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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**

H₂



FILE: [REDACTED]

Office: VIENNA

Date: **DEC 02 2010**

IN RE: Applicant: [REDACTED]

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 APPLICANT:

SELF-REPRESENTED

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.

Thank you,

Argum Sikka
for

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer-in-Charge, Vienna, Austria, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of [REDACTED] 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 applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his U.S. citizen wife.

The officer-in-charge concluded that the applicant failed to establish that his bar to admission would impose extreme hardship on a qualifying relative and denied the Application for Waiver of Ground of Inadmissibility (Form I-601) accordingly.

On appeal, the applicant's wife asserts that she will experience extreme hardship if the applicant is prohibited from residing in the United States. *Statement from the Applicant's Wife*, dated January 22, 2008.

In support of the application, the record contains, but is not limited to, statements from the applicant's wife and parents; medical documentation for the applicant's wife; documentation in connection with the applicant's criminal convictions; a copy of the applicant's marriage certificate; letters from the applicant's wife's former employer; documentation in connection with the applicant's father's pension and debt, and; banking records for the applicant and his wife. The entire record was reviewed and considered in rendering this decision.

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 in December 2005 the applicant was convicted in [REDACTED] of accepting a bribe under Article 357, Clause 1, of the Criminal Code of [REDACTED] and violation of the national border security under Article 337, Clause 1, of the Criminal Code of [REDACTED]. He was sentenced to one year of imprisonment and a fine for these two offenses.

Article 357(1) of the Criminal Code of [REDACTED] provides:

An official person who requests or receives a present or some other benefit, or receives a promise for a present or some other benefit, in order to perform an official act within the framework of his own official authorization which he should not perform, or not to perform an official act which he otherwise must do, shall be punished with imprisonment of one to ten years.

The Board of Immigration Appeals (BIA) has held that bribery is a crime involving moral turpitude. In *Matter of H-*, 6 I&N Dec. 358, 361 (BIA 1954), BIA stated:

We believe the offense of bribery is a base and vile act which involves moral turpitude. The offense in question moreover is one whereby the Government has been cheated out of services the community is rightfully entitled to and it involves the obstruction of lawful governmental functions by deceit, graft, trickery and dishonest means. Such an offense clearly involves moral turpitude.

See also, Okabe v. INS, 671 F.2d 863, 865 (5th Cir. 1982) (holding that offering a bribe is a crime involving moral turpitude because "a corrupt mind is an essential element of the offense").

Article 357(1) of the Criminal Code of [REDACTED] proscribes only the acts of requesting or accepting a bribe as an official person. As the BIA has clearly indicated that acts of bribery involve moral turpitude, the AAO concludes that the language of Article 357(1) of the Criminal Code of [REDACTED] does not encompass conduct that does not involve moral turpitude. Thus, convictions under Article 357(1) of the Criminal Code of [REDACTED] may be categorically deemed crimes involving moral turpitude.

Accordingly, the applicant has been convicted of a crime involving moral turpitude, and he is inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

Section 212(h) of the Act provides a waiver for inadmissibility under section 212(a)(2)(A) of the Act. That section provides, in pertinent part:

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), . . . 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

The AAO notes that section 212(h) of the Act provides that a waiver of inadmissibility is dependent first upon a showing that the bar to admission imposes an extreme hardship on a qualifying family member. In this case, the relative that has been shown to qualify is the applicant's U.S. citizen wife. Hardship to the applicant is not considered under the statute unless it is shown that hardship to the applicant will result in hardship to a qualifying relative. If extreme hardship is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996).

