



**U.S. Citizenship
and Immigration
Services**

(b)(6)

DATE: **JAN 10 2013**

Office: TEGUCIGALPA, HONDURAS

FILE: [REDACTED]

IN RE: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Sections 212(a)(9)(B)(v) and 212(h) of the Immigration and Nationality Act, 8 U.S.C. §§1182(a)(9)(B)(v) and 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.

Thank you,

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

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Nicaragua 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 and section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having accrued more than one year of unlawful presence in the United States and seeking admission within ten years of his last departure. The applicant is the son of a U.S. citizen. He seeks a waiver of inadmissibility pursuant to sections 212(a)(9)(B)(v) and (h) of the Act, 8 U.S.C. §§ 1182(a)(9)(B)(v) and (h), in order to reside in the United States.

The Field Office Director found that the applicant had been convicted of an aggravated felony and that no waiver was available. She denied the Form I-601, Application for Waiver of Ground of Excludability, accordingly. *Field Office Director's Decision*, dated September 13, 2011.

On appeal, counsel asserts that the applicant's conviction for an aggravated felony does not bar his admission to the United States under section 212(a)(2)(i)(I) of the Act. Counsel also contends that the applicant has established that his inadmissibility under section 212(a)(9)(B)(i)(II) would result in extreme hardship for his U.S. citizen mother. *Form I-290B, Notice of Appeal or Motion*, dated September 28, 2011; *Counsel's brief*, dated October 3, 2011.

In support of the application, the record contains, but is not limited to, counsel's briefs; statements from the applicant, two of his siblings, and two cousins; medical documentation relating to the applicant's mother; a psychological evaluation of the applicant's mother; statements of support from friends and associates of the applicant, as well as his pastor; and records relating to the applicant's criminal history. The entire record was reviewed and all relevant evidence considered in arriving at a decision on the appeal.

Section 212(a)(9)(B) states in pertinent part:

(B) Aliens Unlawfully Present.-

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . and again seeks admission within 3 years of the date of such alien's departure or removal, or

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such

alien's departure or removal from the United States, is inadmissible.

The Field Office Director indicated that the applicant had entered the United States without inspection on July 17, 1979 and had accrued more than one year of unlawful presence prior to a 2006 removal. However, the AAO finds the record before us to establish that the applicant entered the United States on June 17, 1979 using an A-1 visa and was admitted for duration of status. We note that for aliens admitted for duration of status, the accrual of unlawful presence begins on the day after U.S. Citizenship and Immigration Services (USCIS) finds a nonimmigrant status violation while adjudicating a request for an immigration benefit or an immigration judge makes a determination of a nonimmigrant status violation in exclusion or removal proceedings. In the present case, the record provides no evidence of a status violation determination made by a USCIS officer or an immigration judge. Accordingly, the AAO cannot find that the applicant accrued unlawful presence prior to his July 27, 2006 removal, despite the length of his residence in the United States. Therefore, the applicant is not inadmissible under section 212(a)(9)(B)(i)(II) of the Act and we will withdraw the Field Office Director's finding in this regard.

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 the applicant pled guilty to tax evasion, 26 USC §7201, on October 17, 2003, from which the tax loss to the U.S. government was computed as being \$411,606.89. On January 22, 2004, he was sentenced to 17 months in prison and three years of supervised release, and fined \$40,000.

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 or 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, 18 U.S.C. § 7201 stated:

Attempt to evade or defeat tax

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$100,000 (\$500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

On appeal, counsel notes that the Field Office Director found the applicant to be inadmissible to the United States for having committed an aggravated felony, which is a ground of removal that does not have an analogue under the grounds of inadmissibility set forth in section 212(a) of the Act. He, therefore, contends that the Field Office Director erred in finding the applicant to be statutorily ineligible to seek relief under section 212(h) of the Act. Counsel further asserts that the applicant’s offense does not involve moral turpitude, basing this claim on the decision reached in *United States v. Carrollo*, 30 F. Supp. 3, 7 (D.C. Mo. 1939)(declining to rule that tax evasion was “an act evidencing baseness, vileness or depravity of moral character”).

