

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Avenue, N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

H2

[Redacted]

DATE: DEC 21 2012 OFFICE: MIAMI

FILE: [Redacted]

IN RE: [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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Cuba who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. The applicant seeks a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside with his U.S. citizen spouse in the United States.

The Field Office Director concluded that the record failed to establish the existence of extreme hardship for a qualifying relative, and denied the application accordingly. *See Decision of the Field Office Director*, dated August 15, 2011.

On appeal, counsel for the applicant asserts that the applicant's spouse would be unable to visit the applicant upon separation so that her only choice would be to relocate to Cuba. Counsel contends that the applicant's spouse cannot relocate to Cuba because her ties in the United States and the financial hardship and country conditions she would encounter in Cuba. Counsel asserts that the applicant's lawful permanent resident mother would not be able to visit the applicant in Cuba and needs him for her care in the United States.

In support of the waiver application and appeal, the applicant submitted identity documents, documentation concerning his criminal record, a letter, a letter from his spouse, a letter from his mother, a letter from his sister, letters from the employers of the applicant and his spouse, and background information concerning country conditions in Cuba. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(2)(A) of the Act states, in pertinent parts:

(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

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

(h) The Attorney General [Secretary of Homeland Security] 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 if –

(1) (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

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.)

The applicant's case arises within the jurisdiction of the Eleventh Circuit Court of Appeals, which has recently reaffirmed the traditional categorical approach for determining whether a crime involves moral turpitude, declining to follow the "administrative framework" set forth by the Attorney General in *Silva-Trevino*. See *Sanchez Fajardo v. Attorney General*, Nos. 09-12962, 09-14845, 2011 WL 4808171 at *3-5 (11th Cir. October 12, 2011) (finding the U.S. Congress to have intended that determinations of whether offenses are crimes involving moral turpitude be made using the traditional categorical/modified categorical approach). In its decision, the Eleventh Circuit defined the categorical approach as "looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." *Id.* at *1 (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990)). The court noted that where the statutory definition of a crime included "conduct that would categorically be grounds for removal as well as conduct that would not, then the record of conviction – i.e., the charging document, plea, verdict, and sentence – [might] also be considered." *Id.* (citing to *Jaggernaut v. U.S. Att'y Gen.*, 432 F.3d 1346, 1354-55 (11th Cir. 2005)). Pursuant to *Sanchez Fajardo*, the AAO will limit any modified categorical inquiry in this matter to the applicant's records of conviction.

The record reflects that the applicant was convicted of grand theft in the third degree/vehicle and grand theft/cargo in the Circuit Court for the Eleventh Judicial Circuit for Miami-Dade County, Florida on September 25, 2006. The applicant received a sentence of three years of probation and restitution. The Field Office Director found the applicant to be inadmissible to the United States for having been convicted of a crime involving moral turpitude. The applicant does not dispute this ground of inadmissibility on appeal, and the AAO finds sufficient support for this finding in the record.

The record also indicates that the applicant was charged with trafficking in cocaine, 150 kilograms or more, and possession of marijuana in an amount exceeding 50 pounds. The record is insufficient, without further information, to determine whether there is "reason to believe" that the applicant has been involved in the illicit trafficking of a controlled substance. If so, he is also inadmissible pursuant to section 212(a)(2)(C) of the Act, for which there is no waiver. As the applicant is clearly inadmissible under section 212(a)(2)(A)(i)(I) of the Act, and he has not established eligibility for a waiver under section 212(h) of the Act, the AAO need not settle whether he is also inadmissible under section 212(a)(2)(C) of the Act.

A section 212(h) waiver of the bar to admission resulting from 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 U.S. citizen or lawfully resident spouse, parent, or child of the applicant. Hardship to the applicant is not considered in section 212(h) waiver proceedings unless it causes hardship to a qualifying relative, in this case the applicant's spouse and mother. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez*, 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.

The record reflects that the applicant is a 31 year-old native and citizen of Cuba. The applicant’s spouse is a 33 year-old native and citizen of the United States. The applicant’s mother is a 50 year-old native of Cuba and lawful permanent resident of the United States. The applicant is currently residing with his spouse in Miami, Florida.

Counsel asserts that the applicant’s spouse would be forced to relocate to Cuba if the applicant resides there because she would be subject to the travel embargo and be unable to visit her husband in Cuba. Counsel contends that the applicant’s spouse would be required to get a license to travel to Cuba. The applicant’s spouse asserts that if she were separated from the applicant, a large part of her and her desire to start a family would be taken from her as well. The record contains the U.S. Department of State’s country specific information for Cuba concerning the travel of U.S. citizens and lawful permanent residents to Cuba. It is noted that according to the Department of State, a spouse of a Cuban national is exempt from obtaining a license for travel and there is no limitation on the duration or frequency of such travel.

Counsel for the applicant asserts that the applicant’s mother would be unable to visit the applicant if he returned to Cuba because she previously fled from that country. The applicant’s mother asserts that the applicant calls her every week to check on her and that she cannot bear the thought of losing him. The applicant’s mother further asserts that it would be difficult to visit the applicant in Cuba because of her age and because she fled from Cuba in the past. The record does

not contain any assertion or medical documentation concerning the applicant's mother's health and her ability to travel. Further, there is no indication that the applicant's mother, as native of Cuba and the mother of a Cuban national, would be unable to visit the applicant in Cuba despite her past ties with the country.

It is acknowledged that separation from a spouse or child nearly always creates a level of hardship for both parties. However, the applicant has not established that the emotional hardship suffered by his spouse or mother would go beyond the common results of separation from a close family member due to inadmissibility.

Counsel for the applicant asserts that the applicant's spouse cannot relocate to Cuba to reside with the applicant because she is a native of the United States and would be leaving her job behind if she relocated. Counsel further asserts that the applicant's spouse would face financial hardship and Cuba's country conditions. The record contains a letter from [REDACTED] indicating that the applicant's spouse has been employed with their company since September 21, 2009. It is noted that the applicant's spouse is a native of Puerto Rico, which shares an official language with Cuba. There is no indication that the applicant or his spouse would be unable to secure employment in Cuba. It is also noted that the letter from the applicant's spouse does not make any assertions concerning her ability and desire to relocate to Cuba with the applicant. The Department of State has not issued any travel advisories for U.S. citizens concerning travel to Cuba. Going on record without supporting documentary evidence generally is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Further, courts considering the impact of financial detriment on a finding of extreme hardship have repeatedly held that, while it must be considered in the overall determination, it is not enough by itself to justify an extreme hardship determination. *See INS v. Jong Ha Wang*, 450 U.S. 139 (1981) (upholding BIA finding that economic detriment alone is insufficient to establish extreme hardship).

Counsel does not make any assertions concerning the ability of the applicant's mother to relocate to Cuba. The applicant's mother similarly does not make any assertions in her letter concerning her ability to relocate to Cuba with the applicant. It is noted that the applicant's mother is a native of Cuba. The record contains insufficient evidence to find that the applicant's spouse and mother would suffer hardship beyond the common consequences of inadmissibility or removal if they relocated to Cuba.

In this case, the record does not contain sufficient evidence to show that the hardships faced by the applicant's spouse or mother, considered in the aggregate, rise to the level of extreme hardship. The AAO therefore finds that the applicant has failed to establish the requisite level of hardship. As the applicant has not established the requisite level of hardship, no purpose is served in determining whether he warrants a favorable exercise of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. 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.