identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

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

[redacted]

H2

Date: JUL 0 7 2011 Office: LONDON FILE: [redacted]

IN RE: Applicant: [redacted]

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

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,

Michael Shumway

for Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of the United Kingdom 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. He was further found inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for seeking to procure a visa and admission into the United States by willful misrepresentation. He seeks waivers of inadmissibility in order to reside in the United States with his lawful permanent resident wife.

The field office director found that the applicant failed to establish extreme hardship to his lawful permanent resident wife and denied the Form I-601 application for a waiver accordingly. *Decision of the Field Office Director,* dated December 8, 2008.

On appeal, the applicant explains that he did not intend to lie to U.S. government officials. *Statement from the Applicant on Form I-290B*, dated December 20, 2008. He further states that his wife wishes to join her brothers in the United States. *Id.*

The record contains statements from the applicant and his wife; a certificate of good conduct regarding the applicant from the International Criminal Police Organization (INTERPOL) in Uganda; a copy of the applicant's wife's lawful permanent resident card, and; documentation relating to the applicant's criminal convictions. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(2)(A) of the Act states in pertinent part, that:

> (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 record shows that, on September 3, 1984, the applicant was convicted of two counts of obtaining property by deception in the United Kingdom. At the time of the applicant's convictions, obtaining property by deception was a theft offense addressed in the United Kingdom Theft Act of 1968, which provided:

> 1. Basic definition of theft

> (1) A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it . . .

15. Obtaining property by deception

> (1) A person who by any deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, shall on conviction on indictment be liable to imprisonment for a term not exceeding ten years.
>
> (2) For purposes of this section a person is to be treated as obtaining property if he obtains ownership, possession or control of it, and 'obtain' includes obtaining for another or enabling another to obtain or to retain.
>
> (3) Section 6 above shall apply for purposes of this section, with the necessary adaptation of the reference to appropriating, as it applies for purposes of section 1.
>
> (4) For purposes of this section 'deception' means any deception (whether deliberate or reckless) by words or conduct as to fact or as to law, including a deception as to the present intentions of the person using the deception or any other person.

U.S. Courts have held that the crime of theft or larceny, whether grand or petty, involves moral turpitude. See *Matter of Scarpulla*, 15 I&N Dec. 139, 140 (BIA 1974) ("It is well settled that theft or larceny, whether grand or petty, has always been held to involve moral turpitude . . ."); *see also Morasch v. INS*, 363 F.2d 30, 31 (9th Cir. 1966) ("Obviously, either petty or grand larceny, i.e., stealing another's property, qualifies [as a crime involving moral turpitude].") However, the BIA has indicated that a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended. *Matter of Grazley*, 14 I&N Dec. 330, 333 (BIA 1973).

As "theft" under the Theft Act of 1968 requires a finding that an individual "dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it," the applicant's convictions for obtaining property by deception are categorically crimes involving moral turpitude. Accordingly, the field office director correctly determined that the applicant is inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act for having been convicted of crimes involving moral turpitude. The applicant does not contest this finding on appeal.

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

> 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 record shows that the applicant failed to reveal his prior convictions when applying for entry to the United States pursuant to the Visa Waiver Program. Specifically, the record shows that the applicant applied for admission to the United States under the Visa Waiver Program on June 25, 2005, March 15, 2006, and September 2, 2007. The applicant himself indicates that he was admitted six times. Yet, for each of these applications, when asked on Form I-94W whether he ever had been arrested or convicted for an offense or crime involving moral turpitude, he checked the box to answer "No." Based on these representations, the field office director determined that the applicant entered the United States by making material misrepresentations, and thus he is inadmissible under section 212(a)(6)(C)(i) of the Act.

On appeal, the applicant asserts that he did not intend to lie to a U.S. official, as he misunderstood the question on Form I-94W and believed his convictions "to have been time spent." *Statement from the Applicant on Form I-290B* at 2. The applicant also contends that he believed the question did not apply to him because he was never sentenced to time in prison. The applicant does not indicate, however, that he believed his crimes were not crimes involving moral turpitude. The question requires an affirmative response if the alien seeking admission was "ever" arrested or convicted for an offense or crime involving moral turpitude, with no exception provided based on when the crime(s) occurred or subsequent proceedings impacting the alien's criminal record. Consequently, we are not persuaded, and the applicant has not presented sufficient explanation or evidence to establish, that his completion of the Forms I-94W did not involve willful misrepresentation of his prior criminal history. The fact that the applicant had been convicted of crimes involving moral turpitude was material to his eligibility for admission to the United States. Thus, the field office director correctly determined that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act, and the applicant requires a waiver of inadmissibility under section 212(i) of the Act.

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

> The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana . . . .
>
> (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 . . .; and

(2) the Attorney General [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he 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.

