

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



U.S. Citizenship  
and Immigration  
Services

[REDACTED]

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DATE: NOV 06 2012 OFFICE: NEW YORK, NY

FILE: [REDACTED]

IN RE: [REDACTED]

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:

[REDACTED]

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in black ink that reads "Michael Shumway".

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the District Director, New York, New York and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and a citizen of Mexico 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 committed a crime involving moral turpitude. She is the spouse of a U.S. citizen and the mother of two U.S. citizens. The applicant seeks a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h) in order to reside in the United States.

The District Director concluded that the applicant had failed to establish that her inadmissibility would result in extreme hardship for a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *District Director's Decision*, dated November 9, 2010.

On appeal, counsel asserts that the applicant's spouse would experience hardship if the applicant is removed and he remains in the United States. She further contends that the applicant's spouse cannot relocate to Mexico. *Form I-290B, Notice of Appeal or Motion*, dated December 8, 2010; *Counsel's statement*.

The record of proceeding includes, but is not limited to, the following evidence: counsel's statement on appeal; a statement from the applicant's spouse; 2008 and 2009 tax returns for the applicant and his spouse, as well as a Form 1099-MISC for the applicant's spouse's business; a letter relating to the applicant's spouse's employment; a 2010 mortgage statement; a letter from the applicant's pastor; statements from two of the applicant's children's school counselors; and a medical statement relating to the applicant. The entire record was reviewed and all relevant evidence considered in reaching a decision on the appeal.

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

(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.

The record reflects that, on May 25, 2004, the applicant pled guilty to second degree Criminal Possession of a Forged Instrument, New York Penal Law (NYPL) § 170.25, a Class D felony, for which the maximum sentence of imprisonment was seven years. On July 20, 2004, she was sentenced to time served and placed on probation for five years.

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. The methodology adopted by the Attorney General consists of a three-pronged approach. 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. 24 I&N Dec. at 698 (citing *Duenas-Alvarez*, 549 U.S. at 193). 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 or “modified categorical” inquiry in which the adjudicator reviews the “record of conviction” to determine if the conviction was based on conduct involving moral turpitude. 24 I&N Dec. 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. Finally, 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.

At the time of the applicant’s conviction for Criminal Possession of a Forged Instrument in the Second Degree, NYPL § 170.25, provided:

A person is guilty of criminal possession of a forged instrument in the second degree when, with knowledge that it is forged and with intent to defraud, deceive or injure another, he utters or possesses any forged instrument of a kind specified in section 170.10.

Criminal possession of a forged instrument in the second degree is a class D felony.

The Board of Immigration Appeals (BIA) has previously found that the mere possession of a fraudulent document is not a crime involving moral turpitude. *See Matter of Serna*, 20 I&N Dec. 579, 586 (BIA 1992)(holding that “the crime of possession of an altered immigration document with the knowledge that it was altered, but without its use or proof of any intent to use it unlawfully, is not a crime involving moral turpitude”). However, a conviction under NYPL § 170.25 requires the applicant to have passed or possessed a forged document “with [the] intent to defraud, deceive or injure another.” In *Rotimi v. Holder*, the Second Circuit Court of Appeals upheld a BIA ruling that had found the petitioner statutorily ineligible for a 212(h) waiver of his conviction for Attempted Criminal Possession of a Forged Instrument under NYPL § 110.00 and §170.25, noting that he had been denied admission to the United States as a returning resident because he had been convicted of a crime involving moral turpitude. 577 F.3d 133 (2<sup>nd</sup> Cir. 2009). Accordingly, the AAO finds that the applicant’s violation of NYPL § 170.25 is a crime involving moral turpitude and that she is inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act. The applicant does not contest her inadmissibility.

A waiver of inadmissibility under section 2121(a)(2)(A)(i)(I) of the Act is found in section 212(h) of the Act, which states:

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), . . . of subsection (a)(2) . . . if –

. . . .

(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 . . . .

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. In this proceeding, the applicant’s qualifying relatives include her spouse and her two U.S. citizen children. Any hardship asserted in relation to the applicant or other family members will, therefore, be considered in terms of its impact on these individuals. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and United States Citizenship and Immigration Services (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 BIA 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 BIA 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 BIA has also held that the common or typical results of 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. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *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 BIA 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.*

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., *Matter of 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). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. See *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); but see *Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for

28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

The AAO now turns to a consideration of the hardship factors in the record and whether, when considered in the aggregate, they demonstrate that the denial of the waiver application would result in extreme hardship for a qualifying relative.

On appeal, counsel asserts that the applicant is pregnant with her fifth child and that, in her absence, her spouse would be unable to care for a newborn and his four other children. She notes that the applicant's spouse is the only breadwinner in the family and that as the owner of a business, he must oversee the work performed by his employees and cannot curtail his hours. Counsel contends that the applicant is the only person who can be "there for her children" and that she helps them with the schoolwork and attends parent-teacher conferences and other school meetings.

In an October 16, 2010 statement, the applicant's spouse asserts it would be heartbreaking to be separated from the applicant and that he would suffer emotionally and psychologically. He states that he and the applicant have been together for 26 years and that they have been residing in the United States with their children since 1995. The applicant's spouse also states that he owns a cleaning business and that he works approximately 56 hours a week. He contends that the applicant stays home with their children, and that, without her, he could not make a living and fulfill his responsibilities as a parent. The applicant's spouse maintains that his cleaning business would suffer because he would not be able to work the necessary hours. He concludes that he and his children could not survive without the applicant.

