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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: **FEB 27 2012** Office: ROME DISTRICT OFFICE (VIENNA)

FILE:

IN RE:

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h) and section 212(a)(9)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B).

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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for Perry Rhew
Chief, Administrative Appeals Of

DISCUSSION: The waiver application was denied by the Officer-in-Charge (OIC), Vienna, Austria, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Montenegro who was found to be inadmissible to the United States under 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 and section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking readmission within ten years of his last departure from the United States. The applicant seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen wife.

In a decision, dated April 21, 2008, the OIC found that the applicant failed to establish that his inadmissibility would impose extreme hardship on a qualifying relative. The waiver application was denied accordingly.

In a Notice of Appeal to the AAO (Form I-290B), dated May 14, 2005, counsel states that the applicant's spouse was born and raised in the United States and all of her immediate family members live in the United States. Counsel states that the applicant's spouse chose to accompany the applicant to Montenegro instead of separate and that she has travelled there five times since the applicant's removal. Counsel states that the applicant's spouse last visited Montenegro while she was pregnant and fell ill while there, returning to the United States for treatment, and ultimately suffering a miscarriage. Counsel states that this tragedy, coupled with the inability of the applicant's spouse to be with the applicant has exacerbated the applicant's spouse's depression. Counsel states further that the applicant is unemployed in Montenegro and is unable to support himself or his spouse, which forced the applicant's spouse to return to the United States to work and send money back to the applicant. Finally, counsel states that the applicant's spouse married the applicant at the age of sixteen, was unaware of the gravity of his immigration status, and has been suffering depression as a result of the separation and her miscarriage.

Section 212(a)(2) of the Act states that:

(A)(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.

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 “negligent homicide” in Troy County, Michigan under section 750.324 of the Michigan Statutes, Annotated (section 324 of the Michigan Penal Code), on May 14, 2003, and was sentenced to two years probation.

Section 750.324 of the Michigan Statutes, Annotated states:

Any person who, by the operation of any vehicle upon any highway or upon any other property, public or private, at an immoderate rate of speed or in a careless, reckless or negligent manner, but not willfully or wantonly, shall cause the death of another, shall be guilty of a misdemeanor, punishable by imprisonment in the state prison not more than 2 years or by a fine of not more than \$2,000.00, or by both such fine and imprisonment.

Section 750.324 of the Michigan Statutes includes acts which involve moral turpitude (reckless homicide) and acts which may not involve moral turpitude (negligent homicide). The AAO also notes that although the AAO is unaware of any published federal cases addressing whether the crime of negligent homicide in Michigan is a crime of moral turpitude, in *Matter of Medina*, 15 I&N Dec. 611, 613-14 (BIA 1976), the BIA held that when criminally reckless conduct required a conscious disregard of a substantial and unjustifiable risk to the life or safety of others, although no harm was intended, the crime involved moral turpitude for immigration purposes. In addition, the Eighth Circuit Court of Appeals has found that where an involuntary manslaughter statute requires recklessness, it is a crime involving moral turpitude. *See Franklin v. INS*, 72 F.3d 571 (8th Cir. 1995). Thus, if the actions leading to the applicant's conviction were deemed reckless than the applicant's conviction is for a crime involving moral turpitude.

On October 5, 2011, the AAO issued a request for further evidence for the applicant to clarify whether his actions were reckless or negligent under the statute. The applicant had 12 weeks to submit his response. It has now been over 12 weeks and no response has been filed. The AAO notes that the OIC's finding of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act has not been contested on appeal. Therefore, the AAO will not disturb the finding by the OIC that the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act as a result of his conviction for negligent homicide.

The AAO does finds that the applicant is inadmissible under section 212(a)(9)(B) of the Act.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

(B) Aliens Unlawfully Present.-

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

....

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

The record shows that the applicant entered the United States without inspection on May 22, 2000. On September 25, 2000 the applicant filed an Application for Asylum and Withholding of Removal

(Form I-589). The applicant's Form I-589 was denied and he was referred to the immigration court. On March 2, 2001, the applicant's I-589 was denied and he was ordered removed by an immigration judge. On March 17, 2003 the applicant departed the United States.

The AAO notes that the filing of an asylum application tolls any period of unlawful presence, including any periods of time in which the application is before an immigration judge, the Board of Immigration Appeals, or federal court. Thus, the applicant accrued unlawful presence from March 2, 2001, the date his Form I-589 was denied by the immigration judge, until March 17, 2003, the date he departed the United States. In applying for an immigrant visa, the applicant is seeking admission within ten years of his March 2003 departure from the United States. Therefore, the applicant is inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

Section 212(a)(9)(B)(v) of the Act provides:

(v) Waiver. – The Attorney General [now the Secretary of Homeland Security (Secretary)] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

Section 212(h) of the Act states:

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), . . . of subsection (a)(2) . . . if –

....

