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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: OCT 12 2011 Office: HIALEAH, FLORIDA

FILE:



IN RE:

Applicant:



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,

Perry Rhew

Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Nicaragua 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. She seeks waivers of inadmissibility in order to reside in the United States with her U.S. citizen children.

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 March 23, 2009.

On appeal, the applicant asserts that her family will suffer hardship should they become separated. *Statement from the Applicant on Form I-290B*, dated April 8, 2009.

The record contains, but is not limited to: statements from the applicant's children; documentation in connection with the applicant's employment, taxes, and expenses; and documentation in connection with the applicant's criminal history. The entire record was reviewed and considered in rendering this decision.

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 convicted in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida of "lewd, lascivious, or indecent assault or act upon or in presence of child" pursuant to Florida Statutes § 800.04, for her conduct on July 21, 1992. She was sentenced to a term of probation.

At the time of the applicant's conviction, Florida Statutes § 800.04 stated:

Lewd, lascivious, or indecent assault or act upon or in presence of child

Any person who:

- (1) Handles, fondles or makes an assault upon any child under the age of 16 years in a lewd, lascivious, or indecent manner;
- (2) Commits actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sadomasochistic abuse, actual lewd exhibition of the genitals, or any act or conduct which simulates that sexual battery is being or will be committed upon any child under the age of 16 years or forces or entices the child to commit any such act;
- (3) Commits an act defined as sexual battery under s. 794.011(1)(h) upon any child under the age of 16 years; or
- (4) Knowingly commits any lewd or lascivious act in the presence of any child under the age of 16 years, without committing the crime of sexual battery, commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Neither the victim's lack of chastity nor the victim's consent is a defense to the crime proscribed by this section.

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.

Florida Statutes § 800.04 addresses certain acts that involve actual physical contact with the child, as well as performing certain acts in the presence of a child without touching. The present case arises in the Eleventh Circuit. In *U.S. v. Padilla-Reyes*, 247 F.3d 1158, 1164 (11th Cir. 2001), the Eleventh Circuit determined that a violation under Florida Statutes § 800.04 constitutes “sexual abuse of a minor” as contemplated by section 1101(a)(43) of the Act. The Eleventh Circuit stated that the phrase “sexual abuse of a minor” encompasses “acts that involve physical contact between the perpetrator and the victim as well as acts that do not.” *Id.* at 1163. The Eleventh Circuit continued:

The conclusion that “sexual abuse of a minor” is not limited to physical abuse also recognizes an invidious aspect of the offense: that the act, which may or may not involve physical contact by the perpetrator, usually results in psychological injury for the victim, regardless of whether any physical injury was incurred.

Id. (citing *United States v. Zavala-Sustaita*, 214 F.3d 601, 605 (5th Cir.2000) for proposition that even with no likelihood of physical contact, threat of psychological trauma from sexual abuse of a minor can be as significant a menace as physical injury).

The Eleventh Circuit has deemed that acts of child abuse constitute crimes involving moral turpitude. *Garcia v. Attorney General of the U.S.*, 329 F.3d 1217, 1222 (11th Cir. 2003)(citing *Guerrero de Nodahl v. I.N.S.*, 407 F.2d 1405, 1406-07 (9th Cir. 1969) for the proposition that child abuse constitutes a crime involving moral turpitude). It is further noted that statutory sexual offenses against minors have been found to be crimes involving moral turpitude, despite the lack of an intent element in the statute in question. *Matter of Dingena*, 11 I&N Dec. 723, 728-29 (BIA 1966)(finding that statutory rape constitutes a crime involving moral turpitude despite the lack of a required *mens rea* in the criminal statute).

In *Matter of Silva-Trevino*, the Attorney General analyzed whether an offense that involved sexual conduct with a minor constituted a crime involving moral turpitude. The Attorney General stated that “so long as the perpetrator knew or should have known that the victim was a minor, any intentional sexual contact by an adult with a child involves moral turpitude.” *Matter of Silva-Trevino*, 24 I&N Dec. at 705 (emphasis in original). The Attorney General found that the moral turpitude question turned on whether the perpetrator knew the victim was a minor.

