

PUBLIC COPY

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

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

H2

MAR 25 2010

FILE:

Office: PHOENIX, ARIZONA Date:

IN RE:

Applicant:

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

ON BEHALF OF APPLICANT:

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).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Phoenix, Arizona, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant, [REDACTED], is a native and citizen of the Philippines 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 been convicted of a crime involving moral turpitude. The applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h). The director concluded that the applicant had failed to establish that her bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated November 13, 2006.

On appeal, counsel asserts that the applicant has a close relationship with her mother, sisters, and aunt and uncle. She states that the applicant's mother assisted in paying her daughter's court-ordered restitution of \$255,200. Counsel contends that the director failed to consider the relationship between the applicant and her mother, her family's history in the United States, and the effort of the applicant and her mother in atoning for the applicant's crime. Counsel maintains that the applicant is temporarily living in Arizona so as to more quickly pay off her restitution. Counsel declares that the applicant's mother has two jobs in order to assist in her daughter's restitution payments. Counsel contends that the applicant's mother mortgaged her house to assist the applicant and that she pays the extra mortgage she incurred with credit cards. She asserts that the applicant's mother will be ruined if the applicant is no longer able to financially assist her. According to counsel, the applicant's remaining restitution payment is \$50,000.

Counsel states that the applicant's mother is 70 years old and her mental state has impacted her health. She avers that if the applicant's mother joins her daughter to live in the Philippines, health care will not be of the same quality as in the United States. She claims that the applicant's mother will not be able to find employment similar to the positions she holds in the United States, and that the applicant's earning capacity will be substantially lower in the Philippines.

The AAO will first address the finding of inadmissibility. 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.

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 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).

The court’s order reflects that on April 8, 2003, the applicant pled guilty in the state of New York to grand theft under N.Y. Penal Law § 155.40(1).¹ She was sentenced to five years of probation and ordered to make restitution in the amount of \$232,000. At her adjustment of status interview the applicant admitted to knowingly using a credit card that did not belong to her to make personal purchases.

N.Y. Penal Law § 155.05 provides that:

1. A person steals property and commits larceny when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof.
2. Larceny includes a wrongful taking, obtaining or withholding of another's property, with the intent prescribed in subdivision one of this section . . .

N.Y. Penal Law § 155.05 defines the terms “deprive” and “appropriate” as:

3. "Deprive." To "deprive" another of property means (a) to withhold it or cause it to be withheld from him permanently or for so extended a period or under such circumstances that the major portion of its economic value or benefit is lost to him, or (b) to dispose of the property in such manner or under such circumstances as to render it unlikely that an owner will recover such property.
4. "Appropriate." To "appropriate" property of another to oneself or a third person means (a) to exercise control over it, or to aid a third person to exercise control over it, permanently or for so extended a period or under such circumstances as to acquire the major portion of its economic value or benefit, or (b) to dispose of the property for the benefit of oneself or a third person.

In determining whether theft is a crime of moral turpitude, the Board of Immigration Appeals (BIA) considers “whether there was an intention to permanently deprive the owner of his property.” *See In re Jurado-Delgado*, 24 I&N Dec. 29, 33 (BIA 2006). N.Y. Penal Law § 155.05 defines the terms

¹ N.Y. Penal Law § 155.40 provides that a person is guilty of grand larceny in the second degree when he steals property the value of which exceeds fifty thousand dollars. Grand larceny in the second degree is a class C felony.

