

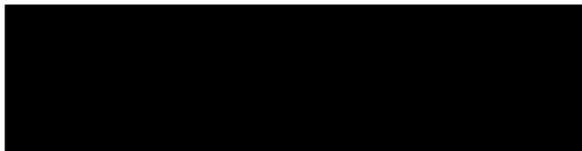
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U.S. Department of Homeland Security  
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Office of Administrative Appeals MS 2090  
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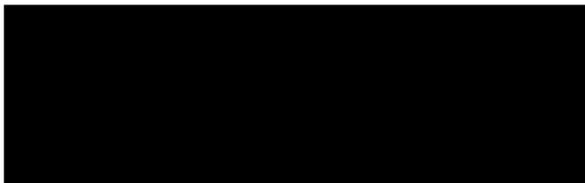
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FILE: [REDACTED] Office: PORTLAND, OREGON Date: **MAR 25 2010**

IN RE: Applicant: [REDACTED]

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

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 Acting Field Office Director, Portland, Oregon, 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 Mexico 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), so as to adjust status. The director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Acting Field Office Director*, dated May 31, 2007.

On appeal, counsel asserts that the director erred in denying the waiver application because it was approved in January 2006. Counsel contends that the applicant's spouse should have been interviewed when the waiver application was resubmitted in April 2007 because it would have revealed her mental capacity. Counsel claims that failure to interview the applicant's spouse or review the notes relating to the approved waiver application prejudiced the applicant, resulting in the denial of a waiver application that had been approved. According to counsel, the applicant was required to submit a waiver application due to his "failure to appear" conviction. Counsel contends that all of the underlying criminal charges relating to the conviction were dismissed, and that "failure to appear" is not a crime involving moral turpitude in that immoral conduct is not an element of the crime, and the statute is violated simply by failure to appear to a hearing. Counsel maintains that since it is arguable that the applicant's crime does not involve moral turpitude, a waiver is not necessary. He cites to *Delgadillo v. Carmichael*, 332 U.S. 388, 68 S.Ct. 10 (1947), and *Garcia-Gonzales v. INS*, 344 F.2d 804 (9<sup>th</sup> Cir. 196), as indicating that the rules of statutory construction in immigration matters require granting to immigrants the benefit of all reasonable doubts in fact and law when interpreting immigration statutes. Counsel asserts that had the applicant been convicted of any of the underlying crimes a waiver would have been necessary.

The AAO will first address the finding of inadmissibility. 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 . . . or an attempt or conspiracy to commit such a crime . . . is inadmissible.
- (ii) Exception.-Clause (i)(I) shall not apply to an alien who committed only one crime if-
  - . . . .
  - (II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or

of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

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.)

The judgment of conviction and sentence from the Circuit Court of the State of Oregon reflects that on January 13, 1999, the applicant pled guilty to "failure to appear in the first degree," which offense is a class C felony (crime seriousness 4, criminal history H). The court placed the applicant on probation for a two-year period; and ordered the imposition of 120 sanction units, payment of fees, and performance of community service.

The Oregon statute under which the applicant was convicted, section 162.205 of the Oregon Statutes (2001) provides:

- (1) A person commits the crime of failure to appear in the first degree if, having by court order been released from custody or a correctional facility upon a release agreement or security release upon the condition that the person will subsequently appear personally in connection with a charge against the person of having committed a felony, the person intentionally fails to appear as required.
- (2) Failure to appear in the first degree is a Class C felony.

The charges for which the applicant failed to appear are the felony crimes of: rape in the first degree; sodomy in the first degree; and sexual abuse in the first, second, and third degree. The applicant was acquitted of the charges of rape in the first degree and sodomy in the first degree, and all sexual abuses charges were dismissed.

In determining whether the applicant's conviction for "failure to appear" is a crime involving moral turpitude, the AAO turns to in *Matter of Sloan*, 12 I&N Dec. 840 (A.G. 1968), a case wherein the Attorney General analyzed whether active and knowing interference with the enforcement of the laws of the United States was a crime involving moral turpitude. The respondent in *Sloan* was convicted of harboring and concealing a person from arrest in violation of 18 U.S.C. §1071. That statute provides:

Whoever harbors or conceals any person for whose arrest a warrant or process has been issued under the provisions of any law of the United States, so as to prevent his discovery and arrest, after notice or knowledge of the fact that a warrant or process has been issued for the apprehension of such person, shall be fined under this title or imprisoned not more than one year, or both; except that if the warrant or process issued on a charge of felony, or after conviction of such person of any offense, the punishment shall be a fine under this title, or imprisonment for not more than five years, or both.