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

(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 record clearly shows that the applicant requires a waiver of inadmissibility under section 212(i) of the Act, and he must obtain a waiver under that provision in order to be admitted to the United States. Thus, the AAO will first address whether the applicant has established eligibility under section 212(i) of the Act before analyzing his criminal history and eligibility for a waiver under section 212(h) of the Act.

A waiver of inadmissibility under section 212(i) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. The applicant's wife 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-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 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).

On appeal, the applicant states that his wife wishes to join her brothers in the United States. On appeal and in a statement submitted on or about April 15, 2008, he provides that his wife returned to the United Kingdom to assist him in operating their shop, as they have worked together for the last 20 years, since they were married. He added in that statement that he and his wife own stores and properties. He explained that his family has traveled to the United States on three occasions to attend student exchange conventions, and that he and his family have further attended weddings and birthdays of friends in the United States. He stated that he and his wife would both suffer emotional hardship should they become separated.

In a statement from the applicant's wife submitted on or about April 15, 2008, she stated that she would have no means of financial support if the applicant is refused a visa to enter the United States, and she would be compelled to rely on her family. She asserted that she would be viewed as a social misfit and failure by her family should she settle in the United States without the applicant, and that his situation would create emotional hardship for her. She noted that she and the applicant have strongly supported each other in good and bad times. She indicated that most of her family is slowly relocating to the United States including her sisters and their families, and that her brothers are already in the United States. She stated that her family, friends, and community members are waiting for her and the applicant to relocate to the United States.

It is noted that the record contains little documentation to support the assertions made by the applicant and his wife concerning hardship in the United Kingdom, thus the AAO is primarily limited to the statements from the applicant and his wife to ascertain their circumstances. The applicant asserts that he and his wife operate a business in the United Kingdom, that they have worked together for 20 years, and that they own stores and properties. Accordingly, the applicant has not established that his wife would endure financial difficulty should she remain in the United Kingdom. The applicant and his wife express that they share a close relationship, and it is evident that they could continue to reside together should she remain in the United Kingdom.

The applicant's wife indicated that she has friends, community members, and brothers in the United States, and that her sisters will soon relocate here. However, with the exception of a single brother, the applicant has not presented any evidence to support that his wife has other relatives or contacts in the United States from whom she would be separated should she reside in the United Kingdom. The record suggests that the applicant's wife has never resided in the United States, but has resided in the United Kingdom, thus remaining in the United Kingdom would not constitute a separation from her native culture or a community to which she has become accustomed. The applicant has not indicated whether his wife has relatives in the United Kingdom. Thus, the applicant has not shown that his wife would face unusual emotional difficulty due to residing outside the United States.

The applicant has not identified other elements of hardship his wife may face should she reside in the United Kingdom. Considering the stated hardship factors in aggregate, the applicant has not shown that his wife will suffer extreme hardship should she remain in the United Kingdom.

Concerning remaining in the United States, the applicant's wife indicated that she would endure financial difficulty should she be separated from the applicant. However, the applicant has not presented any documentation to show his and his wife's present economic circumstances. He stated that he and his wife own stores and properties, and they operate a business together, which suggests that they have financial resources. The AAO is unable to determine whether his wife would be able to draw on these resources or continue to benefit from the operation of their business from the United States. Nor has the applicant identified his wife's potential expenses in the United States. Thus, the applicant has not shown that his wife would face significant financial hardship should she reside apart from him.

The AAO recognizes that the applicant and his wife have shared a close relationship, and that they have been married for a lengthy duration. It is evident that his wife would endure considerable emotional hardship should she now become separated from him. The AAO acknowledges the applicant's wife's concern for the family cultural consequences she may face in relocating to the United States without the applicant. Yet, as noted above, the record contains very little explanation or documentation to support the applicant's and his wife's assertions. For example, the applicant and his wife are citizens of the United Kingdom, yet she is a native of India and he is a native of Uganda. Without further explanation or studies on their particular cultures, the AAO is unable to appreciate the particular social consequences the applicant's wife may face in returning to the United States without the applicant. The applicant has not distinguished the emotional consequences his wife would face from those that are commonly endured when spouses reside apart due to inadmissibility.

The applicant has not identified other elements of hardship his wife may face should she return to the United States without him. Considering the stated hardship factors in aggregate and in light of the lack of supporting evidence in the record, the applicant has not shown that his wife will suffer extreme hardship should she reside in the United States.

As the applicant has not shown that denial of the present waiver application "would result in extreme hardship" to his wife, he has not shown that he is eligible for a waiver under section 212(i) of the Act. As the applicant is not eligible for a waiver under 212(i), no purpose would be served in conducting a detailed analysis of his criminal history and eligibility for a waiver under section 212(h) of the Act. Nor would a purpose be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings regarding a 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. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.