Should a waiver application be denied: either the qualifying relative will join the applicant to reside abroad or the qualifying relative will remain in the United States. Ascertaining the actual course of action that will be taken is complicated by the fact that an applicant may easily assert a plan for the qualifying relative to relocate abroad or to remain in the United States depending on which scenario presents the greatest prospective hardship, even though no intention exists to carry out the alleged plan in reality. *Cf. Matter of Ige*, 20 I&N Dec. 880, 885 (BIA 1994) (addressing separation of minor child from both parents applying for suspension of deportation). Thus, we interpret the

statutory language of the various waiver provisions in section 212 of the Act to require an applicant to establish extreme hardship to his or her qualifying relative(s) under both possible scenarios. To endure the hardship of separation when extreme hardship could be avoided by joining the applicant abroad, or to endure the hardship of relocation when extreme hardship could be avoided by remaining in the United States, is a matter of choice and not the result of removal or inadmissibility. As the Board stated in *Matter of Ige*:

[W]e consider the critical issue . . . to be whether a child would suffer extreme hardship if he accompanied his parent abroad. If, as in this case, no hardship would ensue, then the fact that the child might face hardship if left in the United States would be the result of parental choice, not the parent's deportation.

Id. See also *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996).

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). The factors include 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. *Id.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of deportation, removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. See generally *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator "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." *Id.*

We observe that the actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. See, e.g., *In re Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate).

Family separation, for instance, has been found to be a common result of inadmissibility or removal in some cases. See *Matter of Shaughnessy*, 12 I&N Dec. at 813. Nevertheless, family ties are to be considered in analyzing hardship. See *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 565-66. The question of whether family separation is the ordinary result of inadmissibility or removal may depend on the nature of family relationship considered. For example, in *Matter of Shaughnessy*, the Board considered the scenario of parents being separated from their soon-to-be adult son, finding that this separation would not result in extreme hardship to the parents. *Id.* at 811-12; see also *U.S. v. Arrieta*, 224 F.3d 1076, 1082 (9th Cir. 2000) (“Mr. Arrieta was not a spouse, but a son and brother. It was evident from the record that the effect of the deportation order would be separation rather than relocation.”). In *Matter of Cervantes-Gonzalez*, the Board considered the scenario of the respondent’s spouse accompanying him to Mexico, finding that she would not experience extreme hardship from losing “physical proximity to her family” in the United States. 22 I&N Dec. at 566-67.

The decision in *Cervantes-Gonzalez* reflects the norm that spouses reside with one another and establish a life together such that separating from one another is likely to result in substantial hardship. It is common for both spouses to relocate abroad if one of them is not allowed to stay in the United States, which typically results in separation from other family members living in the United States. Other decisions reflect the expectation that minor children will remain with their parents, upon whom they usually depend for financial and emotional support. See, e.g., *Matter of Ige*, 20 I&N Dec. at 886 (“[I]t is generally preferable for children to be brought up by their parents.”). Therefore, the most important single hardship factor may be separation, particularly where spouses and minor children are concerned. *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *Cerrillo-Perez*, 809 F.2d at 1422.

Regardless of the type of family relationship involved, the hardship resulting from family separation is determined based on the actual impact of separation on an applicant, and all hardships must be considered in determining whether the combination of hardships takes the case beyond the consequences ordinarily associated with removal or inadmissibility. *Matter of O-J-O-*, 21 I&N Dec. at 383. Nevertheless, though we require an applicant to show that a qualifying relative would experience extreme hardship both in the event of relocation and in the event of separation, in analyzing the latter scenario, we give considerable, if not predominant, weight to the hardship of separation itself, particularly in cases involving the separation of spouses from one another and/or minor children from a parent. *Salcido-Salcido*, 138 F.3d at 1293.

On appeal, the applicant's wife states that she gave birth to her and the applicant's first child on May 15, 2008. *Correspondence from the Applicant's Wife*, dated June 14, 2008. She expresses that her labor was difficult, especially without the applicant's presence. *Id.* at 1. She explains that she is

experiencing difficulty acting as a single parent, and that it is hard for her and their daughter to endure separation from the applicant. *Id.*

The applicant's wife explains that she returned to the United States on January 26, 2008 due to her pregnancy. *Statement from the Applicant's Wife*, dated March 29, 2008. The applicant's wife states that, prior to giving birth, she lost her job and was having difficulty obtaining a new one. *Id.* at 1. She explains that she was under the care of her parents while pregnant, and that she was receiving help from her friends. *Id.* She asserts that she will benefit from engaging in employment, or having the applicant in the United States so he can work to support their family. *Id.*

