



U.S. Citizenship
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Date: APR 03 2012

Office: ACCRA, GHANA

File: 

IN RE: 

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

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Cameroon 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 a crime involving moral turpitude. The applicant is applying for a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), to reside in the United States with his U.S. citizen spouse and children.

On December 29, 2008, the Field Office Director determined that the applicant failed to establish extreme hardship to a qualifying relative, did not merit a favorable exercise of discretion, and denied the *Application for Waiver of Grounds of Inadmissibility* (Form I-601) accordingly.

In a letter submitted on appeal, the applicant's spouse asserts that she is experiencing extreme hardship as a result of the applicant's inadmissibility.

On November 22, 2011, the AAO issued a Request for Evidence (RFE) providing the applicant 12 weeks to respond to the notice. In response to that request, the applicant submitted documentation regarding his arrests in the United States and additional evidence in support of his application for a waiver of inadmissibility.

In support of the waiver application, the record includes, but is not limited to: letters from the applicant's spouse, letters from the applicant, documentation of the applicant's spouse's health, documentation regarding the applicant's children's health, documentation regarding the financial situation of the applicant in Cameroon, documentation regarding the applicant's spouse's financial situation in the United States, documentation and photographs regarding the applicant's spouse's and children's travel to Cameroon, documentation concerning the applicant's criminal history, and documentation concerning the applicant's immigration history.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record was reviewed and considered in rendering a decision on the appeal.

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.)

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 record reflects that on August 3, 2001, the applicant was charged with Theft in violation of section 10.56.030 of the Everett Municipal Code. On April 9, 2002 the applicant was granted a deferred adjudication by the Everett Municipal Court under the condition that he pay a fine and serve two years of probation. The disposition reveals that the applicant failed to pay the fines in a timely manner. A bench warrant was issued when the applicant failed to appear in court. On November 1, 2004, the court revoked the stay of proceedings, and the applicant was convicted of theft (Case No. [REDACTED]). A violation of the Everett Municipal Code § 10.56.030 is a gross misdemeanor, which is punishable by imprisonment in jail not to exceed one year; however the applicant’s final sentence is not clear from the docket report provided in the record. *See* Everett Municipal Code § 10.04.080.

Section 10.56.020 of the Everett Municipal Code defines theft as:

- A. To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him of such property or services;
or
- B. By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him of such property or services;
or
- C. To appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive him of such property or services; or
- D. To shoplift.

U.S. Courts have held that the crime of theft or larceny, whether grand or petty, involves moral turpitude. *See Matter of Scarpulla*, 15 I&N Dec. 139, 140 (BIA 1974) (stating, “It is well settled that theft or larceny, whether grand or petty, has always been held to involve moral turpitude . . .”);

Morasch v. INS, 363 F.2d 30, 31 (9th Cir. 1966) (stating, “Obviously, either petty or grand larceny, i.e., stealing another's property, qualifies [as a crime involving moral turpitude].”) However, the BIA has indicated that a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended. *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973).

The Everett Municipal Code does not make a distinction between temporary and permanent takings. The statute notes that “in addition to its common meaning” the term deprive “means to make unauthorized use or an unauthorized copy of records, information, data, trade secrets, or computer programs.” Everett Municipal Code § 10.56.010. Thus, theft under the Everett Municipal Code § 10.56.030 hypothetically encompass conduct that involves moral turpitude and conduct that does not.

In accordance with *Silva-Trevino*, the AAO must determine if an actual case exists in which the Everett Municipal Code § 10.56.030 was applied to conduct that did not involve moral turpitude. The applicant has not presented and the AAO is unaware of any prior case in which a conviction has been obtained under the Everett Municipal Code § 10.56.030 for conduct not involving moral turpitude. Further, the record does not establish that this statute was applied to conduct not involving moral turpitude in the applicant’s own criminal case. The AAO notes that the applicant has not submitted the record of conviction for his case, which consists of documents such as the criminal complaint and the judgment of conviction. Nor has he submitted police reports related to this arrest. The applicant submitted a docket from the Everett Municipal Court, which reflects that a criminal complaint with a summons was issued to the applicant on February 28, 2002. In response to the RFE, the applicant indicated that he was not able to obtain the record of conviction for this case. The burden of proof in these proceedings is on the applicant to demonstrate that he is admissible. *See* Section 291 of the Act, 8 U.S.C. § 1361. As it is the applicant’s burden of proof, we are unable but to determine that the applicant’s conviction is not a crime involving moral turpitude. Moreover, the final sentence issued in the case has not been provided, as such the AAO is unable to conclude that the applicant’s conviction qualifies for the petty offense exception at INA § 212(a)(2)(A)(ii).

The record further reflects that on December 26, 2006, the applicant was arrested and charged with theft in the third degree in violation of section 9A.56.050 of the Revised Code of Washington, in relation to shoplifting of merchandise valuing \$49.00. The applicant departed the United States on January 10, 2007 and the docket report relating to this charge reflects that when the applicant failed to appear before the [REDACTED] Municipal Court, and on July 11, 2007 a bench warrant was ordered for his arrest. The submitted docket report was printed July 14, 2008, and reflects that the last action on the case was on the same date as a referral of the case to the prosecutor’s office for discovery. The applicant has not submitted records related to the current status of this case. In response to the RFE, the applicant states that he is unable to obtain information regarding the disposition of the Third Degree Theft charge from December 26, 2006.

As a result of the applicant’s conviction for theft in violation of Everett Municipal Code § 10.56.030, the applicant is inadmissible under INA § 212(a)(2)(A).

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.