“deprive” and “appropriate” to include circumstances in which a person may not have an intent to permanently deprive an owner of his property. For example, it is not clear that a person intends to permanently deprive an owner of his property when the property is withheld for an extended period or under such circumstances so that the major portion of the property’s economic value or benefit is lost to the owner. Thus, the AAO finds that the statute encompasses conduct involving moral turpitude and conduct that may not. We note, however, that the applicant has conceded that the conduct for which she was convicted involved moral turpitude. The applicant admitted at her immigrant interview that her conviction was for knowingly using a credit card that did not belong to her to make personal purchases. Furthermore, counsel on appeal states that the applicant does not dispute that her offense is a crime involving moral turpitude. Even though the AAO does not have the full record of conviction to analyze, in view of counsel’s admission that the applicant’s crime involves moral turpitude and in light of the applicant’s description of her crime, the AAO finds that the crime for which the applicant was convicted involves moral turpitude as there was an intention to permanently deprive the owner of his property.

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 . . .

A section 212(h) waiver of the bar to admission resulting from violation of section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant is not a consideration under the statute and will be considered only to the extent that it results in hardship to a qualifying relative. The qualifying relative here is the applicant’s naturalized citizen mother. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. See *Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996).

“Extreme hardship” is not a definable term of “fixed and inflexible meaning”; establishing extreme hardship is “dependent upon the facts and circumstances of each case.” *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). The Board of Immigration Appeals (BIA) in *Matter of Cervantes-Gonzalez* lists the factors it considers relevant in determining whether an applicant has established extreme hardship a qualifying relative pursuant to section 212(i) of the Act. 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.* at 565-566.

In *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996), the BIA stated that the factors to consider in determining whether extreme hardship exists “provide a framework for analysis,” and that the “[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists.” It further stated that “the trier of fact must consider the entire range of factors concerning hardship in their totality” and then “determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation.” (citing *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994).

Extreme hardship to the applicant’s mother must be established in the event that she remains in the United States without the applicant, and alternatively, if she joins the applicant to live in the Philippines. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant’s waiver request.

Counsel claims that the applicant’s mother will experience financial ruin if the applicant is no longer able to financially assist her mother. In her letter dated January 7, 2007, the applicant’s mother claims that in repaying the loans she incurred for her daughter she will not be able to make ends meet for more than 10 years after her retirement. She states that her house’s mortgage was \$75,000, and that she now has an equity mortgage of \$115,000 and credit card debt. The mortgage interest statement for 2006 shows that the applicant’s mother and the applicant’s sister, [REDACTED]

own the house located at [REDACTED] in Flushing, New York, and that the ending principal balance is \$156,854. The submitted statements dated December 31, 2006 and November 30, 2006 do not show the name of the person who incurred debt of \$92,917. The applicant’s mother avers that her daughter agreed to repay her, but that she will not be able to do so if she leaves the country. The applicant’s mother states in a letter dated April 10, 2006, that she works 16 hours a day to help the applicant. In a letter dated March 15, 2006, the applicant contends that if she returns to the Philippines her salary would not be sufficient to repay her mother. The employment letter dated January 26, 2006 by [REDACTED] of [REDACTED] reflects that the applicant’s mother annual salary is \$51,844, and the letter by the human resources receptionist/clerk with NewYork-Presbyterian indicates that she earns \$45,857 annually. The employment letter by the immigration supervisor dated October 26, 2001, conveys the applicant earned \$102,000 as a senior manager with [REDACTED]

In the report by [REDACTED], dated July 25, 2006, [REDACTED] conveys that the applicant’s mother developed major depressive disorder because she is extremely depressed about the likelihood of her daughter’s return to the Philippines. He contends that she takes medication for depression. In her letter dated April 10, 2006, the applicant’s mother states that she worries about not being able to guide her daughter if she is in the Philippines. She asserts that the “shame and embarrassment of having one member of the family be sent back is enough to cause mental anguish.” She indicates that at times she is unable to work efficiently because she worries about her daughter’s situation. She asserts that if she has health problems her daughter will want to take care of her but will not be able to do so if she is in the Philippines. [REDACTED], the applicant’s aunt, states in her letter dated September 1, 2006 that she lives with the applicant’s mother. She declares that the applicant’s mother has been unhappy about the applicant’s situation. In her letter dated September 1, 2006, the