The applicant's wife states that she had to leave [REDACTED] due to poor circumstances there and her status as a tourist. *Id.* She indicates that hospitals are poor in [REDACTED] and that giving birth there would have been costly. *Id.* She expresses that she had concern regarding administrative processes due to giving birth in another country. *Id.*

The record contains a statement from the applicant's wife at a time when she was still residing in [REDACTED] with the applicant. The applicant's wife expressed that she was experiencing severe emotional distress and that she was depressed. *Statement from the Applicant's Wife Submitted with Form I-290B*, dated January 22, 2008. She indicated that there was no work in [REDACTED] for her or the applicant, and that they were under extreme financial distress. *Id.* at 1. She noted that she had no health insurance in [REDACTED] which required her to return to the United States during her pregnancy. *Id.* at 1-2. She provided that she and the applicant wish to be together and to live in the United States so they can work and provide for their baby. *Id.* at 2-3.

The applicant's wife previously stated that she has known the applicant since she was seven years old. *Prior statement from the Applicant's Wife*, dated September 13, 2007. She explained that she was born in the United States, and that she moved to [REDACTED] as a child where she attended school and met the applicant. *Id.* at 2. She provided that she moved back to the United States with her family, yet she stayed in touch with the applicant and saw him each year during her family's extended vacations to [REDACTED]. *Id.* She noted that she and the applicant were married in November 2005, and that she relocated to [REDACTED] in December 2006 to reside with the applicant while his immigrant visa application was pending. *Id.*

She explained that she was experiencing tremendous financial hardship in [REDACTED] and that she was not permitted to work as a U.S. citizen. *Id.* at 3. She provided that she and the applicant resided with the applicant's parents due to their financial situation, yet that the applicant's parents are unemployed and have modest means. *Id.* She noted that the applicant's mother took a loan from a bank which she must repay in installments. *Id.* at 4.

The applicant's wife stated that she left a good position in the United States as a bank teller supervisor to relocate to [REDACTED]. *Id.*

The applicant's wife indicated that she was under the care of a psychiatrist due to her severe emotional distress, and that she was diagnosed with Adaptability Disorder. *Id.* She explained that she was undergoing extensive psychotherapy and taking medication due to her mood and problems sleeping. *Id.*

The applicant's wife added that her entire family is in the United States, and that her physician in [REDACTED] recommended that she return in order to salvage her psychiatric health. *Id.* at 5. The applicant provided a letter from a specialist psychiatrist in [REDACTED], who stated that the applicant's wife was under treatment with regular therapy including psychotherapy and medication due to difficulties in adaptation to her social environment in [REDACTED]. *Medical Report from [REDACTED]* interpreted on August 5, 2007. [REDACTED] observed that the applicant's wife experienced symptoms for more than six months, including problems sleeping, mood disorders such as depression, and disorders with "the instinct for food". *Id.* at 1. [REDACTED] provided that after regular psychotherapeutic and medication treatment, he found it necessary for the applicant's wife to return to the United States. *Id.*

Upon review, the applicant has shown that a qualifying relative will suffer extreme hardship if the present waiver application is denied. It is first noted that the applicant's wife indicated that she gave birth to her and the applicant's child in the United States on May 15, 2008. Birth in the United States would make the applicant's child a U.S. citizen, and a qualifying relative under section 212(h) of the Act. However, the applicant has not provided his child's birth certificate, or any other evidence to show that he now has a child such as hospital records or other identification documents. The e-mail correspondence from the applicant's wife on June 14, 2008 is not sufficient evidence to show that the applicant has a U.S. citizen child. Accordingly, the only proven qualifying relative in the present proceeding is the applicant's wife.

