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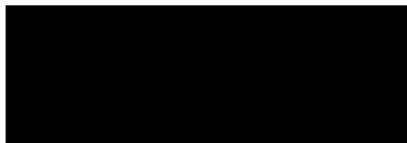
U. S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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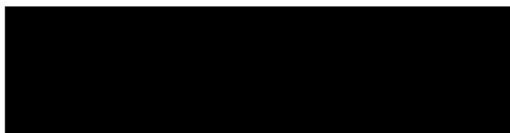


IN RE:



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

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,

f/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 of India and a citizen of the United Kingdom was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of crimes involving moral turpitude. The applicant was also found to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having attempted to procure entry into the United States by fraud or willful misrepresentation. The applicant is the son of a lawful permanent resident. He seeks a waiver of inadmissibility pursuant to section 212(h) and section 212(i) of the Act in order to reside in the United States.

In a decision, dated November 28, 2008, the Field Office Director found the applicant inadmissible under section 212(a)(6)(C)(i) of the Act for not disclosing his criminal convictions when entering the United States on the visa waiver program. He also found the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act for convictions occurring in 1986 and 1992. The field office director stated that he acknowledges that the applicant's inadmissibility would have an adverse effect on the applicant's family, but that the hardship they would face did not rise to the level of extreme hardship. The waiver application was denied accordingly.

In a Notice of Appeal to the AAO (Form I-290B), dated December 26, 2008, counsel states that the applicant did prove that his qualifying relative would suffer extreme hardship and that he warranted a favorable exercise of discretion. In his brief on appeal, counsel states that the applicant's misrepresentations were not willful or material and, thus, the applicant is not inadmissible under 212(a)(6)(C)(i) of the Act. Counsel states that the applicant, believing that his criminal records had been deemed null and void, did not disclose his convictions. Counsel states that the applicant's memory had failed him and that the trauma of those incidents made the applicant suffer short term memory loss. Counsel states further that the applicant's failure to disclose his criminal arrests were not material because the applicant would still have been eligible for admission to the United States based on the true facts.

The record indicates that from 1997 to 2007 the applicant entered the United States on various occasions under the Visa Waiver Program and, despite his criminal record, on the required Nonimmigrant Visa Waiver/Departure Form (Form I-94) the applicant continually answered "no" to the question, "have you ever been arrested or convicted for an offense or crime involving moral turpitude or a violation related to a controlled substance; or been arrested or convicted for two or more offenses for which the aggregate sentence to confinement was five years."

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

- (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

The AAO finds that the applicant's failure to disclose his criminal convictions on his Form I-94 was willful and a material misrepresentation under 212(a)(6)(C)(i) of the Act. The AAO finds that despite counsel's claims, the applicant's misrepresentation was willful in that he understood that he had a criminal record and no exception to disclosure is provided for on the Form I-94. Moreover, the applicant's misrepresentation was material. According to the Department of State's Foreign Affairs Manual, a misrepresentation is material if either: (1) The alien is excludable on the true facts; or (2) The misrepresentation tends to shut off a line of inquiry that is relevant to the alien's eligibility and that might well have resulted in a proper determination that he be excluded. *9 FAM 40.63 N61*. As discussed below, had the applicant disclosed his criminal record, it would have resulted in his inadmissibility and exclusion. Therefore, the applicant's failure to disclose his criminal record was material. A misrepresentation is generally material only if by it the alien received a benefit for which he would not otherwise have been eligible. *See Kungys v. United States*, 485 US 759 (1988); see also *Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998); *Matter of Martinez-Lopez*, 10 I&N Dec. 409 (BIA 1962; AG 1964) and *Matter of S- and B-C-*, 9 I&N Dec. 436 (BIA 1950; AG 1961). Thus, the AAO finds that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act.

The AAO also finds that the applicant is inadmissible under section 212(a)(2)(A) of the Act for having been convicted of crimes involving moral turpitude.

