

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY

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

[REDACTED]

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER

Date:

OCT 20 2010

IN RE: [REDACTED]

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

ON BEHALF OF APPLICANT:

[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and a citizen of Ecuador 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 a crime 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 remain in the United States with his lawful permanent resident spouse and child and his two U.S. citizen children.

In a decision dated May 21, 2008, the director found that although the applicant had established that his spouse suffers from epilepsy, he did not show that she would suffer extreme hardship beyond what most spouses would face in similar circumstances. The application was denied accordingly.

In a Notice of Appeal to the AAO (Form I-290B) dated June 19, 2008, counsel states that the applicant seeks to present further evidence of the hardship that would be suffered by his wife and children if he were denied a waiver of inadmissibility. Counsel states that the applicant's spouse does depend on the applicant's support in battling her epilepsy and his children depend on his assistance to remain financially, emotionally, and mentally stable.

Section 212(a)(2)(A) of the Act states, in pertinent parts:

(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.

(ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or

(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.)

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).

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 indicates that on [REDACTED] the applicant was convicted in [REDACTED] of Intent to Defraud, a second degree felony and was sentenced to eight years probation and 350 hours of community service, and was fined \$650. The acts which led to the applicant’s conviction

occurred on November 6, 1997. The applicant, who was born on October 10, 1955, was 41 years old at the time he committed the acts which led to his conviction.

The AAO notes that it has long been held that any crime involving fraud is a crime involving moral turpitude. *Burr v. INS*, 350 F.2d 87, 91 (9th Cir. 1965), *cert denied*, 383 U.S. 915 (1966). In the applicant's case the court disposition indicates that the course of conduct leading to the applicant's conviction involved a fictitious or counterfeit inspection certificate or insurance document. Thus, the AAO finds that the applicant's conviction is categorically a crime involving moral turpitude. In addition, the maximum sentence for a second degree felony in Texas is twenty years, rendering the applicant ineligible for the petty offense exception.

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), (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

A waiver of inadmissibility under section 212(h) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse, parent, son or daughter of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. The applicant's spouse and three children are qualifying relatives in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996).

As a qualifying relative is not required to depart the United States as a consequence of an applicant's inadmissibility, two distinct factual scenarios exist 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 of Immigration Appeals 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.

The record of hardship includes: statements from the applicant’s spouse, daughter and son; two letters from medical doctors regarding the applicant’s spouse’s medical condition; and school records for the applicant’s daughter and son.

The applicant’s spouse states, in an undated affidavit, that at the age of twelve she was hit by a car and severely injured. She states that as a result of this accident, she must take three pills of Dilantin daily and will continue to take these pills for the rest of her life. The applicant’s spouse states that she suffers from painful headaches and unexpected seizures. She states that her headaches require immediate medical attention and often coincide with her experiencing extreme stress. She states that

the applicant helps to care for her on a daily basis and helps to care for their grandson when she is feeling ill.

The applicant's spouse states further that she is employed as a second grade bilingual teacher and earns an annual salary of \$45,000 per year. She states that their monthly household expenses are approximately \$3,000 per month and they pay \$18,000 per semester for their daughter's tuition. The applicant's spouse states that although all three of her children are adults, two of them are still living in their house and they all rely on their father both emotionally and financially. In addition, their five year old grandson is also living in their home and they care for him while his mother, their daughter, is in school.

The applicant's spouse states that if the applicant must return to Ecuador she could not return with him because her children would stay in the United States and she would not want to be separated from them. She also states that she would not want to be separated from the applicant as he is the person who has cared for her her entire life and is a great source of strength, love, and support. She states that in Ecuador the economy is in such a state that she and the applicant would not be able to find sufficient employment to support themselves and that the only family she has in Ecuador is her eighty year old father who would not be able to help them. In addition, the applicant's spouse asserts that she requires constant medical attention and medication. She states that she could not obtain the appropriate medical attention or medication in Ecuador and would fear putting other people at risk of harm. Finally, she states that she would suffer severe and extreme emotional hardship if the applicant was forced to return to Ecuador.

