

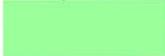


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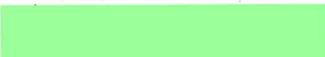


Date: **MAR 18 2013**

Office: BOSTON, MASSACHUSETTS

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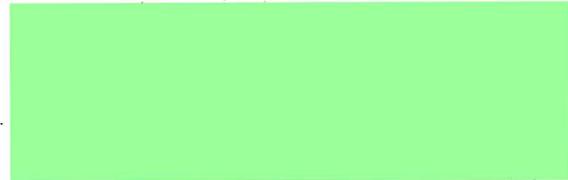
IN RE:

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 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 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

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**DISCUSSION:** The waiver application was denied by the Field Office Director, Boston, Massachusetts, 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 Dominican Republic 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 been convicted of crimes involving moral turpitude. He seeks a waiver of inadmissibility in order to reside in the United States where his U.S. citizen spouse and children live separately from him.

The field office director denied the Form I-601 waiver application, finding that the applicant failed to establish extreme hardship to a qualifying relative. *See Decision of the Field Office Director*, dated July 15, 2011. The field office director further found that even had extreme hardship been established, the waiver application would be denied as a matter of discretion. *Id.*

On appeal, counsel for the applicant asserts that extreme hardship has been established and the applicant merits a favorable exercise of discretion. *See Form I-290B, Notice of Appeal or Motion*, received August 11, 2011.

The record contains, but is not limited to: Form I-290B and counsel's statement thereon; counsel's memorandum in support of appeal; various immigration applications and petitions; a hardship letter from the applicant's spouse; an affidavit from the applicant; a tutor's correspondence and an individualized education program performance report concerning the applicant's son, [REDACTED] country conditions documents for the Dominican Republic; birth, marriage and other biographical documents; and documents related to the applicant's entire criminal history, including his arrests and convictions under the alias [REDACTED]. The entire record was reviewed and considered in rendering this decision.

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.)

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 where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. First, 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).

However, if a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, "the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude." 24 I&N Dec. at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage inquiry in which the adjudicator reviews the "record of conviction" to determine if the conviction was based on conduct involving moral turpitude. *Id.* at 698-699, 703-704, 708. The record of conviction consists

of documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.* at 698, 704, 708.

If review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. 24 I&N Dec. at 699-704, 708-709. However, this “does not mean that the parties would be free to present any and all evidence bearing on an alien’s conduct leading to the conviction. (citation omitted). The sole purpose of the inquiry is to ascertain the nature of the prior conviction; it is not an invitation to relitigate the conviction itself.” *Id.* at 703.

The record shows that the applicant has been twice convicted of crimes involving moral turpitude, the first for Unlawful Possession of a Telecommunications System, in violation of Massachusetts General Law § C166,§42B (“did unlawfully possess an instrument, apparatus, equipment or device which was designed, adapted or which was used to fraudulently obtain telecommunication service with the intent to use or employ the same”), for his conduct on June 11, 1995. He was subsequently convicted for Possess/Use False Stolen RMV Document, in violation of Massachusetts General Law § 90/24B/C, for his conduct on December 3, 1997. It is noted the applicant identified himself in conjunction with the latter conviction as “[REDACTED],” an alias which appears multiple times in documents related to several other arrests, charges and encounters with law enforcement. Fraud has, as a general rule, been held to involve moral turpitude. The U.S. Supreme Court in *Jordan v. De George* concluded that “Whatever else the phrase ‘crime involving moral turpitude’ may mean in peripheral cases, the decided cases make it plain that crimes in which fraud was an ingredient have always been regarded as involving moral turpitude. . . . Fraud is the touchstone by which this case should be judged. The phrase ‘crime involving moral turpitude’ has without exception been construed to embrace fraudulent conduct.” 341 U.S. 223, 232 (1951). Based on the two convictions described, the field office director determined that the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of crimes involving moral turpitude. The applicant does not contest his inadmissibility on appeal. He requires a waiver under section 212(h) of the Act.

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

The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana . . . .

