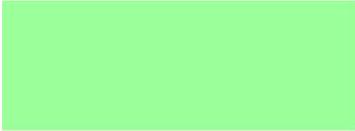


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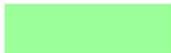


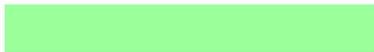
U.S. Citizenship
and Immigration
Services



Date: **JUN 11 2013**

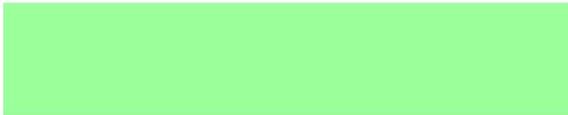
Office: KENDALL

FILE: 

IN RE: Applicant: 

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

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office 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 our 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-190B, 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 a 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, Kendall, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Cuba 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 (Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of crimes involving moral turpitude. The applicant is the husband of a U.S. lawful permanent resident (LPR). On July 12, 2012, he filed an Application for Waiver of Grounds of Inadmissibility (Form I-601). The applicant seeks a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182 (h), in order to remain in the United States with his U.S. LPR wife and U.S. citizen children.

In a decision dated August 8, 2012, the field office director concluded that the applicant failed to establish that his qualifying relatives would experience extreme hardship as a consequence of his inadmissibility and denied the Form I-601 waiver application accordingly.

On appeal, counsel asserts that the director erred in finding that the applicant has not established extreme hardship to his qualifying relatives, as the evidence outlining emotional, psychological, medical and financial difficulties demonstrates extreme hardship to the applicant's LPR spouse and U.S. citizen children.

The record includes, but is not limited to: counsel's brief; the applicant's declaration; statements by the applicant's wife and children; copy of a marriage certificate; copies of naturalization certificates; financial documentation; medical reports; family photos; country conditions documentation; birth certificates; and documentation regarding the applicant's criminal history.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record has been reviewed and considered in rendering a decision on the appeal.

Section 212(a)(2)(A) of the Act provides, in pertinent part, that:

- (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –
 - (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible

The Board of Immigration Appeals (Board) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

[M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general....

In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required *mens rea* may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

The Eleventh Circuit has found that, when evaluating whether an offense constitutes a crime involving moral turpitude, immigration adjudicators must employ the categorical and modified categorical approach. *Fajardo v. U.S. Att’y Gen.*, 659 F.3d 1303, 1305-06 (11th Cir. 2011). “To determine whether a conviction for a particular crime constitutes a conviction of a crime involving moral turpitude, both [the Eleventh Circuit] and the BIA have historically looked to ‘the inherent nature of the offense, as defined in the relevant statute....’” *Id.* at 1305. “If the statutory definition of a crime encompasses some conduct that categorically would be grounds for removal as well as other conduct that would not, then the record of conviction—i.e., the charging document, plea, verdict, and sentence—may also be considered.” *Id.* (citing *Jaggernauth v. U.S. Att’y Gen.*, 432 F.3d 1346, 1354-55 (11th Cir. 2005)).

The record shows that on July 1, 2008, the applicant was convicted in the Circuit Court of the Eleventh Judicial Circuit in and for [REDACTED] Florida, of grand theft in the third degree in violation of section 812.014(2)(c) of the Florida Statutes. In Florida, a third degree felony is punishable by a term of imprisonment not exceeding five years. *See* Florida Statutes § 775.082. The applicant was placed on probation for a period of five years, was ordered to perform 100 hours of community service, and was ordered to pay court costs and fees. The field office director found the applicant inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude. As the applicant does not dispute his inadmissibility on appeal, and the record does not show that determination to be in error, we will not disturb the finding of inadmissibility.

The field office director further found the applicant inadmissible under section 212(a)(2)(A)(i)(I) for his April 10, 1996 conviction for burglary of an unoccupied vehicle and possession of burglary tools in the Circuit Court of the Eleventh Judicial Circuit in and for [REDACTED] Florida. However, the record of proceedings before the AAO indicates that this conviction has been vacated due to procedural defect in the criminal proceeding. In support, the applicant submitted a copy of a Post Conviction Motion For Relief From Illegal Sentence And Statutory Null And Void Judicial Disposition. In the motion, the applicant, through counsel, requests the Dade County Circuit Court that his nolo contendere plea be withdrawn and vacated pursuant to the relevant Florida Rules of Criminal Procedure, which provide, in pertinent part, that:

3.800. Correction, Reduction, and Modification of Sentence

(a) Correction. A court may at any time correct an illegal sentence imposed by it, or an incorrect calculation made by it in a sentencing scoresheet, or a sentence that does

not grant proper credit for time served when it is affirmatively alleged that the court records demonstrate on their face an entitlement to that relief, provided that a party may not file a motion to correct an illegal sentence under this subdivision during the time allowed for the filing of a motion under subdivision (b)(1) or during the pendency of a direct appeal.

