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U. S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
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U.S. Citizenship  
and Immigration  
Services

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DATE: JUL 06 2011

OFFICE: NEW YORK  
(GARDEN CITY)

FILE: 

IN RE: 

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

ON BEHALF OF APPLICANT:



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 application for waiver of inadmissibility was denied by the District Director, New York, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Colombia who 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 crimes involving moral turpitude. The applicant is applying for a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his U.S. citizen spouse and daughter, and lawful permanent resident sons.

The director determined that the applicant failed to establish extreme hardship to a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated September 17, 2008.

On appeal, counsel asserts that the applicant's qualifying relatives would suffer extreme hardship if the applicant were denied admission to the United States. *Appeal Brief*, dated October 17, 2008.

In support of the waiver application, the record includes, but is not limited to, letters from the applicant, his spouse and mother-in-law, birth certificates, the applicant's marriage certificate, the applicant's spouse's naturalization certificate, the applicant's daughter's birth certificate, the applicant's sons' permanent resident cards, financial documentation, tax returns, employment verification letters, and letters of support from community members. The entire record was reviewed and considered in rendering a decision on the appeal.

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 *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 on February 1, 2000, the applicant was convicted in the United States District Court for the Eastern District of New York of conspiracy to defraud the United States in violation of 18 U.S.C. § 371. The applicant was sentenced to time served in prison followed by three years supervised release, and payment of a fine (Case No. [REDACTED]).

At the time of the applicant’s conviction, 18 U.S.C. § 371 provided, in pertinent part:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

Title 18 U.S.C. § 371 is divisible because it “creates two crimes, first, a conspiracy to commit an offense against the United States, and, second, a conspiracy to defraud the United States in any manner or for any purpose.” *Matter of E*, 9 I&N Dec. 421, 423 (BIA 1961). A conspiracy to commit an offense involves moral turpitude if the substantive offense involves moral turpitude. 9 I&N Dec. 421, 423. For example, in *Matter of Gaglioti*, the BIA found that the alien’s conviction for conspiracy to establish gaming devices did not involve moral turpitude because the underlying offense did not involve moral turpitude. 10 I. & N. Dec. 719 (BIA 1964).

In the instant matter, the conviction record reflects that the applicant was convicted of *conspiring to defraud* the United States. *See Criminal Docket for Case # 1:99-cr-00864-JBW-1*. Fraud has, as a general rule, been held to involve moral turpitude. The U.S. Supreme Court in *Jordan v. De George* concluded: “Whatever else the phrase ‘crime involving moral turpitude’ may mean in peripheral cases, the decided cases make it plain that crimes in which fraud was an ingredient have always been regarded as involving moral turpitude. . . . Fraud is the touchstone by which this case should be judged. The phrase ‘crime involving moral turpitude’ has without exception been construed to embrace fraudulent conduct.” 341 U.S. 223, 232 (1951). Furthermore, the BIA in *Matter of E* held: “Conspiracy to defraud the United States under 18 U.S.C. 371 by impeding, obstructing and attempting to defeat the lawful functions of an agency of the United States is a crime involving moral turpitude.” 9 I&N Dec. at 427. Therefore, the applicant’s conviction under section 18 U.S.C. § 371 is a crime involving moral turpitude, and he is inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The applicant does not contest his inadmissibility on appeal.

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

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

....

(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 . . . .

A waiver of inadmissibility under section 212(h) 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, parent, son or daughter of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. The applicant's U.S. citizen spouse and daughter, and two lawful permanent resident sons are the qualifying relatives 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-Moralez*, 21 I&N Dec. 296, 301 (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 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. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *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.*

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., Matter of 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). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. *See Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *but see Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

On appeal, counsel asserts that the applicant has a close emotional and psychological relationship with his children and spouse that would be destroyed if he were compelled to depart the United States. Counsel states that without the applicant’s income, his spouse and children would have to move from their house and seek public assistance. Counsel notes that the applicant pays the mortgage on a home owned by his spouse and mother-in-law. Counsel states that the “the love, attention, nurturing and presence of both parents is essential to the well-being and happiness of young children.”

