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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

[redacted]

H2

Date: APR 2 3 2012 Office: MOSCOW 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,

Michael Shumway

for Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Ukraine 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. She seeks a waiver of inadmissibility in order to reside in the United States with her U.S. citizen fiancé.

The field office director denied the Form I-601 application for a waiver, finding that the applicant failed to establish extreme hardship to a qualifying relative. *Decision of the Field Office Director,* dated September 28, 2009.

On appeal, counsel for the applicant asserts that the applicant's criminal offense did not constitute a crime involving moral turpitude, and she is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act. *Brief from Counsel*, dated October 23, 2009. Counsel further asserts that the applicant's fiancé will suffer extreme hardship should the present waiver application be denied. *Id.*

The record contains, but is not limited to: briefs from counsel; psychological evaluations of the applicant's fiancé; statements from the applicant, the applicant's fiancé, and others in support of the application; records of telephone calls and money transfers; documentation regarding the job market for physicians in Ukraine; reports on general conditions in Ukraine; letters regarding the applicant's fiancé's employment; and documentation regarding 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 forgery in office under Article 366 of the Criminal Code of Ukraine for her conduct on or about November 7, 2007. The record of the applicant's conviction noted that her conduct fell within Part 2 of Article 366. She was sentenced to two years and six months of incarceration, and deprivation of the right to hold certain administrative and economic positions. Article 366 of the Criminal Code of Ukraine states:

> 1. Forgery in office, that is putting any knowingly false information in any official documents, or any other fabrication of documents, and also making and issuing knowingly false documents by an official shall [be] punishable by a fine up to 50 tax-free minimum incomes, or restraint of liberty for a term of up to three years, with the deprivation of the right to occupy certain positions or engage in certain activities for a term of up to three years.
>
> 2. The same act that caused any grave consequences, shall be punishable by the imprisonment for a term of two to five years with the deprivation of the right to occupy certain positions or engage in certain activities for a term of up to three years.

In a brief dated October 23, 2009, counsel asserts that offenses under Article 366 of the Criminal Code of Ukraine do not constitute crimes involving moral turpitude, as the statute does not require the specific intent to defraud. Counsel cites the decision of the Board of Immigration Appeals (BIA) in *Matter of Kochlani*, 24 I&N Dec. 128 (BIA 2007), to support the proposition that crimes that do not require specific intent to defraud do not involve moral turpitude unless they are "inherently fraudulent." The AAO acknowledges the holding in *Matter of Kochlani,* 24 I&N Dec. at 130-131, and finds that it supports that offenses under Article 366 of the Criminal Code of Ukraine categorically constitute crimes involving moral turpitude, as acts of forgery are inherently fraudulent. The BIA held in *Matter of O'b-*, 6 I&N Dec. 280, 282-83 (BIA 1954), that an offense of forgery of a narcotic prescription constituted a crime involving moral turpitude, even though the statute did not require an intent to defraud. The BIA added that "[f]orgery generally includes acts of deception deliberately practiced with a view of gaining a wrong or unfair advantage." *Id.* at 283. The BIA stated in *Matter of A-*, 5 I &N Dec. 52, 53-54 (BIA 1953), that "forgery in all its degrees involves an intent to defraud and is thus a crime of moral turpitude," and that "[w]here fraud *or* forgery is involved, it is clear that a finding of moral turpitude is required." (emphasis added).

Counsel cites *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), and states that there is a realistic probability that Article 366 of the Criminal Code of Ukraine would be applied to reach conduct that does not involve moral turpitude. Counsel asserts that the record of the applicant's conviction does not include an analysis of her intent in committing her wrongful conduct. Counsel contends that the applicant's only intent in engaging in the conduct was to keep her employment. The AAO is not aware of any court or administrative decisions in which Article 366 of the Criminal Code of Ukraine was a subject, and the applicant has not submitted any decisions in which the law was applied to conduct that did not involve moral turpitude. Nevertheless, in light of counsel's argument that offenses under Article 366 of the Criminal Code of Ukraine are not categorically crimes involving moral turpitude, we will examine the record of the applicant's conviction to determine if the statute was applied to conduct not of a turpitudinous nature in the applicant's own case.

