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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

Date:

Office: ROME

NOV 14 2011

IN RE:

Applicant

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under Sections 212(a)(9)(B)(v)
and 212(h) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(9)(B)(v),
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.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Israel 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 also found inadmissible under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for one year or more and seeking readmission within 10 years of his last departure. He seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen wife, daughter, and parents.

The field office director denied the Form I-601 application for a waiver, finding that the applicant failed to establish extreme hardship to a qualifying relative. *Decision of the Field Office Director*, dated February 3, 2009.

On appeal, counsel for the applicant asserts that the applicant has shown that his wife and parents will suffer extreme hardship should the present waiver application be denied. *Brief from Counsel*, dated April 25, 2009.

The record contains, but is not limited to: briefs from counsel; psychological evaluations for the applicant's wife; copies of documents in connection with mental health treatment of the applicant's wife; copies of medical records for the applicant's wife and parents; statements from the applicant, as well as the applicant's parents, wife, daughter, and other family members and individuals; documentation of the applicant's criminal convictions; reports on conditions in Israel; and documentation relating to the applicant's income while in the United States. The entire record was reviewed and considered in rendering this decision.

As a preliminary matter, counsel indicates that the field office director erred in denying the applicant's Forms I-601 and I-212 applications. However, the applicant may only appeal one application with a single Form I-290B and filing fee. As counsel notes on Form I-290B that the appeal relates to the applicant's Form I-601 waiver application, and discusses the extreme hardship standard of sections 212(a)(9)(B)(v) and 212(h) of the Act, it is evident that the applicant wishes for the merits of his Form I-601 waiver application to be addressed. Thus, the AAO treats the appeal as a request for review of the denial of the applicant's Form I-601 application for a waiver. The record does not show that the applicant has filed a separate appeal of the field office director's denial of his Form I-212 application. The applicant requires approved Forms I-601 and I-212 applications in order to be admitted to the United States.

Section 212(a)(9) of the Act provides, in pertinent part:

(B) Aliens Unlawfully Present.-

- (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

.....

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

The applicant entered the United States as a B-2 nonimmigrant visitor for pleasure on December 8, 1987, with authorization to remain until June 7, 1988. The applicant did not depart until he was removed on August 30, 2005. Thus, he accrued unlawful presence from April 1, 1997, the date the unlawful presence provisions in the Act took effect, until he departed on August 30, 2005. This period totals over eight years. He now seeks admission as an immigrant pursuant to his marriage to a U.S. citizen. He was deemed inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present for more than one year and seeking readmission within 10 years of his last departure. The applicant does not contest his inadmissibility under section 212(a)(9)(B)(i)(II) of the Act on appeal, and he requires a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act.

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.)

The record shows that the applicant was arrested on October 10, 2002 due to his participation in a scheme to alter the odometer readings and titles on used automobiles in order to deceive purchasers, from January 1997 to November 1998. He was convicted of one count of conspiracy under 18 U.S.C. § 371, 10 counts of interstate transportation of falsely made securities under 18 U.S.C. § 2314, and 10 counts of false odometer statements under 49 U.S.C. § 32705(a) and (b).

At the time of the applicant's convictions, 18 U.S.C. § 2314 stated:

Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting

Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person or persons to travel in, or to be transported in interstate or foreign commerce in the execution or concealment of a scheme or artifice to defraud that person or those persons of money or property having a value of \$5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's check bearing a forged countersignature; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign

commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof—

Shall be fined under this title or imprisoned not more than ten years, or both.

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 AAO is not aware of any Federal judicial or administrative decisions in which 18 U.S.C. § 2314 has been applied to reach conduct that does not involve moral turpitude. However, in *Omari v. Gonzales*, the Fifth Circuit Court of Appeals commented that:

The first five paragraphs of 18 U.S.C. § 2314 set out five alternative ways that the statute can be violated. The first paragraph describes violation by “whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud.” 18 U.S.C. § 2314. Violation of this paragraph does not necessarily entail fraud or deceit, since the paragraph can be violated by transporting or transferring goods known to be stolen. For example, the

goods could be transferred to someone who knew they were stolen, so that there would be no misrepresentation or deceit. A conviction under 18 U.S.C. § 2314 is therefore not necessarily a conviction for an offense involving fraud or deceit.

419 F.3d 303, 307-08 (5th Cir. 2005).

It appears that 18 U.S.C. § 2314 may potentially reach conduct that does not involve moral turpitude. However, the record of the applicant's conviction contains a presentence investigation report that clearly shows that he was convicted for engaging in a scheme to defraud purchasers of automobiles. Specifically, he worked with others to purchase high-mileage automobiles, then alter the titles and odometer readings to falsely represent that they were more valuable vehicles with lower mileage. The vehicles and falsely-made titles were transported in interstate commerce. The report states that the "government's investigation has confirmed that 270 cars were fraudulently sold as part of this scheme."

