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

H2

[Redacted]

FILE:

[Redacted]

Office: CALIFORNIA SERVICE CENTER

Date:

SEP 09 2011

IN RE:

Applicant:

[Redacted]

APPLICATION:

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

ON BEHALF OF APPLICANT:

[Redacted]

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,

for Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Italy who was found to be inadmissible under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of committing a crime involving moral turpitude. The applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h). The director concluded that the applicant had failed to establish that her bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. The applicant submitted a timely appeal.

On appeal, counsel asserts that the applicant's crime of conspiracy under Italian Statute Article 416 does not involve moral turpitude because conviction does not require an underlying fraud or any other morally turpitudinous crime. Moreover, counsel argues that even if the crime of conspiracy involves moral turpitude, the grant of a waiver under section 212(h)(1)(A) of the Act is warranted.

Furthermore, counsel maintains that the applicant demonstrated extreme hardship to her daughter if the waiver is denied. Counsel states that though the applicant's daughter had a non-malignant brain tumor removed in October 2007, she now has focal seizures, numbness to her hand and face, headaches, exhaustion, anxiety, and sensory deficits. Counsel indicates that the applicant's daughter is anxious about her symptoms worsening and her tumor returning. Counsel avers that the applicant's daughter should not drive. Counsel maintains that the applicant's daughter and two grandchildren, who are 7 years old and 18 months old, require constant assistance. Counsel declares that the applicant's daughter has not fully recovered from surgery because she lacks help and rest. Counsel states that the applicant's son-in-law often travels for his job and cannot provide the level of care that his wife and children require. Counsel avers that the applicant's daughter cannot afford care for herself and her children, and the applicant will be able to take care of her daughter and grandchildren.

Counsel indicates that the applicant's daughter is an attorney in Florida, and will not be able to practice law outside of Florida. Counsel conveys that the applicant's son-in-law's business is based in Miami, and his clients are primarily in the Caribbean, making it an extreme hardship for the applicant's daughter to join her mother to live in Europe. Counsel avers that the applicant's daughter owns a home in Florida.

We will first address the finding of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of committing crimes involving moral turpitude.

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.

The Board of Immigration Appeals (Board) 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 penal certificate in the record reflects that the applicant was charged with committing the offense of conspiracy on November 10, 1983 in Italy. On February 12, 1998, the applicant was convicted of that crime and the court ordered that she serve two years and four months in prison, be placed on probation, and have property confiscated.

We note that *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. In evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator first 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).

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.

On appeal, counsel declares that the applicant’s offense does not involve moral turpitude. Counsel states that in *Matter of Flores*, 17 I&N Dec. 225 (BIA 1980), the Board held that for conspiracy to be morally turpitudinous, the definition of conspiracy must include the element of fraud or the underlying substantive offense of the conspiracy must involve moral turpitude. 17 I&N Dec. 225 at 228. Counsel asserts that Italian Statute Article 416 convicts a person of conspiracy without having to prove either an intent to defraud or any underlying substantive offense. Counsel avers that the applicant was convicted of participation in an alleged conspiracy or association and that her conviction does not involve any underlying substantive crime. Counsel cites *Matter of G*, 7 I&N Dec. 114 (BIA 1956), which states that, “As a matter of law, a conspiracy to commit an offense involves moral turpitude only when the substantive offense charged therein involves moral turpitude.” 7 I&N Dec. 114 at 115. Counsel contends that since the conspiracy statute under which the applicant was convicted lacks an underlying substantive offense involving moral turpitude, the applicant’s conviction does not involve moral turpitude.

The AAO finds unpersuasive counsel’s contention that the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act. Counsel appears to be arguing that a conviction for conspiracy can be obtained under Article 416 of the Italian Criminal Code even where the object of the conspiracy was not a crime. However, it is clear from the language of the statute itself that this is not the case.

Article 416 of the Italian Criminal Code, as translated and provided by the applicant, states:

When three or more people will associate/conspire to commit more crimes, those, who promote or represent or organize the association/conspiracy, are punished, for this only, with imprisonment from three to seven years. For the mere fact of participating in the association/conspiracy, the penalty is . . .