applicant's sister, [REDACTED] conveys that she lives with her mother and unmarried aunt and uncle; and that her mother has depression, hypertension, high cholesterol, advanced osteoporosis, and arthritis. The letter by [REDACTED] dated February 1, 2006, indicates the applicant's mother is prescribed Zocor. The undated letter by [REDACTED] a resident at the Department of Psychiatry at New York-Presbyterian Hospital, states that the applicant's mother was seen in their clinic and was diagnosed with dysthymic disorder. He conveys that her treatment includes Zoloft and weekly interpersonal therapy sessions. He states that she was seen three times and that she has symptoms of sadness and anxiety. The record contains a prescription, dated February 23, 2006, for Zoloft.

Family separation must be considered in determining hardship. See, e.g., *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) ("the most important single hardship factor may be the separation of the alien from family living in the United States"). However, courts have found that family separation does not conclusively establish extreme hardship. In *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991), the Ninth Circuit upheld the finding that deporting the applicant and separating him from his wife and child was not conclusive of extreme hardship as it "was not of such a nature which is unusual or beyond that which would normally be expected from the respondent's bar to admission." (citing *Patel v. INS*, 638 F.2d 1199, 1206 (9th Cir.1980) (severance of ties does not constitute extreme hardship). *Perez v. INS*, 96 F.3d 390, 392 (9th Cir. 1996), states that "[e]xtreme hardship" is hardship that is "unusual or beyond that which would normally be expected" upon deportation and "[t]he common results of deportation or exclusion are insufficient to prove extreme hardship." (citing *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir.1991)).

The applicant's mother has depression due to: financial concerns, concern about her daughter living alone in the Philippines, and the shame and embarrassment of her daughters return to the Philippines. The AAO finds that the applicant has not fully demonstrated that her mother will not have the financial means to retire. The applicant has not shown that her two sisters would be unable to assist their mother in paying the equity mortgage. Furthermore, the record shows that the applicant earned \$102,000 in 2001 as a senior manager with [REDACTED]. The applicant has provided no evidence to demonstrate that she will be unable to obtain employment in the Philippines that will enable her to repay her mother.

Although the applicants' mother states that she would not be able to guide her daughter if she lived in the Philippines, the AAO notes that the applicant's mother has the means to remain in contact with her daughter. Although the applicant's mother is depressed about separation from her daughter, the applicant has not demonstrated that the emotional hardship of her mother, as a result of remaining in the United States without her, is unusual or beyond that which is normally to be expected upon an applicant's bar to admission to the United States. See *Hassan* and *Perez*, *supra*.

When the hardship factors alleged are considered in the aggregate, the AAO finds they fail to demonstrate that the applicant's mother will experience extreme hardship if she remained in the United States without her. The applicant has not established that her mother will experience financial problems or shown that her mother's depression about finances, separation from her, and the shame of her return to the Philippines is unusual or beyond that which is normally to be expected upon an applicant's bar to admission to the United States.

Counsel claims that if the applicant's mother joins her daughter to live in the Philippines, she will experience a diminished level of health care. However, there is no documentation in the record showing that the quality of their healthcare in the Philippines will be significantly lower than that of their healthcare in the United States. Counsel maintains that the applicant's mother will be unable to find employment similar to the positions she now holds and that the applicant's earning capacity will be greatly reduced. There is no documentation in the record to show that the applicant will be unable to obtain employment in the Philippines which would allow her to financially support her mother or that the applicant's mother will be unable to obtain employment. When the factors alleged are considered collectively, the AAO finds that they fail to demonstrate that the applicant's mother would experience extreme hardship if she joins her daughter to live in the Philippines. No evidence has been presented to show that the applicant or her mother will be unable to obtain employment or shows that the quality of their health care will be significantly lower than it is in the United States.

Based upon the record before the AAO, the applicant in this case fails to establish extreme hardship to a qualifying family member for purposes of relief under sections 212(h) of the Act.

Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether she merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under sections 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.