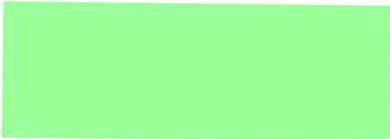




U.S. Citizenship
and Immigration
Services

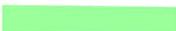
(b)(6)



AUG 12 2013

Date:

Office: PHOENIX

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Phoenix, Arizona, denied the waiver application and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and 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 been convicted of a crime involving moral turpitude. The record reflects that the applicant was convicted in 2005 of theft. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with her U.S. citizen spouse and son.

The Field Office Director found that the applicant failed to establish that her qualifying relatives would experience extreme hardship as a consequence of her inadmissibility. The application was denied accordingly. *See Decision of the Field Office Director* dated March 5, 2012.

On appeal, filed April 6, 2012, and received by the AAO March 4, 2013, counsel for the applicant contends in the Notice of Appeal (Form I-290B) that USCIS erred by not finding a qualifying relative would suffer extreme hardship if the applicant is forced to leave the United States. The record contains statements from counsel, the applicant's spouse and son, and a licensed professional counselor, as well as financial documentation. The entire record was reviewed and considered in rendering a decision on the appeal.

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.

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.)

The AAO notes that the Ninth Circuit has adopted the “realistic probability” approach, as articulated by the U.S. Supreme Court in *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183 (2007), to determine whether or not the elements of a statute categorically render the offense a crime involving moral turpitude. See *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 1004-1007 (9th Cir. 2008). In defining this approach, the U.S. Supreme Court explained:

[T]o find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime. To show that realistic possibility, an offender, of course, may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.

Duenas-Alvarez, 549 U.S. at 193.

The record shows that on February 4, 2005 the applicant was convicted of Theft under Arizona Revised Statutes § 13-1801, 1802, 610, 701, 702, 702.01, and 801 (a class 4 felony) for events that occurred on April 25, 2004. The indictment indicates the applicant was charged with controlling property belonging to [REDACTED] with the intent to deprive [REDACTED] of the property, in violation of ARS § 13-1802(A)(1), and a plea agreement indicates she that she pleaded guilty and was sentenced to three years of probation. The AAO notes that the maximum sentence for a class 4 felony under Arizona Revised Statutes § 13-702 is three years.

Arizona Revised Statutes § 13-1802 states that:

(A). A person commits theft if, without lawful authority, the person knowingly:

1. Controls property of another with the intent to deprive the other person of such property; or
2. Converts for an unauthorized term or use services or property of another entrusted to the defendant or placed in the defendant's possession for a limited, authorized term or use; or
3. Obtains services or property of another by means of any material misrepresentation with intent to deprive the other person of such property or services; or

4. Comes into control of lost, mislaid or misdelivered property of another under circumstances providing means of inquiry as to the true owner and appropriates such property to the person's own or another's use without reasonable efforts to notify the true owner; or

5. Controls property of another knowing or having reason to know that the property was stolen; or

6. Obtains services known to the defendant to be available only for compensation without paying or an agreement to pay the compensation or diverts another's services to the person's own or another's benefit without authority to do so.

(B). A person commits theft if, without lawful authority, the person knowingly takes control, title, use or management of a vulnerable adult's property while acting in a position of trust and confidence and with the intent to deprive the vulnerable adult of the property. Proof that a person took control, title, use or management of a vulnerable adult's property without adequate consideration to the vulnerable adult may give rise to an inference that the person intended to deprive the vulnerable adult of the property.

Arizona Revised Statutes § 13-1801 states, in pertinent part:

(4). "Deprive" means to withhold the property interest of another either permanently or for so long a time period that a substantial portion of its economic value or usefulness or enjoyment is lost, to withhold with the intent to restore it only on payment of any reward or other compensation or to transfer or dispose of it so that it is unlikely to be recovered.

As the applicant has not disputed on appeal that theft is a crime involving moral turpitude, and the record does not show the finding of inadmissibility to be erroneous, we will therefore not disturb the finding of the Field Office Director.¹

Section 212(h) of the Act provides, in pertinent part:

(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 –

¹ In response to a Notice of Intent to Deny the applicant's Form I-485, Application to Adjust Status and in support of the Form I-601, Application for Waiver of Grounds of Inadmissibility, counsel for the applicant contested the Field Office Director's determination that the applicant's conviction constituted a crime involving moral turpitude. However, on appeal counsel has not contested the finding.

