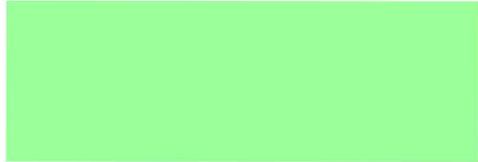




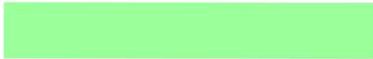
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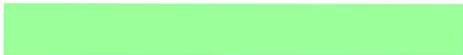
DATE:
JUN 14 2013

Office: SAN BERNARDINO



IN RE:

Applicant:



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

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States 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 applicant's father and three children are U.S. citizens and his mother is a lawful permanent resident. The applicant is applying for a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States.

The field office director determined that the applicant failed to establish extreme hardship to a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director*, dated November 15, 2011.

On appeal, the applicant details hardship to the applicant's qualifying relatives.

The record includes, but is not limited to the applicant's brief, a psychological evaluation, statements from the applicant's family members, and criminal records. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(2) of the Act states in pertinent part:

Criminal and related grounds. —

(A) Conviction of certain crimes. —

(i) In general. — Except as provided in clause (ii), any 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-

....
(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.)

This case arises in the Ninth Circuit. To determine if a crime involves moral turpitude, the Ninth Circuit Court of Appeals employs the categorical approach set forth in *Taylor v. United States*, 110 S.Ct. 2143 (1990). See *Nicanor-Romero v. Mukasey*, 523 F.3d 999, 1004 (9th Cir. 2008), *overruled on other grounds by Marmolejo-Campos v. Holder*, 58 F.3d 903, 911 (9th Cir. 2009). The purpose of the categorical approach is to determine whether the full range of conduct encompassed by the statute constitutes a crime of moral turpitude. *Cuevas-Gaspar v. Gonzalez*, 430 F.3d 1013, 1017 (9th Cir. 2005), *abrogation on other grounds recognized by Holder v. Martinez-Gutierrez*, 132 S.Ct. 2011, 2020-21 (2012). If the statute “criminalizes both conduct that does involve moral turpitude and other conduct that does not, the modified categorical approach is applied.” *Marmolejo-Campos*, 558 F.3d at 912 (citing *Fernando-Ruiz v. Gonzalez*, 466 F.3d 1121, 1163 (9th Cir. 2006)); see also *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1161 (9th Cir. 2009). However, there must be “a realistic probability, not a theoretical possibility, that the statute would be applied to reach conduct that did not involve moral turpitude.” *Nicanor-Romero*, 523 F.3d at 1004 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). To demonstrate a “realistic probability,” the applicant must point to his or her own case or other cases in which the state courts in fact did apply the statute to conduct not involving moral turpitude. 523 F.3d at 1004-05. A realistic probability also exists where the statute expressly

punishes conduct not involving moral turpitude. *See U.S. v. Vidal*, 504 F.3d 1072, 1082 (9th Cir. 2007).

Once a realistic probability is established, the modified categorical approach is applied, which requires looking to the “limited, specified set of documents” that comprise what is known as the record of conviction – the charging document, a signed plea agreement, jury instructions, guilty pleas, transcripts of a plea proceeding and the judgment – to determine if the conviction entailed admission to, or proof of, the elements of a crime involving moral turpitude. *Castillo-Cruz*, 581 F.3d at 1161 (citing *Fernando-Ruiz*, 466 F.3d at 1132-33); *see also Marmolejo-Campos*, 558 F.3d at 912 (citing *Cuevas-Gaspar*, 430 F.3d at 1020). The Ninth Circuit has reaffirmed that courts may not examine evidence outside the record of conviction in determining whether a conviction was for a crime involving moral turpitude. *See Olivas-Motta v. Holder*, --- F.3d ---, 2013 WL 2128318 (9th Cir. May 17, 2013) (rejecting *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)). Where the burden of proof is on the applicant, as in the present case, the applicant cannot sustain that burden where the record of conviction is inconclusive. *Young v. Holder*, 697 F.3d 976, 989 (9th Cir. 2012).

The record reflects that on June 12, 2003 the applicant was convicted of disorderly conduct (lewd conduct) in violation of California Penal Code § 647(a). The applicant received three years of summary probation, 20 days of community service and a \$1000 fine. California Penal Code section 647(a) provides the following:

Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:

(a) Who solicits anyone to engage in or who engages in lewd or dissolute conduct in any public place or in any place open to the public or exposed to public view.

In *Matter of Mueller*, the Board found that a conviction for “lewd and lascivious conduct” in violation of Wis. Stat. § 944.20(2) that did not require “any intent whatsoever” was not a crime involving moral turpitude. 11 I&N Dec. 268, 270 (BIA 1965). The Board reasoned that “[m]oral turpitude is dependent upon the depraved or vicious motive of the alien. It is in the intent that moral turpitude inheres.” *Id.* at 269. Similarly, in *Matter of P-*, the Board held that a Washington conviction for indecent exposure to children was not a crime involving moral turpitude where there was no indication of whether the exposure was made “to arouse the sexual desires of the parties concerned or with a lewd or lascivious intent, or whether it was because of a negligent disregard of the children’s presence occasioned by physical necessity.” 2 I&N Dec. 117, 121 (BIA 1944) (emphasis in original).