Florida Statutes § 800.04 does not require that the perpetrator knew, or should have known, the victim’s age. Nor does it state mistake of age as a possible defense. It appears that an individual could be convicted under Florida Statutes § 800.04 irrespective of his or her knowledge of the victim’s age. Thus, Florida Statutes § 800.04 reaches conduct that is turpitudinous and conduct that is not, and convictions under the statute cannot be deemed categorically crimes involving moral turpitude. We must look to the record of the applicant’s conviction to determine if Florida Statutes § 800.04 was applied to turpitudinous conduct in her case.

In *Matter of Silva-Trevino*, the Attorney General further stated:

In a case involving sexual abuse, a simple inquiry regarding the alien's knowledge of the victim's age might conclusively resolve the moral turpitude question. If, for example, probative evidence, such as a birth certificate or an admission by the alien, establishes that the victim was a young child, this fact would prove that the alien's sexual acts were directed at a person he knew, or reasonably should have known, was a child and thus that the alien's conviction was for a crime involving moral turpitude. The same would be true if the alien and the victim had a relationship (familial or otherwise) from which it could be shown that the alien knew or should have known the victim's actual age.

Matter of Silva-Trevino, 24 I&N Dec. at 708.

The formal record of the applicant’s conviction does not settle the question of whether the applicant knew or should have know the age of the victim of her act for which she was convicted under Florida Statutes § 800.04. However, the Complaint/Arrest Affidavit reports that the victim was a 13-year-old girl who was spending the night at the applicant’s and her husband’s apartment, and the proscribed acts took place while the applicant’s three children were asleep. The victim’s young age

of 13 renders it less likely that the applicant did not know, or could not have deduced, that she was a minor. Further, the fact that the 13-year-old girl was spending the night with the applicant, her husband, and the applicant's three young children suggests a familial or other relationship that would inform the applicant that the girl was a minor. Thus, the record shows by a preponderance of the evidence that the applicant knew, or should have known, that the victim of her act under Florida Statutes § 800.04 was a minor. The applicant has not asserted or shown otherwise. Accordingly, the record supports that the applicant was convicted under Florida Statutes § 800.04 for turpitudinous conduct that renders her inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The record shows that the applicant was also convicted for an act of retail theft for her actions on August 8, 1997. The applicant has not provided complete documentation relating to this offense or conviction. While a record from the Circuit and County Courts of the Eleventh Judicial Circuit of Florida, in and for Miami-Dade County, reports that adjudication was withheld for the applicant's offense, the same record reflects that she was given a term of probation. Thus, her offense constitutes a conviction for the purpose of determining whether she is admissible to the United States. The applicant provided the complaint against her which cites to Florida Statutes § 812.015. At the time of the applicant's conviction, Florida Statutes § 812.015 addressed retail and farm theft, including the definition for retail theft as "the taking possession of or carrying away of merchandise, money, or negotiable documents; altering or removing a label or price tag; transferring merchandise from one container to another; or removing a shopping cart, with intent to deprive the merchant of possession, use, benefit, or full retail value." Fl. Stat. § 812.015(1)(d). Florida Statutes § 812.015 further stated:

(6) An individual who, while committing or after committing theft of property, resists the reasonable effort of a law enforcement officer, merchant, merchant's employee, or farmer to recover the property which the law enforcement officer, merchant, merchant's employee, or farmer had probable cause to believe the individual had concealed or removed from its place of display or elsewhere commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083, unless the individual did not know, or did not have reason to know, that the person seeking to recover the property was a law enforcement officer, merchant, merchant's employee, or farmer. For purposes of this section the charge of theft and the charge of resisting may be tried concurrently.

