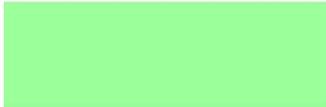




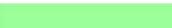
U.S. Citizenship
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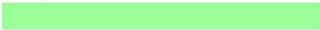
(b)(6)



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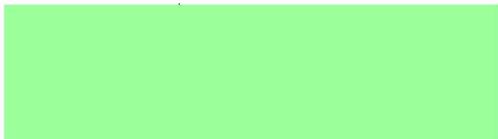
Office: OAKLAND PARK, FLORIDA

FILE: 

IN RE: 

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

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,

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 Acting Field Office Director, Oakland Park, Florida and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Canada 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. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with his U.S. citizen spouse.

In a decision, dated November 21, 2011, the acting district director found that the applicant failed to demonstrate that his qualifying relative would suffer extreme hardship as a result of his inadmissibility to the United States. The application was denied accordingly.

In a brief on appeal counsel asserts that the applicant's spouse will suffer extreme hardship as a result of the applicant's inadmissibility and that the acting field office director erred in giving a disproportionate amount of weight to the police report in regards to the applicant's criminal conviction. Counsel submits additional evidence of hardship on appeal.

Section 212(a)(2)(A) of the Act states, in pertinent parts:

(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

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

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

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

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

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

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

(Citations omitted.)

The applicant's case arises within the jurisdiction of the Eleventh Circuit Court of Appeals, which has recently reaffirmed the traditional categorical approach for determining whether a crime involves moral turpitude. See *Fajardo v. Attorney General*, 659 F.3d 1303, 1310 (11th Cir. 2011) (finding that the Congress intended the traditional categorical or modified categorical approach to be used to determine whether convictions were convictions for crimes involving moral turpitude and declining to follow the "realistic probability approach" put forth by the Attorney General in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)). In its decision, the Eleventh Circuit defined the categorical approach as "'looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions.'" 659 F.3d at 1305 (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990)). The court indicated, however, that where the statutory definition of a crime includes "conduct that would categorically be grounds for removal as well as conduct that would not, then the record of conviction – i.e., the charging document, plea, verdict, and sentence – may also be considered." 659 F.3d at 1305 (citing *Jaggernaut v. U.S. Att'y Gen.*, 432 F.3d 1346, 1354-55 (11th Cir. 2005)).

The record shows that on November 18, 2010, in Broward County, Florida, the applicant was convicted of attempted burglary of an occupied dwelling under Florida Statute §810.02(3)(A). The applicant was sentenced to 18 months probation, but the maximum penalty for this offense is 5 years in prison.

In *Matter of Loussaint*, 24 I&N Dec. 754 (BIA 2009), the Board of Immigration Appeals (BIA) found that burglary of an occupied dwelling under Florida Statute §810.02(3)(A) is categorically a crime involving moral turpitude. Thus, the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude. We note that in making this finding we did not consider the information included in the Probable Cause Affidavit connected to the applicant's arrest. Our finding is based solely on the statutory language of Florida Statute §810.02(3)(A).

(b)(6)

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

A waiver of inadmissibility under section 212(h) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse, parent, son or daughter of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. The applicant's spouse is the only qualifying relative in this case. 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-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996).

The record of hardship includes: a statement from the applicant, medical records for the applicant's spouse, financial documentation, the applicant's spouse's resume, and a psychological evaluation for the applicant's spouse.

We find that the applicant has shown that his spouse would suffer extreme hardship as a result of separation, but has not shown that she would suffer extreme hardship as a result of relocating to Canada. The applicant's spouse states that she suffers from depression, alcoholism, celiac disease, thyroid disease, and asthma. She states that she would suffer extreme emotional hardship if she were separated from the applicant. The record indicates that the applicant's spouse has been attending therapy sessions one to two times per week for two years and that although she supports the family financially, the applicant is her sole source of emotional support. She states that he applicant helps her with her business, taking care of their home, taking her to appointments, and cooking her gluten free meals to manage her celiac disease. We find that due to the applicant's spouse's depression and alcoholism; the absence of other supportive family members in the applicant's spouse's life; and the daily support the applicant provides to his spouse, that his spouse would suffer extreme hardship as a result of separation.

However, we do not find that the applicant's spouse would suffer extreme hardship upon relocation to Canada. The applicant's spouse states that she would suffer physical and financial hardship as a result of relocating to Canada. She states that she has started a marketing consultant business in Florida in partnership with a company in New Jersey and would not be able to continue with this work if she moved to Canada. She states that she would not be able to find work in Canada and that her asthma, which is triggered by cold weather and allergens, would worsen while living in Canada. We find that the record does not fully support these assertions. We acknowledge that relocating to

Canada would be difficult for the applicant's spouse, but do not find that the hardship she would experience rises to the level of extreme. The record contains a letter from the applicant's spouse's treating physician at the [REDACTED]. The applicant's spouse's doctor states that the applicant's spouse's asthma is triggered by cold weather and allergens, that she receives shots for her allergies, manages the cold weather by living in Florida, and has also been treated with prescription inhalers. Although the applicant's spouse's physician states that the applicant's spouse's would be prone to severe asthma attacks in Canada, the letter does not indicate that her asthma could not be treated or controlled, even in the cold weather, with prescription inhalers or other methods. Furthermore, the record contains no evidence that the applicant's spouse would be unable to find employment in Canada. We acknowledge that the applicant's spouse started a business in Florida in 2010, but the record does not reflect that given her previous employment experience she would suffer financially from the dissolution of this business. The applicant's spouse's resume indicates that she worked as a high level executive for [REDACTED] in an international or global capacity for 20 years. Moreover, her resume indicates that she has experience working with [REDACTED] in Canada as the Division Manager for [REDACTED] and the Assistant Production Manager for [REDACTED]. Thus, we find that the current record does not show that the applicant's spouse would suffer hardship rising to the level of extreme as a result of relocation.

Although the applicant has demonstrated that the qualifying relative would experience extreme hardship if separated from 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. The AAO has long interpreted the waiver provisions of the Act to require a showing of extreme hardship in both possible scenarios, as 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 from relocation, 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, no purpose would be served in discussing whether he merits a waiver as a matter of discretion. We note, however, that as we deem burglary of an occupied dwelling to be a dangerous crime, the applicant would have to meet the requirements of 8 C.F.R. § 212.7(d) to warrant a favorable exercise of discretion.

In proceedings for application for waiver of grounds of inadmissibility under 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 not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.