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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

Date: **APR 27 2012** Office: GUANGZHOU 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:

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,

A handwritten signature in cursive script that reads "Michael Shumway".

for Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of China 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 daughter.

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 April 30, 2009.

On appeal, the applicant asserts that she has not been convicted of a crime involving moral turpitude. *Statement from the Applicant Submitted with Form I-290B*.

The record contains, but is not limited to: statements from the applicant and her daughter; tax and employment records for the applicant's daughter; 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 an offense under Article 272 of the Criminal Law of the People's Republic of China for her conduct between 1996 and October 1997. She was sentenced to seven years of incarceration, though her time of imprisonment was reduced to approximately four years for good behavior and demonstrated rehabilitation.

On appeal, the applicant contests whether she was properly convicted of this offense, and whether the offense constitutes a crime involving moral turpitude. The applicant contends that most of her proscribed conduct occurred prior to the passage of the criminal law under which she was convicted. She asserts that such prosecution is not practiced in the United States pursuant to prohibitions of *ex post facto* laws. However, the applicant has not provided supporting documentation to establish that she was prosecuted for actions that were not deemed criminal at the time she committed them. The applicant claims that the criminal provision was not in effect during “most” of her conduct. However, she reports that the provision was enacted on March 14, 1997, and her conduct occurred from June 1996 to October 1997. The applicant's own statement supports that the law was in effect during at least part of the period that she engaged in the proscribed conduct. The AAO does not find that concepts regarding the retroactive application of criminal laws in the United States undermine the finding that she was convicted of a crime in China. It is further noted that the record clearly shows that the applicant was convicted under Article 272 of the Criminal Law of the People's Republic of China, and the AAO lacks jurisdiction to review the criminal proceedings or otherwise render the conviction invalid.

The applicant has not submitted the text of Article 272 of the Criminal Law of the People's Republic of China, or a certified translation of the law. In immigration proceedings, the law of a foreign country is a question of fact which must be proven if the petitioner relies on it to establish eligibility for an immigration benefit. *Matter of Annang*, 14 I&N Dec. 502 (BIA 1973). The AAO lacks an official or certified translation of Article 272 of the Criminal Law of the People's Republic of China, but takes notice of an unofficial translation that may be referenced only generally for the content of the law, as follows:

A COMPANY officer who misappropriates funds for self-use or lending to others is subject to imprisonment or detention of up to three years if: 1) the amounts involved are ‘relatively large’ and have not been returned within three months; or 2) funds are returned within three months but the sum is ‘quite large’ and is used for unlawful profit-making activities.

<http://forums.vr-zone.com/singapore-finance-news/1113905-article-272-chinas-criminal-law.html>, accessed on January 27, 2012.

The AAO is not aware of any federal judicial or administrative decisions addressing whether an offense under Article 272 of the Criminal Law of the People's Republic of China constitutes a crime involving moral turpitude.

The record does not show that Article 272 of the Criminal Law of the People's Republic of China was applied to conduct in the applicant's case that did not involve moral turpitude. The applicant asserts that Article 272 of the Criminal Law of the People's Republic of China does not require morally turpitudinous conduct, and that "the court failed to establish sufficient facts on the record to specifically say that moral turpitude was involved in the specific offenses for which [she] was found guilty." The applicant asserts that she had no intent to defraud, she was only performing her job duties, she did not receive benefits from her actions, and that her transgressions consisted of not following the proper technical procedures of her company. She states that she was targeted for prosecution due to her personal differences with her supervisor. She likens her actions to "a bank officer in the United States who makes a loan without obtaining each signature required." The applicant asserts that the reasoning of the Board of Immigration Appeals (BIA) in *In re L-V-C-*, 22 I&N Dec. 594 (BIA 1999), supports that her conduct did not involve moral turpitude. The applicant states that the loans for which she was responsible were repaid in full in the normal course of business, and that her company suffered no loss.

However, the AAO must first look to the language of the statute itself to determine if all offenses addressed involve moral turpitude. Article 272 of the Criminal Law of the People's Republic of China requires that the perpetrator, in the capacity as a company officer, misappropriates funds for her own use or to lend to others. A plain reading of this section of law shows that it requires a breach of trust to unlawfully appropriate funds of one's employer, akin to notions of embezzlement in U.S. law such as 18 U.S.C. §§ 641 and 656. The BIA has determined that all violations of 18 U.S.C. § 656 constitute crimes involving moral turpitude, including bank officers who embezzle or willfully misapply funds entrusted to them. *Matter of Batten*, 11 I&N Dec. 271 (BIA 1965).

