

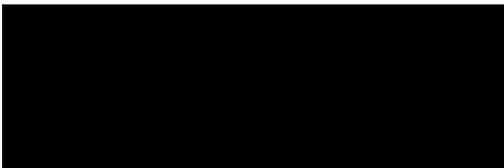
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U.S. Department of Homeland Security
U.S. Immigration and Citizenship Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



H2

FILE:



Office: MEXICO CITY, MEXICO
(CIUDAD JUAREZ)

Date **OCT 21 2010**

IN RE:



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:

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

Thank you,

Perry Rhew
for

Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of the Bahamas. The director stated that the applicant was inadmissible under 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 committing crimes involving moral turpitude. The director indicated that 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 his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility on October 17, 2007.

On appeal, counsel contends that the applicant's qualifying relatives will suffer extreme hardship based on the applicant's 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 *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. 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 record reflects that the applicant was convicted of *Possession of a Cloned Cellular Telephone*, § 817.4821 Fl. Stat. Ann., on May 22, 1997. The applicant was also convicted of *Fleeing and Eluding a Law Enforcement Officer*, § 316.1935 Fl. Stat. Ann., on November 9, 1995. On January 16, 1997, the applicant was convicted of *Resisting Arrest, Obstruction of Justice to Police Officer by Filing a False Report*.

This record indicates that the applicant's resisting arrest charge was related to filing a false police report. Providing false information to a police officer constitutes a CIMT. *See Omagah v. Ashcroft*, 288 F.3d 254, 262 (5th Cir. 2002) (finding that crimes that include "dishonesty or lying as an essential element" tend to involve moral turpitude); *Matter of Jurado*, 24 I&N Dec. 29, 34-35 (BIA

2006)(concluding that it was sufficient to establish moral turpitude if the false statement provided to a public official was made with the intent to disrupt the performance of their duties); *Itani v. Ashcroft*, 298 F.3d 1213, 1215 (11th Cir. 2002) (“Generally a crime involving dishonesty or false statement is considered to be one involving moral turpitude.”). In addition, fleeing from a police officer may constitute a CIMT. See *Mei v. Ashcroft*, 393 F.3d 737 (7th Cir. 2004); *People v. Bautista*, 265 Cal.Rptr. 661 (Cal.App. 1990); *People v. Dewey*, 49 Cal.Rptr.2d 537 (Cal.App. 4th 1996). The applicant does not contest his inadmissibility on appeal.

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 U.S. citizen spouse and two U.S. citizen children are the 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) [REDACTED] 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 includes, but is not limited to: statements from the applicant’s spouse; a statement from [REDACTED] of Pediatric Neurology, indicating that the applicant’s daughter suffers from chronic seizures and must take Lamictal; copy of a Social Security disability income statement for the applicant’s daughter; a copy of the Individual Educational Plan for the applicant’s son from the School Board of Broward County, Florida; copies of Speech-Language Evaluations for the applicant’s children; a statement from the applicant; statements from the applicant’s family and friends attesting to his moral character; conviction records; extensive medical records for the applicant’s daughter from Miami Children’s Hospital, including examination reports, progress reports

and lab reports; the applicant's marriage certificate; and the birth certificates of the applicant's children.

The entire record was reviewed and all relevant evidence considered in rendering this decision.

The applicant's spouse has submitted statements detailing the hardships impacting her due to the fact that her daughter has chronic seizures and her son is learning disabled. She asserts that she cannot relocate to the Bahamas because her children need the medical care provided to them in the United States.

The record includes extensive documentation covering the conditions of the applicant's son and daughter. Documentation contained in the record indicates that both children are enrolled in special educational programs and attend speech and therapy sessions. Medical records fully document the applicant's daughter's condition from the time it was discovered at the age of seven months. These records are sufficient to establish that the applicant's daughter is facing a severe, life-long medical condition, and that both children have special needs with regard to their educational and mental development. The relationships between the applicant's daughter and her doctors, as well as the relationships between both of his children and their developmental resources, are critical to their health and well being. Severing these ties would result in an extreme disruption in their medical care and educational development. Based on these medically necessitated relationships, their length and history, it would create an extreme hardship for the applicant's spouse and two children to sever their medical and educational ties to the community in order to relocate to the Bahamas.

With regard to hardship upon separation, the applicant's spouse explains the applicant's inadmissibility has resulted in extreme emotional hardship on both her and her children because she is now the sole financial, physical and emotional support for her special needs children. She specifically states that her son needs extensive educational support and attends speech therapy four times a week. She explains that her daughter has a seizure disorder, delayed language development and must take medications twice a day, as well as attend speech and occupational therapy three times a week. The applicant's spouse further explains that their daughter requires follow up visits with pediatricians and neurologists on a regular basis, and that she has been declared disabled by the Social Security Administration. Documentation submitted into the record support her assertions, including medical records for her daughter, and educational and developmental records for both her daughter and son.

The applicant's spouse further explains that the demands on her time for her children's medical and educational needs preclude her from working full time, and that her children are facing long-term medical challenges requiring both of her parents to help in meeting them.

Tax documentation filed in conjunction with the applicant's adjustment of status application indicates that the applicant's spouse's income for 2006 was \$10,883. This amount falls below the federal poverty guidelines for a family of three. Based on these findings the record indicates that the applicant's spouse will experience significant financial hardship, which will be factored into an overall determination of extreme hardship.

When considered in the aggregate, the hardship factors in this case - the medical and educational needs of their children, and the financial impact on the applicant's spouse, as well as the normal impacts associated with the removal of a family member - rise above the common impacts associated with separation from an inadmissible family member. Therefore, the record establishes impacts which would result in extreme hardship upon relocation with the applicant or upon separation from the applicant.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. See *Matter of T-S-Y*, 7 I&N Dec. 582 (BIA 1957).

In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

See *Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Id.* at 300. (Citations omitted).

Counsel contends that the applicant has been rehabilitated, and notes that he has not had any criminal convictions since 1997. The record also contains a number of statements from friends and family members attesting to the applicant's moral character.

The AAO finds that the unfavorable factors in this case include the applicant's criminal convictions. The favorable factors in this case include the presence of the applicant's spouse and children in the United States and the length of time since the applicant has had any criminal convictions. In addition, the medical condition of the applicant's daughter and the developmental needs of both of his children, as well as the financial impact of his absence, all weigh heavily in favor of granting his waiver. Although the applicant's convictions are serious, the favorable factors in this case marginally outweigh the negative factors; therefore favorable discretion will be exercised.

Based upon the record before the AAO, the applicant in this case has established extreme hardship to a qualifying family member for purposes of relief under sections 212(h) of the Act, and warrants a favorable exercise of discretion based on the individual factors in this case.

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. Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.