The applicant has shown that his wife will suffer extreme hardship should she relocate to [REDACTED] to maintain family unity. The record reflects that the applicant's wife attempted to live in [REDACTED] yet she experienced significant difficulty there. Her claims to have experienced economic hardship there are supported by reports on conditions in the country. *World Factbook: [REDACTED]* U.S. Central Intelligence Agency, dated October 19, 2010 (estimating that unemployment in [REDACTED] was 32.2 percent in 2009). There is support for the applicant's wife's concern for the quality and cost of healthcare in [REDACTED]. See *Medical Information and List of Physicians, United States Embassy, [REDACTED]* <[http://\[REDACTED\].usembassy.gov/medical_information.html](http://[REDACTED].usembassy.gov/medical_information.html)>, accessed October 27, 2010 (noting that "most public hospitals and clinics [REDACTED] are not equipped and maintained at U.S. or Western European standards," and that American citizen patients are often required to pay their bills at the time of receiving services.).

The applicant has submitted evidence to show that his wife received treatment for mental health problems in [REDACTED] for at least a six month period, including psychotherapy and medication. [REDACTED] concluded that the applicant's wife's difficulties were due to her inability to adapt to life in [REDACTED].

The AAO finds that the applicant's wife's documented mental health challenges and treatment constitute unusual circumstances not commonly faced by individuals who reside abroad due to the admissibility of a spouse.

The applicant's wife will face other elements of hardship should she reside in [REDACTED] including separation from her family members and employment opportunities in the United States. While these challenges are common consequences when individuals relocate due to inadmissibility, all factors of hardship are considered in aggregate.

Based on the foregoing, the applicant has shown that his wife will suffer extreme hardship should she return to [REDACTED] to maintain family unity.

The applicant has shown that his wife will experience extreme hardship should she remain in the United States without him. As discussed above, the applicant's wife has received treatment for mental health problems in the past. The applicant has not indicated whether his wife continues to receive mental health services in the United States now that she has returned from [REDACTED]. However, the AAO finds that the applicant's wife's past treatment sufficiently reflects her vulnerability to difficult emotional circumstances.

The record supports that the applicant's wife has made significant sacrifices in an effort to join the applicant. Multiple letters from the applicant's wife's employer and work associates in the United States reflect that she relinquished a stable and fruitful position in the United States in order to be with the applicant in [REDACTED] while he pursued an immigrant visa. The applicant's wife explained that she and the applicant have known each other since they were children and that they share a close bond. She endured substantial hardship in order to remain with the applicant until her mental health necessitated her return to United States. These facts support that the applicant's wife has a strong attachment to the applicant.

As noted above, the applicant has not submitted documentation to support the birth of his child. However, the record shows that the applicant's wife was pregnant as of approximately January 23, 2008. As the present appeal was filed in or about January 2008, it is understood that the results of the applicant's wife's pregnancy were unknown, and documentation of the birth of their child was unavailable.

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 shown that his wife will suffer extreme hardship should she reside in the United States without him. Accordingly, the applicant has shown that denial of the present waiver application "would result in extreme hardship" to a qualifying relative, as required for a waiver under section 212(h) of the Act.

In *Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996), the BIA held that establishing extreme hardship and eligibility for a waiver of inadmissibility does not create an entitlement to that relief, and that extreme hardship, once established, is but one favorable discretionary factor to be considered. All negative factors may be considered when deciding whether or not to grant a favorable exercise of discretion. See *Matter of Cervantes-Gonzalez*, *supra*, at 12.

The negative factors in this case consist of the following:

The applicant was convicted of two crimes for his actions in December 2005, at least one of which constitutes a crime involving moral turpitude.

The positive factors in this case include:

The applicant's U.S. citizen wife would experience extreme hardship if he is prohibited from residing in the United States; the applicant will face significant hardship should he remain in

the record does not show that the applicant has engaged in further criminal activity, either before or after his conduct that led to his convictions, and; the long history of the applicant's relationship with his wife supports that he has a propensity to cultivate a strong family unit.

While the applicant's prior criminal act cannot be condoned, the positive factors in this case outweigh the negative factors.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant also bears the burden of persuasion. *See Matter of Mendez-Morales*, 21 I&N Dec. at 301 (applicant must show that he merits a favorable exercise of discretion). In this case, the applicant has met his burden that he is eligible for a waiver and he merits approval of his application.

ORDER: The appeal is sustained.