3.850. Motion to Vacate, Set Aside or Correct Sentence

(a) Grounds for Motion. The following grounds may be claims for relief from judgment or release from custody by a person who has been tried and found guilty or has entered a plea of guilty or nolo contendere before a court established by the laws of Florida: (1) The judgment was entered or sentence was imposed in violation of the Constitution or laws of the United States or the State of Florida.

The record also includes an order dated January 25, 2012 by [REDACTED] of the Florida Circuit Court for [REDACTED] in which it is concluded that the applicant established a procedural violation. The Circuit Court found that the sentence entered against the applicant was illegal. The record evidence reflects that the applicant's nolo contendere plea was withdrawn. On April 9, 2012, the charges were dismissed "*nolle pros*" in open court. Based upon this evidence, the AAO concludes that the applicant's April 10, 1996 conviction was vacated due to a violation of the Florida Rules of Criminal Procedure.

The Board has held that vacatur of a plea will vacate the conviction for immigration purposes as long as it was not pursuant to a rehabilitative statute or because of immigration hardship. *See, e.g. Matter of Adamiak*, 23 I. & N. Dec. 878, 879 (BIA 2006) (where the criminal court failed to advise the defendant of the immigration consequences of his plea pursuant to section 2943.031 of the Ohio Revised Code, the subsequent vacatur is not a conviction for immigration purposes because the guilty plea has been vacated as a result of a "defect in the underlying criminal proceedings" and not for a rehabilitative or immigration hardship purpose); *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003) (concluding that in light of the language and legislative purpose of the definition of a "conviction" at section 101(a)(48) of the Act, "there is a significant distinction between convictions vacated on the basis of a procedural or substantive defect in the underlying proceedings and those vacated because of post-conviction events, such as rehabilitation or immigration hardships"); and *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000) (according full faith and credit to a New York court's vacation of a conviction under a statute that was neither an expungement nor a rehabilitative statute); *See also, Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999) (under the definition in section 101(a)(48)(A), no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute).

Here, the record shows that the applicant's conviction was vacated due to a defect in the underlying criminal proceedings and not pursuant to a state rehabilitative statute or because of immigration hardship. Therefore, the AAO finds that the applicant's April 10, 1996 conviction is no longer a conviction for immigration purposes. The applicant remains inadmissible under section

212(a)(2)(A)(i)(I) of the Act for his grand theft conviction, and he requires a discretionary waiver under section 212(h) of the Act.

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

(h) The Attorney General [Secretary of Homeland Security] may, in [her] discretion, waive the application of subparagraph (A)(i)(I) . . . 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 section 212(h) waiver of the bar to admission resulting from violation of section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant is not a consideration under the statute and will be considered only to the extent that it results in hardship to a qualifying relative. The applicant's wife and children are the qualifying relatives in these proceedings. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. See *Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996).

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

The Board has also held that the common or typical results of removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. See generally *Matter of Cervantes-Gonzalez*, 22

I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that “[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists.” *Matter of O-J-O*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator “must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation.” *Id.*

The actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. See, e.g., *Matter of Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. See *Salcido-Salcido*, 138 F.3d 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.

With regards to relocation to Cuba, counsel states that the applicant’s family would experience extreme hardship as they have established a life in the United States for 17 years. Regarding the applicant’s son, counsel indicates and the record evidence reflects that the applicant’s children will experience the hardship of not knowing the Spanish language, not having the educational opportunities and resources equal to what they have in the United States, and the difficulties in them having to adapt to life in a communist country that represses all forms of dissent. The applicant indicates that they fled Cuba in 1995 due to the oppressive political system. In support, the applicant submitted the Human Rights Watch- World Report 2011: Cuba. In addition to the issues surrounding the children’s travel to Cuba, the Cuban government’s possible treatment of the applicant and his family upon their return to that country is of concern. As stated above and supported by the record, it is reasonable to believe that the applicant and his wife will face repercussions for their fleeing from Cuba, thus placing their children in a situation in which they are in a foreign country without other known family members to care for them.

