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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

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FILE: [REDACTED]

Office: TAMPA, FLORIDA

Date:

IN RE: [REDACTED]

APR 18 2011

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i) and 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 \$630. 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,

Michael Shumway

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Tampa, Florida. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for having attempted to procure admission into the United States by fraud or willful misrepresentation on September 21, 1998. The applicant was also found to be 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), as an alien convicted of a crime involving moral turpitude. The applicant is married to a U.S. citizen and has a U.S. citizen child. She seeks a waiver of inadmissibility in order to reside in the United States.

In a decision, dated May 15, 2009, the district director found the applicant inadmissible under sections 212(a)(6)(C)(i) for presenting false documents to an immigration officer and 212(a)(2)(A)(i)(I) of the Act for being convicted of illegally entering the United States. The district director then found that the applicant failed to establish extreme hardship to her qualifying relatives and denied the application accordingly.

In a brief, dated June 5, 2009, counsel states that the applicant's spouse and son would suffer extreme hardship as a result of the applicant's inadmissibility. Counsel states that the applicant's son would face hardships due to the diminished educational opportunities in Mexico and that the applicant's spouse would suffer extreme hardship because of his medical condition.

The record indicates that on September 21, 1998 at the Interstate Highway 35 checkpoint in Laredo, Texas the applicant presented a Mexican passport in the name of [REDACTED] and a photo-altered I-94 card in an attempt to prove lawful entry into the United States. The applicant was then transported to a detention center to await a hearing in the United States District Court, Southern District of Texas.

The record indicates that on September 22, 1998 in United States District Court, Southern District of Texas, the applicant pled guilty to a violation of Title 8, United States Code, Section 1325 for entering the United States illegally on September 21, 1998 by crossing the Rio Grande River near Laredo, Texas. The applicant was sentenced to five years probation.

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).

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.

As stated above, on September 22, 1998 in United States District Court, Southern District of Texas, the applicant pled guilty to a violation of Title 8, United States Code, Section 1325 for entering the United States illegally on September 21, 1998 by crossing the Rio Grande River near Laredo, Texas. The applicant was sentenced to five years probation.

The AAO finds that the applicant’s conviction is not for a crime involving moral turpitude and thus, she is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act. In general, criminal convictions for immigration violations not involving fraud have been found to not be crimes involving moral turpitude. For example, the Fifth Circuit Court of Appeals found that a conviction under 8 U.S.C. § 1326 for re-entering the United States after deportation was not a crime involving moral turpitude. *Rodriguez v. Campbell*, 8 F.2d 983 (5th Cir. 1925). The AAO notes that the applicant’s actions on September 21, 1998 involved two immigration violations, an illegal entry and presenting fraudulent documents in an attempt to gain an immigration benefit, but the applicant only pled guilty to entering the United States illegally as evidenced by the complaint in the record. Therefore, the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

However, the applicant is inadmissible under section 212(a)(6)(C) of the Act for presenting fraudulent documents at the Interstate Highway 35 checkpoint in an attempt to gain the immigration benefit of continued admissibility in the United States.

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

- (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Section 212(i) of the Act provides 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 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 her 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. [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 of hardship includes: two briefs from counsel, articles concerning education in Mexico, a letter from the applicant’s son’s teacher, the school enrollment record for the applicant’s son, a medical note from the applicant’s spouse’s doctor, information concerning health care in Mexico, a letter from the applicant’s church, financial documentation, a letter from the applicant’s spouse’s employer, and medical documentation.

In his brief, dated June 5, 2009, counsel states that the applicant’s son, who is currently in third grade, would suffer extreme hardship if his mother is removed from the United States because he would then be forced to move to Mexico. Counsel states that the Mexican education system ranks amongst the world’s poorest, with Mexican boys suffering more than girls. He states that the applicant’s son would face extreme hardship due to the diminished educational success in Mexico. Counsel submits various articles to support his statements about education in Mexico. He also cites a *USA Today* article, dated May 1, 2008, which states that young boys and girls in Mexico are performing manual labor prior to or after school to help augment their family’s financial situations.

In his brief, counsel also states that the applicant’s spouse will suffer extreme hardship as a result of the applicant’s inadmissibility because he suffers from diabetes. Counsel states that country conditions in Mexico pertaining to health care are not suitable to best maintain and manage the applicant’s spouse’s condition as it is being treated in the United States. Counsel has submitted notes from the applicant’s spouse’s doctors in support of these statements. He also cites to numerous country reports which state that Mexico does not spend much on health care. Other reports from counsel state that diabetes has become Mexico’s main cause of limb loss and blindness and that under 20% of people with diabetes in Mexico have their blood glucose levels under control. Counsel also raises concerns about the death toll in Mexico resulting from the H1N1 virus in 2009.

The AAO notes, as stated above, hardship to the applicant's son can only be considered in section 212(i) waiver proceedings when it has been established that hardship to the applicant's son would cause hardship to the applicant's spouse. The current record has not established this connection.

To establish hardship to the applicant's spouse counsel has submitted supporting documentation. A medical note from the applicant's spouse's doctor, dated September 23, 2008, states that the applicant's spouse is his patient and has been diagnosed with Type II Diabetes and Hypertension. In a brief, dated September 26, 2008, counsel states that the applicant cooks all her spouse's meals to help maintain his blood sugar levels and also helps her spouse to care for his brother, who is dying of kidney failure.

Counsel submits numerous articles stating that Mexico's per capita health care spending is low and under 20% of the people with diabetes in Mexico have their blood glucose levels under control. An article from *Medical News Today*, dated November 15, 2007, states that there is an ever rising cost in the treatment and care of people with diabetes and that hospital services are overwhelmed in Mexico. He states that diabetes has become a serious potential threat for health services in Mexico. The AAO notes that the articles submitted do reflect that Mexico has a serious problem with effectively treating its population for diabetes, but they do not show that someone in the applicant's spouse's position would not be able to access health care for treatment of his diabetes and hypertension.

The AAO also notes that the record contains a letter from the applicant's spouse's employer, [REDACTED] a company he co-owns. The letter, dated August 20, 2008, states that the applicant's spouse has been the [REDACTED] since 1999 and that he earns \$88,400 per year. In his brief, dated September 26, 2008, counsel states that relocating to Mexico would cause the applicant's spouse a great amount of emotional distress because he would not be able to earn as much money in Mexico as he does in the United States. The AAO recognizes that relocating would be a hardship for the applicant's spouse, but the hardship currently presented does not rise to the level of extreme hardship. The record indicates that the applicant and her spouse are from Matehuala, the fourth-largest city in the Mexican state of San Luis Potosí and that the applicant's spouse is a skilled laborer with experience in masonry and in operating his own business. The record does not contain documentation to show that an individual relocating to Matehuala, Mexico, with the applicant's spouse's background would not be able to access health care for his diabetes and would not be able to find employment paying a living wage. Furthermore, except for the assertions from counsel regarding the applicant cooking her spouse's meals, the record does not indicate how the applicant's spouse would experience extreme hardship as a result of separation. 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Therefore, the AAO cannot find that the applicant's spouse would suffer extreme hardship as a result of the applicant's inadmissibility.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's spouse caused by the applicant's inadmissibility to the United States. 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 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. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.