By contrast, the Board has held that offenses where lewdness is an element of the crime do involve moral turpitude. For example, in *Matter of Lambert*, the Board found that a conviction

for “renting rooms with knowledge that the rooms were to be used for the purpose of lewdness, assignation or prostitution” was a crime involving moral turpitude. 11 I&N Dec. 340, 342 (BIA 1965); *see also Matter of P-----*, 3 I&N Dec. 20 (1947) (holding that “keeping a house of ill-fame resorted to for the purposes of prostitution and lewdness” is a crime involving moral turpitude); *Matter of W-*, 4 I&N Dec. 401 (BIA 1951) (noting that moral turpitude inheres in a conviction “. . . to commit or offer or agree to commit any act of prostitution, assignation, or any other lewd or indecent act.”)

In a recent decision, the Board clarified that “[t]he key difference between cases like *Matter of P-* and *Matter of Mueller* on the one hand and *Matter of Lambert* on the other is lewdness. In our view, lewd intent brings the offense of indecent exposure within the definition of a crime involving moral turpitude. . . . This is what makes it ‘base, vile, or depraved, and contrary to the accepted rules of morality.’” *Matter of Medina*, 26 I&N Dec. 79, 83 (BIA 2013) (citations omitted). The Board applied this distinction to a conviction for indecent exposure under Cal. Penal Code § 314(1), which provides that “[e]very person who willfully and lewdly . . . [e]xposes his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby . . . is guilty of a misdemeanor.” 26 I&N Dec. at 83. The Board concluded that “a person convicted of indecent exposure in violation of section 314(1) has committed a crime involving moral turpitude because a finding of lewdness is necessary for a conviction.” *Id.* at 84. In making its finding, the Board noted that the Ninth Circuit recently held in *Rohit v. Holder* that a conviction for disorderly conduct involving solicitation of prostitution, which includes “any lewd act between persons for money or other consideration,” under Cal. Penal Code § 647(b) is a crime involving moral turpitude. 670 F.3d 1085, 1089-90 (9th Cir. 2012).

The AAO also notes that the Board has previously found that a conviction under Cal. Penal Code § 647(a) for “the soliciting of a person or persons to engage in, and the engaging in lewd and dissolute conduct in a public place” is a crime involving moral turpitude. *Matter of Alfonzo-Bermudez*, 12 I&N Dec. 225, 226-27 (BIA 1967).

A conviction under Cal. Penal Code § 647(a) requires a finding that a person “engage[d] in lewd or dissolute conduct” The California Supreme Court has emphasized that § 647(a) is based on a desire to prevent “vagrancy” and “socially harmful lewd or dissolute conduct” rather than sexual or obscene gestures performed in public but under circumstances that do not involve lewdness, such as during a performance in a play. *See Barrows v. Mun. Court*, 464 P.2d 483 (Cal. 1970). The same court, in analyzing an indecent exposure conviction under Cal. Penal Code § 314, has held that public nudity is not “lewd” unless “the actor not only meant to expose himself, but intended by his conduct to direct public attention to his genitals for purposes of sexual arousal, gratification, or affront.” *In re Smith*, 497 P.2d 807, 810 (Cal. 1972). Finally, individuals convicted under § 647(a) are subject to lifetime registration as sex offenders under Cal. Penal Code § 290, as are those convicted of rape, incest, prostitution, and “lewd or lascivious acts upon the body of a child.” *Barrows*, 464 P.2d at 486.

Based on the precedent discussed above, the AAO finds that there is no realistic possibility that Cal. Penal Code § 647(a) would be applied to conduct that does not involve moral turpitude, and the applicant has not demonstrated otherwise. The incorporation of lewdness as an element of § 647(a) “brings the offense . . . within the definition of a crime involving moral turpitude.” *Matter of Medina* at 83. Therefore, a conviction under Cal. Penal Code § 647(a) is categorically a crime involving moral turpitude, rendering the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The record also reflects that on August 23, 1993, the applicant was convicted of forgery or counterfeiting seals/possession and concealment of counterfeit seals in violation of Cal. Penal Code § 472. The applicant received two years of summary probation and a 60 day suspended sentence. At the time of the applicant’s conviction, Cal. Penal Code § 472 provided:

Every person who, with intent to defraud another, forges, or counterfeits the seal of this State, the seal of any public officer authorized by law, the seal of any Court of record, or the seal of any corporation, or any other public seal authorized or recognized by the laws of this State, or of any other State, Every person who, with intent to defraud another, forges, or counterfeits the seal of this State, the seal of any public officer authorized by law, the seal of any Court of record, or the seal of any corporation, or any other public seal authorized or recognized by the laws of this State, or of any other State, Government, or country, or who falsely makes, forges, or counterfeits any impression purporting to be an impression of any such seal, or who has in his possession any such counterfeited seal or impression thereof, knowing it to be counterfeited, and willfully conceals the same, is guilty of forgery.

