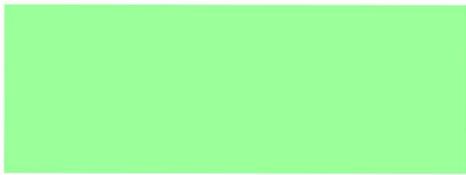


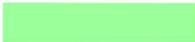


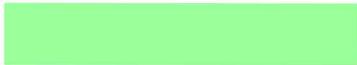
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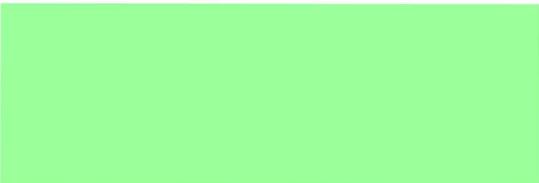


DATE: **JUL 18 2013** OFFICE: VIENNA

FILE: 

IN RE: 

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h), section 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v), and Permission to Reapply for Admission into the United States after Deportation or Removal under section 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

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 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,


Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application and Application for Permission to Reapply for Admission into the United States after Deportation or Removal were denied by the Field Office Director, Vienna, Austria. The Administrative Appeals Office (AAO), on appeal, determined that the Form I-601 waiver application was unnecessary, as the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act, and sustained the appeal as to the Form I-212 Application for Permission to Reapply for Admission. The applicant remains inadmissible under section 212(a)(9)(B)(i)(II) of the Act, which was not addressed in the prior AAO decision. The AAO will now reopen the matter *sua sponte*, withdraw its prior decision, and dismiss the appeal, as the applicant has not shown eligibility for a waiver under section 212(a)(9)(B)(v) of the Act, and no purpose would be served in approving his Application for Permission to Reapply for Admission.

The applicant is a native of Yugoslavia and citizen of Macedonia who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking readmission within 10 years of his last departure from the United States. The applicant was also found to be inadmissible 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. 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 his U.S. citizen spouse and children.

The Field Office Director concluded that the record failed to establish the existence of extreme hardship for a qualifying relative, and denied the application accordingly. *See Decision of the Field Office Director*, dated March 16, 2012. The AAO determined that the applicant's waiver application was moot and sustained the applicant's appeal as to the Application for Permission to Reapply for Admission. *See Decision of Administrative Appeals Office*, dated April 24, 2013.

On appeal, counsel for the applicant asserts that the applicant has demonstrated extreme hardship upon separation and relocation to the applicant's spouse and children. Specifically, counsel asserts that the applicant's oldest son suffers from a medical condition that requires treatment in the U.S. Counsel also asserts that the applicant's spouse needs the applicant's financial support and cannot relocate to Macedonia because her father is wheelchair-bound and depends on her care.

In support of the waiver application and appeal, the applicant submitted identity documents, family photographs, letters from the applicant and his spouse, letters of support, financial documentation, medical documentation concerning the applicant's child and father-in-law, background information concerning the impact of separation on the applicant's children, and criminal records. 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.

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

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or

(II) 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 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. 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. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability exists where, at the time of the proceeding, an “actual (as

opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien's own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude." *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

However, 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 inquiry in which the adjudicator reviews the "record of conviction" to determine if the conviction was based on conduct involving moral turpitude. *Id.* 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.

The record reflects that the applicant was convicted on [REDACTED] in the Criminal District Court of Tarrant County, Fort Worth, Texas, for abandoning or endangering a child pursuant to section 22.041(c) of the Texas Penal Code. The applicant was sentenced to six months imprisonment.

Section 22.041(c) of the Texas Penal Code provides:

- (c) A person commits an offense if he intentionally, knowingly, recklessly, or with criminal negligence, by act or omission, engages in conduct that places a child younger than 15 years in imminent danger of death, bodily injury, or physical or mental impairment.

