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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090
U.S. Citizenship
and Immigration
Services



H2

Date: APR 13 2012 Office: NEW YORK 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.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of the Dominican Republic 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. He seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen wife and children.

The district 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 District Director*, dated February 10, 2011.

On appeal, counsel for the applicant asserts that the applicant's wife and children will suffer extreme hardship should the present waiver application be denied. *Statement from Counsel with Form I-290B*, dated April 5, 2011.

The record contains, but is not limited to: correspondence from counsel; a statement from the applicant's wife; a psychological evaluation for the applicant's wife and children; medical documentation for the applicant's wife and son; a letter from the applicant's family's pastor; copies of tax records for the applicant's family; and documentation in connection with the applicant's criminal conviction. 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.)

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 shows that the applicant was convicted of bank fraud in violation of 18 U.S.C. § 1344 for his conduct between January 1999 and June 2000. Based on this conviction, the district director determined that the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude. The applicant does not contest his inadmissibility on appeal. He requires a waiver 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 wife and 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 dated April 5, 2011, the applicant's wife indicated that she has been HIV-positive since 1996, and that she has been under constant medical care from her physician and a specialist in infectious diseases since that time. She noted that their two children are not HIV-positive due to the care she has received in the United States. She explained that she contracted the disease from her first husband who was abusive, but that the applicant treats her with love and devotion and provides her with tremendous emotional support. She indicated that he accompanies her to medical appointments and helps her cope with the stress of being HIV-positive. She provided that she and the applicant have struggled with their son's illness, as he was born with a kidney disease that threatened his life as an infant but that is currently in remission. She noted that her son now suffers from severe asthma which requires a nebulizer and prescription medication. She stated that her son has been rushed to emergency rooms on many occasions. She indicated that she and the applicant do not believe it would be safe for her and their son to reside in the Dominican Republic due to their health problems. She also expressed that their children would suffer should they relocate to the Dominican Republic and be uprooted from their family and friends in the United States.

The applicant provides a report on his wife and children from a licensed psychologist, [REDACTED] dated March 8, 2011. [REDACTED] described the applicant's wife's and son's health problems and indicated that they will suffer significant hardship should they relocate to the Dominican Republic. [REDACTED] concluded that the applicant's wife exhibits major depressive disorder as a result of fear that she will become separated from the applicant, and that the applicant's two children will develop separation anxiety disorder and severe depressive symptomology should they reside apart from the applicant.

Upon review, the applicant has shown that his wife will suffer extreme hardship should the present waiver application be denied. The applicant provides letters from physicians to support the statements made about his wife's and his son's health and medical treatment. The applicant's wife has been under the care of the same medical center for the management of her HIV-positive status since 1996, and though her condition is identified as stable, she suffers from periodic bouts of depression and she struggles with anxiety. In a statement dated March 3, 2011, [REDACTED] attests that the applicant has been dedicated to his wife and that his day to day support has been a key factor in helping her cope with her stress. He notes that "[t]aking medication for HIV requires tremendous dedication, since missing even a few doses can contribute to failure of therapy." In a statement dated March 3, 2011, [REDACTED] explains that the applicant's son was born with hydronephrosis, and he was diagnosed with asthma and has required multiple trips to a medical office and emergency room. [REDACTED] notes that the applicant has attended every medical visit for his children, and that he is the key person to maintain his children's physical and emotional well-being. The applicant's wife faces uncommon health concerns, and it is evident that she would endure

significant emotional hardship and a threat to her physical health should she relocate to the Dominican Republic and lose access to the professionals who have successfully provided her care for over 15 years. It is evident that her son's physical health challenges and need for medical care contribute substantially to her emotional challenges, and she would reasonably fear for his safety should he reside in the Dominican Republic.

The applicant's wife would face other challenges should she relocate to the Dominican Republic, including separation from her family and community in the United States, the loss of her employment, separation from her country of nationality and lengthy residence, and emotional difficulty due to sharing in her two children's challenges in residing outside the United States. Considering all elements of hardship to the applicant's wife in aggregate, she would face extreme hardship should she relocate to the Dominican Republic.

The applicant has also shown that his wife will suffer extreme hardship should she remain in the United States without him. The applicant's wife's health concerns are significant and create substantial emotional difficulty for her. She and the applicant have reasonable concern for their four-year-old son's health due to his history of emergency care and need for ongoing medical services. These health matters constitute unusual challenges. The letters from [REDACTED] and [REDACTED] reflect that the applicant serves a key role in supporting his wife and maintaining her emotional and physical health, and that the applicant's wife will suffer significant emotional difficulty should she remain in the United States without him. The applicant's wife would endure the hardship of acting as a single parent for two children ages four and 14, which entails additional emotional, physical, and financial difficulty. In combination with the applicant's wife's concerns related to her and her son's health, her difficulty would rise to an extreme level. Based on the foregoing, the applicant has shown that denial of the present waiver application "would result in extreme hardship" to his wife, as required for a waiver under section 212(h) of the Act.

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

The negative factors in this case consist of the following:

The applicant failed to depart the United States upon the expiration of his B-2 nonimmigrant status, and remained for a lengthy duration without a legal immigration status. The applicant engaged in criminal conduct between January 1999 and June 2000 that resulted in his conviction for bank fraud, a crime involving moral turpitude.

The positive factors in this case include:

The applicant's U.S. citizen wife will suffer extreme hardship should the applicant reside outside the United States. The applicant's two U.S. citizen children will face hardship should he depart the

United States. The applicant has resided in the United States since 1994, and he has family ties here including his wife and children. The applicant has provided emotional and financial support for his U.S. citizen wife and children. The letter from [REDACTED] notes that the applicant “has been at [his wife’s] side both physically and emotionally throughout her illness”, and he “has been seemingly unconcerned about his own risk [of contracting HIV].”

The applicant’s criminal activity serves as a strong negative factor in this case. However, he has only been convicted of a single offense. He was not sentenced to a term of imprisonment other than six months of home detention, and the record does not show that he has engaged in criminal conduct since 2000. He has conducted himself well over the last 12 years, and he does not appear to have a propensity to engage in further criminal conduct. The AAO finds that the applicant’s presence in the United States poses significant benefits for his wife and children, and the hardship they would experience if the waiver is denied add to the positive equities. We find that the positive factors in this case overcome the negative factors, and the applicant warrants a favorable exercise of discretion.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met his burden that he merits approval of his application.

ORDER: The appeal is sustained.