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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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Date: DEC 07 2011

[Redacted]

FILE: [Redacted]

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) and under Section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i).

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, with a fee of \$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,

for Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Field Office Director, Newark, New Jersey. 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 England who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of crimes involving moral turpitude. The applicant was also found to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having attempted to procure entry into the United States by fraud or willful misrepresentation. The record indicates that the applicant is married to a United States citizen and has one U.S. citizen child. The applicant seeks a waiver of inadmissibility to reside in the United States with his family.

In a decision dated May 5, 2009, the field office director found that the applicant's criminal record included eight convictions over a period of almost 25 years, which he failed to disclose on his entry into the United States on June 4, 2004 under the visa waiver program and on his Form I-485 filed on December 29, 2004. The field office director also found that the applicant failed to establish extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly.

In a letter on appeal, dated June 30, 2009, counsel states that he is enclosing a psychosocial evaluation for the applicant's spouse and child. He also states that personal statements made by the applicant's family show genuine extreme hardship and that the applicant's troubled past has finally been translated into something positive in the form of his loving family. He further asserts that the applicant's spouse suffers from medical problems that require monitoring and evaluation. Counsel states that the applicant's family intends to stay together, even if forced to relocate to another country. Finally, counsel asserts that the applicant's first offense occurred when he was 17 years old and should not be considered a conviction and the applicant's other convictions were either probationary, involved a fine only, or minimal imprisonment.

The record indicates that on June 4, 2004 the applicant entered the United States under the Visa Waiver Program and, despite his criminal record, on the required Nonimmigrant Visa Waiver/Departure Form (Form I-94) the applicant answered "no" to the question, "have you ever been arrested or convicted for an offense or crime involving moral turpitude or a violation related to a controlled substance; or been arrested or convicted for two or more offenses for which the aggregate sentence to confinement was five years."

In addition, the record also indicates that on December 29, 2004 the applicant filed an I-485 application in which he answered "no" to the question, "have you ever been arrested, cited, charged, indicted, fined, or imprisoned for breaking or violating any law or ordinance, excluding traffic violations." However, the record does indicate that on December 7, 2005 during his adjustment interview, he disclosed his criminal convictions when asked about his arrest record.

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.

The AAO does not find that the applicant's initial failure to disclose his criminal record on his I-485 was a willful misrepresentation because there was a timely retraction. In *Matter of R-R-*, 3 I&N Dec. 823 (BIA 1949) and *Matter of M-*, 9 I&N Dec. 118 (BIA 1960), the BIA held that a timely retraction is voluntary and occurs before an applicant is confronted with the potential falsity of his statements or documentation. In this case the applicant voluntarily and timely offered the correct information regarding his arrest record when asked about any criminal record during his adjustment interview. As in the above mentioned cases, the applicant retracted the incorrect answer to the question on his Form I-485 before ever being confronted by the interviewing officer as to the incorrect or false nature of his original answer.

However, the AAO does find that the applicant's failure to disclose his criminal convictions on his Form I-94W were willful misrepresentations under 212(a)(6)(C)(i) of the Act. The AAO notes that the applicant does not dispute that his failure to disclose his criminal record was a willful misrepresentation.

In regards to the applicant's inadmissibility under section 212(a)(2)(A) of the Act, 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 determining whether a crime involves moral turpitude, the Third Circuit Court of Appeals, per *Jean-Louis v. Holder*, 582 F.3d 462 (3<sup>rd</sup> Cir. 2009), makes a categorical inquiry, which consists of looking “to the elements of the statutory offense . . . to ascertain that least culpable conduct hypothetically necessary to sustain a conviction under the statute.” *Id.* at 465-66. The “inquiry concludes when we determine whether the least culpable conduct sufficient to sustain conviction under the statute “fits” within the requirements of a CIMT.” *Id.* at 470.

However, if the “statute of conviction contains disjunctive elements, some of which are sufficient for conviction of [a CIMT] and other of which are not . . . [an adjudicator] examin[es] the record of conviction for the narrow purpose of determining the specific subpart under which the defendant was convicted.” *Id.* at 466. This is true “even where clear sectional divisions do not delineate the statutory variations.” *Id.* In so doing, an adjudicator may only look at the formal record of conviction. *Id.*

As stated above, the applicant has a criminal record of eight convictions starting in 1976 and ending in 2001. All of the applicant’s crimes occurred in England. The record indicates that on October 14, 1976, the applicant was convicted of burglary and theft of a non-dwelling and sentenced to two years probation. On June 1, 1978, the applicant was convicted of burglary and theft of a dwelling and sentenced to two years probation. On November 10, 1978, the applicant was convicted on two counts, one for burglary and theft of a dwelling and the other for theft. No sentence information was given for this conviction. On April 6, 1983, the applicant was convicted of theft of mail in transmission and sentenced to nine months in prison. On July 31, 1984, the applicant was convicted of burglary and theft of a non-dwelling. No sentence information is given for this conviction. On March 30, 1990, the applicant was convicted of grievous bodily harm and sentenced to one year probation. On May 26, 1995, the applicant was convicted of assault occasioning actual bodily harm and was sentenced to three months in prison. Finally, on March 7, 2001, the applicant was convicted of shoplifting. No sentence information was given for this conviction.