(1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that –

- (i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien’s application for a visa, admission, or adjustment of status,
- (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

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(iii) the alien has been rehabilitated; or

(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 . . .; and

(2) the Attorney General [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

The applicant's most recent conduct resulting in a conviction for a crime involving moral turpitude occurred on December 3, 1997, which counsel correctly notes meets the threshold requirement for consideration under section 212(h)(1)(A)(i) of the Act. The applicant was not eligible for this consideration by the field office director as 15 years had not yet passed when he filed his waiver application. An application for admission is, however, a "continuing" application, and admissibility is adjudicated on the basis of the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992). In the present case, while the applicant meets the threshold requirement for consideration under section 212(h)(1)(A)(i) of the Act, he has not established by a preponderance of the evidence that he has been rehabilitated as required.

As noted by the field office director, the applicant has an extensive criminal history, spanning from at least 1995 to 2007. In addition to the charge that resulted in his first conviction for a crime involving moral turpitude, the applicant was arrested and charged on June 11, 1995 with Fraud Telecommunication, Larceny of Property, Operating a Motor Vehicle Negligently so as to Endanger, and Operating a Motor Vehicle without a License. He was arrested on March 1, 1996 and charged with Assault with a Dangerous Weapon. The applicant was arrested again on April 3, 1996 and charged with Conspiracy to Violate Controlled Substance Laws and Illegal Possession of a Class D Substance, Cocaine. He was arrested on October 21, 1996 and charged with Fail to Stop at a Stop Sign/Traffic Device, Operating a Motor Vehicle without a License, Attaching Plates to a Motor Vehicle, Operating/Allowing an Unregistered Motor Vehicle/Trailer, and Operating/Allowing Uninsured Motor Vehicle. On December 2, 1997, in conjunction with his second conviction for a crime involving moral turpitude, the applicant was also arrested and charged with Possession of a Controlled Substance (Steroids), and Fail to Stop/Yield. On November 22, 2000, he was arrested and charged with Fail to Stop for Police, Speeding, Fail to Stop/Yield. On August 15, 2001 the applicant was arrested and charged with Miscellaneous Municipal Ordinance/Bylaw Violation. On June 29, 2005, the applicant was arrested and charged with Operating a Motor Vehicle on a Suspended License. On September 11, 2006, he was arrested and charged with Malicious Destruction of Property +\$250. On January 31, 2007 the applicant was again arrested and charged with Malicious Destruction of Property +\$250. While most charges were ultimately dismissed, the fact that the applicant has repeatedly come to the attention of law enforcement so frequently and

over such a substantial portion of his adult life spanning from at least 1995 to 2007 weighs against a favorable exercise of discretion concerning his waiver application. It additionally prevents the AAO from finding that the applicant has been rehabilitated over the past 15 years, particularly as the record contains no documentary evidence of rehabilitation. While the applicant and his spouse, with whom he has not resided since 2003, maintain that the applicant is actively involved in the lives of their sons there is no corroborating documentary evidence of this, a fact addressed numerous times by the field office director. The director noted that the applicant is not listed as a parent or guardian on the administrative data sheet from [REDACTED] school and that his name does not appear on [REDACTED] birth certificate as the father. Counsel does not address these deficiencies on appeal and no explanation is offered or evidence submitted in rebuttal. The AAO has reviewed a single-paragraph note emailed to counsel by [REDACTED] tutor expressing that the applicant and [REDACTED] spend considerable time together and the latter has "shared with me his joy in spending time with his father." The evidence is insufficient to establish that the applicant has been rehabilitated since his most recent conviction for a crime involving moral turpitude and does not demonstrate that admitting him would not constitute a risk to the safety of others in the United States. Based on the foregoing, the applicant has not shown that he is eligible for a waiver under section 212(h)(1)(A) of the Act. A waiver under section 212(h)(1)(B) will still be considered.