.....

(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 section 212(h) waiver of the bar to admission resulting from violation of section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant is not a consideration under the statute and will be considered only to the extent that it results in hardship to a qualifying relative. The qualifying relatives in this case are the applicant's spouse and child. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. See *Matter of Mendez-Morales*, 21 I&N Dec. 296 (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 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 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.*

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 1292, 1293 (9th Cir. 1998) (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.

On appeal counsel asserts that the applicant’s son will experience extreme hardship if the applicant leaves the United States. In a previous brief counsel stated that the applicant’s son was raised by the applicant and he should not be required to live without his mother. Counsel asserts that although the applicant’s spouse speaks conversational Spanish it would be unreasonable to expect he could find employment in Mexico. Counsel also noted the spouse’s age and length of residence in the United States, and that he owns a business and pays taxes. Counsel asserts it would be unjust to force him to live the rest of his life alone or to move out of the United States.

The applicant’s spouse states that he has been happy running businesses with applicant and he would be devastated emotionally and financially without her. The applicant’s son states that the applicant has taken care of him, that she works long hours so they can survive, and that he is happy at home. He states that he only speaks English so moving to Mexico would be detrimental. A professional counselor states that the applicant and spouse are happily married, cherish each other, and are sweethearts and business partners. She further states that separation would cause emotional and financial devastation.

The AAO finds that the record fails to establish that the applicant’s qualifying spouse and son will suffer extreme hardship as a consequence of being separated from the applicant. The applicant’s spouse states he would be devastated without the applicant and her son states that he is happy at home, but the record contains no detail or supporting evidence explaining the exact nature of the

qualifying spouse's or son's emotional hardships and how such emotional hardships are outside the ordinary consequences of removal. The assertions made by the applicant's spouse and her son have been considered. However, assertions cannot be given great weight absent supporting evidence, and the statement from the professional counselor is insufficient for purposes of meeting the burden of proof in these proceedings. It has also not been established that the applicant's spouse and son would be unable to travel to Mexico on a regular basis to visit the applicant.

The applicant's spouse and the counselor indicate that the spouse would suffer financially if the applicant leaves the United States. Other than 2009 and 2010 tax returns for the applicant's spouse submitted in support of the applicant's Form I-485, Application to Adjust Status, no documentation has been submitted establishing the spouse's current income, expenses, assets, and liabilities or his overall financial situation to establish that without the applicant's physical presence in the United States the applicant's spouse will experience financial hardship. The applicant's spouse and the counselor indicate that the applicant and her spouse are business partners, but the record lacks details and supporting documentation of their business operations, including the roles the applicant and her spouse have in the businesses. The record does not demonstrate that the applicant's presence is necessary for the operation of the business or that her absence would adversely affect the business and result in a reduction in the current flow of income to her spouse. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)). Further, courts considering the impact of financial detriment on a finding of extreme hardship have repeatedly held that, while it must be considered in the overall determination, "[e]conomic disadvantage alone does not constitute "extreme hardship." *Ramirez-Durazo v. INS*, 794 F.2d 491, 497 (9th Cir. 1986).

The AAO recognizes that the applicant's spouse and son will endure hardship as a result of separation from the applicant. However, their situation if they remain in the United States is typical to individuals separated as a result of removal and does not rise to the level of extreme hardship based on the record. The difficulties that the applicant's spouse and son would face as a result of separation from the applicant, even when considered in the aggregate, do not rise to the level of extreme as contemplated by statute and case law.

The AAO also finds the record fails to establish that the applicant's spouse or son would experience extreme hardship if they were to relocate to Mexico. Counsel states that the applicant's spouse would be unable to find employment and it would be unjust to expect him to leave the United States. The applicant's son states it would be detrimental for him to move to Mexico. However, the record does not contain any country condition evidence and fails to address where the applicant would live if she returned to Mexico, and therefore fails to establish concerns regarding relocating to Mexico would rise to the level of extreme hardship for the applicant's spouse or son. Further, no documentation has been provided establishing that the applicant, the applicant's spouse, or her son would be unable to obtain gainful employment in Mexico to maintain their standard of living.

(b)(6)

NON-PRECEDENT DECISION

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In this case, the record does not contain sufficient evidence to show that the hardships faced by the qualifying relatives, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.