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U.S. Department of Homeland Security
U.S. Immigration and Citizenship Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
and Immigration
Services

H₂



FILE:



Office: PHILADELPHIA, PA

Date: **OCT 25 2010**

IN RE:



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

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
for

Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of [REDACTED]. 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, and under section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), for having entered the United States by presenting a fraudulent passport. The director indicated that the applicant sought two separate waivers 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(i). 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) on May 13, 2008.

On appeal, counsel contends that the Field Office Director erred in both his factual findings and his application of the law.

Section 212(a)(6)(C) Misrepresentation, states in pertinent part:

- (i) In general. 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.

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 on [REDACTED], the applicant pled guilty to and was convicted of Copying Recording Devices, a felony, 18 Pennsylvania Consolidated Statutes Annotated § 4116, and Trademark Counterfeiting, Pa. Cons. Stat. Ann. § 4119, a misdemeanor, in a consolidated proceeding for two separate arrests involving the sale of counterfeit compact discs.

The AAO notes that title 18, § 4119 of Pa. Cons. Stat. Ann. has been held unconstitutional by the Supreme Court of Pennsylvania as constitutionally overbroad. *Com. v. Omar*, 981 A.2d 179 (Pa. 2009). Although the AAO cannot adjudicate the constitutionality of a statute in an administrative proceeding, if a statute has been struck down by a valid state or federal court as constitutionally overbroad then the conviction should not stand for immigration purposes. *See generally Matter of Alfonso-Bermudez*, 12 I&N Dec. 225 (BIA 1967). As such, the applicant has one conviction involving moral turpitude, Copying: Recording Devices, under 18 Pa. Cons. Stat. Ann. § 4116, related to copying music CDs.

18 Pennsylvania Consolidated Statutes Annotated § 4116 states, in relevant part:

(b) Unauthorized transfer of sounds on recording devices.--It shall be unlawful for any person to:

(1) knowingly transfer or cause to be transferred, directly or indirectly by any means, any sounds recorded on a phonograph record, disc, wire, tape, film or other article on which sounds are recorded, with the intent to sell or cause to be sold, or to be used for profit through public performance, such article on which sounds are so transferred, without consent of the owner; or

(2) manufacture, distribute or wholesale any article with the knowledge that the sounds are so transferred, without consent of the owner.

* * *

(d) Manufacture, sale or rental of illegal recording or recorded devices.-- It shall be unlawful for any person to knowingly manufacture, transport, sell, resell, rent, advertise or offer for sale, resale or rental or cause the manufacture, sale, resale or rental or possess for such purpose or purposes any recorded device in violation of this section.

In *Matter of Kochlani*, 24 I&N Dec. 128, 131 (BIA 2007), the BIA determined that trafficking in counterfeit goods is a crime involving moral turpitude because it is “tantamount to commercial forgery” and involves the theft of someone else’s property in the form of a trademark. In this case the statute in question is designed to prohibit the sale of counterfeit movies and music in various media formats such as CDs, DVDs, VHS tapes or other formats. In order to be convicted 18 Pa. Cons. Stat. Ann. § 4116 an individual must manufacture, distribute or otherwise transfer recorded

sounds without the consent of the owner, a violation of their copyrights. As with the case in *Matter of Kochlani, supra*, fraud is inherent in the act of manufacturing or distributing recorded devices because it defrauds purchasers, who pay for brand-name quality and take home only a fake, and copyright owners are deprived of profits derived from the sale of products bearing their products. *Id.*

In deciding *Kochlani* the BIA noted:

As Congress made clear . . . ‘Trademark counterfeiting . . . defrauds purchasers, who pay for brand-name quality and take home only a fake,’ but it also exploits mark holders, since ‘counterfeiters [can earn] enormous profits . . . by capitalizing on the reputations, development costs, and advertising efforts of honest manufacturers at little expense to themselves.’

24 I&N Dec. at 131 (citation omitted).

The Ninth Circuit Court of Appeals in *Tall v. Mukasey*, 517 F.3d 1115 (9th Cir. 2008), determined that Cal. Penal Code § 350, counterfeit of registered mark, is categorically a crime involving moral turpitude. The Ninth Circuit held:

Under the categorical approach, § 350(a) is a crime involving moral turpitude because it is an inherently fraudulent crime. Either an innocent purchaser is tricked into buying a fake item; or even if the purchaser knows the item is counterfeit, the owner of the mark has been robbed of its value. The crime is really a species of theft.

517 F.3d at 1119.

The AAO finds these cases persuasive and their precedents applicable. The AAO is not aware of any state case which has applied the statute to conduct that does not involve moral turpitude. The AAO finds that 18 Pa. Cons. Stat. Ann. § 4116, which penalizes the manufacturing, distributing, selling, or offering for sale copyrighted materials without the consent of the owner, is an inherently fraudulent crime involving theft of copyrighted materials. The AAO can therefore conclude that a conviction under 18 Pa. Cons. Stat. Ann. § 4116 is categorically a crime involving moral turpitude. The applicant’s conviction was for a felony, third degree, punishable by up to seven years imprisonment, and thus does not qualify for the petty offense exception at § 212(a)(2)(A)(i)(II). 18 Pa. Cons. Stat. Ann. §106(b)(4). The applicant does not contest this finding.

