician, [REDACTED] who indicates that she has chronic idiopathic leukopenis which makes traveling difficult. *Letter from [REDACTED]* dated July 24, 2007.

Upon review, the applicant has not shown that his wife will suffer extreme hardship should he be prohibited from residing in the United States. The applicant has not established that his wife will endure extreme hardship should she remain in the United States without him.

It is first noted that the record reflects that the applicant has never resided in the same country as his wife. Thus, should the applicant remain outside the United States, such situation would not constitute an interruption of his wife's present circumstances or create additional hardship for her. The applicant's wife has not asserted that she has depended on the applicant for financial support or assistance at any time.

The applicant's wife indicated that her household has monthly expenses of approximately \$2367.73. She further stated that she works for two separate employers at rates of \$650 and \$787 per week. Based on a 52-week, 12-month year, the applicant's wife earns approximately \$6179 per month. According to her stated income, it is evident that the applicant's wife has sufficient funds to meet the expenses she claimed. It is further noted that the applicant's wife's employer indicated that the applicant's wife purchased an investment property, but the AAO lacks explanation or documentation to show whether the property has a positive cash flow such that it generates additional income for her. Nor did the applicant's wife indicate whether her adult daughter, who works part-time, contributes toward the household's economic needs such as for car insurance, telephone expenses, childcare, and diapers. Thus, the record shows that the applicant's wife is capable of meeting her financial needs in the applicant's absence, and the applicant has not established that his wife will suffer economic detriment should she remain in the United States.

The applicant's wife has been diagnosed with chronic idiopathic leukopenis. She provides that she is under the care of a doctor in the United States. The record does not show that the applicant's wife's care is dependent on the applicant, thus she would continue to have the same care should he reside abroad and she remain in the United States.

The applicant's wife expressed that she loves the applicant and that she wishes to be with him and have his support. The AAO acknowledges that the separation of spouses often results in significant emotional hardship. However, the applicant has not distinguished his wife's emotional challenges from those commonly experienced when spouses reside apart due to inadmissibility.

U.S. federal court and administrative decisions have held that the common results of deportation or exclusion are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). For example, *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), 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, *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. *Hassan v. INS, supra*, held further that the uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported.

All elements of hardship to the applicant's wife, should she remain in the United States, have been considered in aggregate. Based on the foregoing, the applicant has not shown that his wife will endure extreme hardship should he reside abroad and she remain.

The applicant has not shown that his wife will suffer extreme hardship should she join him in the United Kingdom. The applicant's wife expresses that she would endure significant emotional difficulty should she become separated from her daughter and granddaughter. The AAO acknowledges that the applicant's wife, her daughter, and her granddaughter reside together and have integrated lives. It is further evident that the applicant's wife wishes to remain close to her parents. However, as noted above, emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. The applicant has not distinguished his wife's psychological difficulty due to separation from her family members in the United States from that which is often expected when an individual relocates abroad due to the inadmissibility of a spouse.

The applicant's wife asserts that she would be unable to secure comparable employment in the United Kingdom. Yet, the applicant has not provided any documentation or reports to support that childcare and cashier work is not readily available in the United Kingdom that would allow his wife to utilize her prior work experience. Nor has the applicant stated his income and expenses such that the AAO can ascertain the economic circumstances his wife may face in the United Kingdom. The record shows that he owns an apartment and he has worked at a brewery since 1994, thus it appears that he has economic stability. The applicant has not shown that his wife would face financial difficulty in the United Kingdom.

It is evident that the applicant's wife wishes to continue to assist her daughter economically. However, the applicant has not shown that his wife's daughter would be unable to earn sufficient income to meet her and her daughter's needs in the applicant's wife's absence, or that his wife would be unable to continue to provide economic support for her daughter and granddaughter should she choose.

The applicant's wife states that she cares for her two elderly parents who have health problems. However, the applicant has not submitted any medical documentation for his mother- or father-in-law to support that they have health issues. The applicant has not submitted any evidence that his wife supports her parents financially. Thus, while the AAO acknowledges that the applicant's wife wishes to continue to reside in the United States near her family members, he has not shown that her parents or other family members will lack required assistance in her absence. [REDACTED] stated that the applicant's wife's condition makes traveling difficult, yet the record contains no explanation of her symptoms or the degree that the condition impacts her ability to travel. The applicant has not shown that his wife would be required to travel to the United States for medical treatment, or that her health would prevent her from visiting her family in the United States.

All stated elements of hardship to the applicant's wife, should she relocate to the United Kingdom, have been considered in aggregate. Based on the foregoing, the applicant has not shown that his

wife will endure extreme hardship should she join him abroad. Therefore, the applicant has not shown that denial of the present waiver application “would result in extreme hardship” to his wife, as required for a waiver under section 212(i) 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.

Accordingly, the applicant has not shown that he is eligible for a waiver under section 212(i) of the Act. For this reason, the appeal must be dismissed. Therefore, no purpose would be served in determining whether the applicant qualifies for a waiver under sections 212(h)(1)(A) or (B) of the Act.

In proceedings regarding a waiver of grounds of inadmissibility under sections 212(h) and (i) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* 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.