

identifying data deleted to
prevent disclosure of unredacted
invasion of personal privacy

PUBLIC COPY



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

[REDACTED]

Date: **APR 05 2012**

Office: NEWARK, NJ

FILE: [REDACTED]

IN RE: Applicant: [REDACTED]

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:

[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.

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, Newark, New Jersey, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Peru 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 director indicated that 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 extreme hardship to a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On appeal, counsel asserts that U.S. Citizenship and Immigration Services (USCIS) erred in finding the applicant's criminal conviction for driving while intoxicated with a suspended or revoked license is a crime involving moral turpitude. Counsel states that *In Re Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999), requires that the alien be aware of the suspension of his license for the offense to involve moral turpitude and that USCIS did not demonstrate the applicant was aware of his license being suspended or revoked when he was arrested for driving while intoxicated. Furthermore, counsel states that USCIS failed to consider the applicant's conditional discharge for the conviction for possession of a controlled substance, as it means that the applicant is not inadmissible for having committed a crime involving moral turpitude. Additionally, counsel states that the applicant's two U.S. citizen children will experience extreme hardship if the applicant is barred admission into the United States. Counsel conveys that the applicant has been in the United States since 1992, and is married and has a close relationship with his children, and is concerned about their education.

Section 212(a)(2) of the Act states in pertinent part:

Criminal and related grounds. —

(A) Conviction of certain crimes. —

- (i) In general. — Except as provided in clause (ii), any 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) a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

Section 212(h) of the Act provides, in pertinent part, that:

The Attorney General may, in his discretion, waive the application of . . . subparagraph (A)(i)(II) . . . insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if – . . . in the case of an immigrant who is 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 that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully permanent resident spouse, parent, son, or daughter of such alien.

The submitted record of conviction shows that the applicant was convicted of possession of 30 grams or less of marijuana in New Jersey in 1999. This conviction renders the applicant inadmissible under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having been convicted of a crime relating to a controlled substance. This offense is eligible for the limited waiver under section 212(h) of the Act as it relates to a single offense of simple possession of 30 grams or less of marijuana.

In regard to the conditional discharge of the drug offense, in *Matter of Pickering* the Board reiterated that if a court vacates a conviction for reasons unrelated to a procedural or substantive defect in the underlying criminal proceedings, the alien remains "convicted" for immigration purposes. *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003). The conviction record before the AAO does not indicate the reason for the conditional discharge of the applicant's marijuana offense. Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish eligibility for the benefit sought. Accordingly, for immigration purposes the applicant remains convicted of possession of marijuana.

On December 28, 1997, the applicant was arrested and charged with driving with a suspended license contrary to N.J.S.A. 39:4-50, and driving under the influence of liquor or drugs contrary to N.J.S.A. 39:3-40. The applicant pled guilty to these charges and was ordered to pay fines and costs.

At the time of the applicant's arrest, N.J.S.A. 39:4-50 stated that:

(a) A person who operates a motor vehicle while under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug, or operates a motor vehicle with a blood alcohol concentration of 0.10% or more by weight of alcohol in the defendant's blood or permits another person who is under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug to operate a motor vehicle owned by him or in his custody or control or permits another to operate a motor vehicle with a blood alcohol concentration of 0.10% or more by weight of alcohol in the defendant's blood, shall be subject:

(1) For the first offense, to a fine of not less than \$250.00 nor more than \$400.00 . . .

(2) For a second violation, a person shall be subject to a fine of not less than \$500.00 nor more than \$1,000.00, . . .

N.J.S.A. § 39:3-40 stated that:

No person to whom a driver's license has been refused or whose driver's license or reciprocity privilege has been suspended or revoked, or who has been prohibited from obtaining a driver's license, shall personally operate a motor vehicle during the period of refusal, suspension, revocation, or prohibition.

No person whose motor vehicle registration has been revoked shall operate or permit the operation of such motor vehicle during the period of such revocation.

The 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.)

In determining whether a crime involves moral turpitude, the Third Circuit Court of Appeals, per *Jean-Louis v. Holder*, 582 F.3d 462 (3rd Cir. 2009), makes a categorical inquiry, which consists of looking “to the elements of the statutory offense . . . to ascertain that least culpable conduct hypothetically necessary to sustain a conviction under the statute.” *Id.* at 465-66. The “inquiry concludes when we determine whether the least culpable conduct sufficient to sustain conviction under the statute “fits” within the requirements of a CIMT.” *Id.* at 470.