Accordingly, the applicant's conduct involved fraud, and the presentence investigation report suggests that he was convicted under a section or sections of 18 U.S.C. § 2314 that proscribe actions with a fraudulent intent. Crimes that require fraud as an element have been found to be crimes involving moral turpitude. *Matter of Adetiba*, 20 I&N Dec. 506, 507-08 (BIA 1992); *Matter of Flores*, 17 I&N Dec. 225, 228 (BIA 1980). Thus, the applicant's 10 offenses under 18 U.S.C. § 2314 constitute crimes involving moral turpitude. On this basis, the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act, and he requires a waiver under section 212(h) of the Act. As such, we need not assess whether his offenses under 18 U.S.C. § 371 and 49 U.S.C. § 32705(a) and (b) also constitute crimes involving moral turpitude.

The applicant requires waivers under sections 212(h) and 212(a)(9)(B)(v) of the Act, which both require that he establish that a qualifying relative will suffer extreme hardship should the waiver application be denied. However, children of the applicant are not qualifying relatives under section 212(a)(9)(B)(v) of the Act. The AAO will first assess whether he meets the more restrictive requirements of section 212(a)(9)(B)(v) of the Act.

Section 212(a)(9)(B)(v) of the Act provides for a waiver of section 212(a)(9)(B)(i) inadmissibility as follows:

The Attorney General [now Secretary of Homeland Security] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established . . . that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

A waiver of inadmissibility under section 212(a)(9)(B)(v) 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 and parents are the only qualifying relatives under section 212(a)(9)(B)(v) of the Act. 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 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 a report dated March 2, 2009, a clinical psychologist, [REDACTED], indicated that he was presenting his conclusions based on a February 28, 2009 interview of the applicant's wife, in follow-up to his initial evaluation on May 23, 2005. [REDACTED] indicated that the applicant's wife was significantly more depressed than she was in his initial evaluation. He noted that the applicant's wife continues to work full-time as a secretary for the Board of Education in Yonkers, New York, and that she supports her three adult children from her first marriage, all of who reside with her. [REDACTED] stated that the applicant's wife visited the applicant in Israel three times since the applicant was deported in September 2005, and that their long separation has taken a significant toll on her. He concluded that the applicant's wife is suffering from Major Depressive Disorder, and that her condition has become chronic. He stated that he referred the applicant's wife to a psychologist for psychotherapy, and that her prognosis is very poor due to the fact that her symptoms are rooted in the experience of separation from the applicant. He provided that antidepressant medication or supportive psychotherapy will not do much to ameliorate the depth of her depressive symptomology, and that the applicant's returned to the United States is in her best interest.

In a letter dated March 14, 2009, a licensed clinical psychologist, [REDACTED] stated that she has been treating the applicant's wife in insight oriented and supportive psychotherapy. [REDACTED] explained that the applicant's wife reported having a difficult and painful life with her prior husband who had a severe drug addiction and who abandoned her and their children. [REDACTED] stated that the applicant's wife reported that the applicant has been very supportive of her and that they share a close bond. [REDACTED] provided that the applicant's wife expressed that she would feel severe guilt should she leave her three children in the United States and join the applicant in Israel. [REDACTED] reported that the applicant's wife experiences persistent sadness, difficulty with focus and concentration, frequent irritability, excessive worry and fatigue, anhedonia, decreased appetite and weight loss, and extreme helplessness. She stated that the applicant's wife experiences physical pain for which he uses medication. [REDACTED] diagnosed the applicant's wife with Major Depressive Disorder, and noted that she has developed depressive symptomology on the basis of her realistic fear that she will continue to be separated from the applicant.

The record contains medical documentation, dated in 2005, that supports that she was treated for severe arm pain and disc herniation.

In an undated statement, the applicant's wife explained that her health has deteriorated dramatically since the applicant departed the United States. She explained that she continues to suffer from depression, and all of her doctors note that she is getting worse. She expressed that she struggles at work and cannot concentrate due to her stress and concern for the applicant, and she fears she could lose her employment. She explained that her three adult children rely on her for emotional and financial support, and that she cannot leave them or take them with her to Israel to join the applicant. She noted that her children suffered abuse from their father. She stated that she and the applicant share a close relationship, and that she is suffering significant emotional difficulty due to their separation.

In a statement dated July 3, 2006, the applicant's wife explained that she was born in Iraq, lived in Jordan, and came to the United States in 1980. She described her difficulties with her first marriage,

and noted that she lived a life of isolation and despair for many years. She explained that she had a major illness in her shoulders and nervous system in 2005, and she ceased working for approximately five months to engage in physical and pharmaceutical therapy. She stated that she continued to experience symptoms as of the date of her statement, and she needs the applicant to help support her physically and emotionally.