(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

A waiver of inadmissibility under section 212(a)(9)(B)(v) and section 212(h) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative. Under section 212(a)(9)(B)(v) relatives who are considered qualifying relative include the U.S. citizen or lawfully resident spouse or parent of the applicant. Under section 212(h) relatives who are considered qualifying relative include 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. 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 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 of hardship includes: an affidavit from the applicant's spouse, a letter from the applicant's spouse's doctor in Montenegro, records of the applicant's spouse's miscarriage, a psychological evaluation for the applicant's spouse, numerous letters of support from the applicant's family, and two additional letters from the applicant's spouse.

In her statements, the applicant's spouse states that she is suffering severe depression. In her statement, dated May 15, 2008, she states that she has made attempts to live with the applicant in Montenegro, visiting him five times, but that each time she became sick. She states that the last time she visited Montenegro she was pregnant and became ill while there. She states that after returning to the United States she suffered a miscarriage. She also states that she is working too many hours in order to support herself and the applicant. In another statement, the applicant's spouse states that she stayed with the applicant and his family for two years in Montenegro. She states that she is now suffering physically and mentally as she must work two jobs as a waitress in order to support herself and the applicant. She states that living in Montenegro was not easy as the economy is bad and the jobs pay very little. In her third letter, the applicant's spouse states that she met the applicant in the United States and that they saw each other several times before he was removed from the United States. She also states that she decided to visit him in Montenegro as he lives in the town near her grandmother's home, that she stayed in Montenegro for two years, and that she felt the living conditions were appalling and miserable. She states that the applicant was trying to earn money by raising cattle, but that it was not economically profitable and that many times they did not have electricity or tap water.

The record also includes a letter from a medical office in Montenegro, dated May 13, 2008 and stating that the applicant's spouse had been complaining of respiratory problems that began bothering her in January 2008 and that began while in Montenegro. The record also includes a prescription dated February 2008 for a drug called Macrobid. In addition, the record includes an Exitcare Form from [REDACTED] Hospital in Michigan which gives home care instructions for women who have had a miscarriage.

Finally, the record includes a letter, dated May 8, 2007, from a [REDACTED] who evaluated the applicant's spouse's psychological status and suitability for psychotherapy. He states that she was referred because of complaints of depressive symptoms and a preoccupation with her husband's return to the United States. [REDACTED] states that the applicant's spouse currently lives with her father and two brothers in Michigan and that her mother is in Albania. He also states that the applicant's spouse has been educated up to the tenth grade, attending kindergarten and first grade in Michigan, second through seventh grade in Montenegro, and then eighth through tenth grade again in Michigan. [REDACTED] concludes that the applicant's spouse is clinically depressed as a result of suffering severe emotional and financial hardship as she tries to have her husband enter the United States. He states that she feels that she can do no more but work and wait for the waiver and she does not feel that she can return to Montenegro because of the living conditions.

The AAO notes that the record includes letters from the applicant's spouse's father and brother that support the emotionally suffering of the applicant's spouse as it has been related to [REDACTED]. The letters state that the applicant's spouse just cries and does not eat or sleep.

The AAO finds that the current record does not establish that the applicant's spouse would suffer extreme hardship as a result of relocation. The record does not establish that it would be extreme hardship for the applicant's spouse to relocate to Montenegro, where she spent six years of her youth and two recent years of her adulthood. The record indicates that she has family in Montenegro and does not support a finding that she would not be able to find employment there. The record contains no supporting documentation to establish country conditions in Montenegro and that relocating there would be an extreme hardship for someone of the applicant's spouse's background and education. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)). The applicant must submit documentation to support any claims of hardship.

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 remain in the United States and thereby suffer extreme hardship as a consequence of separation can easily be made for purposes of the waiver even where there is no intention to remain separated in reality. *See Matter of Ige*, 20 I&N Dec. 880, 886 (BIA 1994). Furthermore, to separate and suffer extreme hardship, where relocating abroad with the applicant would not result in extreme hardship, is a matter of choice and not the result of inadmissibility. *Id.*, *see also Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996). As the applicant has not demonstrated extreme hardship from relocation, we cannot find that refusal of admission would result in extreme hardship to the qualifying relative(s) in this case.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's spouse caused by the applicant's inadmissibility to the United States. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B) 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.