The record indicates that the applicant presented a fraudulent passport when he entered the United States in April 2000. As such, the applicant is also inadmissible under section 212(a)(6)(C) of the Act. Counsel asserts the applicant was a juvenile on this date, however, there is no enumerated exception to this ground of inadmissibility based on age, and as such counsel’s assertions have no merit.

The waiver application will be evaluated under section 212(i) of the Act. A waiver granted under this provision would also serve to waive the applicant’s inadmissibility under section 212(a)(2)(A)(i)(I) of the Act as well.

Section 212(i) of the Act provides, in pertinent part:

- (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 waiver of inadmissibility under section 212(i) 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 or parent of the applicant. Hardship to the applicant or his children can be considered only insofar as it results in hardship to a qualifying relative. The applicant's spouse is the only qualifying relative 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 ██████ 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 proceeding contains, but is not limited to, the following evidence: briefs and statements from counsel; country conditions materials on ██████; a letter from the applicant’s spouse; court records pertaining to the applicant’s convictions; statements and attestations of support from the applicant’s children; a school record pertaining to the applicant’s stepson’s need for special education; a biopsychosocial assessment of the applicant’s stepson; a statement from ██████ business registration certificate for the applicant’s spouse’s in-home daycare; financial records such as insurance policy statements and utilities invoices; photographs of the applicant, his spouse and their children; and copies of birth certificates.

The record also contains financial documentation filed in conjunction with a Form I-864.

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

With regard to hardship upon relocation, counsel for the applicant has asserted that the applicant’s spouse and children would experience extreme hardship if they were to relocate to ██████ due to the shock of acculturation, and that they have no family ties in ██████ and deep community ties in the United States. Counsel asserts that the applicant’s stepson, ██████ ██████ ██████, and that severing his relationships with the professionals who support him would result in extreme hardship. Although children are not qualifying relatives in 212(i) waiver

proceedings, hardship to them may be considered as it results in a direct hardship impact on a qualifying relative.

With regard to hardship upon separation, if the applicant's children and spouse remained in the United States, counsel asserts they would experience extreme hardship. Specifically, counsel asserts that the applicant's [REDACTED] has to participate in [REDACTED] to assist him, that he has been [REDACTED] and that removal of the applicant would result in a severe hardship on the child.

The record includes educational records and [REDACTED] of the applicant's [REDACTED]. The AAO notes that this evidence is sufficient to establish that the [REDACTED] [REDACTED] a significant medical condition.

With regard to financial hardship, the record contains financial documentation from a previous filing which indicates that the applicant's spouse only earned [REDACTED] in 2003. The applicant's spouse states in her affidavit dated April 3, 2008 that her husband is involved in taking care of their five young children, and that without his support the business she owns and operates will fail. While there is no evidence of the current level of income, the applicant's spouse has provided a breakdown of their financial obligations, indicating they have roughly [REDACTED] in monthly expenses.

However, upon further examination of the record the AAO notes that a protection order has been entered against the applicant by his spouse. The protection order, entered in [REDACTED] for the period January 3, 2008, through January 2, 2011, restrains the applicant from making any communication with his spouse, including personal, written or telephone contact. The protection order indicates that the applicant only has visitation and custody rights over his [REDACTED] [REDACTED] but he is prohibited from contacting his [REDACTED]. This protection order calls into doubt the applicant's assertions of hardship due to separation based on his inadmissibility, and represents a clear breakdown in their marital relationship. In light of this, it cannot be determined that the applicant's spouse would experience any additional impact if the applicant were removed and she were to remain in the United States. Moreover, since they are now separated, the applicant's spouse will not relocate with him to [REDACTED] further contradicting assertions of hardship based on relocation.

The protection order was entered on January 3, 2008. Counsel submitted his brief on June 12, 2008. Counsel and the applicant failed to address the protection order or show that it has been withdrawn. The record does not contain an updated statement from the applicant's spouse on appeal to show that she now has a relationship with the applicant. The issuance of the protection order indicates that the applicant engaged in abusive behavior towards his spouse. As such, the protection order undermines any claims of emotional hardship if the applicant is removed. The AAO must consider the reality of the facts in this case, and cannot make a hypothetical determination of hardship to the applicant's spouse if the totality of the evidence in the record demonstrates that she would remain separated from the applicant and not relocate with him to [REDACTED]. The record, as it is currently constituted, fails to overcome this piece of fatal evidence, and as such the applicant has failed to establish extreme hardship to a qualifying relative in the event of separation.

In proceedings for application for waiver of grounds of inadmissibility under section 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.