The record contains an August 11, 2010 statement issued by [REDACTED] that establishes the applicant was pregnant at the time the appeal was filed. It also includes an October 30, 2009 statement from the [REDACTED] that indicates the applicant's spouse is employed by the firm as a subcontractor in the janitorial division. Further, the record contains tax records that establish the applicant is operating a cleaning business under the name of "Justino Janitorial Services." The applicant has also submitted letters from counselors at the schools attended by her now 18-year-old son and 15-year-old daughter, which support counsel's claims regarding her involvement in her children's lives. The record also contains a 2010 mortgage statement that establishes the applicant and her spouse own a home.

While the AAO acknowledges the hardship claims made by counsel and the applicant's spouse, and has considered them in light of the submitted documentary evidence, we do not find the applicant to have established that the hardship that would be experienced by her spouse as a result of her inadmissibility would be beyond that which is normally created by the separation of families in removal or exclusion cases.

In their respective statements, counsel and the applicant's spouse assert that given his work responsibilities, he would be unable to care for his five children without the applicant. However, the record indicates that three of the applicant's children are between 18 and 24 years old. It is,

therefore, not clear what day-to-day responsibilities the applicant's spouse would have regarding them or that they would be unable or unwilling to assist their father with the care of their two younger siblings. As a result, we do not find the record to demonstrate that the applicant's spouse would be responsible for the day-to-day care of five children in the applicant's absence or that his ability to maintain his business would be jeopardized by his parental responsibilities.

We also observe that while the applicant's spouse asserts that he would experience emotional or psychological hardship if he is separated from the applicant, the record contains no documentary evidence, e.g., a psychological evaluation or other medical report, to support this claim. Going on record without supporting documentation is not sufficient to meet the applicant's burden of proof in this proceeding. See *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Although we take specific note of the fact that the applicant and her spouse have been married for approximately 23 years and do not question the strong emotional bond between them, we do not find the length of their relationship, even when considered in the aggregate with the normal hardships of separation, to demonstrate a level of hardship that exceeds that which normally results from the separation of families. Accordingly, the applicant has not established that her spouse would suffer extreme hardship if the waiver application is denied and he remains in the United States.

We also cannot find that either of the applicant's U.S. citizen daughters, who are now 15 and 24 years old, would experience extreme hardship in the applicant's absence. Neither counsel nor the applicant's spouse indicate what specific impacts the applicant's removal would have on her U.S. citizen children and, in the absence of clear assertions from the applicant, the AAO may not speculate as to the hardships they would suffer. The burden of proof in this proceeding lies with the applicant, and "while an analysis of a given application includes a review of all claims put forth in light of the facts and circumstances of a case, such analysis does not extend to discovery of undisclosed negative impacts." *Matter of Ngai*, 19 I&N Dec. at 247. We must, therefore, conclude that the applicant has failed to establish that her removal from the United States would result in extreme hardship for either of her U.S. citizen daughters.

To establish that relocation to Mexico would result in extreme hardship for a qualifying relative, counsel states that the applicant's spouse has worked hard to establish his business and has purchased a home for his family in the United States. She contends that he has resided in the United States for more than 25 years and cannot just leave everything behind and start over in Mexico. Counsel asserts that the economy in Mexico is deteriorating and that starting a new business in Mexico would be impossible for someone the applicant's spouse's age, who also has a spouse and five children. She further asserts that if the applicant's spouse relocates to Mexico, the individuals he employs would lose their jobs.

Counsel also maintains that the applicant's U.S. citizen daughters would experience hardship if they relocated to Mexico. She states that they have spent their entire lives in the United States, have been educated in the United States and do not have adequate Spanish-language writing skills. She further

contends that the applicant's 15-year-old daughter would be unable to adjust to school in Mexico, given the language barrier, the lack of extracurricular activities and the absence of a stable home with both her parents.

The AAO acknowledges that the applicant's spouse's has been a Lawful Permanent Resident of the United States since 2002 and that he has established a business in the United States. However, the record does not demonstrate that, as counsel claims, it would be impossible for him, at 47 years old, to start a new business in Mexico. We find the record to contain no published country conditions materials that establish economic conditions in Mexico or that the applicant's spouse's age would preclude him from opening a business or from obtaining other employment that would allow him to support his family in Mexico. Without supporting documentation, the assertions of counsel are not sufficient to meet the burden of proof in these proceedings. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Accordingly, the record does not establish that relocation to Mexico would result in extreme hardship for the applicant's spouse.

The AAO has also considered counsel's claims regarding the hardship that would be experienced by the applicant's 15-year-old U.S. citizen daughter who was born in and has lived her life in the United States. We note that in *Matter of Kao & Lin*, 23 I&N Dec. 45 (BIA 2001), the BIA found that a 15-year-old child who was not fluent in Chinese, had spent her formative years in the United States and was integrated into the American lifestyle would experience extreme hardship if she relocated to Taiwan with her parents. In the present case, the applicant's 15-year-old daughter, like the child in *Matter of Kao & Lin*, has spent her formative years in the United States. Further, counsel indicates that she would face a language barrier in Mexican schools and also that her Spanish-language writing skills are inadequate. Therefore, pursuant to the reasoning in *Kao & Lin*, the AAO finds the applicant to have established that relocation to Mexico would result in extreme hardship for her 15-year-old daughter.

The AAO, however, 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 demonstrated extreme hardship from separation, we cannot find that refusal of admission would result in extreme hardship to a qualifying relative in this case.

As the record does not establish the applicant's inadmissibility would result in extreme hardship to a qualifying relative, she has not demonstrated eligibility for a waiver under section 212(h) of the Act.

Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for application for 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. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.