(7) It is unlawful to possess, or use or attempt to use, any antishoplifting or inventory control device countermeasure within any premises used for the retail purchase or sale of any merchandise. Any person who possesses any antishoplifting or inventory control device countermeasure within any premises used for the retail purchase or sale of any merchandise commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. Any person who uses or attempts to use any antishoplifting or inventory control device countermeasure within any premises used for the retail purchase or sale of any merchandise commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Florida Statutes § 812.015 does not state the basic elements of an underlying crime of theft, but rather addresses aspects of certain kinds of theft, namely retail and farm theft. However, it is evident that the applicant has been convicted of an act of theft, and the record of her conviction shows that it was a retail theft. The 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."). In *Matter of Jurado*, 24 I&N Dec. 29, 33-34 (BIA 2006), the BIA found that violation of a Pennsylvania retail theft statute involved moral turpitude because the nature of retail theft is such that it is reasonable to assume such an offense would be committed with the intention of retaining merchandise permanently. Accordingly, there is sufficient support that the applicant has been convicted of a theft offense that constitutes a crime involving moral turpitude. This conviction also renders her inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The applicant requires a waiver of inadmissibility under section 212(h) 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.

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 children 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-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 statement on Form I-290B dated April 8, 2009, the applicant asserts that she and her family will suffer hardship should her waiver application be denied. She noted that she has been in the United States for more than half of her life, and that she considers the United States her country. She explained that she has raised her children, taught them to love and respect, and that they have never been separated. She added that she has been her children's only source of emotional and financial support.

In a statement dated April 21, 2009, the applicant's son provided that the applicant has been a kind, loving, and caring mentor for him and his sisters, and that he will suffer emotional hardship should she depart. He added that he would face difficulty continuing his employment in the United States Navy in the applicant's absence, as the applicant would be absent when he returned from deployments. He explained that he wishes for his son to continue to have a relationship with the applicant.

In a statement dated April 20, 2009, the applicant's daughter stated that the applicant has been a good mother to her and her siblings. She explained that the applicant has cared for her since she was born, including times of illness, and that she wishes to have the applicant help her with her pregnancies and children. She noted that she does not wish for her children to grow up without their grandmother like she did.

In a statement dated April 21, 2009, the applicant's youngest daughter stated that the applicant worked hard to support her and her siblings, and that she continues to take care of them. She explained that the applicant's potential deportation has caused her and her family stress and sadness.

Upon review, the applicant has not shown that a qualifying relative will suffer extreme hardship should the present waiver application be denied. The AAO has carefully examined the statements from the applicant and her children. It is evident that they share a close relationship, and that the applicant's children will face emotional difficulty should they become separated from her. However, such psychological hardship is a common consequence when family members are separated due to inadmissibility. The applicant has not provided sufficient explanation or documentation to distinguish her children's emotional challenges from those commonly faced due to the deportation of a parent.

The applicant has not submitted explanation or documentation to show that she provides economic support for her children. Nor has the applicant asserted or shown that her children face economic needs that they cannot meet independently. The applicant's children are presently ages 25, 22, and 20. The record does not show whether they live independently, whether they work, or whether they

have spouses or other household members who share their expenses. Thus, the AAO is unable to conclude that they rely on the applicant for financial support, or that they would suffer economic difficulty should she depart the United States.

The AAO recognizes that the applicant's children wish to have the applicant in the United States so she can build a relationship with her grandchildren. However, grandchildren are not qualifying relatives in the present matter. While it is understood that hardship to the applicant's future grandchildren will create difficulty for the applicant's children, the record does not show that any emotional hardship created will rise to an extreme level.

The applicant has not asserted that her children will suffer hardship should they relocate with her to Nicaragua. In the absence of clear assertions from the applicant, the AAO may not speculate regarding hardships her children may face. In proceedings regarding a waiver of grounds of inadmissibility under sections 212(h) and 212(a)(9)(B)(v) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361.

All stated elements of hardship have been considered in aggregate. Based on the foregoing, the applicant has not shown that denial of her waiver application under section 212(h) of the Act "would result in extreme hardship" to her children. Accordingly, no purpose would be served in discussing whether she merits a waiver as a matter of discretion.

The applicant has not met her burden to show eligibility for a waiver under section 212(h) of the Act. *See* Section 291 of the Act, 8 U.S.C. § 1361. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.