The record evidence also suggests that relocation would be difficult for the applicant’s son given his behavioral struggles, his need for school counseling, and his lack of knowledge of the Spanish language. Counsel states that the applicant’s son has been diagnosed with asthma and attention

deficit hyperactivity disorder (ADHD), and that he has been attending counseling sessions with a behavioral therapist at the [REDACTED]. The Board and U.S. Courts decisions have found extreme hardship in cases where the language limitations of the children impeded an adequate transition to daily life in the applicant's country of origin. In *Matter of Kao and Lin*, 23 I&N Dec. 45, 50 (BIA 2001), the Board concluded that the language abilities of the respondent's 15-year-old daughter were not sufficient for her to have an adequate transition to daily life in Taiwan. The girl had lived her entire life in the United States and was completely integrated into an American life style, and the Board found that uprooting her at that stage in her education and her social development to survive in a Chinese-only environment would constitute extreme hardship. In *Prapavat v. INS*, 638 F. 2nd 87, 89 (9th Cir. 1980) the Ninth Circuit Court of Appeals found the Board abused its discretion in concluding that extreme hardship had not been shown to the aliens' five-year-old citizen daughter, who was attending school, and would be uprooted from the country where she lived her entire life and taken to a land whose language and culture were foreign to her. Here, the AAO notes that relocation would mean that the applicant's son would be uprooted from his community and have to discontinue his current treatment with a behavioral therapist. When the hardship factors to the applicant's wife and children are considered collectively, the AAO finds that the applicant's qualifying relatives would experience extreme hardship if they joined the applicant to live in Cuba.

However, we do not find the record to show that they would experience extreme hardship if they remained in the United States and were separated from the applicant. With regards to remaining in the United States without the applicant, in a declaration dated June 11, 2012, the applicant's wife indicates that she depends upon the applicant for emotional and financial support and in helping her raise and take care of their two children. The applicant's wife indicates, and the medical documentation in the record corroborates, that she has been diagnosed with chronic low back pain, tachycardia, and migraines. She states that her back pain leaves her incapacitated for several days, and that the applicant assists her and their children during this time by taking care of the household chores and their children. If he is denied admission, the applicant's wife and children would lose the support and assistance of the applicant.

The applicant's wife also asserts financial hardship from separation. Even though counsel contends that the applicant is the main provider for the household through his disability income, the applicant's wife states in her declaration that "during these difficult financial times, [the applicant] strives to work hard in order to maintain [their] family." As such, counsel's assertion of financial hardship to the applicant's wife is not consistent with the applicant's wife's declaration. Further, the record does not contain financial evidence to resolve this inconsistency, evidence of the source or sources of the applicant's income and how his removal would affect his family's finances. No evidence of either employment or disability income was submitted. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Additionally, in the absence of documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Without this financial

documentation, the AAO is unable to conclude that the applicant's wife and children would experience financial hardship without the applicant's continued income and financial contributions to the household.

Counsel asserts that the applicant's children would experience extreme hardship in the event of separation from the applicant. Counsel states that the applicant's son has been diagnosed with asthma and attention deficit hyperactivity disorder (ADHD), and that the son's condition would be aggravated in the absence of his father. The applicant's son indicates in a letter dated June 11, 2012, that he is emotionally attached to his father and that together they form a strong family unit. Here, the AAO acknowledges that the applicant's wife and children will experience emotional difficulties if they remain in the United States without the applicant, but the applicant has failed to demonstrate that these hardships, when combined with other hardship factors, will be extreme. The AAO recognizes the significance of family separation as a hardship factor, but concludes that the above-described emotional hardships, as demonstrated by the evidence in the record in the form of statements and letters, are the common result of removal or inadmissibility and do not rise to the level of extreme hardship in this case. U.S. court decisions have repeatedly held that the common results of removal or inadmissibility are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991).

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 relocate and thereby suffer extreme hardship can easily be made for purposes of the waiver even where there is no actual intention to relocate. *Cf. Matter of Ige*, 20 I&N Dec. 880, 886 (BIA 1994). Furthermore, to relocate and suffer extreme hardship, where remaining in the United States and being separated from the applicant would not result in extreme hardship, is a matter of choice and not the result of inadmissibility. *Id.*, *also cf. Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996). As the applicant has not demonstrated extreme hardship from separation, we cannot find that refusal of admission would result in extreme hardship to the qualifying relative in this case. Having found the applicant statutorily ineligible for relief, it is unnecessary to discuss whether he 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 rests with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the applicant's appeal is dismissed.

ORDER: The appeal is dismissed.