The AAO finds that the applicant, born [REDACTED] was only 17 years old at the time of his 1976 conviction. In its decision, *In re Miguel Devison-Charles*, 22 I&N Dec. 1362 (BIA 2000), the Board of Immigration Appeals (Board) stated, “[w]e have consistently held that juvenile delinquency proceedings are not criminal proceedings, that acts of juvenile delinquency are not crimes, and that findings of juvenile delinquency are not convictions for immigration purposes.” *Devison-Charles* at 1365; see also *Matter of De La Nues*, 18 I&N Dec. 140 (BIA 1981) and *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981). Importantly, the Board added, “[w]e have also held that the standards established by Congress, as embodied in the FJDA (Federal Juvenile Delinquency Act), govern whether an offense is to be considered an act of delinquency or a crime.” *Devison-Charles* at 1365.

The FJDA defines a ‘juvenile’ as ‘a person who has not attained his eighteenth birthday, or for the purpose of proceedings and disposition under this chapter for an alleged act of juvenile delinquency, a person who has not attained his twenty-first birthday,’ and ‘juvenile delinquency’ as ‘the violation of a law of the United States committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult.

*Ramirez-Rivero* at 137 (citing 18 U.S.C. § 5031). Thus, it appears that the applicant’s 1976 conviction is for an act of juvenile delinquency and not a crime for immigration purposes.

The Board has held that burglary with intent to commit theft is a crime involving moral turpitude. *See Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982). In *Matter of Moore*, the Board noted that since moral turpitude inheres in the intent, the crime of breaking and entering with intent to commit larceny involves moral turpitude. 13 I&N Dec. 711, 712 (BIA 1971). However, the Board has also determined that to constitute a crime involving moral turpitude, a theft offense must require the intent to permanently take another person's property. *See Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973) ("Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended."). Nevertheless, the applicant has not asserted that his burglary and theft offenses lacked intent to permanently take another person's property. In *Matter of Jurado*, 24 I&N Dec. 29, 33-34 (BIA 2006), the Board found that violation of a Pennsylvania retail theft statute involved moral turpitude because the nature of retail theft is such that it is reasonable to assume such an offense would be committed with the intention of retaining merchandise permanently. Thus, we will not disturb the finding that the applicant's convictions for burglary, theft and shoplifting are crimes involving moral turpitude.

The AAO notes that assault may or may not involve moral turpitude. *See Matter of Danesh*, 19 I&N Dec. 669, 670 (BIA 1988). The Board has stated that offenses characterized as "simple assaults" are generally not considered to be crimes involving moral turpitude. *See Matter of Perez-Contreras, supra; Matter of Short*, 20 I&N Dec. 136, 139 (BIA 1989). In addition, the Board has recognized that not all crimes involving the injurious touching of another person reflect moral depravity on the part of the offender. *See Matter of Sanudo*, 23 I&N Dec. 968, 971 (BIA 2006).

More recently, in *Matter of Solon*, 24 I&N Dec. 239, 242 (BIA 2007), the BIA stated:

[I]n the context of assault crimes, a finding of moral turpitude involves an assessment of both the state of mind and the level of harm required to complete the offense. Thus, intentional conduct resulting in a meaningful level of harm, which must be more than mere offensive touching, may be considered morally turpitudinous. However, as the level of conscious behavior decreases, i.e., from intentional to reckless conduct, more serious resulting harm is required in order to find that the crime involves moral turpitude. Moreover, where no conscious behavior is required, there can be no finding of moral turpitude, regardless of the resulting harm.

In accordance with *Matter of Solon*, we find that for the applicant's assault crimes to constitute crimes involving moral turpitude, they must have resulted in serious bodily harm. The Court of Criminal Appeal in the United Kingdom has found that bodily harm includes any hurt or injury calculated to interfere with the health or comfort of the victim and that such hurt or injury need not be permanent, but must, no doubt, be more than merely transient and trifling. *Rex v. Donovan* [1934] 2 KB 498 at 509, CCA. In addition, courts in the United Kingdom have consistently found that grievous bodily harm means serious bodily harm. *DPP v Smith* [1961] AC 290, HL; *R v. Cunningham* [1982] AC 566, HL; *R v. Brown (A.)* [1994] 1 AC 212, HL; *R v. Brown and*

*Stratton* [1998] Crim LR 485, CA; *R v Saunders* [1985] Crim LR 230, [1985] LS Gaz R 1005. The applicant has not disputed that his convictions for assault, occasioning actual bodily harm, and grievous bodily harm constitute assaults resulting in serious bodily injury and are crimes involving moral turpitude. Therefore, we will not disturb the finding that these convictions render the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of crimes involving moral turpitude.