The leaders are subject to the same punishment . . .

By its terms, Article 416 states that a person is convicted for associating or conspiring “to commit more crimes.” Article 416 of the Italian Criminal Code does not contain intent to defraud as an element, but one would not expect such an element to be contained in Article 416, but in the statutory provision for the underlying substantive crime that is the object of the association or conspiracy. The applicant’s conspiracy conviction involved an underlying criminal offense, and we must consider whether that offense is morally turpitudinous.

We, however, cannot engage in the second-stage inquiry of reviewing the “record of conviction” to determine if the underlying criminal offenses of the conspiracy were based on conduct involving moral turpitude because the applicant has not submitted her entire record of conviction. The applicant bears the burden of proving eligibility for a benefit, and must therefore submit the available documents comprising the record of conviction and show that they fail to establish that her

conviction was based on conduct involving moral turpitude. To the extent such documents are unavailable, this fact must be established in accordance with the requirements in 8 C.F.R. § 103.2(b)(2). The applicant submitted only the penal certificate, which lists the conspiracy offense of which the applicant was convicted. It does not describe the circumstances of the applicant's crime of conspiracy, and the applicant has not established, pursuant to the requirements in 8 C.F.R. § 103.2(b)(2), that the documents constituting her record of conviction are unavailable. Thus, the record before the AAO does not demonstrate that the applicant's offense of conspiracy is not morally turpitudinous. As such, the applicant has failed to show that she is not subject to inadmissibility under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of committing a crime involving moral turpitude.

Lastly, we observe that counsel contends that the applicant's crime does not involve moral turpitude as she was convicted under a criminal procedural system that did not provide an adversarial system, and was based on the system of "Libero Convincimento" or "Personal Belief" of the prosecutor. Counsel submits a letter by ██████████ in which ██████████ conveys that under the old code of penal procedure, the public prosecutor's personal belief prevailed over the evidence and the trial documents. ██████████ indicates that under the old penal code the principle of non-culpability, which emerges from the evidence and trial documents, could not prevail over the person belief of the examining magistrate and the public prosecutor. Counsel argues that the applicant's conviction was politically motivated.

However, this evidence does not establish that the applicant's criminal conviction was politically motivated. Furthermore, we cannot determine from the record whether Italy's criminal justice system had procedural safeguards affording due process and the impact of such safeguards on the applicant's criminal proceeding. In *In Re Max Alejandro Madrigal-Calvo*, 21 I&N Dec. 323, 327 (BIA 1996), the Board held that collateral attacks on a conviction do not operate to negate the finality of the conviction unless and until the conviction is overturned. (citations omitted). A collateral attack on a judgment of conviction cannot be entertained "unless the judgment is void on its face," and "it is improper to go behind the judicial record to determine the guilt or innocence of an alien." *Id.* The AAO finds that the record does not indicate that the applicant's criminal conviction was overturned.

The waiver for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act is found under section 212(h) of the Act. Section 212(h) of the Act provides, in pertinent parts:

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 . . . ; 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(h)(1)(A) of the Act provides that the Attorney General may, in his discretion, waive the application of subparagraph (A)(i)(I) of subsection (a)(2) if 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. Since the conviction rendering the applicant inadmissible occurred in 1983, which is more than 15 years ago, it are waivable under section 212(h)(1)(A) of the Act.

Section 212(h)(1)(A)(ii) and (iii) of the Act require that the applicant's admission to the United States not be contrary to the national welfare, safety, or security of the United States; and that the applicant establish his rehabilitation.

We note that the offense rendering the applicant inadmissible occurred 27 years ago and the applicant has not been convicted of any crimes since then. Counsel asserts that the applicant submitted letters from [REDACTED] her employer.

However, we find that the applicant has not been forthcoming in submitting the language of the provisions of the Italian Criminal Code under which she was convicted or in providing her entire record of conviction. Thus, the actual nature of the applicant's crime is unknown, and consequently the AAO will decline to find that the applicant's admission to the United States will not be contrary to the national welfare, safety, or security of the United States. As such, the applicant fails to establish eligibility for a waiver under section 212(h)(1)(A) of the Act.

