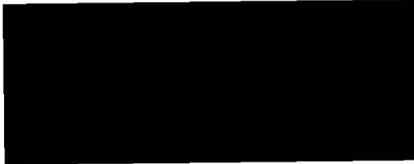


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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090  
**U.S. Citizenship  
and Immigration  
Services**



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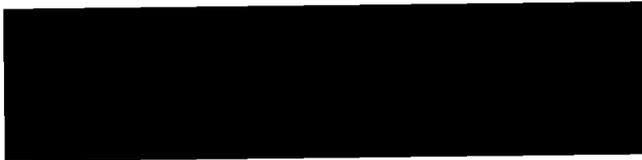
IN RE:

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, London, England, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Scotland 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, and section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for procuring 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.

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 July 30, 2009.

On appeal, counsel for the applicant asserts that the applicant is not inadmissible under section 212(a)(6)(C)(i) of the Act, and his wife will suffer extreme hardship should the present waiver application be denied. *Brief from Counsel*, dated August 26, 2009.

The record contains, but is not limited to: a brief from counsel; statements from the applicant, as well as the applicant's wife, mother-in-law, and other relatives; medical documentation for the applicant's wife; documentation associated with the applicant's wife's efforts to obtain employment in Scotland; documentation relating to the applicant's income and his family's expenses; documentation regarding the applicant's wife's employment and finances when she resided in the United States; early school records for the applicant and documentation relating to his challenges as a child; and documentation regarding the applicant's criminal convictions. The entire record was reviewed and considered in rendering this decision.

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

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

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

(ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5

years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

The Board of Immigration Appeals (BIA) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

[M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general....

In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

In *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. First, in evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a “realistic probability, not a theoretical possibility,” that the statute would be applied to reach conduct that does not involve moral turpitude. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability exists where, at the time of the proceeding, an “actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien’s own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude.” *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

However, if a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, “the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude.” 24 I&N Dec. at 697 (citing *Duenas-*

*Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage inquiry in which the adjudicator reviews the “record of conviction” to determine if the conviction was based on conduct involving moral turpitude. *Id.* at 698-699, 703-704, 708. The record of conviction consists of documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.* at 698, 704, 708.

If review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. 24 I&N Dec. at 699-704, 708-709. However, this “does not mean that the parties would be free to present any and all evidence bearing on an alien’s conduct leading to the conviction. (citation omitted). The sole purpose of the inquiry is to ascertain the nature of the prior conviction; it is not an invitation to relitigate the conviction itself.” *Id.* at 703.

The record shows that the applicant has been convicted of multiple offenses in Scotland, including housebreaking with intent to steal on or about February 25, 1999; two offenses of taking and driving away a motor vehicle on February 11 and March 9, 1999 and February 2, 1994; theft on or about January 10, 1996; and opening a Lockfast place with intent to steal, and attempting to open a Lockfast place with intent to steal on or about February 2, 1994.

The applicant has not presented detailed, official documentation regarding his criminal proceedings, including the specific sections of law under which he was convicted. Nor has the applicant provided the text of the foreign laws. However, it is clear that the applicant was convicted of multiple theft offenses. The Board of Immigration Appeals (BIA) has determined that to constitute a crime involving moral turpitude, a theft offense must require the intent to permanently take another person’s property. *See Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973) (“Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended.”). The applicant has not presented any information or evidence to indicate that his acts of theft involved temporary takings.

The applicant’s convictions for housebreaking with intent to steal and opening and attempted opening of a Lockfast place with intent to steal appear to equate to burglary offenses in the United States. The Board of Immigration Appeals (BIA) has maintained that the determinative factor in assessing whether burglary involves moral turpitude is whether the crime intended to be committed at the time of entry or prior to the breaking out involves moral turpitude. *Matter of M-*, 2 I&N Dec. 721, 723 (BIA 1946). The BIA has held that burglary with intent to commit theft is a crime involving moral turpitude. *See Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982).

Accordingly, the record supports that the applicant was convicted for crimes involving moral turpitude, and he is inadmissible under section 212(a)(2)(A)(i)(I) of the Act. Though counsel asserts that some of the applicant's convictions do not constitute crimes involving moral turpitude or convictions for immigration purposes, the applicant does not contest that he has been convicted of multiple crimes involving moral turpitude or that he is inadmissibility under section 212(a)(2)(A)(i)(I) of the Act on appeal. He requires a waiver of inadmissibility under section 212(h) of the Act.

