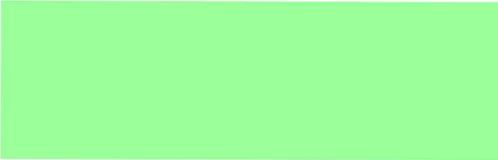


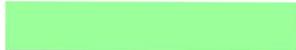


U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: JUN 20 2013 Office: SAN SALVADOR (PANAMA CITY)

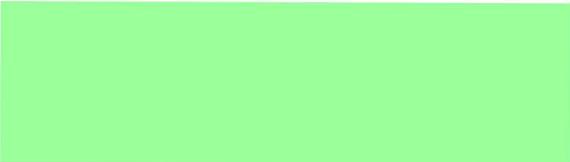


IN RE:



APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to section 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v), and under 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.

Thank you,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Field Office Director, Panama City, Panama, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Ecuador 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 (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having committed a crime involving moral turpitude, and under section 212(a)(9)(B)(i)(II) of 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 seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen wife and child.

In a decision dated September 25, 2012, the field office director concluded that the applicant had failed to show that his U.S. citizen spouse would suffer extreme hardship as a result of his inadmissibility. The application was denied accordingly.

On appeal, counsel asserts that the applicant's spouse and daughter are suffering extreme hardship as a result of the applicant's inadmissibility and three years of separation. The applicant submits additional hardship evidence with his 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-

....

(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).

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

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), . . . of subsection (a)(2) . . . if –

....

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . . .

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. 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).

The record indicates that on December 3, 2001, the applicant pled guilty in U.S. District Court, [REDACTED] Division, to one count of possession of a false identification document under 18 U.S.C § 1028(a)(4). The applicant was sentenced to one year of

probation. The maximum sentence for a conviction under 18 U.S.C §1028(a)(4) is 15 years imprisonment.

At the time of the applicant's conviction, 18 U.S.C. § 1028(a)(4) provided:

Fraud and related activity in connection with identification documents and information

(a) Whoever, in a circumstance described in subsection (c) of this section--

...

(4) knowingly possesses an identification document (other than one issued lawfully for the use of the possessor) or a false identification document, with the intent such document be used to defraud the United States;

...

shall be punished as provided in subsection (b) of this section. . . .

Although mere possession of fraudulent immigration documents is not a crime involving moral turpitude, knowing possession with the intent to defraud the United States government is. *See Matter of H- and Y-*, 3 I&N Dec. 236 (CO. 1948); *Matter of Serna*, 20 I&N Dec. 579, 586 (BIA 1992). Because the applicant's offense involves the intent to defraud the U.S. government, it is a crime involving moral turpitude. Thus, we find that the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The applicant is also inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

Section 212(a)(9) of the Act provides:

**(B) ALIENS UNLAWFULLY PRESENT.-**

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

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 244(e) prior to the commencement of proceedings under section 235(b)(1) or section 240), and again seeks admission within 3 years of the date of such alien's departure or removal, or

(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.

(ii) Construction of unlawful presence.- For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.

...

(iv) Tolling for good cause.-In the case of an alien who-

(I) has been lawfully admitted or paroled into the United States,

(II) has filed a nonfrivolous application for a change or extension of status before the date of expiration of the period of stay authorized by the Attorney General, and

(III) has not been employed without authorization in the United States before or during the pendency of such application, the calculation of the period of time specified in clause (i)(I) shall be tolled during the pendency of such application, but not to exceed 120 days.

(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 inspection on or about December 15, 1999. On February 7, 2001, the applicant married a U.S. citizen and on July 30, 2001, his spouse filed a Petition for an Alien Relative (Form I-130) on his behalf. The Form I-130 was approved on June 12, 2003 and he then filed an Application for Adjustment of Status (Form I-485) on July 30, 2001. As noted above, on December 3, 2001, the applicant was convicted under 18 U.S.C § 1028(a)(4) for possession of a false identification document and on December 21, 2001 the applicant was placed in removal proceedings. On March 29, 2005, an immigration judge granted the applicant voluntary departure, but his removal proceedings were later reopened. On October 4, 2007, an immigration judge denied the applicant's Form I-485 and a warrant of deportation was issued. On November 5, 2007, the applicant filed an appeal with the BIA, who denied the appeal on July 18, 2008. The applicant self-executed his removal order by departing the United States on October 2, 2009. Thus, the applicant accrued unlawful presence from December 15, 1999, the date of his illegal entry to July 30, 2001, the date he filed his Form I-485. Therefore, the applicant is inadmissible under section 212(a)(9)(B)(i) of the Act for having been unlawfully

present in the United States for more than one year and seeking readmission within 10 years of her last departure.

Waivers of inadmissibility under section 212(h) and 212(a)(9)(B)(v) of the Act are dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which under section 212(h) includes the U.S. citizen or lawfully resident spouse, parent, son or daughter of the applicant and under section 212(a)(9)(B)(v) of the Act includes the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. Because the applicant must qualify for a waiver under section 212(a)(9)(B)(v) of the Act, hardship to his daughter will not be considered, unless it is shown to be causing hardship to his spouse. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996).

Extreme hardship is “not a definable term of fixed and inflexible content or meaning,” but “necessarily depends upon the facts and circumstances peculiar to each case.” *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, the Board provided a list of factors it deemed relevant in determining whether an 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 v. I.N.S.*, 138 F.3d 1292 (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.