Crimes involving fraud are considered to be crimes involving moral turpitude. *Jordan v. DeGeorge*, 341 U.S. at 227-32; *McNaughton v. INS*, 612 F.2d 457, 459 (9th Cir. 1980) (“A crime having as an element the intent to defraud clearly is one involving moral turpitude.”). Because intent to defraud is a necessary element of a conviction under Cal. Penal Code § 472, it is categorically a crime involving a moral turpitude.

The records of conviction demonstrate that both of the applicant’s convictions were vacated pursuant to Cal. Penal Code § 1203.4. However, the AAO finds that a dismissal under Cal. Penal Code § 1203.4 does not erase the applicant’s convictions for immigration purposes. Under the current statutory definition of “conviction” provided at section 101(a)(48)(A) of the Act, 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. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). Any subsequent, rehabilitative action that overturns a state conviction, other than on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings, is ineffective to expunge a conviction for immigration purposes. *Id.* at 523, 528. In *Matter of Pickering*, the Board reiterated that if a court vacates a conviction for reasons unrelated to a procedural or substantive defect in the underlying criminal proceedings, the alien remains

“convicted” for immigration purposes. *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003). It appears from the record that the dismissal of the applicant’s convictions was by a state rehabilitative statute. There is nothing in the record to show that it was based specifically on a defect in the conviction or in the proceedings underlying the conviction. Thus, the applicant remains “convicted” within the meaning of section 101(a)(48)(A) of the Act.

The AAO will now address the applicant’s request for a waiver of inadmissibility under section 212(h) of the Act. Section 212(h) states, in pertinent part:

(h) The Attorney General [Secretary of Homeland Security] may, in his 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 qualifying relatives in this case are the applicant’s U.S. citizen father and children and his lawful permanent resident mother. If extreme hardship to a 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 of Immigration Appeals (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 U.S. 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 v. INS*, 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.

On appeal, the applicant contends that his children and his “common-law” wife, [REDACTED] would experience financial hardship if he were removed because he is the sole economic provider for his family. He also states that his parents “would suffer psychological impact” in his absence. He acknowledges that he made mistakes in the past but states that he fulfilled his sentence and that his convictions were later expunged and vacated. He notes that he is a hard working and law-abiding person and that he would like to “live the American Dream” with his family.

The applicant’s children write that he is an excellent father and that he buys them everything they need. They also state that he helps them with homework and with problems at school. They request forgiveness for their father and beg that he be permitted to remain in the United States. [REDACTED]

Additionally, [REDACTED] indicates in a letter that she and the applicant have three children together and that she is pregnant with a fourth child. She states that she and her children depend on the applicant for emotional and financial support and that he provides them with housing, food, and other necessities. She contends that she and her children cannot imagine living without him and that they want their family to remain together.

The applicant’s father states that he needs the applicant’s assistance in “personal and health matters.” He asserts that he and his family have felt “emotionally affected and psychologically unstable” due to the possibility that the applicant will be required to leave the United States. He states that separation of his family will cause extreme hardship.

The record also contains a psychological evaluation of the applicant’s U.S. citizen father from [REDACTED] dated July 22, 2011. The evaluation states that the applicant’s father “is suffering from frequent headaches, anxiety, and insomnia which are the result of his son [REDACTED] possibly not being allowed to remain” in the United States. The evaluation states that the applicant’s father fears for the safety of the applicant should he be forced to return to Mexico, “feels isolated and depressed,” has symptoms of panic attacks, and has difficulty sleeping. The evaluation diagnoses the applicant’s father with Generalized Anxiety Disorder and states that he:

has shown excessive anxiety and worry. These feelings are interfering with him trying to focus on looking for a job. He worries constantly about his wife . . . [if the applicant] is not permitted to stay in the United States. He doesn’t have the economic resources to help his ailing wife at this time and depends on [the applicant] to help them out financially and emoti[o]nally.

The AAO finds that the applicant’s U.S. citizen father would suffer extreme hardship if separated from the applicant. The psychological evaluation establishes that the applicant’s father is

¹ The applicant has not demonstrated that the State of California recognizes common law marriages. Furthermore, a “common law” spouse is not a qualifying relative for purposes of a waiver application under 212(h) of the Act. Therefore, we will refer to the mother of the applicant’s spouse by her name, [REDACTED]. Any hardship to her will be considered only to the extent that it causes extreme hardship to the applicant’s children or parents.

experiencing significant emotional difficulties related to the applicant's potential removal from the United States. His symptoms of anxiety and depression are interfering with his ability to sleep, to carry out his daily responsibilities, and to find work to support himself and his wife. The applicant's father relies on the applicant for financial support and there is no indication that he and his wife would have another source of support if the applicant were removed.

However, the applicant has not claimed that any of his qualifying relatives would suffer extreme hardship if they were to relocate to Mexico with the applicant. 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 to any of his qualifying relatives on relocation, we cannot find that refusal of admission would result in extreme hardship to the qualifying relatives in this case.

The AAO therefore finds that the applicant has failed to establish extreme hardship to a qualifying relative as required under section 212(h) of the Act. 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 application for waiver of grounds of inadmissibility, 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. The waiver application is denied.