The AAO notes that section 22.041(c) of the Texas Penal Code can be violated by a person acting intentionally, knowingly, recklessly, or with criminal negligence. The applicant's criminal record indicates that he was convicted for criminal negligence in endangering a child. The Fifth Circuit Court of Appeals, in *Rodriguez-Castro v. Gonzales*, 427 F.3d 316 (5th Cir. 2005), determined that a conviction under section 22.041(b) of the Texas Penal Code, child abandonment in circumstances with an unreasonable risk of harm, does not constitute a crime involving moral turpitude. The Fifth Circuit states that since the statute criminalizes conduct based upon the knowledge of a reasonably situated adult, without regard to whether a person is actually aware of such harm, it does not necessary encompass willful or intentional acts. *Id.* It is noted that as crimes involving moral turpitude require both reprehensible conduct and some degree of scienter, negligent acts generally do not rise to the level of moral turpitude. See *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008); *Matter of Perez-Contreras*, 20 I&N Dec. 615 (BIA 1992) (holding that a statute that involves negligently causing bodily harm is not a CIMT).

Section 6.03(d) of the Texas Penal Code provides:

- (d) A person acts with criminal negligence, or is criminally negligent, with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will

occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

The AAO finds that the applicant's conviction under section 22.041(c) of the Texas Penal Code, like the conviction in *Rodriguez-Castro v. Gonzales*, criminalizes negligent conduct in which a person should be aware of a set of circumstances. Accordingly, the AAO finds that the applicant's conviction under this section of the penal law is not a crime involving moral turpitude.

Section 212(a)(9)(B) of the Act, in pertinent part, provides:

(B) ALIENS UNLAWFULLY PRESENT.-

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

....

(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.

....

(v) Waiver.-The Attorney General has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

The record reflects that the applicant entered the United States without admission or parole in 1995 and filed for asylum in 1997. On August 16, 2002, the Board of Immigration Appeals (BIA) affirmed the immigration judge's decision denying the applicant's asylum application and ordered the applicant to depart within 30 days of the order. The applicant remained in the United States until his removal on March 22, 2010. The applicant accrued unlawful presence in the United States from 31 days from the BIA's order of August 16, 2002 until his removal on March 22, 2010. As the applicant accrued over one year of unlawful presence in the United States and he now seeks readmission within 10 years of his last departure, he is inadmissible under section 212(a)(9)(B)(i)(II) of the Act. The applicant does not contest his inadmissibility on appeal.

A section 212(a)(9)(B)(v) waiver of the bar to admission resulting from section 212(a)(9)(B)(i)(II) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse or parent. Hardship to the applicant is not considered in section

212(h) waiver proceedings unless it causes hardship to a qualifying relative, in this case the applicant's spouse. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez*, 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 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 record reflects that the applicant is a 40-year-old native of Yugoslavia and citizen of Macedonia. The applicant's spouse is a 35-year-old native of Macedonia, formerly Yugoslavia, and citizen of the United States. The applicant is currently residing in Macedonia and the applicant's spouse is residing in Arlington, Texas with their children.

Counsel for the applicant asserts that the applicant's spouse is suffering financial hardship in the absence of the applicant, as she relies upon a part-time job to provide her family with financial support. The applicant's spouse contends that she has been struggling to make ends meet and has had difficulty receiving financial assistance from the State. The applicant's spouse asserts that she is behind on the rent so that her family could possibly end up being evicted from their residence.

The record contains a 2009 federal tax return for the applicant and his spouse, indicating wages in the amount of \$9,063. It is noted that the applicant was removed from the United States on March 22, 2010, so that the applicant resided in the United States for that taxation period. It is also noted that the record does not contain updated financial documents since the applicant's removal. The record does not contain information concerning the applicant's spouse's current wages, financial assistance received, expenses, or any other supporting documentation that would indicate her inability to maintain her financial obligations.