The record of hardship includes: a psychological evaluation for the applicant’s spouse, a statement from the applicant’s spouse, a statement from the applicant’s father, a statement from the applicant’s grandmother, a statement from the applicant’s aunt, a letter from the applicant’s spouse’s church, photographs of Ecuador, information regarding family ties to the United States and the lack of family ties to Ecuador, financial documentation, and documentation of country conditions in Ecuador.

Counsel states that the applicant’s spouse is suffering emotionally and financially as a result of separation and would suffer emotionally and financially as a result of relocation. Counsel asserts that the applicant’s spouse attempted to relocate to Ecuador with her daughter, but because of the country conditions and lack of familial support in Ecuador, she suffered extreme emotional and financial hardship and returned to the United States. He states further that in the United States the applicant’s spouse is suffering emotionally and financially.

We find that the record establishes that the applicant’s spouse is suffering extreme hardship as a result of the applicant’s inadmissibility. The psychological evaluation and statements from family indicate that the applicant’s spouse is suffering extreme emotional hardship as a result of separation. The record indicates that the applicant’s spouse met with a psychologist in 2012 on five occasions. [REDACTED] diagnosed the applicant’s spouse with Adjustment Disorder with Mixed Anxiety and Depressed Mood. Her symptoms were reported as: anxiety, weight gain, impaired concentration affecting her work, short-term memory loss, nightmares, and digestive problems. Statements from family members support these findings of emotional hardship. In

addition, the record indicates, through financial documentation and corroborating statements, that the applicant's spouse is suffering extreme financial hardship as a result of separation. The record indicates that the applicant's spouse was receiving welfare benefits in Puerto Rico from February to May 2011 and resides in her grandmother's home with her daughter. The record also indicates that while the applicant was in the United States he was earning an income of approximately \$17,000 to \$23,000 per year.

We also find that the applicant's spouse would suffer extreme hardship as a result of relocating to Ecuador. The record indicates that the applicant's spouse has visited Ecuador four times and attempted to reside there in October 2009. The record indicates that while in Ecuador the applicant's spouse suffered anxiety and panic attacks as a result of the extreme poverty, the living conditions of the applicant's family, her inability to communicate effectively, and lack of familial support. Country conditions information in the record indicates that Ecuador is experiencing an increase in violence due to the drug trade in the country and that crime is a severe problem. Exacerbating the applicant's spouse's hardship upon relocation would be that she would relocate with a two-year-old child.

In this case, the record contains sufficient evidence to show that the hardships faced by the applicant's spouse, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship. The AAO therefore finds that the applicant has established extreme hardship to his U.S. Citizen spouse as required under section 212(a)(9)(B)(v) and section 212(h) of the Act.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996). For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Id.* at 299. The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

The AAO notes that *Matter of Marin*, 16 I & N Dec. 581 (BIA 1978), involving a section 212(c) waiver, is used in waiver cases as guidance for balancing favorable and unfavorable factors and this cross application of standards is supported by the Board of Immigration Appeals (BIA). In *Matter of Mendez-Morales*, the BIA, assessing the exercise of discretion under section 212(h) of the Act, stated:

We find this use of *Matter of Marin*, *supra*, as a general guide to be appropriate. For the most part, it is prudent to avoid cross application, as between different types of relief, of particular principles or standards for the exercise of discretion. *Id.* However, our reference to *Matter of Marin*, *supra*, is only for the purpose of the approach taken in that case regarding the balancing of favorable and unfavorable factors within the context of the relief being sought under section 212(h)(1)(B) of the Act. *See, e.g., Palmer v. INS*, 4 F.3d 482 (7th Cir.1993) (balancing of

discretionary factors under section 212(h)). We find this guidance to be helpful and applicable, given that both forms of relief address the question of whether aliens with criminal records should be admitted to the United States and allowed to reside in this country permanently.

*Matter of Mendez-Moralez* at 300.

In *Matter of Mendez-Moralez*, in evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the BIA stated that:

The factors adverse to the applicant include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature, recency and seriousness, and the presence of other evidence indicative of an 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 the alien began his 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 and service to 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). .

*Id.* at 301.

The BIA further states that upon review of the record as a whole, a balancing of the equities and adverse matters must be made to determine whether discretion should be favorably exercised. The equities that the applicant for section 212(h)(1)(B) relief must bring forward to establish that he merits a favorable exercise of administrative discretion will depend in each case on the nature and circumstances of the ground of exclusion sought to be waived and on the presence of any additional adverse matters, and as the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence. *Id.* at 301.

The favorable factors in the applicant's case include: the applicant's family ties to the United States, the hardship his wife, child, and grandparents would face if he were to be found inadmissible, the lack of a criminal record since 2001, the applicant's steady record of employment, his statements of regret for his actions, and, as evidenced by numerous letters in the record, the applicant's attributes as a supportive husband and trusted employee.

The unfavorable factors in the applicant's case include his illegal entry into the United States, his criminal conviction, and his unlawful presence in the United States.

Although the applicant's violations of immigration law and criminal record cannot be condoned, the positive factors in this case outweigh the negative factors. In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) and section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

**ORDER:** The appeal is sustained.