

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: **MAY 29 2012**

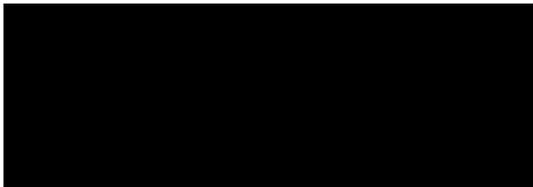
Office: SAN JOSE

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 Jose, 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 the Philippines 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. She seeks a waiver of inadmissibility in order to reside in the United States with her U.S. citizen husband and children, and her lawful permanent resident mother.

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 21, 2009.

On appeal, counsel for the applicant asserts that the applicant's husband, children, and mother will suffer extreme hardship should the present waiver application be denied. *Statement from Counsel on Form I-290B*, dated September 16, 2009.

The record contains, but is not limited to: a brief from counsel; copies of birth records for the applicant's family members; copies of tax, financial, and employment records for the applicant's family; documentation relating to the sale of the applicant's home; statements from the applicant, the applicant's husband, and the applicant's mother; documentation on conditions in the Philippines; a psychological evaluation of the applicant's family members; documentation relating to evaluation and services rendered to the applicant's older daughter due to developmental delays; medical documentation for the applicant's younger daughter; copies of health insurance cards for the applicant's family members; and documentation relating to 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 was convicted of access card forgery under California Penal Code § 484f(b) and using personal identifying information without authorization under California Penal Code § 530.5(a) for her conduct on or about June 28, 2003. Based on these convictions, the field office director determined that the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of crimes involving moral turpitude. The applicant does not contest her inadmissibility on appeal. She 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 husband, children, and mother 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 October 2, 2009, the applicant's husband explained that he immigrated to the United States from Vietnam at age four, and his entire family including his parents, sisters, grandparents, and aunts have all become U.S. citizens. He provided that he married the applicant in 2003, and they have two daughters. He stated that he is the sole economic provider for their family, the applicant cares for their children while he works, and he would be unable to afford childcare in her absence. He indicated that he recently lost his job as an insurance sales person, and he works part-time at a car dealership. He asserted that his family is struggling financially and they cannot afford to live apart. He added that they had to sell their townhouse as a short sale and move in with his mother-in-law. He expressed concern for his ability to find employment in the Philippines due to his lack of language ability and familiarity with the culture. He stated that he has suffered from anxiety and depression since the applicant's waiver application was denied. He expressed concern for the welfare of his two daughters, as one suffers from a speech impediment and the other was born with asthma.

The applicant provided documentation to show that her six-year-old daughter has received speech therapy for a speech and language delay. The record also shows that the applicant's four-year-old daughter has asthma for which she receives medical care in the United States.

The applicant submitted a report from a licensed marriage and family therapist, [REDACTED], dated October 1, 2009, that describes the applicant's family members' challenges. [REDACTED] noted that the applicant's husband is facing emotional distress due to his family's financial problems and the prospect of relocating to the Philippines or becoming separated from the applicant. [REDACTED] observed that the applicant's daughters are developing healthy attachment to both parents, and that their development could be impacted should they become separated from the applicant.

Upon review, the applicant has shown that her husband will suffer extreme hardship should the present waiver application be denied. The record supports that the applicant's husband has well-founded concern for the welfare of his two daughters, ages four and six years. His older daughter has a developmental speech delay for which she has received evaluation and services in the United States, and it is clear that she will face difficulty and uncertainty should she relocate to the Philippines and become separated from the professionals who currently assist her. The applicant's

younger daughter suffers from asthma for which she receives care in the United States. While the applicant has not shown that her younger daughter would lack adequate care in the Philippines for this condition, it is understood that her health status presents concerns for the applicant's husband. The special needs of the applicant's daughters constitute unusual circumstances not commonly experienced by families who face the possible removal of a parent, and it is evident that these factors will contribute to the applicant's husband's emotional hardship whether he relocates to the Philippines or remains in the United States.

The record shows that the applicant's husband will face other hardship should he relocate to the Philippines, including separation from his country and culture, separation from his extended family, the loss of his ability to continue his employment and related financial difficulty, and the need to adapt to an unfamiliar language, culture, and job market. Should he remain in the United States, he will face the separation of his family, the loss of the applicant's presence, increased financial requirements and related difficulty including possible childcare costs, and the possible separation from his two young daughters should they relocate with the applicant. In the absence of a waiver, inadmissibility under section 212(a)(2)(A)(i)(I) of the Act continues indefinitely, and the applicant's husband faces a possible permanent separation of his family should he reside in the United States.

Considering all of these elements of hardship in aggregate, the applicant has shown that denial of the present waiver application "would result in extreme hardship" to her husband, as required for a waiver under section 212(h) 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 entered the United States as a B-2 nonimmigrant visitor for pleasure with authorization to remain until February 16, 1997. She failed to depart the United States and remained for lengthy period without a lawful immigration status. The applicant was convicted of two crimes for her conduct in 2003 that call into question her moral character.

The positive factors in this case include:

The applicant's U.S. citizen husband will suffer extreme hardship should the present waiver application be denied. The applicant's U.S. citizen children will experience significant hardship should she reside outside the United States. Though the applicant has been convicted of two offenses, the record supports that they grew out of the same course of conduct in 2003, and she has not been engaged in criminal conduct before or after that time. The applicant committed her criminal acts when she was 19 years old, and she has expressed remorse and exhibited rehabilitation. The

AAO is persuaded that the applicant does not have a propensity to engage in further criminal conduct.

The applicant's criminal activity serves as a strong negative factors in this case, and her violations of U.S. immigration law cannot be condoned. However, 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 her burden that she merits approval of her application.

ORDER: The appeal is sustained.