The record indicates that on June 3, 1986, in the United Kingdom, the applicant was convicted of one count of theft-shoplifting and was fined. On December 2, 1992, the applicant was convicted in the United Kingdom of conspire/theft and was sentenced to nine months in prison, which was suspended and the applicant served two years probation. The applicant, born on February 24, 1968, was eighteen and twenty-four years old at the time of these convictions.¹

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

¹ The AAO notes that the record indicates that on May 14, 2006, the applicant was arrested for driving a motor vehicle with excess alcohol. The record does not indicate that this charge has been adjudicated. Nevertheless, the AAO finds that a conviction for a single offense of a charge for a simple driving while under the influence of alcohol has not been found to be a crime involving moral turpitude. *In Re Lopez-Meza, Id.* 3423 (BIA Dec. 21, 1999). *See also, Matter of Torres-Varela*, 23 I. & N. Dec. 78 (BIA 2001).

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 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.” 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 AAO finds that the applicant’s convictions for shoplifting-theft and conspire/theft are crimes involving moral turpitude. The Board of Immigration Appeals (BIA) has determined that to constitute a crime involving moral turpitude, a theft offense must require the intent to permanently take another person’s property. *See Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973) (“Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended.”). The AAO notes that Section 1 of the Theft Act of 1968 states that, “A person is guilty of theft, if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it”. In addition, the AAO notes that it is well settled that a conspiracy to commit a certain crime involves moral turpitude if the underlying crime involves moral turpitude. *See Matter of P-*, 5 I. & N. Dec. 444, 446 (BIA 1953). Thus, the applicant was convicted of knowingly taking goods of another with the intent to permanently deprive that person of such goods, a crime involving moral turpitude, and is inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

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) . . . 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

(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 AAO finds that the crimes involving moral turpitude for which the applicant was found inadmissible occurred more than 15 years prior to the applicant's application for a visa, so the applicant is eligible to apply for a waiver under section 212(h)(1)(A) of the Act. However, the applicant also must overcome his inadmissibility under section 212(a)(6)(C)(i) of the Act, thus no purpose would be served in discussing his eligibility for a waiver under section 212(h)(1)(A) of the Act.

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.

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 mother 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).

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.

The record of hardship includes: counsel's brief; letters from two of the applicant's friends and a former therapist attesting to his good character; letters from his three siblings; medical documentation regarding the applicant's mother; and a statement from the applicant's mother.

In her statement, the applicant's mother states that since her husband died the applicant has been looking after her and supporting her. She states that with the applicant not in the United States, she has been living with her daughter and her son-in-law and that it is very difficult for her because Indian religion states that she should be living with a son. She states that she cannot rely on her daughter forever. She also states that she has been ill, has high blood pressure, and that the applicant is alone in London with all of his family in the United States.

The AAO notes that the three letters submitted by the applicant's siblings indicate that the applicant had older brothers living in the United Kingdom, but he does not see them. The letters also indicate

that the applicant has one younger brother living in the United States. These letters indicate that the applicant has been helping his mother emotionally and financially and that due to their mother's ill health their situation would be easier if the applicant was living in the United States. A letter from the applicant's older sister, dated December 22, 2008, states that the applicant cared for their mother after their father died.

The medical documentation submitted indicates that the applicant's mother has had numerous diagnostic tests completed and that she has been prescribed medication, but does not detail an ongoing medical condition that may affect her ability to endure her son's inadmissibility to the United States.

The AAO finds that the record does not indicate that the applicant's spouse will suffer extreme hardship as a result of the applicant's inadmissibility. In this case, the record does not contain sufficient evidence to show that the applicant's mother is facing hardships that rise to the level of extreme hardship. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Moreover, the record contains inconsistent evidence concerning the applicant's family's situation. The applicant's mother stated that the applicant had no family in the United Kingdom, but the applicant's siblings stated that their older brothers were living in the United Kingdom. Similarly, the applicant's mother states that she is living with her daughter, but according to Indian religion should be living with her son, failing to mention that she has another son living in the United States and numerous sons living in the United Kingdom. The AAO notes that it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Therefore, the applicant has failed to submit documentation to show that his mother is suffering extreme hardship as a result of his inadmissibility.

The AAO finds that the applicant has failed to establish eligibility for a waiver of inadmissibility under section 212(i) 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(i) of the Act, the burden of establishing that the application merits approval 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.