Counsel asserts that the applicant is eligible for a waiver under section 212(h)(1)(B) of the Act. That section 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 -

...

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney

General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . .

A section 212(h) waiver of the bar to admission resulting from violation of section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant is not a consideration under the statute and will be considered only to the extent that it results in hardship to a qualifying relative. The qualifying relative in this case is the applicant's U.S. citizen daughter. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296 (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.

In rendering this decision, the AAO will consider all of the evidence in the record.

With regard to joining her parents to live in Italy, counsel conveys that the applicant's daughter is a licensed attorney in Florida, and that she will "not be able to ever have a chance to practice law outside the [United States] without substantial hurdles if she were to abandon that license." Furthermore, counsel avers that the applicant's son-in-law's business is based in Miami, and that his clients are primarily in the Caribbean, which makes it an extreme hardship for the applicant's daughter to join her mother to live in Europe. Counsel indicates that the applicant's daughter owns her home in Florida.

Although it is not clear that the applicant's daughter would relocate if the waiver application is denied, in view of the unique hardship factors, including separation from family and having to abandon her law practice, we find that the applicant has demonstrated that her daughter will experience extreme hardship should she join her mother to live in Italy.

If she remains in the United States without her mother, the applicant's daughter states that she will experience emotional and financial hardship. The applicant's daughter asserts in the letter dated September 9, 2008, that her husband is self-employed and is away for long periods of time traveling frequently to the Caribbean and Central and South America. The applicant's daughter indicates that she needs the emotional support of her mother and needs her parents to take care of both her and her two children. The applicant's daughter states that she has focal seizures and cannot drive her son or travel to visit her parents any more, that her tumor is monitored for possible re-growth, and that she significantly reduced her law practice and works from home.

The applicant's son-in-law states in the letter dated September 5, 2008, that when fatigued his wife has focal seizures (tightening of her face and right eye). He avers that they have medical bills from her surgery and cannot afford outside help. He states that he travels to the Caribbean once or twice every month, and his trips range from a few days to two to three weeks.

Lastly, [REDACTED] states in the letter dated October 25, 2010, that the applicant's daughter underwent surgery in October 2007 to remove a cavernous angioma in her left cerebral parietal lobe. He indicates that the applicant's daughter has a persistent cognitive disability, and experiences severe symptoms including numbness, headaches, and sensory deficits, which greatly hinder her ability to perform daily duties.

The record before the AAO demonstrates that a tumor was removed from the applicant's daughter in 2007, and that she has a cognitive disability, and numbness, headaches, and sensory deficits, which hinder her ability to perform daily duties. In view of the evidence in the record of the health problems of the applicant's daughter and her having to raise her two young children while her husband travels, we find that the applicant has demonstrated extreme hardship to her daughter if she remains in the United States without her mother.

In *Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996), the Board stated that once eligibility for a waiver is established, it is one of the favorable factors to be considered in determining whether the Secretary should exercise discretion in favor of the waiver. Furthermore, the BIA stated that:

In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

*Id.* at 301.

The AAO must then, "[B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Id.* at 300. (Citations omitted).

We find that the adverse factor in the present case is the criminal conviction for conspiracy committed in November 10, 1983 in Italy.

The favorable factors in the present case are the passage of 27 years since the criminal conviction that rendered the applicant inadmissible to the United States; her not having any other criminal convictions since 1983; her record of employment; and her family ties (daughter, grandchildren, son-

in-law) to the United States. The AAO finds that the crime of which the applicant committed that renders her inadmissible to the United States is serious in nature, perhaps even more serious than the record currently reflects. Nevertheless, when taken together, we find the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility rests with the applicant. *See* section 291 of the Act. Here, the applicant has now met that burden. Accordingly, the appeal will be sustained and the waiver application will be approved.

**ORDER:** The appeal is sustained.