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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**

H2

FILE:

Office: HONG KONG

Date:

JAN 24 2011

IN RE:

Applicant:

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

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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 Officer-in-Charge (OIC), Hong Kong, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant, who is a native and citizen of Hong Kong, was 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), for having been convicted of committing a crime involving moral turpitude (man living on earnings of prostitution); and under section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), for seeking admission into the United States by fraud or willful misrepresentation. The OIC indicated that the applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), and section 212(i), 8 U.S.C. § 1182(i). The OIC 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, the applicant asserts that he is innocent of the crime of which he was convicted, and pleaded guilty in order to continue the operation of his guesthouse, which is his livelihood. The applicant describes the incident for which he was arrested, and maintains that he did not intentionally misrepresent his criminal history in the tourist visa application. He asserts that he does not know the English language and that a travel agency completed his application. The applicant avers that his wife's depression has worsened, and that his son, who is an adult, needs his assistance.

The AAO will first address the finding that the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of committing a crime involving moral turpitude.

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.

The Board of Immigration Appeals (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.)

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 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.

The record reflects that in Hong Kong on August 13, 1990 the applicant was convicted of the offense of man living on earnings of prostitution. He was fined \$7,500. We note that the charge states that the applicant escorted an agent posing as a customer to a room. The applicant asked the agent what kind of girl he wanted, and they agreed on the cost of a Thailand female. The applicant brought the woman, received money, and then left the room. The applicant indicated on appeal that he owns the premises involved in the criminal offense.

Based on the applicant’s criminal record, we find that his conviction involves moral turpitude in view of *Matter of A-*, 5 I&N Dec. 546 (1953). In that case the Board held that the respondent’s conviction under English law for being the landlord of a premises and a willful party to the

continued use of such premises as a brothel involves moral turpitude. *Id.* at 549. Furthermore, we note that in *Matter of W-*, 3 I&N Dec. 231 (BIA 1948), the Board found that the appellant's conviction in Vancouver, British Columbia, for unlawfully keeping "a disorderly house, to wit, a common bawdy house" involves moral turpitude. *Id.* at 231-232.

On appeal, the applicant indicates that he is innocent of the criminal offense of which he was convicted. However, we observe that in *In Re Max Alejandro Madrigal-Calvo*, 21 I&N Dec. 323, 327 (BIA 1996), the Board held that collateral attacks on a conviction do not operate to negate the finality of the conviction unless and until the conviction is overturned. (citations omitted). A collateral attack on a judgment of conviction cannot be entertained "unless the judgment is void on its face," and "it is improper to go behind the judicial record to determine the guilt or innocence of an alien." *Id.*

Thus, we find the applicant's conviction for living on earnings of prostitution is a crime involving moral turpitude, rendering the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The waiver for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act is found under section 212(h) of the Act. That section provides, in pertinent part:

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . 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

(ii) 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 applicant was also found to be inadmissible for under section 212(a)(6)(C) of the Act, which provides, in pertinent part:

(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.

The OIC stated that the applicant failed to disclose the arrest and conviction for living on the earnings of prostitution when he applied for a non-immigrant visa.

An applicant who applies for a nonimmigrant visa must complete a Form DS-156, Nonimmigrant Visa Application. The reverse side of Form DS-156, at Question 38, asks an applicant the following: "Have you ever been arrested or convicted for an offense or crime . . . ?" We note that the applicant signed the application on February 2, 2005 and that the application was completed by the applicant's son. The record, therefore, conveys that the applicant willfully failed to disclose in the Form DS-156 the material fact of his criminal conviction, a crime involving moral turpitude, which renders the applicant inadmissible to the United States. Based on the record, we find the applicant inadmissible under section 212(a)(6)(C) of the Act for seeking admission into the United States by fraud or willful misrepresentation of a material fact.

Section 212(i) of the Act provides a waiver for fraud and material misrepresentation. That section states 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.

As previously stated in this decision, the waiver for inadmissibility for committing a crime involving moral turpitude is set forth under section 212(h) of the Act, which section provides a waiver under two scenarios. Section 212(h)(1)(A) of the Act provides that the Attorney General may, in his discretion, waive the application of subparagraph (A)(i)(I) of subsection (a)(2) if 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; if the applicant's admission to the United States not be contrary to the national welfare, safety, or security of the United States; and if the applicant establishes his rehabilitation. Section 212(h)(1)(B) of the Act waives inadmissibility if an applicant establishes extreme hardship to a qualifying relative.

The OIC denied the applicant's section 212(h) waiver because he found that the applicant was not was rehabilitated, as required by section 212(h)(1)(A) of the Act, since he was not truthful regarding the facts relating to his conviction and professed innocence of the crime, and because he failed to disclose his prior arrest and conviction. We note that failure to disclose the arrest is not a criminal act involving moral turpitude similar to the applicant's prior crime, and it does not demonstrate whether the applicant has continued or ceased involvement in activities akin to his prior criminal acts, which we find to be a key factor in determining rehabilitation. That the

applicant's failed to disclose his prior arrest and conviction has limited bearing on whether he demonstrated rehabilitation for activities related to prostitution. Nonetheless, we do find that the applicant has neither acknowledged that he committed a crime nor expressed any remorse for it, and the record lacks any affirmative showing by the applicant of his rehabilitation. Thus, we will uphold the OIC's determination that the applicant has not established eligibility under section 212(h)(1)(A) of the Act.

The OIC should have, but did not, make a determination as to whether the applicant demonstrated extreme hardship under sections 212(h)(1)(B) and 212(i) of the Act. However, it also appears that the applicant failed to provide evidence of extreme hardship to the OIC. Based on the all the evidence now in the record, the AAO will address on appeal whether the applicant demonstrated extreme hardship to a qualifying relative.

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. A waiver under section 212(h)(1)(B) is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Because section 212(i) has a higher hardship standard, it will be applied in this case. Thus, hardship to the applicant or his children can be considered only insofar as it results in hardship to a qualifying relative. The applicant's lawful permanent resident 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 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.

The psychological evaluation by [REDACTED] Jin dated March 18, 2008, conveys that the applicant's spouse has a history of depressive mood which first began after she divorced the applicant in 1992. [REDACTED] reports that for social and financial reasons and because of their children would be separated from their father, the applicant's wife regretted her decision to divorce the applicant. [REDACTED] conveys that the applicant's wife indicates that she was not as depressed after remarrying the applicant in 2005. However, [REDACTED] avers that the applicant's wife asserts that she plunged into despair, feeling punished and helpless and having no appetite, after the applicant's visa was denied in January 2008. [REDACTED] diagnosed the applicant's wife with major depressive disorder. He stated that she has a body weight of 98 pounds and is severely depressed.

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 hardship factor asserted in the instant case, and demonstrated by the evidence in the record, is the emotional impact to the applicant's wife as a result of separation from her husband. In view of the substantial weight that we give to the separation of spouses in the hardship analysis, and in light of the significant consequences that the record establishes separation from the applicant will have on the applicant's wife, we find the applicant has demonstrated that the hardship that his wife will experience as a result of separation is extreme.

However, there is no claim made of hardship to the applicant's wife if she joined her husband to live in Hong Kong. The burden of proof in this proceeding lies with the applicant, and "while an analysis of a given application includes a review of all claims put forth in light of the facts and circumstances of a case, such analysis does not extend to discovery of undisclosed negative impacts." *Matter of Ngai*, 19 I&N Dec. 245, 247 (Comm'r 1984).

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(i) and 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 sections 212(i) and 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.