The sentencing document for the applicant, dated November 7, 2007, reports that she committed her wrongful acts in the capacity of Chief Accountant of a private company. She falsified documentation to show that her company made payments pursuant to two purchase contracts in order to understate their profits and evade taxes. The applicant entered knowingly false data into official documents. Forensic analysis indicated that it was likely that the applicant forged the signatures of two individuals to falsely claim that they received payments. Although the applicant denied that she forged the signatures, the court found that her guilt was "fully proved." It is evident that the applicant engaged in conduct that constitutes forgery under general principles of U.S. criminal law, including writing the signatures of others on knowingly erroneous official documentation as "acts of deception deliberately practiced with a view of gaining a wrong or unfair advantage." *Matter of O'b-*, 6 I. & N. Dec. at 283. The AAO finds that Article 366 of the Criminal Code of Ukraine was applied to turpitudinous conduct in the applicant's case.

Counsel asserts that Article 366 of the Criminal Code of Ukraine is analogous to 18 U.S.C. § 1001(a)(3) which proscribes "knowingly and willfully making or using any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry." Counsel cites *Matter of Marchena*, 12 I&N Dec. 355 (BIA 1967) and *Hirsh v. INS*, 308 F.2d 562, 567 (9th Cir. 1962) to support that offenses under 18 U.S.C. § 1001(a)(3) are not crimes involving moral turpitude. However, 18 U.S.C. § 1001(a)(3) does not encompass the conduct proscribed by Article 366 of the Criminal Code of Ukraine, or the specific acts for which the applicant was convicted. For example, the applicant was found guilty of forging signatures of individuals on official documentation, and this act is beyond the scope of 18 U.S.C. § 1001(a)(3). As discussed above, the BIA has clearly indicated that acts of forgery constitute crimes involving moral turpitude.

Based on the foregoing, the applicant's conviction under Article 366 of the Criminal Code of Ukraine constitutes a crime involving moral turpitude. She is inadmissible under section 212(a)(2)(A)(i)(I) of the Act, and she 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 U.S. citizen fiancé is the "qualifying relative" in this case. *See* 8 C.F.R. § 212.7(a). 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-Moralez,* 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 August 1, 2011, the applicant's fiancé provides that he will endure hardship if the applicant is not permitted to reside in the United States. He explains that he is a physician with significant professional activities in the New York City area. He notes that the applicant resides with her mother in Ukraine, and that she is unemployed and he supports her financially. He indicates that he met the applicant in 2008, and that they communicate regularly through video calls. He adds that he visited her in Ukraine in January 2011 and they traveled to Israel in May 2011. He provides that he and the applicant wish to have a child, but that proper care is not available in Ukraine. He asserts that relocating to Ukraine is not an option for him, as he would become separated from his 14-year-old daughter from a prior relationship. He notes that he presently pays significant child support for his daughter, and that he would be unable to earn sufficient income in Ukraine to meet his daughter's

needs. He states that he has developed high blood pressure and a psychologist indicated that he is depressed.

The applicant submits an evaluation of her fiancé conducted by a licensed certified social worker, [redacted] based on an interview of the applicant's fiancé on June 12, 2011. The evaluation describes the applicant's and her fiancé's histories, and the course of their relationship since they met in 2008. [redacted] speculates that the applicant's fiancé will be at risk for a major clinical depression or alcoholism due to his past experiences of a failed marriage, the murder of his mother by her husband sometime before 2000, and the presence of alcoholism in his family. [redacted] notes that the applicant's fiancé's prior marriage ended amicably, due to his work and study taking a toll on the relationship and he and his former spouse becoming like roommates.

