

(b)(6)

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



U.S. Citizenship
and Immigration
Services

[REDACTED]

Date: **JAN 29 2013**

Office: LOS ANGELES

FILE: [REDACTED]

IN RE: Applicant: [REDACTED]

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

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 in accordance with the instructions on 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".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Los Angeles, California. An appeal of the denial was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on motion. The motion will be dismissed and the underlying application will be denied.

The applicant is a native and citizen of the United Kingdom who was found to be inadmissible under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of crimes involving moral turpitude. The director indicated that the applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h). The director concluded that the applicant had failed to establish that her bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

The AAO determined that the applicant was inadmissible to the United States because at least two of her convictions were for crimes involving moral turpitude. *Notice of Intent to Dismiss*, dated June 16, 2011. In addition, the AAO found the applicant was inadmissible pursuant to section 212(a)(6)(C) of the Act for seeking admission into the United States on August 8, 1996 by willful misrepresentation of a material fact. *Id.* Lastly, the AAO concluded that the applicant failed to establish eligibility for a waiver under section 212(i) of the Act. *Id.* In the decision dated November 10, 2011, the AAO confirmed the determinations made in the Notice of Intent to Dismiss.

On motion, counsel's first contention is that evidence shows that the applicant's true intention was not to reside permanently in the United States. Counsel asserts that the AAO mischaracterized the applicant's stay as a student in valid, non-immigrant, F-1 status from about 1986 to 1989 as residing in the United States with immigrant intent. Counsel claims that the AAO wrongly cited as evidence of immigrant intent the visits the applicant made to the United States for six months or less or her authorized extensions of stay, as well as the numerous visits in 1994 and 1995 for fertility treatments. Citing 22 C.F.R. § 41.31(b)(2), counsel argued that it is appropriate to use the tourist visa to come to the United States for the purpose of obtaining medical treatment, and in general, six months are allowed when entering the United States as a visitor. Counsel contends that the AAO erred in concluding that on the basis of her marriage to a U.S. citizen on November 18, 1995, the applicant resided in the United States prior to her arrival in 1996. Counsel argues that marriage to a U.S. citizen does not necessarily establish an intention to permanently reside in the United States. Counsel declares that the applicant discussed remaining in the United States permanently with her husband only after she was placed in exclusion proceedings in 1996. Counsel asserts that the applicant could have filed for adjustment of status in November 1995, but had not done so, which demonstrates lacked the intention to remain permanently in the United States. Counsel argues that the AAO failed to address the applicant gave birth to her second child while in the United States because of a high-risk pregnancy. Counsel asserts that the applicant had a California Benefits Identification card from 1996 for health care benefits, and temporarily used the card while she lacked funds and was pregnant, but this should not be construed as evidence of having a permanent intent to remain in the United States.

Second, counsel argues that the AAO erred in concluding that the applicant's sworn statement reflected the applicant intentionally misrepresented her criminal record by not disclosing her entire criminal history during her secondary inspection interview. Counsel asserts that the applicant is not

a lawyer and simply was not able to remember all of her past convictions or know she was required to disclose a battery arrest which had been disposed through diversion. Counsel contends that the applicant's failure to disclose crimes was not intentional, and as her crimes occurred ten years prior to her interview, she should not be expected to remember specific information about all of her convictions. Counsel argues that the AAO was wrong to determine the applicant made material misrepresentations which were tended to shut off a line of inquiry relevant to her eligibility for admission into the United States. Counsel asserts that the cases cited by the AAO are not relevant, for the applicant did not intentionally fail to disclose her criminal record, and the line of inquiry relevant to her eligibility for admission was never shut off, for the applicant disclosed the exact nature of her crimes, the year and location of arrest, and the legal name of one of her convictions (grand larceny by check). Counsel contends that the applicant mentioned "fraud" and thus did not shut off a line of inquiry relevant.

Lastly, counsel contends that a waiver should be granted in the instant case. Counsel asserts that the applicant is separated from her husband, but is attempting reconciliation. Counsel declares that the applicant's husband has no family members in the United Kingdom. Counsel asserts that the applicant's son, [REDACTED] who was born on October 10, 1996, has acute asthma, and must see an orthopedist for atrophy of his quadriceps. Counsel contends that the applicant's husband will depend on the applicant for financial support for he has had difficulty finding employment, and relies on her to provide health insurance for their children. Counsel states that even though the applicant's U.S. citizen children are not qualifying relatives, the impact they have on their father should be considered. Counsel declares that a favorable exercise of discretion is warranted due to the applicant's complete rehabilitation.

In support of the motion, counsel submitted a declaration by the applicant dated December 9, 2011, a statement by her husband dated December 7, 2011, medical records, and a letter from a school.

In the AAO's decision dated November 10, 2011, we determined that the applicant was an "intending immigrant" and did have a preconceived intent to remain permanently in the United States when she obtained a B-1/B-2 visitor visa and procured admission on multiple occasions to the United States on that visa, rendering her inadmissible under section 212(a)(6)(C) of the Act for willfully misrepresenting a material fact and seeking admission into the United States by material misrepresentations. In addition, we concluded that the sworn statement in the record reflected that the applicant intentionally misrepresented her criminal record by not disclosing her entire criminal history at her secondary inspection interview, and was inadmissible under section 212(a)(6)(C) of the Act for seeking admission into the United States by material misrepresentations of her criminal record and eligibility for admission. Lastly, we found that the applicant failed to establish that a qualifying relative would experience extreme hardship because the applicant had not listed her U.S. citizen spouse as a qualifying relative on the waiver application and provided no evidence of his hardship if the waiver was denied.