The applicant's spouse asserts that she and her children have been lost in the absence of the applicant. Counsel asserts that the applicant's oldest child is suffering from chronic lung disease and the applicant's spouse has been dealing with his medical visits without the applicant. The record contains a physician's letter stating that the applicant's oldest child has health issues, including: growth delay, chronic lung disease, feeding problems, chronic sinusitis and otitis, learning disabilities, speech delay, and social disabilities. The record also contains a letter from the applicant's son's school stating that his premature birth has caused some academic issues and his smaller size has led to social issues. The physician and the applicant's son's instructional facilitator indicate that the presence of the applicant would provide support for the applicant's son and spouse. It is initially noted that the applicant's children are not qualifying relatives in the context of this application so that any hardship they suffer will be considered only insofar as it affects the applicant's spouse. Further, absent an explanation in plain language from the treating physician of the specific nature and severity of any current condition and a description of any treatment or family assistance needed, the AAO is not in the position to reach conclusions concerning the severity of a

medical condition or the treatment needed.¹ Going on record without supporting documentary evidence generally is not sufficient for purposes of meeting the burden of proof in these proceedings. 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)).

It is acknowledged that separation from a spouse often creates hardship for both parties and the evidence indicates that the applicant's spouse would suffer emotional hardship due to separation from the applicant. However, there is insufficient evidence in the record, in the aggregate, to find that the applicant's spouse is suffering extreme hardship upon separation from the applicant.

Counsel for the applicant asserts that the applicant's spouse cannot relocate to Macedonia because she would have to bring her oldest son, who is receiving medical care in the United States. Counsel contends that the only place in Macedonia where a medical facility can be found is Skopje. The record indicates that the applicant is currently residing in Skopje. Further, the record does not contain any supporting information concerning conditions in Macedonia, including its medical resources. As such, there is no indication that the applicant's oldest son would be unable to receive medical treatment for his physical conditions, as necessary. It is noted that the U.S. Department of State's Country Specific Information for Macedonia does not identify any medical facility issues in Macedonia, regarding accessibility or quality of care.

Counsel asserts that the applicant's spouse is the primary caregiver for her father, who is housebound in a nursing home following a heart attack. Counsel also asserts that the applicant's spouse's mother depends on the applicant's spouse to drive her to and from the nursing home. Counsel indicates that the applicant's spouse's father resides in a nursing home, but still identifies the applicant's spouse as his primary caregiver, without further explanation. The record contains medical records concerning the applicant's spouse's father, but it does not indicate the extent to which he requires assistance from his family members. The applicant's spouse does not make any assertions concerning her role and responsibilities in the lives of her parents in the United States. Further, the record does not contain letters of support from the applicant's mother or father addressing the extent of their relationship with the applicant's spouse. It is noted that the applicant's spouse is a native of Macedonia, formerly Yugoslavia. The record contains insufficient evidence, in the aggregate, to find that the applicant's spouse would suffer extreme hardship upon relocation to Macedonia.

In this case, the record does not contain sufficient evidence to show that the hardships faced by the applicant's spouse, considered in the aggregate, rise to the level of extreme hardship. The AAO therefore finds that the applicant has failed to establish the requisite level of hardship to qualifying relative. As the applicant has not established the requisite level of hardship to a qualifying family member, no purpose would be served in determining whether the applicant merits a waiver as a matter of discretion.

¹ Counsel for the applicant asserts that the applicant's son's treating physician is limited in her explanation of the patient's condition due to Health Information Portability and Accountability Act (HIPAA). It is noted that a patient's privacy rights under HIPAA are waivable.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) 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. The applicant filed a Form I-212, which was denied concurrently with his Form I-601 on March 16, 2012. An application for permission to reapply for admission is denied, in the exercise of discretion, to an alien who is mandatorily inadmissible to the United States under another section of the Act, and no purpose would be served in granting the application. *Matter of Martinez-Torres*, 10 I&N Dec. 776 (Reg. Comm. 1964). As the applicant is inadmissible under section 212(a)(9)(B)(v) of the Act, no purpose would be served in granting the applicant's Form I-212 application. The appeal will therefore be dismissed.

ORDER: The matter is reopened *sua sponte*. The AAO's prior decision of April 24, 2013 is withdrawn. The appeal is dismissed.