We again note that the applicant has not provided a certified translation of Article 272 of the Criminal Law of the People's Republic of China. In examining the records of her conviction, we find that the applicant has not shown that the article was applied to conduct in her case that did not involve moral turpitude. The applicant claims that all funds in question were repaid, yet the court stated that the applicant's company "lost 72,800,000 [Chinese Yuan]" and that "[t]he funds have been unable to be returned until now." This statement supports that the funds were not repaid in the normal course of business as claimed by the applicant. It is noted that whether the funds in question were ultimately repaid is not determinative of whether an individual violated Article 272 of the Criminal Law of the People's Republic of China, as the article proscribes misappropriation of funds for less than three months where the amount at issue is "quite large" and used for profit-making or three months or more where the amount is "relatively large." In the applicant's case, the amount in question was substantial,

The applicant asserts that her actions were open and observable by others, suggesting that she was not engaging in illicit activity. However, the conviction documents indicate that she circumvented procedures, failed to notify her superiors of the transactions she authorized, and acted without authorization. Whether others were aware of her actions does not contradict these findings. The AAO is also not persuaded that violations of Article 272 of the Criminal Law of the People's Republic of China are analogous to offenses of structuring currency transactions to evade reporting requirements under 31 U.S.C. §§ 5324(1) and (3), such as were under review in *In re L-V-C-*, 22 I&N Dec. 594 (BIA 1999). The applicant contends that her actions consisted of failing to follow procedures. However, the record

of her conviction clearly shows that she was found guilty of acting without authorization to misappropriate the funds of her company, which is distinguishable from merely disregarding procedures.

Based on the foregoing, the AAO finds the record to support that the applicant's offense under Article 272 of the Criminal Law of the People's Republic of China constitutes a crime involving moral turpitude. Thus, the applicant 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 daughter is

the only qualifying relative 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).

On appeal, the applicant does not address whether her daughter will suffer hardship should the present waiver application be denied. In a statement dated February 13, 2009, the applicant's daughter stated that she and her husband would financially support the applicant in the United States, and that they own their own home, are financially stable, and have well-paying and secure employment. She provided that the applicant would reside with her or her brother. She explained that her entire life is in the United States, including her husband, her job, and her brother. She noted that the applicant's health is currently "okay", but that she intends to care for the applicant as she grows older. She explained that relocating to China to care for the applicant would create hardship due to the loss of her job and separation from her husband.

The record contains notes from an interview with the applicant on August 25, 2008, in which the applicant indicated that her daughter does not need her support. She stated that her husband has a pension that supports her and her husband, and that sometimes her children send money to them.

Upon review, the applicant has not established that her daughter will suffer extreme hardship should the present waiver application be denied. The record clearly shows that the applicant's daughter earns substantial income and she is not dependent on the applicant for economic support. While the applicant indicated that her daughter sometimes sends money to her, she has not shown that her daughter endures economic difficulty due to any financial ties between them. The applicant has not submitted explanation or evidence to show that her daughter faces unusual emotional hardship due to their separation. While the applicant's daughter indicates that she wishes to care for the applicant in her old age, she notes that the applicant does not face present health challenges. Based on the foregoing, the applicant has not shown that her daughter will suffer extreme hardship should she remain in the United States without her.

The applicant's daughter noted difficulties she would face should she return to China, including the loss of her employment and separation from her husband. The AAO acknowledges that these hardships are substantial, and due weight is given to these factors. However, the general references to these hardships do not distinguish them from common challenges faced by individuals who relocate abroad due to the inadmissibility of a relative. It is noted that the applicant's daughter is a native of China, which supports that she would not face the difficulties of adapting to an unfamiliar language or culture should she return there. The applicant's daughter also did not discuss whether her husband is also a native of China and able to relocate there with her should they choose. Considering these hardship factors in aggregate, the applicant has not established that her daughter will face extreme hardship should she reside in China.

Based on the foregoing, the applicant has not shown that denial of her waiver application under section 212(h) of the Act "would result in extreme hardship" to her daughter. 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.