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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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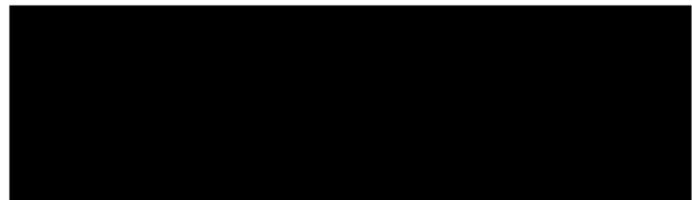
Date: **MAY 09 2012** Office: CHICAGO

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.

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 Office

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

The applicant is a native and citizen of El Salvador 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 wife and children.

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, and that the applicant failed to show that he warrants a favorable exercise of discretion. *Decision of the Field Office Director*, dated August 11, 2009.

On appeal, counsel for the applicant asserts that the applicant has shown that his wife and children will suffer extreme hardship should the present waiver application be denied. *Brief from Counsel*, dated September 9, 2009.

The record contains, but is not limited to: a brief from counsel; statements from the applicant and his wife; documentation in connection with the applicant's family's income, taxes, and financial status; an article on conditions in El Salvador; and documentation in connection with the applicant's criminal history. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(2) of the Act states in pertinent part:

Criminal and related grounds. —

(A) Conviction of certain crimes. —

- (i) In general. — Except as provided in clause (ii), any 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, or
 - (II) a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), 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 June 13, 1985 the applicant was convicted of Attempted Criminal Mischief 2nd degree in New York. He pled guilty to Criminal Damage to Property for his conduct on or about July 10, 1992. On or about July 22, 2005 the applicant was convicted of Criminal Damage to Property under Illinois Criminal Statute § 5/21-1(1)(a). The applicant has been arrested and charged with other crimes over an approximately 20 year period. The field office director determined that the applicant's offenses involving damaging property render him inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act for having been convicted of crimes involving moral turpitude. The applicant does not contest his inadmissibility on appeal. The applicant 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 U.S. citizen wife and children 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).

In a statement dated September 11, 2007, the applicant's wife provided that she has resided in the United States for her entire life, and she had been married to the applicant for six years as of the date of her statement. She indicated that she and the applicant have a son together, and she has three children from a prior marriage. She stated that the applicant works full-time, earns approximately \$30,000 per year, and obtains health coverage for their family through his employment. She stated that she and the applicant own a home in which they reside, yet they would lose it should the applicant reside outside the United States. She asserted that the applicant provides financial support for her three children, and their biological father has not done so. She stated that her children suffered due to their biological father's actions, that her daughter required counseling and therapy, and that the applicant is the only father figure they have known. She provided that the applicant's daughter from a prior relationship was killed by a drunk driver in 1995, and that the applicant continues to suffer from the loss.

In a statement issued in approximately 2007, the applicant provided that he has four other children from his prior marriage. He described circumstances regarding these children, including that one child from the family was killed in a car accident in 1995, the family was awarded \$5 million in damages and his oldest daughter gained custody of the other children after bringing an action against him. He noted that he has continued to share a close relationship with two of his daughters and participate in their lives. He added that he is close with his wife and their son, and that he spends his

free time with his family. He indicated that his wife and son would not accompany him to El Salvador.

In a brief dated September 9, 2009, counsel reiterates that the applicant has one son with his current wife, four other living biological children, and three stepchildren from his current wife. Counsel notes that the record contains documentation of the applicant's employment and tax returns, and evidence that his family depends on him for medical and dental insurance. Counsel contends that the applicant has shown that his wife and children will face extreme hardship should he reside in El Salvador, including financial and emotional difficulty. Counsel asserts that conditions in El Salvador are poor, including prevalent crime. Counsel notes that the applicant's children from his prior marriage lost their mother and sister, and indicates that they will endure significant psychological hardship should they lose the applicant's presence.

Upon review, the applicant has not submitted sufficient evidence to show that his wife or children will suffer extreme hardship should the present waiver application be denied. It is first noted that, with the exception of a brief from counsel dated September 9, 2009 and an article on violence in El Salvador dated March 12, 2009, the documents provided by the applicant are dated September 2007 and earlier, two or more years before the appeal was filed. The record does not contain current information or documentation to show the present status of his family's employment, financial status and expenses, and household members. In proceedings regarding a waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. In the absence of clear explanation and documentation, the AAO may not speculate regarding the present circumstances his family faces, or the consequences that would occur should he reside in El Salvador.

