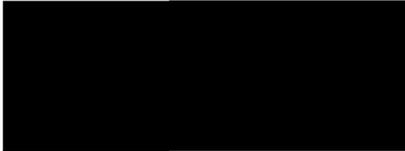


identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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



H₂

Date: **MAR 13 2012** Office: SAN FRANCISCO

FILE: 

IN RE:

Applicant: 

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:



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, San Francisco, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Vietnam 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 crimes involving moral turpitude. He seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen mother and son.

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 August 26, 2011.

On appeal, counsel for the applicant asserts that the applicant's mother and son will suffer extreme hardship should the present waiver application be denied. *Brief from Counsel*, dated October 22, 2011.

The record contains, but is not limited to: a brief from counsel; statements from the applicant, as well as the applicant's fiancée, mother, siblings and other family members; documentation relating to the applicant's son's developmental delays and academic requirements; documentation regarding the applicant's academic activities; evidence regarding the applicant's mother's and brother's finances; reports on conditions in Vietnam; and documentation relating to the applicant's criminal history. 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 the applicant has been convicted of multiple crimes, including: burglary under California Penal Code § 459 for his conduct on or about March 13, 2000; theft under California Penal Code § 496(a) for his conduct on or about September 14, 1999; possession, concealment, and sale of stolen property under California Penal Code § 496d(a) for his conduct on or about May 9, 2001; and offenses of driving under the influence of alcohol in 2002 and 2003. The field office director found the applicant to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act for having been convicted of crimes involving moral turpitude, and there is ample support for this determination. The applicant does not contest his inadmissibility on appeal. He 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 mother and son are the qualifying relatives 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).

The applicant has presented sufficient information to show that his six-year-old U.S. citizen son will suffer extreme hardship should the present waiver application be denied. The mother of the applicant’s son, the applicant’s fiancée, is 24 years old. In a statement dated February 28, 2010, she states that she cares for their son full-time due to his disability and special needs. She indicates that their son has a sensory disorder, a speech delay, and he cannot be left alone. She describes in detail the additional steps required to accomplish otherwise common tasks due to their son’s needs, and she explains that the applicant takes an active role in caring for his son when he is not working to support them. She states that their son receives therapy each week with a speech-language pathologist, and that the applicant pays the costs of this required treatment.

The applicant’s fiancée explained that she traveled to Vietnam twice, and that she doesn’t believe their son could adapt to life there due to the climate, lack of options to continue therapy, loss of his state-sponsored medical benefits, the potential development of asthma due to being born premature and a genetic predisposition, a lack of access to medical treatment, and other safety issues. She expressed concern for educational opportunities and job prospects.

The applicant has submitted reports on his son, including a speech and language assessment that indicates that his social skills are delayed, that his expressive and receptive language skills are severely delayed, and recommends speech therapy two times per week. The record contains documentation generated in the course of the applicant’s son’s speech therapy. An occupational therapy evaluation diagnoses the applicant’s son with speech delay, and observed that he is having difficulty processing sensory information. The report recommends occupational therapy one time per week to address the applicant son’s difficulty with sensory processing and to facilitate fine motor development.

The applicant describes his efforts to obtain education and start a business to support his family, and he expresses his desire to continue to develop a close bond with his son and to participate in his care.

The applicant’s son’s developmental challenges and associated therapeutic needs constitute unusual circumstances not commonly faced by children who endure separation from a parent or relocation to another country. It is evident that the applicant’s son requires and receives special services in the

United States that would be disrupted should he relocate to Vietnam. The record shows that he resides with his grandparents, his mother, and the applicant in the United States, and he spends significant time with his grandmother. It is understood that he would face substantial emotional difficulty should his family be separated in order for him to relocate to Vietnam. The AAO acknowledges the applicant's fiancée's concern for conditions in Vietnam and the impact they would have on their son, particularly the reduced access to medical care. Documentation in the record reflects that the applicant's son has exposure to the Vietnamese language. However, considering his challenges in aggregate, the applicant has shown that he would endure extreme hardship should he depart the United States and reside abroad.

The applicant's close relationship to his son and commitment to his care support that his son will endure substantial emotional hardship should he become separated from the applicant. As discussed above, the applicant's son's developmental delays create uncommon challenges for him in dealing with disruption of the stability of his family and relationships with those who provide his care. The applicant's wife asserts that she cares for their son full-time, and she does not work outside the home. They contend that the applicant provides their income. The applicant has not submitted complete documentation of his income or his household's expenses, and their household also contains the applicant's fiancée's parents. Thus, the AAO is unable to fully assess the financial impact the applicant's absence would have on his son's well-being in the United States. However, due consideration is given to the expenses of raising a young child with special needs and the assertion that the applicant's fiancée does not work, such factors that support that the applicant's son would face hardship due to the loss of the applicant's economic contribution to their household. The applicant's fiancée noted that the applicant pays for his son's therapy, and the record supports that the lack of such service would create significant hardship for their son.

All elements of hardship to the applicant's son must be considered in aggregate to determine the totality of the circumstances he faces. The AAO finds that, should the applicant's son remain in the United States without the applicant or relocate to Vietnam, he will face extreme hardship. Based on the foregoing, the applicant has shown that denial of the present waiver application "would result in extreme hardship" to his son, as required for a waiver under section 212(h) of the Act. As the applicant has established that a qualifying relative will suffer extreme hardship, he has met his statutory requirement to show eligibility and we need not also assess whether his mother will suffer extreme hardship should the waiver application be denied.

In *Matter of Mendez-Moralez*, 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 multiple criminal offenses, including crimes involving moral turpitude.

The positive factors in this case include:

The applicant's U.S. citizen son will suffer extreme hardship should the applicant reside outside the United States. The applicant's U.S. citizen mother and fiancée will face significant hardship should the waiver application be denied. The applicant has expressed remorse for his criminal activity. The applicant's offenses occurred during a contained period, and the record does not show that he has engaged in criminal conduct since 2003, in approximately nine years. The applicant has made significant efforts to reform his behavior, pursue education and business opportunities, and to support his fiancée and son. The applicant has numerous immediate family members in the United States who support his continued presence. The applicant has resided in the United States since the age of 12 years, and he would face hardship should he now return to Vietnam approximately 19 years later at age 31.

The applicant's criminal acts cannot be condoned. His theft-related acts call into question his character, and his convictions for driving under the influence of alcohol raise concerns about his regard for the safety of others. However, the AAO is satisfied that the applicant has invested considerable effort in rehabilitating himself, and that he does not pose a risk to others in the United States. 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 section 212(h) 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.