The AAO notes that the record contains two medical letters to establish the applicant's spouse's medical problems. The record contains a letter from the doctor that was present in 1970 when the applicant's spouse had her accident in Ecuador. The letter, translated from Spanish and dated June 13, 2008, states that on December 23, 1970 the applicant's spouse was brought to the hospital by her relatives after being hit by a car outside a private school. [REDACTED] states that no documentation currently exists for this period of time. [REDACTED] states that the applicant had a lesion on the right side of her forehead and that her right arm was broken in two places. She states that when she went to clean the lesion on the applicant's spouse's forehead she could see that the frontal bone was crushed and fragments of the bone had lacerated the cerebral mass. She states that she extracted the bone fragments, cleaned the wound, and attended to the applicant's spouse's arm, but nothing more could be done because the city lacked medical specialists. She states that the next day the hospital caught on fire and the applicant's spouse had to be relocated to Quito. She states that she only now found out about the patient's health after being contacted by her relatives.

A second medical note, submitted by a [REDACTED] and dated February 18, 2008, states that the applicant's spouse was in his office for treatment of her epilepsy on February 9, 2008. [REDACTED] states that the applicant's spouse was brought in by her husband, who is her caretaker. He states that the applicant's spouse had laboratory work done and was advised to continue to take Dilantin on a daily basis. [REDACTED] states that the applicant reports that his spouse is occasionally having seizures and it is necessary for him to be close to her in the event that she has a seizure.

In an affidavit dated June 17, 2008, the applicant's daughter states that she has lived with her parents her whole life. She states that at 16 years old she married and had a child, but because she was so young her father helped to support her, her spouse, and her child. She states that she lived in [REDACTED]

██████████ to attend ██████████ but returned home to ██████████ without finishing her degree. She states that she is in the process of a divorce and that her father has always encouraged and helped her. She states that she will attend ██████████ to finish her degree and will also work part-time. She states that she will be relying on her father to help with her son and to take him to school in the mornings. She states that if her father were to be removed it would cause her great agony as she relies on him for everything. The AAO notes that the record contains an admissions letter from ██████████ and transcripts from ██████████ in support of the applicant's daughter's statements.

In an affidavit dated June 15, 2008, the applicant's son states that he has lived with his parents since he was born in 1981. He states that his father paid for his education so that he would not have to worry about work. He states that after graduating from college he worked in the insurance business and soon decided to start his own company. He states that with his father's help and dedication his business is doing very well. He states that his father is the only person he can trust with his paperwork and money when he is not in the office and that he has to leave his office frequently due to the nature of his work. The applicant's son also states that he has been accepted into the ██████████ Master's in Business Administration program and will need to be out of the office even more, requiring his father to be in the office even more. The AAO notes that the record contains an admissions letter from the ██████████ and the applicant's son's college transcripts.

The AAO finds that the applicant's spouse would suffer extreme hardship as a result of separation. The AAO finds that the applicant's spouse has established that she suffers from a serious medical condition that requires constant care. The AAO also finds that the applicant's children have established that they would not be available to care for their mother's needs in the way that their father is available to care for her. The AAO acknowledges that the applicant's spouse's medical condition does not prevent her from being able to function as a teacher and as a childcare provider for her grandson. Nevertheless, the AAO recognizes the unpredictability of the applicant's spouse's condition and that care from a spouse is not easily replaced.

Although the AAO finds that the applicant's spouse will suffer extreme hardship as a result of separation, the AAO does not find that the current record establishes that the applicant's spouse or his children would suffer extreme hardship as a result of relocation. The AAO recognizes that the applicant's spouse and children have many ties to the United States, but the record does not show that they would suffer extreme hardship by relocating to Ecuador. The applicant's spouse states that Ecuador's economy is struggling and that in Ecuador she would not be able to receive the medical attention she requires, but she does not provide any documentary evidence to support these statements. The assertions of the applicant's spouse are relevant evidence and have been considered. However, absent supporting documentation, these assertions cannot be given great weight. *See Matter of Kwan*, 14 I&N Dec. 175, 177 (BIA 1972) ("Information contained in an affidavit should not be disregarded simply because it appears to be hearsay. In administrative proceedings, that fact merely affects the weight to be afforded [it] . . ."). Going on record without supporting evidence generally is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Similarly, the applicant's children have not provided any details or documentation as to the extreme hardship they would suffer as a result of relocating to Ecuador.

The AAO therefore finds that the applicant has failed to establish eligibility for a waiver of inadmissibility under section 212(h) of the Act. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

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

ORDER: The appeal is dismissed.