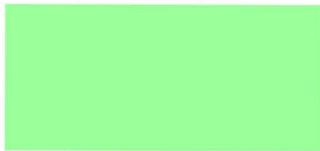


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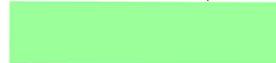


U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
20 Massachusetts Avenue NW
Washington, DC 20529-2090
**U.S. Citizenship
and Immigration
Services**



DATE: **JAN 24 2013**

Office: SANTA ANA, CA

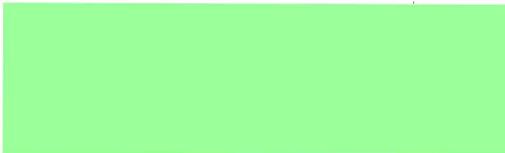


IN RE: Applicant:



APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to sections 212(h) and (i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(h) and (i).

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the 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 request 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

for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

(b)(6)

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

The applicant is a native of Lebanon and a citizen of Canada who was found to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for having attempted to procure admission to the United States through fraud or misrepresentation, and under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. The applicant is the spouse of a U.S. citizen and is the beneficiary of an approved Petition for Alien Relative. The applicant seeks a waiver of inadmissibility pursuant to sections 212(h) and (i) of the Act, 8 U.S.C. §§ 1182(h) and (i), in order to remain in the United States with her husband.

The Field Office Director concluded that the applicant had failed to demonstrate extreme hardship to her qualifying spouse and denied the application accordingly. *See Decision of Field Office Director*, dated November 14, 2011.

On appeal, counsel for the applicant asserts that the Field Office Director failed to consider fully the evidence of hardship to the qualifying spouse. Counsel states that the Field Office Director did not give proper weight to the psychological assessment or the qualifying spouse's affidavit, which indicate that he suffers from serious psychological and physical disabilities that would create extreme hardship for him in the applicant's absence. *Counsel's Brief*.

The record includes, but is not limited to: statements from the applicant, the qualifying spouse, and their siblings; financial records; and a psychological assessment. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(6)(C) of the Act provides, in pertinent part:

- (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

In the present case, the record reflects that the applicant was convicted on February 11, 1992 of petty theft in the Superior Court of California. On December 17, 2001, the applicant appeared for a visa interview at the U.S. Consulate in Montreal, Canada and failed to disclose her conviction. As a result, the Field Office Director found the applicant to be inadmissible for misrepresenting a material fact in that she failed to reveal a conviction for a crime involving moral turpitude.

To be considered material, a misrepresentation or concealment must be shown by clear, unequivocal, and convincing evidence to be predictably capable of affecting, that is, having a natural tendency to affect, the official decision. See *Kungys v. United States*, 485 U.S. 759, 771-72 (1988); see also *Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998); *Matter of Martinez-Lopez*, 10 I&N Dec. 409 (BIA 1962; AG 1964). The Board of Immigration Appeals (Board) has held that a misrepresentation made in connection with an application for visa or other documents, or for entry into the United States, is material if either:

1. the alien is excludable on the true facts, or
2. the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in proper determination that he be excluded.

Matter of S- and B-C-, 9 I&N Dec. 436, 448-49 (BIA 1960; AG 1961).

Section 212(a)(2)(A)(i)(I) of the Act provides that an alien who has committed or has been convicted of a crime involving moral turpitude is inadmissible. However, the petty offense exception at section 212(a)(2)(A)(ii) provides, in pertinent part:

- (ii) Exception.-Clause (i)(I) shall not apply to an alien who committed only one crime if-

- (I) 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 maximum penalty for petty theft in California is imprisonment for up to six months and a \$1,000 fine. Cal. Penal Code § 490. The record reflects that upon conviction, the applicant was sentenced to 36 months of probation and 10 days in prison or a fine. Therefore, as it was her only conviction at the time of her 2001 immigrant visa application, the applicant's petty theft conviction fell within the petty offense exception and did not render her inadmissible under section 212(a)(2)(A)(i)(I) of the Act. For that reason, her failure to disclose her conviction during her visa interview was not material because she would not have been "excludable on the true facts." *Matter of S- and B-C-*, 9 I&N Dec. at 447. Accordingly, the applicant is not inadmissible under section 212(a)(6)(C)(i) for attempting to procure admission by misrepresenting a material fact.

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However, the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act due to her subsequent conviction on November 3, 2009 for manufacture or sale of counterfeit mark in violation of Cal. Penal Code § 350(a)(2). The Ninth Circuit Court of Appeals in *Tall v. Mukasey* held:

Under the categorical approach, § 350(a) is a crime involving moral turpitude because it is an inherently fraudulent crime. Either an innocent purchaser is tricked into buying a fake item; or even if the purchaser knows the item is counterfeit, the owner of the mark has been robbed of its value. The crime is really a species of theft.