The applicant was also found inadmissible under section 212(a)(6)(C)(i) of the Act for procuring admission to the United States by making a willful misrepresentations. Specifically, the applicant entered the United States seven times pursuant to the visa waiver program from 2002 to 2006, yet he declined to reveal his criminal convictions for crimes involving moral turpitude which would have eliminated his eligibility. On each entry, on Form I-94W, at Item B, when asked "Have you ever been arrested or convicted for an offense or crime involving moral turpitude" the applicant checked the box for "No." On appeal, counsel and the applicant that the applicant did not willfully conceal material information, as he did not understand the definition of a crime involving moral turpitude or his obligation to reveal his convictions. As discussed above, the applicant's criminal convictions render him inadmissible under section 212(a)(2)(A)(i)(I) of the Act, and his failure to reveal these convictions was material to his eligibility to enter pursuant to the visa waiver program. Given the applicant's criminal history, the AAO is not persuaded that in the course of seven entries to the United States, the applicant's failure to reveal his criminal history was never willful. Although the term "crime involving moral turpitude" is a term of art within U.S. immigration law that a lay person may not understand at first encounter, the applicant had ample opportunity to investigate the matter prior to or at the time of his subsequent visits. Based on the record, we think it more likely (at a minimum) that the applicant knew that it was possible that he was required to reveal at least some of his crimes, but chose not to reveal them, or investigate further what disclosure was required, so as to avoid complications in being admitted to the United States. The applicant has not shown that he was erroneously deemed inadmissible under section 212(a)(6)(C)(i) of the Act, and he requires a waiver under section 212(i) 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.

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. 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 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 AAO has examined the record closely, and observes significant elements of hardship to the applicant's wife. She has endured psychological difficulty, dating back to at least February 13, 2004 when she sought counseling services for anxiety and panic attacks. At that time, she reported that she began suffering attacks a couple of years prior to that date, with heart palpitations, sweating, dizziness, and fear of a heart attack, for which she was prescribed a medication and individual therapy. A medical letter dated August 20, 2009 indicates that the applicant's wife continued to take antidepressant medication, and a physician observed that she suffered with "low mood." The applicant's wife's history of mental health concerns constitute a challenge not commonly faced by individuals who relocate or face the separation from a spouse due to inadmissibility.

Applicant's wife relocated to Scotland join the applicant due to her difficulty coping with their separation. The record supports that she has faced significant emotional hardship while residing in Scotland, including separation from her numerous family members in the United States with whom she shared a close bond and interconnected lives. Detailed letters in the record described the applicant's wife's role in her family in the United States, including her close support for her young cousin who struggles with manic depression and was hospitalized after a suicide attempt.

Documentation supports that the applicant's wife is a licensed counselor in the United States and she enjoyed full-time employment in her field here, yet it is evident that she was compelled to relinquish her opportunities in the United States in order to reside with the applicant abroad. She states that she has been unable to secure employment in Scotland, and the applicant has submitted evidence to support that his wife has made multiple attempts to obtain a position in her field there. It is evident that her inability to secure employment is contributing to her emotional distress. The AAO acknowledges the applicant's wife's indication that they are experiencing financial difficulty due to her inability to gain employment. The record supports that the applicant's wife's history of mental health challenges exacerbates the difficulty she experiences in facing these hardships.

Considering these hardships in aggregate, the AAO finds that the applicant's wife will endure extreme hardship should she continued to reside in Scotland to maintain family unity.

As discussed above, the difficulty the applicant's wife is experiencing in Scotland is significant, yet she chose to endure this hardship largely due to the emotional hardship of remaining separated from the applicant. This choice, combined with her documented history of mental health challenges over at least 10 years, supports that the hardship of separation is unusually substantial for her. The applicant's wife indicated that she and the applicant wish to have children, and due consideration is given to the related consequences of residing in separate countries, and the resulting emotional impact. The record does not show that the applicant's wife would be unable to meet her economic needs in the applicant's absence, yet we acknowledge her concern for her financial welfare and the obligations she faces such as student loan debt. The AAO acknowledges that, in the absence of a waiver, inadmissibility under sections 212(a)(2)(A)(i)(I) and 212(a)(6)(C)(i) of the Act is permanent, and this fact weighs heavily on the applicant's wife. In a statement dated September 30, 2008, she indicated that "If I found out that I was going to have to be permanently separated from [the applicant], the anxiety and depression that I would suffer would be immense and possibly overwhelming."

Considering all elements of hardship to the applicant's wife should she reside in the United States apart from the applicant for an indefinite period, she will suffer extreme hardship. Accordingly, the applicant has established that denial of the present waiver application "would result in extreme hardship" to a qualifying relative, as required for waivers under sections 212(h) and 212(i) of the Act.

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 crimes, including crimes involving moral turpitude. The applicant entered the United States on seven occasions pursuant to the visa waiver program, yet he failed to reveal his criminal history in each instance that constituted material misrepresentations.

The positive factors in this case include:

The applicant's wife will suffer extreme hardship should the applicant reside outside the United States. The applicant has provided economic and emotional support for his wife and cultivated a strong and stable relationship. The applicant has maintained consistent employment with the same employer for a lengthy period. The record shows that the applicant's pattern of criminal acts occurred during a contained period between the ages of 15 and 23, and he has not been convicted of a criminal offense since 2002, and over 10 years. He has expressed remorse for his prior transgressions, and the record supports that he has made sincere efforts to reform himself and depart from his criminal past. The AAO is satisfied that the applicant no longer has a propensity to engage in further criminal conduct, and that he does not pose a risk to others in the United States. The record also supports that the applicant's wife's many relatives in the United States will benefit from her continued residence here, as she plays an integral role in her family and offers them emotional support and other assistance.

Based on the foregoing, 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.