In a brief dated April 25, 2009, counsel emphasizes the significance of the applicant's wife's diagnosis of major depressive disorder and her associated symptoms. Counsel points out that the applicant's wife is receiving treatment, and that [REDACTED] assessment of her condition is congruent with the findings of [REDACTED]. Counsel states that the applicant's wife has been suffering muscle spasms since 2005, and that at least two doctors have recommended that she undergo surgery to correct damage to her spinal vertebrae. Counsel asserts that the applicant's wife would have no means to pay for surgery should she join the applicant and Israel. Counsel provides that the applicant's wife would be compelled to relinquish her job and medical insurance should she reside abroad. Counsel notes that the applicant's wife has invested 17 years and her career, and relinquishing her position would jeopardize her retirement plans and financial security. Counsel stated that the applicant's wife does not speak Hebrew, so her opportunities in Israel would be limited.

Upon review, the applicant has shown that a qualifying relative, his wife, will suffer extreme hardship should the present waiver application be denied. The applicant has provided documentation from mental health professionals to support that his wife is experiencing significant emotional and physical consequences due to their lengthy separation. She has been evaluated over a four-year period and undergone psychotherapy, yet her condition has worsened. The record contains documentation of the applicant's wife's diagnosis and treatment for severe arm pain and disc herniation in 2005, and she and [REDACTED] reported that she continues to experience physical pain that she attempts to regulate through medication. The applicant's wife faces documented health challenges that are greater than those commonly experienced when an individual is separated from a spouse or relocates due to inadmissibility.

The applicant's wife explained that she resides with her three adult children who she supports financially and emotional, and it is evident that she would endure significant emotional hardship should she relocate to Israel without them. The AAO acknowledges the applicant's wife's assertion that the father of her children was abusive and abandoned their family, and accepts that this fact would exacerbate the psychological difficulty she would experience should she choose to leave her children and relocate to Israel.

The applicant's wife would face other challenges should she relocate to Israel, including the loss of her employment, interruption of her healthcare and medical insurance during a time of illness, difficulty due to adapting to a new country and culture where she does not speak the primary language, and separation from her community and the country in which she has resided for over 30 years. All elements of hardship are considered in aggregate, and due consideration is given to these additional burdens.

The AAO appreciates that the applicant's wife is placed in the position of choosing to relocate to Israel which will result in extreme hardship for her, and continuing her six-year separation from the applicant for an indefinite period. Given the documented mental health challenges caused, in large part, by her separation from the applicant, the AAO finds that denial of the present waiver application "would result in extreme hardship" to the applicant's wife. Section 212(a)(9)(B)(v) of the Act.

In *Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996), the BIA held that establishing extreme hardship and eligibility for a waiver of inadmissibility does not create an entitlement to that relief, and that extreme hardship, once established, is but one favorable discretionary factor to be considered. All negative factors may be considered when deciding whether or not to grant a favorable exercise of discretion. See *Matter of Cervantes-Gonzalez*, *supra*, at 12.

The negative factors in this case consist of the following:

The applicant has been convicted of multiple crimes involving moral turpitude. The applicant entered the United States as a B-2 nonimmigrant visitor for pleasure on December 8, 1987 and he remained for approximately 17 years without a legal immigration status.

The positive factors in this case include:

The applicant's wife will suffer extreme hardship should the applicant continue to reside outside the United States. The applicant has presented statements and evidence to support that his daughter will suffer significant hardship should he continue to be separated from her. The applicant's parents have documented health problems, the applicant has provided emotional and material support for them, and they and the applicant will benefit from being reunited. The applicant has presented numerous statements from relatives and other individuals who attest to his good character and support of his daughter and other family members. The applicant consistently paid taxes while residing in the United States.

The applicant's criminal offenses involved a pattern of fraud which raises serious concerns about his honesty and respect for the laws of the United States. However, the offenses were part of the same scheme, and the record does not show that the applicant has engaged in criminal activity at times other than the period from January 1997 to November 1998, and approximately 13 years have passed since he committed his crimes. The record does not show that the applicant has a propensity to commit further criminal acts. The AAO finds that the significant benefits to the applicant's U.S. citizen wife, parents, and daughter of reuniting them with the applicant in the United States overcome the applicant's prior misconduct, such that a favorable exercise of discretion is warranted.

The applicant has shown that he meets the requirements for a waiver under section 212(a)(9)(B)(v) of the Act. Therefore, he also meets the requirements for a waiver under section 212(h) of the Act. In proceedings for an application for waiver of grounds of inadmissibility under sections 212(h) and 212(a)(9)(B)(v) of the Act, the burden of establishing that the application merits approval remains

entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met his burden that he merits approval of his application.

ORDER: The appeal is sustained.