A motion to reconsider must establish that the decision was based on an incorrect application of law or Service policy. See 8 C.F.R. § 103.5(a)(3). A motion to reopen must state new facts. See 8 C.F.R. § 103.5(a)(2).

In the instant case, the applicant has not met the requirements of a motion to reconsider because counsel simply restates the arguments previously made on appeal – that the applicant was not an “intending immigrant” and did not have a preconceived intent to remain permanently in the United States at the times she entered as a nonimmigrant; and that the applicant’s failure to disclose her entire criminal history at her secondary inspection interview was not an intentional misrepresentation of her criminal record because she could not remember all of her past convictions and did not know that she was required to disclose her battery conviction. We find that these arguments were adequately addressed previously. Accordingly, the motion to reconsider under 8 C.F.R. § 103.5(a)(3) is denied.

However, the applicant has established the requirements of a motion to reopen. The new facts are that the applicant and her husband are “working diligently and hard” for reconciliation and have made “significant favorable steps . . . toward a successful relationship”; his sons need to be with their father; the job situation of the applicant’s husband is not stable and he needs the financial stability provided by his wife; their children, particularly [REDACTED] require the applicant’s health insurance and the impact on the applicant’s husband due to the hardship of their children must be considered in the hardship assessment; and the applicant’s husband has no family members in the United Kingdom.

Accordingly, we will grant counsel’s motion to reopen, and for the reasons set forth in this decision will deny the underlying waiver application.

The applicant seeks a waiver of inadmissibility pursuant to sections 212(i) and 212(h) of the Act. The waiver under section 212(i) of the Act requires the applicant show that the bar to admission imposes an extreme hardship to the citizen or lawfully resident spouse or parent of the applicant. Hardship to an applicant and to his or her child are not a consideration under the statute, and unlike section 212(h) of the Act where a child is included as a qualifying relative, children are not included under section 212(i) of the Act. Hardship to the applicant and to her children will be considered only to the extent that it results in hardship to a qualifying relative, who in this case is the applicant’s U.S. citizen spouse. Once extreme hardship is established, it is but one favorable factor to be considered in determining whether the Secretary should exercise discretion. *See Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996).

Extreme hardship is “not a definable term of fixed and inflexible content or meaning,” but “necessarily depends upon the facts and circumstances peculiar to each case.” *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative’s family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative’s ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. *Id.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of 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.

In rendering this decision, the AAO will consider all of the evidence in the record.

The applicant's husband asserted in the statement dated December 7, 2011 that he was recently in South Africa to secure projects that would be worked on in the United States. He declared that he and the applicant married in 1995 and separated due to marital problems, and were working toward a successful relationship. The applicant's husband contended that if he separated permanently from the applicant and the boys, it would add stress and mental anguish to his life. He stated that the boys need him and he cannot relocate to the United Kingdom because he has no family members there. The applicant's husband indicated that his job situation is not stable, and the boys depend on their mother financially and for health insurance. He stated that one of the boys has asthma and allergies

and recently was treated for fractured bones, and his son's medical bills for the year have totaled over \$50,000. The applicant's husband indicated that his wife has changed and is responsible and caring, and attends law school part time.

The asserted hardships to the applicant's husband are emotional and financial in nature. The applicant's husband asserted concern about separation from the applicant and his boys. However, the evidence in the record is not consistent with that claim. Birth certificates reflect the applicant's husband is not the biological father of her three sons, who were born on December 23, 1981, October 10, 1996, and June 19, 2001. The letter from the oldest son dated August 21, 2008 stated that "my mother and my two brothers are the only family I know and have." He stated in an undated declaration "I lived with my mother until I joined the U.S. Navy as a result of her guidance . . . without the financial support of my mother I would have to resort to welfare." There is no evidence in the record establishing that the applicant's husband ever had a relationship with his wife and her sons prior to the filing of the motion. On appeal the AAO noted evidence that reflected that the applicant and her husband were separated, including his withdrawal of the petition for alien relative (Form I-130) filed on the applicant's behalf. Thus, when all of the asserted emotional and financial hardship factors are considered together, we find that applicant has not demonstrated that the hardship to her husband in remaining in the United States without her would be extreme.

The asserted hardships to the applicant's husband in relocating with his wife to live in the United Kingdom are lack of family ties to the United Kingdom and separation from his wife's sons. However, when we consider these hardship factors together, they fail to establish that the hardship to the applicant's husband in joining his wife to live in the United Kingdom would be extreme.

In addition, even were we to find extreme hardship, we would deny the waiver application as a matter of discretion. In evaluating whether relief is warranted in the exercise of discretion, the factors adverse to the alien may include the nature and underlying circumstances of the removal ground at issue:

[T]he 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:

[B]alance 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 case are the nature and seriousness of the applicant's crimes, and the applicant's significant violations of the United States' immigration laws. *Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996). The applicant's multiple crimes reflect dishonesty and bad character, as does the applicant's abuse of the privileges afforded by a tourist visa by numerous overstays on the visa and engaging in employment.

When we consider and balance the adverse factors in this case, the applicant's crimes and her significant violations of immigration laws, with the favorable factors such as the applicant's attending law school, her close bond with her sons and their hardship, and even assuming hardship to the applicant's spouse, we find that the adverse factors outweigh the favorable factors. Accordingly, the applicant would not merit a grant of relief in the exercise of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i) and 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. The applicant has not met that burden. Accordingly, the motion will be dismissed.

ORDER: The motion is dismissed.