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

tlz

[REDACTED]

FILE:

[REDACTED]

Office: LOS ANGELES (SAN BERNARDINO)

Date:

IN RE:

Applicant:

[REDACTED]

FEB 17 2011

APPLICATION:

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

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,

Michael Shumway

for

Perry Rhew

Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Nigeria who was found to be inadmissible under 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 been convicted of a crime involving a controlled substance; and under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of committing a crime 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 (Form I-601) accordingly.

On appeal, counsel asserts that the director failed to consider all of the submitted evidence and the totality of the circumstances in the hardship determination. Counsel maintains that the applicant's children would experience extreme hardship if they remained in the United States without their father. Counsel avers that the applicant is the sole provider for his family members, and that his children have no other family member in the United States other than their father.

The AAO will first address the grounds of inadmissibility.

The applicant was found inadmissible for having been convicted of a crime involving a controlled substance. The record reflects that on July 9, 1982, in Rhode Island, the applicant was convicted of possession of marijuana and was ordered to pay costs.

Section 212(a) of the Act states in pertinent part:

(2) Criminal and related grounds. —

(A) Conviction of certain crimes. —

- (i) In general. — Except as provided in clause (ii), any 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, or
 - (II) a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

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

The Attorney General may, in his discretion, waive the application of . . . subparagraph (A)(i)(II) . . . insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if –

- (1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [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 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 . . .

The marijuana conviction renders the applicant inadmissible under section 212(a)(2)(A)(i)(II) of the Act, U.S.C. § 1182(a)(2)(A)(i)(II). A section 212(h) waiver applies to controlled substance cases that involve a single offense of possession of 30 grams or less of marijuana. The court record from the State of Rhode Island Supreme Court Judicial Records Center (JRC) dated July 31, 2006, conveys that on July 9, 1982, in Rhode Island, the applicant was convicted of possession of marijuana and was ordered to pay costs of \$13.50, further, it has the notation of: "CERTIFICATE OF DESTRUCTION FILED . . . 8-5-83." This record fails to identify the amount of marijuana involved in the applicant's conviction. Thus, the record is inconclusive as to whether the applicant's conviction involved simple possession of 30 grams or less of marijuana.

To meet his burden, the applicant must, at a minimum, submit the available documents that comprise the record of conviction and show that these fail to establish that his conviction was based on possession of more than 30 grams of marijuana. To the extent such documents are unavailable, this fact must be established pursuant to the requirements in 8 C.F.R. § 103.2(b)(2). The AAO notes that the submitted court record indicates that the applicant's record of conviction for the possession of marijuana conviction was destroyed. Thus, the applicant has established, in accordance with the requirements in 8 C.F.R. § 103.2(b)(2), that the documents comprising his record of conviction are unavailable. The submitted document does not demonstrate that the applicant's controlled substance offense was based on possession of more than 30 grams of marijuana.

We take notice that in *Esquivel-Garcia v. Holder*, 593 F.3d 1025, 1029 (9th Cir. 2010), the Ninth Circuit analyzed whether a controlled substance conviction rendered the alien ineligible for cancellation of removal where the record of conviction was inconclusive as to the nature of the controlled substance. The Ninth Circuit cited *Sandoval-Lua v. Gonzales*, 499 F.3d 1121, 1129-30

(9th Cir.2007), wherein it held that "an alien who seeks to prove eligibility for cancellation of removal can meet his or her initial burden by pointing to an inconclusive record of conviction." The Ninth Circuit determined that [REDACTED] demonstrated that his "record of conviction is inconclusive because it does not disclose the nature of the controlled substance, and the petitioner's testimony that he thought the substance was heroin does not alter the record of conviction."

The submitted document from the JRC conveys that the applicant was convicted of possession of marijuana and was ordered to pay costs of \$13.50, and the record has the notation "CERTIFICATE OF DESTRUCTION FILED . . . 8-5-83." That document, however, does not indicate the amount of marijuana possessed by the applicant. Thus, the only available document that comprises the applicant's record of conviction is inconclusive as to whether the applicant's conviction involved simple possession of 30 grams or less of marijuana. In accordance with [REDACTED] because the only available record of conviction is inconclusive regarding the amount of marijuana, the AAO will not conclude, based on the record before it, that the applicant is ineligible for consideration of a waiver under section 212(a)(2)(A)(i)(II) of the Act.

The applicant was also found to be inadmissible under section 212(a)(2)(A)(i)(I) of the Act, which 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.

The Board 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.)

On May 1, 2000, in California, the applicant pled guilty to violation of Cal. Penal Code § 484, petty theft, and was ordered to serve two days in jail.

On October 21, 1988, in Rhode Island, the applicant pled nolo contendere to fraudulent use of credit cards, counts 1 and 2. He was placed on probation for 18 months, concurrent for each count, and was ordered to pay costs.

We note that the applicant was arrested in San Bernadino, California, on February 5, 1993, for burglary, forgery (2 counts), and forgery of credit card. Though the record shows these charges as dismissed on May 27, 2005, we point out that the original disposition of these charges is not shown.

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.” *Silva-Trevino*, 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.

The director found the applicant inadmissible for having been convicted of crimes involving moral turpitude. The applicant has not disputed this determination on appeal.

Cal. Penal Code § 484 provides, in pertinent part:

- (a) Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft. . . .

The Ninth Circuit Court of Appeals in *Castillo-Cruz v. Holder* determined that petty theft under Cal.

Penal Code § 484(a) requires the specific intent to deprive the victim of his or her property permanently, and is therefore a crime categorically involving moral turpitude. 581 F.3d 1154, 1160 (9th Cir. 2009).