As it has not been 15 years since the date of the activities for which the applicant is inadmissible, Section 212(h)(1)(A) of the Act provides that the applicant must establish to the satisfaction of the Secretary that the denial of his admission would result in extreme hardship to his U.S. citizen spouse or one of his U.S. citizen children. And, if he meets that requirement, he must then prove that he merits a waiver in the exercise of discretion.

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 applicant's qualifying relative in this case is his U.S. citizen spouse and his U.S. citizen children.¹ After a careful review of the record, the AAO finds that the hardship that the applicant's

¹ The record indicates that the applicant's spouse's oldest daughter is not the applicant's biological child, but rather the applicant's stepchild. Although the applicant's spouse states that her older daughter was adopted by the applicant, the record does not contain evidence of the adoption.

U.S. citizen spouse would experience as a result of the applicant's inadmissibility is extreme. The record reflects that the applicant's spouse, a native of Oregon, relocated to Cameroon for ten months in 2009, with both of her young daughters. The applicant's daughters are now seven and four years old. The applicant's spouse states that she suffered from medical, emotional, and financial hardship as a result of the relocation. The record contains a Medical Certificate from a physician at [REDACTED] indicating that the applicant's spouse sought care there for chronic depression. The doctor indicated that the applicant's spouse was receiving psychotherapy sessions due to symptoms of insomnia, anorexia, decreased self-esteem, fatigue, and feelings of hopelessness. The record shows that the applicant's spouse was also prescribed anxiety and pain medication. The applicant's spouse reports that she attempted suicide while living in Cameroon and together with applicant decided that it was best for her to return to the United States with the couple's eldest daughter. The applicant's spouse states that her youngest daughter remains in Cameroon with the applicant because she is not able to care for her two daughters by herself. The record indicates that the couple's eldest daughter was teased in school in Cameroon as a child of mixed-race. The record also indicates that the applicant's youngest child has the sickle cell trait and suffered from skin infections in Cameroon. The applicant's spouse states that she was disappointed with the hospital care in Cameroon and that she is worried what could happen to her daughter if develops complications related to sickle cell. In support of the applicant's spouse's concern regarding the health care system in Cameroon, the applicant submitted an internet report on health statistics in Cameroon. The AAO will also take note of the U.S. Department of State, Country Specific Information on Cameroon which states that medical facilities in Cameroon, even in the large cities, are extremely limited, "hampered by the lack of trained specialists, outdated diagnostic equipment, and poor sanitation." *U.S. Department of State, Country Specific Information, Cameroon*, dated August 12, 2011. The applicant's spouse stated that while she and her daughters lived in Cameroon, they rented one room where they all lived together, with her husband sleeping on the floor and her and her daughters in one bed. The record contains a receipt for the rent of the room. The applicant and his spouse both state that it was difficult for the applicant to find work in Cameroon to support his spouse and children and the construction work that he did find paid \$100 per month. The applicant's spouse stated that she visited the U.S. Embassy to try to find work, but was unable to locate work.

We will next consider the hardship claimed to the applicant's spouse if she were to remain in the United States without the applicant. The applicant's spouse states that she is suffering emotional and financial hardship due to separation from the applicant. To document her financial hardship, the applicant's spouse has submitted records from the State of Oregon, Department of Human Services indicating that she receives food stamps and cash assistance from the State. The applicant's spouse states that she is unable to find employment and has relied on financial assistance from her husband in Cameroon, as well as the assistance that she receives from the State of Oregon. The applicant's spouse has provided evidence that her mother, who also lives in Oregon, is unable to assist her financially because she is disabled and relies on public benefits. The applicant's spouse reports that she and her daughter have had to live with her mother or friends, at times sleeping on couches; however, she has not provided any documentary evidence of her living situation in the United States. The applicant's spouse also states that she is suffering emotional hardship due to the separation from her youngest daughter and the challenges of raising her older daughter without the support of the applicant. The record indicates that the applicant's spouse has documented her emotional challenges with the State of Oregon Department of Human Services. The AAO finds that when considered in

the aggregate, the financial and emotional hardship to the applicant's U.S. citizen spouse is extreme. As the record indicates that the hardship to the applicant's spouse rises to an extreme level, we need not consider the independent hardship to the applicant's U.S. citizen children.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Id.* at 299. The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

In *Matter of Mendez-Moralez*, in evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the BIA stated that:

The factors adverse to the applicant 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, recency and seriousness, and the presence of other evidence indicative of an 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 the alien began his 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 and service to 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 BIA further states that upon review of the record as a whole, a balancing of the equities and adverse matters must be made to determine whether discretion should be favorably exercised. The equities that the applicant must bring forward to establish a favorable exercise of administrative discretion is merited will depend in each case on the nature and circumstances of the ground of inadmissibility sought to be waived and on the presence of any additional adverse matters, and as the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence. *Id.* at 301.

The favorable factors in the applicant's case include the hardship to the applicant's spouse and children as a result of his inadmissibility and the applicant's documented efforts to obtain an education to improve his life while in Cameroon. The applicant also submitted a letter from the family that hosted him upon his initial travel to the United States as a dancer on a Q visa, attesting to the applicant's moral character.

The unfavorable factors include the applicant's criminal record, which includes theft and reckless driving, and his immigration history in the United States, which includes working without authorization after entering the United States on a Q visa and changing his status to a student visa. The record illustrates that the applicant departed the United States with unresolved criminal and financial issues. Indeed, the applicant has a history of failing to appear in court to resolve criminal charges. The evidence suggests that the applicant has attempted to avoid the consequences of his criminal acts. Given the outstanding charge against him, we cannot determine that the applicant is rehabilitated, and this weighs heavily on our discretionary determination. We determine that based on the record before us, the negative factors outweigh the positive factors. In these proceedings, the burden of establishing eligibility for the waiver rests entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has not met his burden and the appeal will be dismissed.

ORDER: The appeal is dismissed.