The AAO acknowledges that the Field Office Director erred in applying a ground of removal to find the applicant inadmissible to the United States. We conclude, nonetheless, that the applicant is inadmissible to the United States based on his conviction for tax evasion, an offense that the Board of Immigration Appeals (BIA) has long held to be a crime involving moral turpitude. *See Matter of W*, 5 I&N Dec. 759, 763 (BIA 1954). Although we note counsel’s reference to *Carrollo*, the AAO is not bound to follow the published decision of a U.S. district court outside that particular proceeding, even within the same district. Moreover we note that, in *Carrollo*, the petitioner was convicted of tax evasion under the same federal statute, 18 U.S.C. § 145(b), that the BIA subsequently found to

be a crime involving moral turpitude in *Matter of W*. Accordingly, the applicant's conviction for tax evasion bars his admission to the United States under section 212(a)(2)(A)(i)(I) of the Act.

To obtain a waiver of his section 212(a)(2)(A)(i)(I) inadmissibility, the applicant must satisfy the requirements of section 212(h) of the Act, which states, 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 –

....

(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)(1)(B) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, the U.S. citizen or lawfully resident spouse, parent or child of an applicant. The qualifying relative in this proceeding is the applicant's U.S. citizen mother. Accordingly, hardship to the applicant or other family members will be considered only insofar as it results in hardship to his mother. 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 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.

On appeal, counsel states that the applicant’s 89-year-old mother suffers from a number of medical problems, including arterial hypertension, stress incontinence, hypothyroidism, multinodular goiter, hyperlipidemia, osteoarthritis, left shoulder bursitis, and sick sinus syndrome (heart rhythm disorder), which has required the implantation of a pacemaker. He also indicates that the applicant’s mother has undergone a total bilateral knee replacement. Counsel states that during the time the applicant resided in the United States, he was the caregiver for his parents. He maintains that the applicant’s mother is suffering from extreme loss and grief, and that she has been taking medication for the depression she has experienced since the applicant’s was imprisoned for tax evasion and her husband’s death. With the passing of time, counsel maintains, the applicant’s mother has become more fearful.

Although counsel notes that the applicant’s mother has two sons and a daughter who are living in the United States, he contends that they have always been too preoccupied with their own families and their own problems to care for their mother. He asserts that the applicant’s mother “deserves to live out her life with her son and caretaker,” who previously devoted his life to her care and that of his now deceased father.

In a December 29, 2003 letter, submitted prior to the applicant’s sentencing for tax evasion, one of the applicant’s older brothers indicated that his family obligations and his work schedule left little if

any, time for extended visits to his elderly and fragile parents, both of whom were then living. He stated that the applicant was the only one of his parents' four surviving children who was responsible for their well-being. In a June 9, 2010 statement, this same brother asserts that the applicant was their mother's closest and most supportive son. He further reports that the deaths of his father and another brother have already negatively affected his elderly mother's physical and mental well-being.

The applicant's sister, in a June 10, 2010 statement, indicates that in the applicant's absence their mother now resides with her, but that she cannot devote the same amount of time to their mother as did the applicant. She states that she is a restaurant manager and works approximately 65 hours a week, which limits the amount of time she can spend with their mother. The applicant's sister states that their mother has always been completely dependent on the applicant for all her needs and that, while the applicant was in the United States, he assured that their mother's "health, spiritual well being and basic necessities were appropriately met." Since the applicant was removed, his sister contends, their mother's physical health, as well as her emotional health, has systematically declined. She further asserts that the applicant shared a special relationship with their mother that she and her other siblings never achieved.

In support of the preceding hardship claims, the record contains a statement, dated January 7, 2004, from [REDACTED] who indicated that the applicant was at that time, the caretaker for his elderly mother, who suffered from advanced arthritis, and had recently had a knee replaced and a pacemaker implanted. The record also includes a March 16, 2010 statement from [REDACTED] who reports that the applicant's mother is 88 years-of-age and has been under his care since 1987. [REDACTED] states that the applicant's mother suffers from arterial hypertension, stress incontinence, hypothyroidism, multinodular goiter, hyperlipidemia, osteoarthritis, left shoulder bursitis, sick sinus syndrome requiring the placement of a permanent pacemaker and total bilateral knee replacement. He indicates that as a result of the severity and complexity of her health conditions, as well as her age, she may die at any time and that she wishes to see the applicant once again.