517 F.3d 1115, 1119 (9th Cir. 2008). The applicant does not contest this finding of inadmissibility on appeal. She is eligible to apply for a waiver under section 212(h) of the Act as the spouse of a U.S. citizen.

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 –

(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, 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. 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 applicant has established extreme hardship to a

qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). 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. The Board added that not all of these factors need be analyzed in any given case and emphasized that the list is 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, while 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, or cultural readjustment 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, although 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 v. INS*, 138 F.3d 1292 (9th Cir. 1998) (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); conversely, *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 case-by-case whether denial of admission would result in extreme hardship to a qualifying relative.

In his statements, the qualifying spouse indicates that he has disabilities that have made relationships difficult for him. He states that he is sterile, which put pressure on his past marriages. He also states that he is deaf in one ear, which causes him to misunderstand things and to become angry easily. His eyesight is also poor. He claims that in 2007, he was the victim of a burglary and reacted by becoming extremely introverted and fearful. He states that he nailed his windows shut, had seven locks on his door, kept the curtains closed at all times, and fell asleep every night with his finger on the trigger of a loaded gun. He isolated himself from others, could not go outdoors at night, became afraid of the dark, and developed obsessive-compulsive behaviors and extreme sensitivities to certain scents and environments. He states that he is distrustful of others, highly sensitive to criticism, and has been filled with self-doubt. He also states that due a head injury he incurred in a bicycle accident as a teenager, he has a poor memory and must write everything down. The qualifying spouse asserts that his mental health has improved dramatically since he met the applicant. The applicant has assisted him to rebuild relationships with his family and friends, to rejoin society, and to feel secure.

A psychological assessment in the record diagnoses the qualifying spouse with panic disorder in relation to his response to the burglary of his home. The assessment also diagnoses the qualifying spouse with obsessive-compulsive disorder and notes that he is "prone to recurrent and persistent thoughts, impulses, and images which are intrusive and inappropriate and that cause marked anxiety and distress." *Psychological Assessment*, [REDACTED], dated August 12, 2011. The assessment notes that the applicant has provided important support to the qualifying spouse and that "[a] separation would cause severe reactive dynamics that would have significant consequences for [the qualifying spouse] in terms of even basic functioning." *Id.*

The qualifying spouse's brother confirms that the applicant has provided necessary psychological support that has resulted in improvements in the qualifying spouse's personality and functioning. See *Letter from* [REDACTED] dated October 4, 2011. Additionally, the applicant's brother notes that he has observed improvements in the qualifying spouse's ability to run his business and socialize since the applicant and the qualifying spouse got married. See *Letter from* [REDACTED] dated September 22, 2011. Both brothers state that the qualifying spouse depends on the applicant and that their families fear that he would be unable to function without her.

The AAO finds that the qualifying spouse would suffer extreme hardship upon separation from the applicant. The evidence indicates that the qualifying spouse suffers from mental illness which affects his basic functioning and that he is highly dependent upon the applicant for support. The documentation supports a finding that the qualifying spouse's mental illness is so severe that it would cause extreme hardship for him in the applicant's absence.

However, the applicant has failed to demonstrate that her qualifying spouse would suffer extreme hardship upon relocation to Canada. None of the documentation in the record addresses the possibility of relocation. The qualifying spouse does not assert that he would be unable to relocate with the applicant. Although the qualifying spouse has close family ties in the United States, he does not claim that he would be negatively affected by separation from his family. While the psychological assessment mentions that the qualifying spouse provides care for his parents, there is no other evidence of this in the record. Additionally, there is no indication that the qualifying spouse's brother could not assist his parents. Although the psychological assessment also recommends therapy for the qualifying spouse, there is no indication that he could not obtain the necessary treatment in Canada. Finally, the applicant has not asserted that her qualifying spouse could not adjust to life in Canada, which is an English-speaking country where he may be able to continue his vocation as a mechanic.

We can find extreme hardship warranting a waiver of inadmissibility only where an applicant has demonstrated extreme hardship to a qualifying relative in the scenario of separation *and* the scenario of relocation. A claim that a qualifying relative will remain in the United States and thereby suffer extreme hardship as a consequence of separation can easily be made for purposes of the waiver even where there is no intention to separate in reality. *See Matter of Ige*, 20 I&N Dec. 880, 886 (BIA 1994). Furthermore, to separate and suffer extreme hardship, where relocating abroad with the applicant would not result in extreme hardship, is a matter of choice and not the result of inadmissibility. *Id.*, *see also Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996). As the applicant has not demonstrated extreme hardship on relocation, we cannot find that refusal of admission would result in extreme hardship to the qualifying spouse in this case.

As the applicant has not established extreme hardship to a qualifying family member, no purpose would be served in determining whether the applicant merits a waiver as a matter of discretion.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. 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.