The applicant has not provided birth certificates for his claimed three stepchildren. In addition to their biological son, two daughters are identified on the applicant's and his wife's 2006 federal tax return. These two individuals are also listed on medical insurance cards effective December 25, 2006. However, there is no other documentation that addresses these individuals, such as academic records, financial records, evidence that shows their age, or other public documents. The applicant's wife indicated in September 2007 that her three children were ages 11, 13, and 18, which would render them now approximately 16, 18, and 23. We acknowledge that acting as a single parent for multiple children involves significant financial, physical, and emotional challenges. However, without adequate documentation of these children, we are unable to give significant weight to the additional burden they would create for the applicant's wife.

The applicant's explanation regarding his biological children from a prior relationship reflects that they reside independently from him, and that one of his daughters obtained custody of the other children from him through a court order. Though he indicated that he is close with two of his children, he has not asserted or shown that they rely on him for financial or emotional support. It is noted that they are currently ages 31, 27, 25, and 22. The AAO acknowledges that another of the applicant's daughters, a sibling to his four biological children from his prior relationship, died in August 1995, 16 years ago. While this was undoubtedly a traumatic experience for him and his children, the record does not show that this circumstance would elevate his children's emotional hardship to an extreme level should the applicant depart the United States. The applicant has not

established that any of his biological children from his prior marriage would suffer extreme hardship should he be compelled to reside outside the United States.

The applicant has shown that he and his wife have a 13-year-old son. The applicant has not provided specific assertions regarding difficulties his son would endure should the applicant reside outside the United States. However, we will assess his son's hardship based on the assertions made about the applicant's family members in general, and due consideration is given to the additional challenges the applicant's wife would face due to acting as a single parent in the applicant's absence.

The applicant has not shown his household's present financial circumstances. He submitted an employment letter, dated January 18, 2007, regarding a position he held that began on October 26, 2006. We are unable to conclude that documentation of employment the applicant held for less than three months as of January 18, 2007 is indicative of his current employment status. The record contains a letter, dated March 1, 2007, that indicates that the applicant's wife held employment beginning October 23, 2006. Documentation of approximately four months of employment as of March 2007 does not show the applicant's wife's present income or employment status. While the applicant provided a document that shows that he and his wife assumed a mortgage in 1999, it does not reflect their financial obligations, the monthly payment, or whether they continue to own the property in question. The applicant has not submitted evidence of other expenses. Accordingly, we are unable to conclude that the applicant's absence would cause financial difficulty for his wife or children.

The applicant's wife expressed that she and her children will face emotional hardship should they be separated from the applicant. The AAO acknowledges that the separation of family members due to inadmissibility often results in psychological difficulty, and we give consideration to the emotional consequences of family separation. However, considering all elements of hardship in aggregate, the applicant has not provided sufficient explanation or evidence to show that his wife or children will suffer extreme hardship should he reside outside the United States and they remain.

The applicant stated that his wife and children will not join him in El Salvador. The AAO acknowledges that conditions in El Salvador pose challenges, and that the country is experiencing a high rate of violent crime. The applicant's wife provided that she has resided in the United States for her entire life, and consideration is given to the emotional and economic difficulty of now relocating to El Salvador and becoming separated from her country and community. It is evident that the applicant's wife's hardship would be compounded due to having a young son. The record lacks discussion of the applicant's and his wife's son's language ability or exposure to the culture of El Salvador. However, we acknowledge that relocating to El Salvador at age 13 will present significant challenges for him, including separation from his country and community, loss of his academic opportunities in the United States, and the need to adapt to a new country and culture during this formative period. Yet, despite the challenges the applicant's wife and son may face in El Salvador, he has not established that they will suffer extreme hardship should they remain in the United States.

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 relocate and thereby suffer extreme hardship

can easily be made for purposes of the waiver even where there is no actual intention to relocate. *Cf. Matter of Ige*, 20 I&N Dec. 880, 886 (BIA 1994). Furthermore, to relocate and suffer extreme hardship, where remaining the United States and being separated from the applicant would not result in extreme hardship, is a matter of choice and not the result of inadmissibility. *Id.*, also *cf. Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996). As the applicant has not claimed that his spouse and children will relocate, and he has not demonstrated extreme hardship from separation, we cannot find that refusal of admission would result in extreme hardship to a qualifying relative in this case.

Based on the foregoing, the applicant has not shown that denial of his waiver application under section 212(h) of the Act “would result in extreme hardship” to his wife or children. Accordingly, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings regarding a waiver of grounds of inadmissibility under sections 212(h) and 212(a)(9)(B)(v) 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.