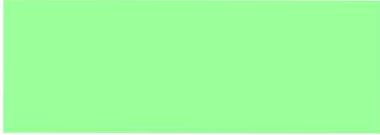




U.S. Citizenship
and Immigration
Services

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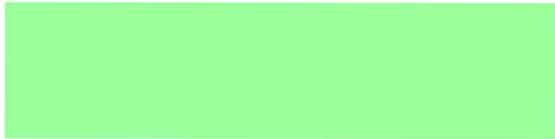
DATE: JUN 21 2013 Office: PHOENIX, AZ

FILE:

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:



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 was denied by the Field Office Director, Phoenix, Arizona, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of the India 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 crimes 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 her U.S. citizen spouse and children.

In a decision dated September 24, 2012, the field office director concluded that the applicant had failed to establish that extreme hardship would be imposed on her U.S. citizen spouse and denied the waiver application accordingly.

In a Notice of Appeal to the AAO (Form I-290B) dated October 24, 2012, counsel for the applicant asserts that the Field Office Director failed to take into consideration critical evidence regarding hardships to the applicant's children and spouse, and that if the hardship impacts are considered in the aggregate they constitute extreme hardship.

In support of the waiver application, the record contains, but is not limited to, the following documentation: a brief from counsel for the applicant; a statement from the applicant's spouse; court records pertaining to the applicant's convictions for theft; tax records, employment letters and other income-related documents pertaining to the applicant's spouse; statements regarding the psychological health of the applicant and her spouse; educational records for the applicant's children; and reports on conditions in India.

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.)

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 applicant was convicted of Theft, \$500 - \$1500, under Colorado Revised Statute (C.R.S.) § 18-4-401, a fourth degree felony, in Archuleta County, Pagosa Springs, Colorado, on July 25, 2002. The applicant was also convicted of Theft, \$100 - \$500, C.R.S. § 18-4-401, a 1st degree misdemeanor, in Archuleta County, Pagosa Springs, Colorado, on July 25, 2002. Based on his convictions, the field office director found that he is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having committed a crime involving moral turpitude. The applicant does not contest this finding, and the AAO does not find it to have been in error. The AAO notes that the applicant is not eligible for the petty offense exception under section 212(a)(2)(A)(ii)(II) of the Act because the applicant was convicted of more than one crime involving moral turpitude. Accordingly, the applicant requires a waiver under section 212(h) of the Act.

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 AAO notes that section 212(h) of the Act provides that a waiver of inadmissibility is dependent first upon a showing that the bar to admission imposes an extreme hardship on a qualifying family member. In this case, the relatives who qualify are the applicant's spouse and children. Hardship to the applicant is not considered under the statute and will be considered only insofar as it results in hardship to a qualifying relative. If extreme hardship is established, the Secretary then assesses whether an exercise of discretion is warranted.

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999), the BIA provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 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. The BIA added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not an exclusive list. *See id.*

Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact 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. *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996). (Citations omitted).

The AAO notes that in *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998), the Ninth Circuit Court of Appeals held that, "the most important single hardship factor may be the separation of the alien from family living in the United States", and that, "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion." (Citations omitted). Although the present case did not arise in the Ninth Circuit, separation of family will be given appropriate weight in the assessment of hardship factors.

The AAO notes further, however, that U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). For example, in *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), the BIA held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), the Court defined "extreme hardship" as hardship that was unusual or beyond that which would normally be expected upon deportation. The Court emphasized that the common results of deportation are insufficient to prove extreme hardship. Moreover, the U.S. Supreme Court held in *INS v. Jong Ha Wang*, 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

On appeal, counsel for the applicant asserts the applicant's spouse and children will experience extreme emotional hardship and physical hardship due to separation. *Brief in Support of Appeal*, dated November 20, 2012. Counsel explains that the applicant was depressed because of her transition to living in the United States, and that is why she was previously convicted of theft. He states that the applicant and her spouse have been married 17 years and have two U.S. citizen children. He states that the applicant's spouse and children share a close relationship with the applicant and will experience extreme emotional hardship due to separation from the applicant.

An examination of the record supports that the applicant has a spouse and two children residing in the United States. The applicant's spouse has submitted a statement asserting that he would experience extreme emotional hardship due to separation from the applicant, and the applicant's children have also submitted documentation indicating they would experience emotional hardship.