General Laws of Rhode Island § 11-49-4, fraudulent use of credit cards, provides:

A person who, with intent to defraud the issuer or a person or organization providing money, goods, services, or anything else of value or any other person, uses, for the purpose of obtaining money, goods, services, or anything else of value, a credit card obtained or retained in violation of this law or a credit card which he or she knows is forged, expired, or revoked, or who obtains money, goods, services, or anything else of value by representing, without the consent of the cardholder, that he or she is the holder of a specified card or by representing that he or she is the holder of a card and the card has not in fact been issued, violates this section . . .

The AAO finds that the applicant's offense of fraudulent use of credit cards involves moral turpitude in view of *Jordan v. DeGeorge*, 341 U.S. 223, 232 (1951), wherein the U.S. Supreme Court stated that "[t]he phrase 'crime involving moral turpitude' has without exception been construed to embrace fraudulent conduct."

Since the applicant's theft and fraudulent use of credit cards offenses involve moral turpitude, rendering him inadmissible under section 212(a)(2)(A)(i)(I) of the Act, we need not review the determination that convictions for burglary, forgery (2 counts), and forgery of credit card charges involve moral turpitude.

A section 212(h) waiver of the bar to admission resulting from violation of sections 212(a)(2)(A)(i)(II) and 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant is not a consideration under the statute and will be considered only to the extent that it results in hardship to a qualifying relative. The qualifying relatives here are the applicant's U.S. citizen daughter and sons. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296 (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 are possible 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 to be taken is difficult, and it 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 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*, 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).

In rendering this decision, the AAO will consider all of the evidence in the record including birth certificates, letters, invoices, and other documentation.

With regard to remaining in the United States without the applicant, the applicant's son, [REDACTED] states in the undated declaration submitted on appeal that he is 23 years old and was raised by his father. He conveys that he and his brother completed their bachelor's degree because of their father's support and guidance. He states that his father is the only immediate family member that he can resort to for support as his maternal grandparents are deceased and his paternal grandfather was murdered. The applicant's son indicates that he postponed completion of his master's program due to a knee surgery, and indicates that he will not be able to complete the program without his father's financial support. Further, he states that if he accompanies his father to Nigeria his earning potential in his field, sport management with a focus in instructional leadership, will greatly diminish as the U.S. Department of State conveys that employment is scarce in Nigeria. He states that he has no cultural ties to Nigeria and would be personally, physically, culturally, and financially lost in Nigeria. The record contains a copy of the bachelor's degree in sociology awarded to [REDACTED] who is the applicant's 28-year-old son, and the letter by the dean of admissions at the [REDACTED] dated August 9, 2007, conveying that [REDACTED] is to begin graduate studies there. The student loan document dated February 8, 2005, shows \$16,568 in outstanding student loans and it reflects that the applicant is the borrower for [REDACTED]. We note that the applicant's U.S. citizen daughter is now 19 years old, and [REDACTED] is 25 years old.

Family separation 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 type of familial relationship considered. For example, in *Matter of Shaughnessy*, the Board considered the scenario of parents being separated from their soon-to-be adult son, finding that this separation would not result in extreme hardship to the parents. *Id.* at 811-12; *see also U.S. v. Arrieta*, 224 F.3d 1076, 1082 (9th Cir. 2000) ("Mr. Arrieta was not a spouse, but a son and brother. It was evident from the record that the effect of the deportation order would be separation rather than relocation."). In *Matter of Cervantes-Gonzalez*, the Board considered the scenario of the respondent's spouse accompanying him to Mexico, finding that she would not experience extreme hardship from losing "physical proximity to her family" in the United States. 22 I&N Dec. at 566-67.

The decision in *Cervantes-Gonzalez* reflects the norm that spouses reside with one another and otherwise 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 familial relationship involved, the hardship resulting from family separation is 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. Indeed, the specific facts of a case may dictate that even the separation of a spouse and children from an applicant does not constitute extreme hardship. In *Matter of Ngai*, for instance, the Board did not find extreme hardship because the claims of hardship conflicted with evidence in the record and because the applicant and his spouse had been voluntarily separated from one another for 28 years. 19 I&N Dec. at 247. 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 asserted hardship factors in the instant case are the emotional and financial hardship as a result of separation from the applicant. The applicant’s 25-year-old son states that he will be financially dependent upon his father while attending a master’s degree program. While we observe that the applicant submitted evidence of acceptance to a master’s degree program and of his father as the borrower of his undergraduate student loans of \$16,568, the applicant’s son has not provided evidence on appeal establishing that he is presently attending [REDACTED] as a graduate student, and furthermore, would be unable to support himself during his studies. We take notice that the record shows that the applicant’s oldest son is employed. Though we recognize that the applicant’s U.S. citizen daughter and sons will experience emotional hardship as a result of separation from their father, we find that in view of their ages, 19, 25, and 28 years old, their emotional hardship is not the same as that of minor children who are emotionally and financially dependent on a parent. When the stated hardship factors are combined and considered collectively, we find they fail to demonstrate the hardship that the applicant’s children will experience as a result of separation is extreme.

With regard to the asserted hardship factors of joining the applicant to live in Nigeria, the applicant’s youngest son states that he has no cultural or social ties to Nigeria, that he will have difficulties obtaining employment in his field (sport management with a focus in instructional leadership), and that his earning potential will be low. The AAO acknowledges that the applicant’s children do not have cultural or social ties to Nigeria. However, we take notice that the applicant’s sons are college educated and the applicant has been employed as a sales manager at a car dealership. The applicant has not furnished any documentation to demonstrate that his son, who is a college graduate, will have difficulties in obtaining employment in his field and that his earning potential will be significantly lower than in the United States. When the asserted hardship factors are combined and considered in the aggregate, we cannot find they establish extreme hardship to the applicant’s sons and daughter if they join the applicant to live in Nigeria.

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 section 212(h) of the Act.

Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of 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.