The applicant submitted a second evaluation of her fiancé conducted by a licensed psychologist, [redacted] based on an interview conducted on October 19, 2009. [redacted] indicated that the applicant had known her fiancé for 18 months at the time of his evaluation, and that her fiancé was experiencing emotional difficulty due to being separated from her. [redacted] noted that he referred the applicant's fiancé to a psychotherapist for therapy. [redacted] stated that the applicant's fiancé's depressive symptomology would become more pronounced the longer he is separated from the applicant. [redacted] noted that the applicant's fiancé's former wife "cheated on him" which ended their marriage.

Upon review, the applicant has not shown that denial of the present waiver application "would result in extreme hardship" to her fiancé, as required for a waiver under section 212(h) of the Act. The applicant has not established that her fiancé would endure extreme hardship should he remain in the United States. It is evident that the applicant's fiancé will not face financial difficulty in the applicant's absence, as he will have full access to his current professional activities. Nor will he encounter interruption of his relationship with or support for his daughter and former wife. The applicant's fiancé's difficulty upon separation from the applicant consists primarily of emotional consequences.

The applicant and her fiancé have known each other since 2008. They communicate daily, and the applicant's fiancé referenced two visits with the applicant abroad in 2011. However, they have never resided in the same country, and denial of the present application would not result in a change in their circumstances. The AAO has carefully examined the reports from [redacted] While the reports are useful in providing background information on the applicant and her fiancé, they may be relied upon only generally as evidence of mental health concerns. Though [redacted] indicated that he referred the applicant's fiancé for psychotherapy in 2009, there is no indication or documentation to support that the applicant's fiancé sought or required such care. Though [redacted] raised concern regarding the applicant's fiancé's depressive symptomology becoming more pronounced the longer he is separated from the applicant, [redacted] evaluation approximately two years later does not reflect an increase in the applicant's fiancé's mental health challenges. It is noted that the reports from [redacted] contain a factual discrepancy regarding the events that ended the applicant's fiancé's prior marriage, each suggesting a different degree of impact on the applicant's fiancé. While such a discrepancy does not destroy all evidentiary value of the reports, we find that it highlights that their contents must be accepted only generally to show the applicant's

fiancé's challenges, as each mental health professional evaluated the applicant's fiancé in a single session and did not have the opportunity to develop an understanding of his symptomology over time.

The AAO gives due consideration to the applicant's and her fiancé's wish to have children. However, it is noted that the applicant's fiancé has expressed that he is close with his young daughter in the United States, and separation from the applicant does not impact his ability to engage in parenthood. The AAO accepts that the applicant and her fiancé may share a close bond despite residing apart for the duration of their three-year relationship. Yet, the record does not establish that her fiancé's psychological hardship due to separation rises to an extreme level.

The record contains references to physical ailments encountered by the applicant's fiancé, including an enlarged prostate and high blood pressure. The applicant has not submitted any medical documentation to support these assertions, and we are unable to give weight to these claims.

We acknowledge the hardship of the applicant becoming separated from his young daughter in the United States, the loss of ability to engage in his extensive professional activities in which he has invested considerable effort over a lengthy period, separation from his country of nationality and residence, and significant economic detriment in entering a job market with substantially reduced income opportunities for physicians. However, the applicant must show that her husband would encounter extreme hardship whether he remains in the United States or resides abroad.

We can find extreme hardship warranting a waiver of inadmissibility only where an applicant has demonstrated extreme hardship to a qualifying relative in the scenario of separation *and* the scenario of relocation. A claim that a qualifying relative will relocate and thereby suffer extreme hardship can easily be made for purposes of the waiver even where there is no actual intention to relocate. *Cf. Matter of Ige*, 20 I&N Dec. 880, 886 (BIA 1994). Furthermore, to relocate and suffer extreme hardship, where remaining the United States and being separated from the applicant would not result in extreme hardship, is a matter of choice and not the result of inadmissibility. *Id.*, *also cf. Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996).

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

In proceedings regarding a waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.