

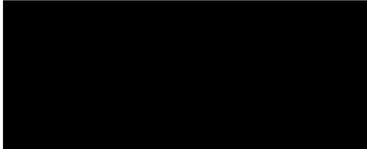
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090
U.S. Citizenship and Immigration Services



PUBLIC COPY

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Date: **JAN 03 2012** Office: HOUSTON



IN RE: Applicant:

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

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

for Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Nigeria who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. He was also found inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for seeking to procure admission into the United States by willful misrepresentation. He seeks waivers of inadmissibility in order to reside in the United States with his U.S. citizen wife and children.

The field office director found that the applicant failed to establish extreme hardship to a qualifying relative and denied the Form I-601 application for a waiver accordingly. *Decision of the Field Office Director*, dated February 12, 2009.

On appeal, counsel for the applicant asserts that the applicant has shown that a qualifying relative will endure extreme hardship if the present waiver application is denied. *Statement from Counsel with Form I-290B*, dated March 12, 2009.

The record contains, but is not limited to: a statement from counsel; a statement from the applicant's wife and mother-in-law; a letter from the applicant's religious organization; a letter from a youth football club for which the applicant and his wife volunteer; documentation of the applicant's compensation for employment; reports on conditions in Nigeria; and documentation in connection with the applicant's criminal history. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(6)(C)(i) of the Act provides, in pertinent part, that:

Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

The record shows that on or about March 13, 1996 the applicant attempted to enter the United States pursuant to the Visa Waiver Pilot Program using a passport that belonged to another individual. He was permitted to withdraw his application for admission. The field office director determined that the applicant attempted to enter the United States by making a material misrepresentation (his true identity and lack of proper travel documentation), and thus he is inadmissible under section 212(a)(6)(C)(i) of the Act. The applicant does not contest his inadmissibility under section 212(a)(6)(C)(i) of the Act on appeal, and he requires a waiver under section 212(i) of the Act.

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, on or about February 1, 2001, the applicant engaged in conduct in Texas that led to a charge of Forgery of a Government Instrument, designated a third degree felony.¹ The applicant pled guilty and was given deferred adjudication for five years, fined \$500, and ordered to perform 240 hours of community service. At the time of the applicant’s criminal proceedings, Forgery of a Government Instrument was proscribed by Texas Penal Code § 32.21, which included as an element of the offense that the perpetrator “forges a writing with intent to defraud or harm another.” Crimes that include as a requirement an intent to defraud have been held, as a general rule, to involve moral turpitude. *Matter of Adetiba*, 20 I&N Dec. 506, 508 (BIA 1992). Though Texas Penal Code § 32.21 may be transgressed with either an intent to defraud or harm another, the charging document in the applicant’s case shows that he was indicted for forging a government instrument “with intent to defraud *and* harm another.” (emphasis added). The record supports that the applicant’s conviction was for a crime involving moral turpitude, which renders him inadmissible under section 212(a)(2)(A)(i)(I) of the Act. He does not contest this finding on appeal.

¹ A third degree felony in Texas is punishable by up to 10 years of incarceration. Texas Penal Code § 12.34. Therefore, the applicant’s conviction does not qualify for the “petty offense” exception in section 212(a)(2)(A)(ii)(II) 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.

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

- (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, 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 the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

The record clearly establishes that the applicant requires a waiver of inadmissibility under section 212(i) of the Act, and he must obtain a waiver under that provision in order to show that he is

admissible to the United States. While the applicant's children are considered qualifying relatives under section 212(h) of the Act, only his wife is considered a qualifying relative under section 212(i) of the Act. Thus, the AAO will first address whether the applicant has established eligibility under section 212(i) of the Act.

A waiver of inadmissibility under section 212(i) 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 or parent of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. The applicant's wife is the only qualifying relative under section 212(i) of the Act. 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 July 15, 2008, the applicant’s wife provided that she was born in the United States and she has three young children. She stated that, although their oldest child is the applicant’s stepson, the applicant has acted as his father figure and supported him significantly since he was two years old. The applicant's wife expressed that all three of their children would suffer emotional difficulty should they become separated from the applicant. She described the applicant's participation in their household, including getting the children ready in the morning.

Applicant's wife stated that she is treated for depression, and that she will endure emotional difficulty should the applicant returned to Nigeria. She explained that she and the applicant work hard to meet their financial needs, including rent, school fees and daycare for their children, a car payment, health and car insurance, clothing, food, utilities, and gas. She stated that she can't imagine meeting these expenses without the applicant's assistance. She asserted that she and their children will have to relocate with the applicant should he reside in Nigeria. She noted that she and the applicant assist others in their family and community including her mother who has multiple sclerosis. She provided that her mother would be crushed should she leave her in her current condition.

The applicant’s mother-in-law stated that the applicant and his wife assist her greatly, both financially and emotionally. She provided that the applicant sometimes takes her to therapy for multiple sclerosis when there is no one else to take her. She lauded the applicant's care in parenting his children.

In a statement with Form I-290B, counsel asserts that the applicant's wife has no relatives or friends in Nigeria, and that all of her family members are in the United States, including her mother, father, three sisters, and two brothers. Counsel asserts that conditions in Nigeria are poor, particularly for women and children. Counsel states that the applicant's family would also face difficulty due to being Christians. Counsel contends that the applicant's mother-in-law with multiple sclerosis would face hardship should she live apart from the applicant and his wife. Counsel adds that separating the applicant's wife from his mother-in-law would create additional emotional hardship for his wife. Counsel asserts that the applicant’s mother-in-law would lack proper medical care should she relocate to Nigeria.