The applicant’s spouse asserts in her affidavit dated June 29, 2007 that she would suffer financial hardships if the applicant is denied admission to the United States. She states that she owns a house with her mother, and her share of the mortgage is \$2,500. She states that the applicant earns \$1,800 per week, and he pays the mortgage. She notes that the applicant coaches their sons’ soccer team, and takes them to school. She states that the applicant is often home with their children while she is working.

The AAO notes that the updated financial documentation submitted with the applicant’s spouse’s Affidavit of Support (Form I-864) reflect that the applicant’s spouse maintained three sources of income at the time the appeal was filed in 2008. The applicant’s spouse was employed with [REDACTED] earning \$13.00 per hour, [REDACTED] earning \$13.00 per hour, and she was self-employed as an independent contractor for [REDACTED], earning \$850.00 a week. A prior letter from Triangle Services dated October 2, 2007 reflects that the applicant’s spouse’s annual salary was \$16,000.00 for her employment with this company. The record also contains a letter from [REDACTED]

Inc. dated March 17, 2008 reflecting that the applicant was self-employed as an independent contractor earning \$3,500.00 per week. The AAO recognizes that the applicant's spouse and three children, ages 10, 15 and 17 years old, will suffer financial hardships if they are faced with the loss of the applicant's income. However, the applicant has not submitted a copy of the mortgage statement or any of his other major expenses as evidence of the financial hardships they will suffer. He has not addressed his employment outlook abroad and the extent to which he may be able to continue financial support. Further, the applicant's family resides in a house with the applicant's mother-in-law, but the applicant has not discussed whether she can and does assist with household duties, such as child care in his absence. Some weight to the claim of financial hardship will be given in this case, but this weight is limited by the lack of supporting documentation.

The AAO acknowledges that the applicant's spouse and children will experience emotional hardship if they are separated from the applicant as a result of his inadmissibility, and is sympathetic to their situation. In *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998), the Ninth Circuit Court of Appeals, referring to the separation of an alien from qualifying relatives, held that "the most important single hardship factor may be the separation of the alien from family living in the United States," and that "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion." (Citations omitted). We will accordingly give significant weight to the emotional hardship the applicant's qualifying family members will suffer if they are separated from the applicant.

All elements of hardship the applicant's spouse and children will suffer if they are separated from the applicant have been considered in the aggregate. The AAO acknowledges that the applicant's spouse and children will suffer hardships related to the emotional impact of separation and some financial hardships. However, the applicant has not demonstrated the extent of the financial hardship. Nor has he shown that the hardship of separation is atypical and beyond what would normally be expected. Based on the foregoing, the applicant has not demonstrated that his spouse and children will suffer extreme hardship upon separation from him.

Furthermore, the applicant has failed to establish extreme hardship to his spouse and children if they relocate to Colombia to maintain family unity.

The applicant's spouse asserts in her affidavit that relocating to Colombia with her children is a "horrible alternative." She states that her children are American and have been educated in this country. She notes that her children "barely know Colombia."

The AAO notes that BIA and Circuit Court of Appeals decisions have found extreme hardship in cases where the language capabilities of the children were not sufficient for them to have an adequate transition to daily life in the applicant's country of origin. For example, *Matter of Kao and Lin*, 23 I&N Dec. 45, 50 (BIA 2001), the BIA concluded that the language capabilities of the respondent's 15-year-old daughter were not sufficient for her to have an adequate transition to daily life in Taiwan. The girl had lived her entire life in the United States and was completely integrated into an American life style. The BIA found that uprooting her at this stage in her education and her social development to survive in a Chinese-only environment would constitute extreme hardship.

However, in this case, the applicant has not demonstrated the full extent of the hardships his children would suffer in Colombia. The applicant has not explained if his children know Spanish and are familiar with the Colombian culture. Nor has he explained the education system in Colombia, and the adjustments they would have to make upon relocation. As such, we will give minimal weight to this hardship factor. The applicant has made no other claims of hardship to his spouse and children should they relocate to Colombia to maintain family unity. Therefore, the applicant has not established that his qualifying family members will suffer extreme hardship upon relocation to Colombia.

In conclusion, the applicant has not established that denial of the present waiver application “would result in extreme hardship” to his spouse and children, as required for a waiver 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. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed. The waiver application is denied.