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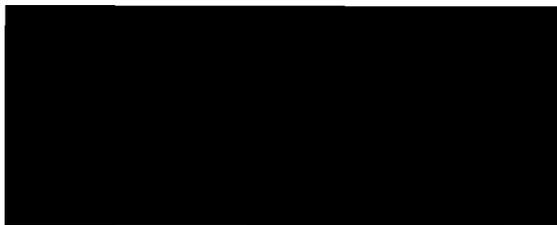
U.S. Department of Homeland Security
U.S. Immigration and Citizenship Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE:



Office: ROME, ITALY

Date:

MAY 11 2010

IN RE:

Applicant:



APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h), 8 U.S.C. § 1182(h), and 212(i), 8 U.S.C. § 1182(i), 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, Rome, Italy, 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 Spain 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; and 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 applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h); and section 212(i) 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 July 26, 2007.

On appeal, counsel states that the applicant's husband, [REDACTED] has two teenage daughters from a prior relationship, and has been employed by the same company for 16 years. Counsel states that [REDACTED] has experienced extreme financial hardship as a result of traveling to visit his wife in Spain, maintaining his household and his wife's in Spain and providing child support obligations of over \$2,000 each month. She states that he has stress-related health problems due to emotional hardship.

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.

Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines "conviction" for immigration purposes as:

A formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where -

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

The transcript of criminal court proceedings reflects that on June 15, 2001, the applicant pled guilty to and was convicted of “sell person for immoral purpose” in violation of section 266f of the California Penal Code.¹ The judge suspended imposition of the applicant’s sentence (3 years in state prison), and ordered that she receive 3 years of formal probation, 180 days in jail, and 250 hours of community service.

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.)

Selling a person for an immoral purpose is conduct that shocks the public conscience as being inherently base, vile or depraved and contrary to the rules of morality. Thus, the AAO finds that the applicant’s offense involves moral turpitude and the director was correct in finding her inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The AAO notes that the applicant’s offense is similar in nature to securing another for prostitution, which was found to be an offense involving moral turpitude in *Matter of Lambert*, 11 I&N Dec. 340 (BIA 1965).

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

¹ Section 266f of the California Penal Code states:

Every person who sells any person or receives any money or other valuable thing for or on account of his or her placing in custody, for immoral purposes, any person, whether with or without his or her consent, is guilty of a felony.

extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . .

The director determined that the applicant was inadmissible under section 212(a)(6)(C) of the Act for failing to reveal during her immigrant visa interview a prior arrest for prostitution.

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

- (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.

At the immigrant visa interview the applicant denied any problems with the law, other than her conviction on June 15, 2001 of “sell person for immoral purpose.” She stated that she left the United States before reporting to jail because the judge let her attend her father’s funeral in Spain. Although the applicant entered the United States on August 22, 2001 through the Visa Waiver Program (VWP), she failed to note her conviction in California on the Form I-94W, Nonimmigrant Visa Waiver Arrival/Departure Form. She also failed to state during her immigrant visa interview that she was arrested in 1994 for prostitution. *Memorandum, Consular Section, American Embassy, Spain.*

The AAO finds that the applicant is not inadmissible for failing to reveal her arrest in 1994. The misrepresentation committed by the applicant must be material. According to the Department of State’s Foreign Affairs Manual, a misrepresentation is material if either: (1) The alien is excludable on the true facts; or (2) The misrepresentation tends to shut off a line of inquiry that is relevant to the alien’s eligibility and that might well have resulted in a proper determination that he be excluded. *9 FAM 40.63 N61*. The additional arrest did not result in a conviction and the applicant never made any admissions as to the elements of the crimes. Had the applicant mentioned this arrest, it would not have resulted in her inadmissibility or exclusion. Therefore, her arrest is not material and the applicant’s omission is not a material misrepresentation. A misrepresentation is generally material only if by it the alien received a benefit for which he would not otherwise have been eligible. *See Kungys v. United States*, 485 US 759 (1988); see also *Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998); *Matter of Martinez-Lopez*, 10 I&N Dec. 409 (BIA 1962; AG 1964) and *Matter of S- and B-C-*, 9 I&N Dec. 436 (BIA 1950; AG 1961).

However, the AAO finds that the applicant’s failure to disclose her June 15, 2001 conviction when she sought admission into the United States on August 22, 2001 through the VWP Program is a material misrepresentation.

In order to apply for admission into the United States through the VWP Program, an applicant must establish that he is not inadmissible to the United States under section 212(a) of the Act, and must possess a valid, unexpired passport issued by a designated country and present a completed, signed Form I-94W, Nonimmigrant Visa Waiver Arrival/Departure Form.² One of the grounds of

² See, 8 C.F.R. § 217.2(b) (1997) and http://travel.state.gov/visa/temp/without/without_1990.html.

inadmissibility under section 212(a) of the Act is having been convicted of committed a crime involving moral turpitude.

Here, the record reveals that the applicant failed to disclose in her Form I-94W her criminal record, which disclosure would have revealed her conviction of “sell person for immoral purpose,” which is a crime involving moral turpitude.³ Had the applicant disclosed the true facts of her conviction, she would not have been admitted to the United States. The applicant is, therefore, inadmissible to the United States under section 212(a)(6)(C)(i) of the Act for having willfully misrepresented a material fact in order to obtain admission to 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.

A section 212(h) waiver of the bar to admission resulting from violation of section 212(a)(2)(A)(i)(I) of the Act, that is, having been convicted of a crime involving moral turpitude, 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 is the applicant’s naturalized citizen spouse.