Counsel asserts that the Field Office Director's decision fails to take into account the impact of being separated from one's spouse and children and the psychological impact that has on spouses and children. The relatives of an inadmissible individual who remain in the United States often experience some emotional impact due to separation. The record must demonstrate that a qualifying relative will experience a hardship which rises above the normal consequences of separation. In this case, many of counsel's assertions are not supported by evidence in the record. Without an articulation of a particular hardship impact, or evidence which demonstrates the presence of any claimed hardship, the AAO cannot presume facts or construct a hardship assertion on behalf of an applicant.

The record contains tax and bank records, among other documents, relating to the applicant's spouse. However, the record does not contain sufficient income records to establish the applicant's spouse's current income. Nor is there evidence that the applicant has contributed to the family financially, thereby demonstrating some change in financial circumstance due to her absence. The record does not indicate the applicant's spouse has accrued any significant debt, is in danger of bankruptcy or cessation of utilities, or even that he would be unable to meet his financial obligations without the assistance of the applicant.

When the hardship factors asserted due to separation are considered in the aggregate, the AAO finds that they fail to establish a qualifying relative will experience extreme hardship due to separation.

With regard to hardship upon relocation, counsel for the applicant asserts that the applicant's spouse would experience extreme hardship due to the living conditions in India, and that he would not be able to find employment upon relocation. Counsel asserts that the applicant's children are gifted educationally, and that having to relocate to India would create uncommon hardship for them.

The applicant's spouse asserts in an October 29, 2012, letter that his children are completely integrated into U.S. culture, are gifted educationally and will experience extreme hardship upon relocation to India because they would not have access to the U.S. educational system. He further states that his career has been built in the United States, and that he would be unable to find comparable employment in India.

Counsel states that the applicant's spouse has strong economic ties to the United States, with a well-paying job and involvement in entrepreneurial activities, and states that these activities would be "impossible" if he had to reside in India. The AAO notes that India is a developed country, and that the applicant's spouse, in claiming his children will suffer educationally upon relocation to India, assumes that the U.S. educational system is superior to India's. The record does not distinguish any

educational impact on the applicant's children from that which is commonly experienced due to relocation.

While the record contains copies of country conditions materials for India, counsel has not specifically articulated why the applicant's spouse would not be able to find employment, other than indicating that he has been living and working in the United States. The AAO does not find this to be a sufficient basis for distinguishing any economic hardship on the applicant's spouse from that which is commonly experienced by the relatives of inadmissible individuals who relocate abroad. Nonetheless, as the applicant has submitted some evidence for consideration on this point, the AAO will consider the economic impact on the applicant's spouse when it aggregates the impacts arising due to separation.

Counsel has also asserted that the conditions in India are such that it would result in physical, emotional and financial hardship to the applicant's spouse and children. As discussed above, the record contains background materials and country conditions materials on India. Counsel selectively quotes from background documents on India, stating that India's high poverty and unemployment rate corroborate that the qualifying relatives in this case would experience extreme hardship upon relocation. However, both the applicant and her spouse are from India. They were both educated in India. There is nothing in the country conditions materials which indicates that the applicant's spouse would not be able to work in his chosen field of employment, or that he or his daughters would necessarily suffer poverty and unemployment in India. Counsel cites to a U.S. State Department report indicating the possibility of terrorist attacks, however the State Department's warning to U.S. citizens traveling in India to exercise caution is not sufficient evidence to demonstrate that the applicant's spouse or children would become victims of terrorist attacks.

Although counsel cites to *Matter of Kao-Lin* in asserting the applicant's children will experience extreme hardship. In *Matter of Kao-Lin*, 23 I&N Dec. 45 (BIA 2001) the applicant's children were 17 and were moving to a country that did not speak English. In this case, English is an official language of India, and there is no evidence they would not be able to transition into Indian culture with English-language skills.

The record fails to distinguish the impacts on the applicant's spouse and children from those that are normally experienced upon relocation. When the hardship factors asserted upon relocation are considered in the aggregate, the AAO finds that they do not rise to the level of extreme hardship.

Therefore, the AAO finds that the applicant has failed to establish eligibility for a waiver of inadmissibility under section 212(h) of the Act. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether she merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval remains entirely with the

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applicant. *See* 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.