However, if the “statute of conviction contains disjunctive elements, some of which are sufficient for conviction of [a CIMT] and other of which are not . . . [an adjudicator] examin[es] the record of conviction for the narrow purpose of determining the specific subpart under which the defendant was convicted.” *Id.* at 466. This is true “even where clear sectional divisions do not delineate the statutory variations.” *Id.* In so doing, an adjudicator may only look at the formal record of conviction. *Id.*

The applicant was arrested and charged with driving with a suspended license contrary to N.J.S.A. 39:4-50, and driving under the influence of liquor or drugs contrary to N.J.S.A. 39:3-40. Neither of

these crimes are crimes involving moral turpitude. Driving with a suspended license is a regulatory offense, which generally is not a crime involving moral turpitude. *See Matter of L-V-C-*, 22 I&N Dec. 594 (BIA 1999) (regulatory offenses are not generally considered turpitudinous). Additionally, simple driving under the influence (DUI) is not a crime involving moral turpitude. *See In Re Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999) (simple driving while intoxicated would not likely be a crime involving moral turpitude); and *Matter of Torres-Varela*, 23 I&N Dec 78 (BIA 2001) (DUI with 2 or more prior DUI convictions is not a crime involving moral turpitude). In *Matter of Short*, 20 I&N Dec. 136, 139 (BIA 1989), the Board stated that where each crime individually does not involve moral turpitude, two offenses cannot be combined to create a crime involving moral turpitude. Thus, we find that the applicant's convictions under N.J.S.A. 39:4-50 and N.J.S.A. 39:3-40 do not render the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

However, as previously discussed the applicant is inadmissible for having a controlled substance violation. 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 relatives in this case are the applicant's U.S. citizen children and his lawful permanent resident parents. 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.

The submitted psychological evaluation by [REDACTED] dated January 9, 2010 states that the applicant’s two U.S. citizen children are six years old and seven months old. [REDACTED] conveys that the applicant entered the United States illegally in 1992 at the age of 15 and has lived here since, and that the applicant’s wife is also illegally in the United States, but the applicant’s family members, who are his parents and brother, are in the United States legally. [REDACTED] states that the applicant supports his wife and children working as a tailor at a dry cleaning business. [REDACTED] indicates that the applicant is distressed because if the waiver is denied, he will not be able to support his family in Peru as well as provide his children with a good education and stable environment. [REDACTED] indicates that if the applicant is deported, the applicant’s wife will be deported as well, and their children will have to relocate to Peru. [REDACTED] conveyed that the applicant’s oldest daughter speaks more English than Spanish and has chronic eczema requiring treatment and medication. Lastly, [REDACTED] states that the applicant’s mother has diabetes and the applicant is her primary source of financial support.

In regard to remaining in the United States without the applicant, the asserted hardship factors are emotional and financial in nature. The record reflects that the applicant's minor children are emotionally and financially dependent on their father, and their mother is illegally in the United States. When these hardship factors are considered collectively, they demonstrate extreme hardship to the applicant's children if they remain in the United States without their father.

However, the applicant has not fully demonstrated his children will experience extreme hardship if they joined him to live in Peru. The applicant has furnished no corroborating evidence consistent with the claim of not being able to support his family in Peru, not having the means to provide them with an education and health care comparable to what they now have, and placing his children at risk in Peru. When these hardship factors are considered collectively, we find that the applicant has not fully established that the emotional and financial hardship that his children will experience if they join him to live in Peru is extreme.

Lastly we note that the applicant's mother states that she has health problems and depends on the applicant for financial support. Medical records are consistent with the assertion that the applicant's mother takes medication for health problems such as diabetes mellitus type 2 (DMT2). However, the applicant has not demonstrated that he financially supports his mother. Therefore, when the asserted hardship factors are considered collectively, they do not demonstrate extreme hardship to the applicant's mother if she remains in the United States without the applicant. Moreover, the applicant has not made any assertions and provided corroboration documentation of the hardship that his mother will experience if she joined the applicant to live in Peru.

Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility rests with the applicant. *See* section 291 of the Act. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed and the waiver application will be denied.

ORDER: The appeal is dismissed.