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

(h) Waiver of subsection (a)(2)(A)(i)(I), (II), (B), (D), and (E).—The Attorney General [now the Secretary of Homeland Security, “Secretary”] may, in [her] discretion, waive the application of subparagraphs (A)(i)(I)...of subsection (a)(2) if—

(1) (A) in the case of any immigrant it is established to the satisfaction of the [Secretary] that—

(i)...the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien’s application for a visa, admission, or adjustment of status,

(ii)the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(iii)the alien has been rehabilitated; or

(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 established to the satisfaction of the [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...

(2) the [Secretary], in [her] discretion, and pursuant to such terms, conditions and procedures as [she] may by regulations prescribe, has consented to the alien’s applying or reapplying for a visa, for admission to the United States, or adjustment of status.

The applicant is seeking a section 212(h) waiver of the bar to admission resulting from a violation of section 212(a)(2)(A)(i)(I) of the Act. A waiver under section 212(h) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or

lawfully resident spouse, parent or child of the applicant. Hardship the applicant experiences upon removal is not considered in section 212(h) waiver proceedings; the only relevant hardship in the present case is hardship suffered by the applicant's United States citizen spouse and child.

Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996). In most discretionary matters, the alien bears the burden of proving eligibility simply by showing 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).

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*, 22 I&N Dec. 560, 565-66 (BIA 1999), the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 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).

The record of hardship includes: a psychosocial evaluation; statements from the applicant, the applicant’s mother, and the applicant’s spouse; a 2008 U.S. Individual Income Tax Return; and a news article regarding conditions in the United Kingdom.

In a psychological evaluation, dated June 14, 2009, [REDACTED] states that the applicant provides essential and irreplaceable physical, emotional, and financial support for his spouse and son. He states that the applicant’s spouse’s parents are U.S. citizens and also reside in [REDACTED]. [REDACTED] states that the applicant’s spouse’s parents are seriously ill and disabled and will soon require daily care, which the applicant’s spouse feels it is her moral duty to provide. [REDACTED] states further that the applicant’s spouse is one of four remaining sisters after the death of one of her sister’s from cancer a few years ago. He states that they all live a short car ride from their parent’s home and that family cohesion is a main value in their lives. [REDACTED] asserts that as a result of the applicant’s immigration status, his spouse has been depressed and anxious and that her mental health issues would only worsen in the absence of the applicant.

In regards to the applicant’s son, [REDACTED] states that the applicant’s son would be devastated in the applicant’s absence and that the applicant’s absence would severely impair his son’s education and socialization. [REDACTED] also adds that the applicant’s spouse and child would be homeless without the applicant and that their health insurance, which is obtained through the applicant’s employer, would be lost. Finally, [REDACTED] states that in England the applicant’s spouse and child would face restrictions on their actions, loss of family, friends, and community, and possible poverty.

The AAO notes that the family statements submitted support the statements made by [REDACTED] and the 2008 tax documentation supports the statements made in regards to the applicant being the sole financial support for his family. The news articles submitted from the British Broadcasting Company and dated June 17, 2009, state that the [REDACTED] of the United Kingdom has the highest unemployment rate in the United Kingdom with 9.3% unemployment and that it is hard for people with good qualifications to find employment.

The AAO finds that the hardships related to separation and relocation presented in this case do not rise to the level of extreme hardship. The AAO acknowledges that the applicant's spouse would experience financial and emotional hardship as a result of separation from the applicant and as a result of relocation and separation from her family in the United States, but this hardship does not rise to the level of extreme. The record does not indicate that the applicant's spouse could not find employment and/or health insurance to support herself and her son in the absence of the applicant. Furthermore, the record does not establish that someone with the applicant's skills could not find employment in the United Kingdom or that upon her relocation the applicant's spouse could not have her sisters help care for her parents.

Therefore, based upon the record before the AAO, the applicant in this case fails to establish extreme hardship to a qualifying family member for purposes of relief under sections 212(h) 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. The AAO does note that even had the applicant established extreme hardship to a qualifying relative, his convictions for assault, occasioning actual bodily harm and grievous bodily harm indicate that he would be subject to the heightened discretion standard of 8 C.F.R. § 212.7(d), as these are violent and dangerous crimes.<sup>1</sup>

The regulation at 8 C.F.R. § 212.7(d) provides:

The Attorney General [Secretary, Department of Homeland Security], in general, will not favorably exercise discretion under section 212(h)(2) of the Act (8 U.S.C. 1182(h)(2)) to consent to an application or reapplication for a visa, or admission to the United States, or adjustment of status, with respect to immigrant aliens who are inadmissible under section 212(a)(2) of the Act in cases involving violent or dangerous crimes, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of the application for adjustment of status or an immigrant visa or admission as an immigrant would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the alien's underlying criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act.

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<sup>1</sup> We note that the an application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the field office or service center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a de novo basis)

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. The applicant has not met that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.