A waiver under section 212(i) of the Act due to inadmissibility under section 212(a)(6)(C)(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 her step-children will be considered only to the extent that it results in hardship to a qualifying relative, who in this case is the applicant’s naturalized citizen spouse.

This decision of the AAO will apply to both of the applicant’s waivers of inadmissibility. However, because the extreme hardship standard is higher under the section (i) waiver, the AAO will analyze whether extreme hardship has been established under that section’s hardship standard.

³ Question B in the Form I-94W, Nonimmigrant Visa Waiver Arrival/Departure Form, asks the applicant: "Have you ever been arrested or convicted of an offense or crime involving moral turpitude . . .?"

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).

“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).

Evidence in the record includes letters, a psychological assessment, photographs, certificates, invoices, income tax records for 2003, Form W-2 Wage and Tax Statements, a State of California Contractors State License Board Active License, records from the Universidad La Salle in Mexico, bank records, a marriage certificate, birth certificates, a family law judgment, medical records, Western Union money transfers, and other documentation.

In rendering this decision, the AAO has carefully considered all of the evidence in the record.

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

With regard to the hardship experienced by [REDACTED] if he were to remain in the United States without the applicant, the psychological assessment dated August 14, 2007 by [REDACTED] reports that [REDACTED] has experienced financial hardship in making over 24 trips to visit his wife since her deportation in 2002 and in paying \$2,280 in child support.

The AAO finds that the record fails to demonstrate that [REDACTED] is experiencing extreme hardship as a result of separation from his spouse. The letter dated August 23, 2006 by The [REDACTED] general manager reflects that [REDACTED] is employed there as a chief engineer, earning

§85,000 annually. The Western Union money transfers and bank withdrawals show that [REDACTED] provides some financial assistance to his wife. No documentation shows that he is still responsible for child support for his daughters, who are now 17 and 19 years old. The documentation in the record is insufficient in demonstrating that [REDACTED] income is insufficient to meet his monthly financial obligations, including the support of his spouse. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

[REDACTED] reports that [REDACTED] has a moderate level of generalized anxiety and depression related to separation from his wife since 2002, and has been diagnosed with high blood pressure since his wife's immigrant visa was denied in October 2006.

Although the input of a mental health professional is respected and valuable, the AAO notes that the submitted psychological is based on a single interview between [REDACTED] and [REDACTED]. The record fails to reflect an ongoing relationship between a mental health professional and [REDACTED]. Moreover, the conclusions reached in the submitted assessment, being based on a single interview, do not reflect the insight and elaboration commensurate with an established relationship with a psychologist, thereby rendering [REDACTED] findings speculative and diminishing the assessment's value to a determination of extreme hardship.

Furthermore, the AAO notes that there are no medical records demonstrating that [REDACTED] has high blood pressure due to separation from his wife. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici, supra*.

[REDACTED] is concerned about separation from his spouse. 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). In *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)).

After careful consideration of the evidence in the record, the AAO finds that the situation of [REDACTED] if he remains in the United States without the applicant, is typical to individuals separated as a result of removal and does not rise to the level of extreme hardship as required by the Act. The record before the AAO conveys that the emotional hardship to be endured by [REDACTED] as a

result of separation from his spouse, is a heavy burden, but it is not unusual or beyond that which is normally to be expected upon removal from the United States. *See Hassan and Perez, supra.*

If [REDACTED] were to join his wife to live in Spain, [REDACTED] states that [REDACTED] would not be able to find employment commensurate with his education and experience. [REDACTED] states that [REDACTED] building contractor license would not be valid in Spain, and that [REDACTED] needs to be in the United States to complete his goal of obtaining his engineer contractor license. She states that he has been employed for 16 years as a chief engineer in the United States.

Although [REDACTED] has been employed with the same company for 14 years in the United States, there is no documentation in the record establishing that he would be unable to obtain employment in Spain. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici, supra.*

[REDACTED] states that [REDACTED] daughters would be deprived of their close relationship with their father if he joined the applicant to live in Spain. In *Dill v. INS*, 773 F.2d 25 (3rd Cir. 1985), the Third Circuit affirmed the BIA's decision in finding no extreme hardship to the petitioner or to the couple that raised her on account of separation, as the petitioner "is an adult who can establish her own life and need not depend primarily on her parents for emotional support in the same way as a young child." Here, in view of the age of [REDACTED] daughters, who are 17 and 19 years old, the AAO finds that they would not depend primarily on their father for emotional support in the same way as a young child. Although the AAO acknowledges that [REDACTED] would endure emotional hardship as a result of separation from his daughters, his hardship would not rise to the level of extreme.

If his daughters joined him in Spain, [REDACTED] states that [REDACTED] is concerned that he would not be able to afford private school education for them, which they now receive in the United States. [REDACTED] however, has not explained why he would experience extreme hardship if he were not able to have his daughters attend afford private school in Spain.

Although [REDACTED] reports that [REDACTED] is concerned about the well-being of his daughters in Spain due to the high incidence of terrorism there, there is no documentation in the record reflecting that Spain has a high incidence of terrorism. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici, supra.*

[REDACTED] reports that [REDACTED] shares the custody of his daughters with his former spouse and it would be difficult for him to take his daughters with him to Spain. The record contains no court records pertaining to the custody arrangements of [REDACTED] daughters. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici, supra.*

In considering all of the hardship factors presented, both individually and in the aggregate, the AAO finds they fail to demonstrate that the applicant's spouse would experience extreme hardship if he were to remain in the United States without her, and if he were to join her to live in Spain.

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.

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) 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.