Upon review, it is first noted that counsel cites an unpublished decision of the AAO in which a waiver application was approved with only a single qualifying relative. Counsel contrasts that decision with the instant matter, in which there are four qualifying relatives. Unpublished decisions of the AAO are not binding on the present matter. Further, the applicant bears the burden of establishing that a single qualifying relative will suffer extreme hardship should the present waiver application be denied. While the presence of multiple relatives who will experience hardship can be relevant to the extent that they share in each other's challenges, the extreme hardship standard of section 212(h) of the Act is met by showing that an applicant has one qualifying relative who will suffer extreme hardship. The presence of multiple qualifying relatives does not, by itself, establish that extreme hardship will be faced by any one of them upon denial of the application.

However, the applicant has shown that his wife will suffer extreme hardship should the present waiver application be denied. The applicant has shown that his wife will suffer extreme hardship should she relocate to Nigeria. As observed by counsel, conditions in Nigeria pose significant challenges. On April 15, 2011, the United States Department of State (USDOS) issued a travel warning for Nigeria advising U.S. citizens to avoid all but essential travel to numerous regions, and stating that “[v]iolent crime committed by individuals and gangs, as well as by persons wearing police and military uniforms, remains a problem throughout the country.” *Travel Warning – Nigeria, U.S. Department of State*, dated April 15, 2011. USDOS cited kidnappings and killings of foreign nationals, including US citizens, as well as bombings and election-related violence that resulted in deaths and injuries, and ethnic or religious-based disturbances. USDOS added that visiting and resident U.S. citizens “have experienced armed muggings, assault, burglary, carjacking, rape, kidnappings, and extortion - often involving violence.” USDOS reported that “[l]aw enforcement authorities usually respond slowly or not at all, and provide little or no investigative support to victims.”

It is evident that conditions in Nigeria would pose significant risks and challenges for the applicant's wife. Her hardship would be compounded by the fact that she has at least two young children.² The applicant's wife would face other difficulties should she depart the United States, including separation from her mother who has multiple sclerosis, separation from her other family members, the loss of her employment, and separation from her community and country of birth and nationality. Considering all of these elements in aggregate, the AAO finds that the applicant's wife will face extreme hardship should she relocate to Nigeria.

The applicant has also shown that his wife will suffer extreme hardship should she remain in the United States without him. The applicant has submitted substantial explanation to show the strong contribution he makes to his household, including playing an integral role in caring for his children. The AAO is persuaded that the applicant's absence from his household would have a significant emotional impact on his wife and two children who are ages six and eight. The applicant's wife states that they have a third child from her prior relationship, and that the applicant has served as his father for the majority of his life. The applicant has not provided a birth certificate for this child or

² While the applicant's wife claims that she has three children, the applicant has only provided birth certificates for two of them. The applicant has only identified two children on Form I-601.

other official documentation to support that he has a stepchild, therefore less weight is given to assertions regarding this child. However, due consideration is given to the explanations from the applicant's wife and the emotional hardship she will endure as a result of her children losing the applicant's presence and participation.

Separation of spouses, and the separation of parents and children, are common consequences when individuals relocate abroad due to inadmissibility. However, the AAO acknowledges that the applicant's wife will suffer significant emotional difficulty should she and her children be separated from the applicant. It is reasonable that such psychological hardship would be exacerbated due to the poor conditions in Nigeria in which the applicant would reside, and the fact that their separation would be for an indefinite period due to permanent inadmissibility under sections 212(a)(2)(A)(i)(I) and 212(a)(6)(C)(i) of the Act.

The record contains references to the fact of the applicant's mother-in-law has multiple sclerosis. However, the applicant has not submitted any medical documentation for his mother-in-law to support this assertion, when such documentation should be readily available. Therefore, less weight is given to health problems suffered by the applicant's mother-in-law. Yet, due consideration is given to the applicant's wife's concern for her mother's welfare, and the AAO acknowledges that the applicant's support is helpful as his wife faces her mother's health challenges.

The applicant's wife asserts that she will face financial difficulty in the applicant's absence, and she references their expenses. The record lacks adequate documentation in order for the AAO to fully assess the applicant's family's economic circumstances. The applicant has submitted evidence of his income, and his wife reported that she works as an office manager. It is evident that acting as a single parent for at least two young children requires substantial financial resources, and the AAO gives due consideration to the impact the loss of the applicant's income would have on his wife.

As discussed above, the applicant has made some assertions that are not adequately supported by documentation. However, the AAO must weigh all assertions and available evidence to determine if the applicant has shown by a preponderance of the evidence that his wife will suffer extreme hardship. Considering all factors in aggregate, the applicant has met his burden to show that denial of his waiver application "would result in extreme hardship" to his wife, whether she remains in the United States or resides in Nigeria. Sections 212(h) and (i) of the Act.

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

The negative factors in this case consist of the following:

The applicant has been convicted of a crime involving fraud. The applicant attempted to enter the United States through misrepresentation.

The positive factors in this case include:

The applicant's wife will suffer extreme hardship should the applicant reside in Nigeria. The applicant's children and mother-in-law will face hardship should he depart the United States. The applicant has shown a propensity to work. The applicant has engaged his community through religious activities and volunteering for a youth organization. The applicant has provided emotional and financial support for his family, and acted as a good father and husband.

The applicant's criminal offense involving fraud and his attempted entry to the United States through misrepresentation call into question his veracity and respect for the laws of the United States. However, these acts occurred over 10 years ago, and the record does not support that the applicant has engaged in further dishonest acts. Accordingly, the AAO finds that the positive factors in this case overcome the negative factors, and the applicant warrants a favorable exercise of discretion.

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

ORDER: The appeal is sustained.