Also included in the record is a November 20, 2009 psychological evaluation of the applicant's mother conducted by psychologist and licensed mental health counselor [REDACTED] indicates that the applicant's mother is living with her daughter, but that her daughter is not capable of caring for her as she is suffering from depression, exacerbated by a recent traumatic event. [REDACTED] states that the applicant's mother reported that she was caring for her daughter, which she found very difficult, that her daughter was "useless to her," that her children in the United States did not really help her and that only the applicant had always been there for her.

[REDACTED] notes that that the applicant's older brother, who accompanied his mother to her appointment, is unable to care for her as a result of his own medical, personal and business problems. She states that the applicant's brother informed her that he is overwhelmed by his health problems, his financial problems, his fear of losing his business and his wife's dependency. He also indicated, [REDACTED] reports, that while he has another brother who is financially capable of helping their mother and who lives near her, that brother has done nothing for her or any other family member.

In her evaluation, [REDACTED] states that at the time of the interview, the applicant's mother was too ill to climb the stairs to her appointment and that the interview had to be conducted in the courtyard of the building. [REDACTED] relates that the applicant's mother informed her that she has been depressed since the applicant's imprisonment and her husband's death in 2004, and that she has progressive kidney disease and also suffers from chronic kidney infections. [REDACTED] also reports that the applicant's mother was hospitalized three times in 2009, once as the result of a fall, once with a serious kidney infection and once with severe anemia.

Based on the information provided during her interview, [REDACTED] finds the applicant's mother to be emotionally and physically dependent on the applicant as he was the only one of his siblings to care for her and her husband. She further concludes that the applicant's mother is experiencing extreme loss and grief, and is suffering from Major Depressive Disorder, Recurrent, Severe, Without Psychotic Features.

While the record does not support all of the hardship claims made on behalf of the applicant's mother, the AAO takes note of her advanced age, her numerous medical problems and her past dependence on the applicant for emotional and physical support. When these specific hardship factors are considered in the aggregate with the hardships that are normally created by the separation of families, the AAO finds the applicant to have established that his mother would suffer extreme hardship if the waiver application is denied and she continues to reside in the United States.

On appeal, counsel states that the applicant's mother is too old and too frail to travel to Nicaragua to join the applicant, a claim which is supported by the March 16, 2010 statement from [REDACTED] who has indicated that, at the applicant's mother's age, her medical problems could result in her death at any time. Based on this evidence, the AAO finds the record to establish that the applicant's mother is, as a matter of age and health, physically incapable of relocating to Nicaragua. Therefore, the applicant has demonstrated that relocation would also result in extreme hardship for his mother.

As the applicant has established that his inadmissibility would result in extreme hardship for a qualifying relative, he is statutorily eligible for a waiver under section 212(h) of the Act. Accordingly, the AAO will consider whether he merits a waiver of inadmissibility as a matter of discretion.

In discretionary matters, the applicant bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

In evaluating whether . . . relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or

business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

See Matter of Mendez-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then "balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Id.* at 300. (Citations omitted).

The adverse factors in the applicant's case are his conviction for tax evasion for which he now seeks a waiver, as well as his unlawful residence and unauthorized employment. The mitigating factors include the applicant's U.S. citizen mother and siblings; the extreme hardship his mother would experience if the waiver application is denied; the absence of any criminal offenses other than that of tax evasion and the 12 years that have elapsed since the events that led to the applicant's conviction; the letters written on behalf of the applicant prior to his 2004 sentencing hearing, which include statements from family members, friends, business associates, the applicant's father's pastor, and representatives of local organizations attesting to the applicant's long-term devotion to and care of his parents, his contributions to charitable causes, his honesty in business dealings, his support of his employees, and his involvement in the community; and the applicant's statement of remorse found in the Presentence Investigation Report contained in the record.

The applicant was convicted in 2003 of failing to pay more than \$400,000 in taxes on income earned between 1997 and 2000, and the AAO notes the serious nature of this offense. Nevertheless, we find that when taken together, the mitigating factors in the present case outweigh the adverse factors such that a favorable exercise of discretion is warranted.

In proceedings for application for waiver of grounds of inadmissibility under sections 212 (h) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.