The Attorney General reasoned that because the definition of moral turpitude includes "anything done contrary to justice" or "an act of baseness \*\*\* in the private and social duties which a man owes to his fellow man, or to society in general," the act of active and knowing interference with the enforcement of the laws of the United States in contravention of 18 U.S.C. § 1071 involves moral turpitude. *Id.* at 854 (citing 37 Op. A.G. 293, 294.)

The reasoning in *Sloan* is applicable to the present case. In Oregon, the crime of "failure to appear" in the first degree is committed when a court orders the release of a person from either custody or a correctional facility (upon a release agreement or security release) conditioned upon his or her subsequently appearing in person in connection with charges brought, and he or she unlawfully and intentionally fails to appear as required. The AAO finds that a person's unlawful and intentional failure to appear in connection with felony charges against the person is tantamount to the active and knowing interference with the enforcement of the laws of the United States. Based on the statutory language of Or. St. 162.205, the AAO finds that the applicant's crime involves moral turpitude. He is therefore inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

Counsel states that the rules of statutory construction in immigration matters require the court to grant to immigrants the benefit of all reasonable doubts, in fact and law, in interpretation of immigration statutes. The AAO finds that its conclusion that violation of Or. St. 162.205 involves moral turpitude is in accordance with the holding in *Sloan* and is based on a rational interpretation of Or. St. 162.205. There is no reasonable doubt as to the interpretation of the facts or law.

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, who in this case are the applicant's U.S. citizen wife and child. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Moralez*, 21 I&N Dec. 296 (BIA 1996).

Although not addressed by the director, the AAO notes that the record reveals that the applicant is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for seeking admission into the United States by fraud or willful misrepresentation. The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

An application or petition 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 Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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

- (i) 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.

U.S. Citizenship and Immigration Service records reflect that the applicant admitted to seeking to procure admission into the United States on March 17, 1998, by presenting a valid Mexican passport with a nonimmigrant visa bearing the name [REDACTED], which passport he purchased from an unknown vendor in Tijuana, Mexico, for approximately \$300. Based on the record, the AAO finds that the applicant is inadmissible under section 212(a)(6)(C) of the Act for having willfully misrepresented the material fact of his true identity, and his eligibility for admission into the United States.

Section 212(i) of the Act provides a waiver for fraud and material misrepresentation. That section states 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 alien 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.

The waiver under section 212(i) of the Act requires the applicant show that the bar to admission imposes an extreme hardship to the citizen or lawfully resident spouse or parent of the applicant. Hardship to an applicant is not a consideration under the statute, and unlike section 212(h) of the Act where a child is included as a qualifying relative, children are not included under section 212(i) of the Act. Hardship to the applicant and to his child will be considered only to the extent that it results in hardship to a qualifying relative, who in this case is the applicant's U.S. citizen spouse. Once extreme hardship is established, it is but one favorable factor to be considered in determining whether the Secretary should exercise discretion. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996).

In rendering this decision, the AAO will consider all of the evidence in the record as it relates to the applicant's section 212(h) and 212(i) waivers. However, in that the hardship standard for the section 212(i) waiver is more stringent, we will apply that standard in determining hardship here.

"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 qualifying relative 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 Mexico. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

Counsel asserts on appeal that the applicant met the criteria for a hardship waiver through his wife and child. He claims that the neuropsychological evaluation, dated September 9, 2004, of the applicant's spouse, shows her mental capacity. We note that the evaluation, which was used to support an application for social security disability benefits, conveys that the applicant's wife was diagnosed with Asperger's Disorder and will "require long-term assistance in meeting basic safety and survival needs." The Consular Report of Birth Abroad shows that the applicant and his wife have a U.S. citizen child, [REDACTED], who was born in Mexico on May 26, 1996. The evaluation indicates that the applicant's in-laws have custody and responsibility for raising the applicant's child. The evaluation conveys that the applicant was estranged or separated from his spouse and was abusive towards her. In view of the evaluation, counsel does not demonstrate how the applicant established extreme hardship to his spouse if she remained in the United States without him and if she joined him to live in Mexico.

Although counsel contends on appeal that the applicant had an approved waiver application, the AAO finds his contention unpersuasive in that the record does not indicate that the applicant ever had an approved waiver application and counsel submitted no waiver application approval on appeal.

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) and 212(i) of the Act.

Because the applicant is statutorily ineligible for relief, no purpose is served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under sections 212(h) and 212(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. The applicant has not met that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.