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 and children<sup>1</sup> are qualifying relatives. 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

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<sup>1</sup> While U.S. citizen children are qualifying relatives for waiver applications under section 212(h) of the Act, the present applicant has not established that he has any kind of relationship with his two youngest children (4-year-old [REDACTED] and 7-year-old [REDACTED]), born of two different women while still married to his current spouse. No assertions have been made or evidence submitted showing that the children reside with the applicant or that he provides any form of support for them. Nor have assertions been made or evidence submitted to suggest that either [REDACTED] would suffer any hardship related to separation from the applicant or relocation to the Dominican Republic. Accordingly, the AAO will not speculate in this regard. Moreover, as previously noted above and by the field office director, the applicant is not listed on 11-year-old [REDACTED] birth certificate as the father, a field left entirely blank. Counsel fails to address this deficiency on appeal and does not submit an explanation or any documentary evidence of paternity. The applicant's 15-year-old son, [REDACTED] and 17-year-old stepson, [REDACTED] are qualifying relatives for purposes of this waiver application.

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 deportation, 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. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *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.*

We observe that 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., In re 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).

The applicant's spouse is a 36-year-old native and citizen of the United States who married the applicant in August 1997 and has been separated from him since "Spring 2003." Neither she nor her children have lived with the applicant for approximately 10 years, during which he has fathered two other children with two different women while still legally married to her. The applicant's spouse writes that she maintains a cordial relationship with the applicant and they partner in parenting [REDACTED]. She states that she cannot imagine how they would manage financially without the applicant who gives her money on a weekly basis and also helps with school expenses, clothing, gifts and other basic necessities. As clearly noted by the field office director, the record

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contains no documentary evidence demonstrating any financial support provided by the applicant to his spouse or children. Counsel does not address this deficiency on appeal or submit any corroborating evidence. Going on record without supporting documentation is not sufficient to meet the applicant's burden of proof in this proceeding. *See 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)). The evidence is insufficient to demonstrate that the applicant's spouse would be unable to financially support herself and her children in the applicant's absence.

The applicant's spouse states that it would be very difficult to lose the applicant as he is extremely involved in her children's lives, she cannot imagine parenting them without him, and she knows that losing their father would be devastating to them. She writes that the applicant tries to go to as many of [REDACTED] football and basketball games as possible, picks [REDACTED] up every day from his after school program, and spends most of every Saturday with [REDACTED] and sometimes takes them to church. The applicant's spouse notes that when the boys are sick she relies on the applicant to help her with their care, he almost always takes them to appointments, and also helps transporting them to sports games and practices. She indicates that [REDACTED] is "especially attached" to the applicant and extremely sensitive to any family discord or change in routine. No specific examples are provided or corroborating evidence submitted. The applicant's spouse states that [REDACTED] has a learning disability and requires home tutoring. In a single paragraph email to counsel, [REDACTED] tutor, [REDACTED] MEd writes that not being able to see his father regularly will have a negative impact on [REDACTED] which will affect his schoolwork. [REDACTED] does not define the impact to which she refers and neither her credentials nor any documentary evidence has been submitted demonstrating her expertise in this area. The applicant's spouse concludes that it would be emotionally devastating for her to watch her boys lose their father to whom they are so close and would be extremely hard for her to parent them on her own. While not insignificant, the AAO notes that the difficulties described are not distinguished from those ordinarily associated with the inadmissibility or removal of a loved one such that they rise to the level of extreme hardship.

The AAO acknowledges that separation from the applicant would cause various difficulties for his U.S. citizen spouse and children. However, it finds the evidence in the record insufficient to demonstrate that the challenges encountered by the qualifying relatives, when considered cumulatively, meet the extreme hardship standard.

Addressing relocation, the applicant's spouse states that she and her three children are entirely assimilated to their lives in the United States, none have lived in the Dominican Republic, and the boys especially would find it very difficult to transition to life there. She adds that for her, relocating to stay close to the applicant is not even an option as her entire life is in the United States including her mother and her secure employment. The applicant's spouse writes that she cannot imagine having to help her children transition to a new culture and new school system in a different language, away from friends and family. It is noted that on the administrative data sheet from [REDACTED] school, dated June 2, 2010, his primary language is listed as Spanish. The applicant's spouse adds that she is not sure the special attention [REDACTED] needs for his learning disability needs would be available in the Dominican Republic and it would be devastating for him to lose the access he currently enjoys in the United States.

The AAO has considered cumulatively all assertions of relocation-related hardship to the applicant's spouse and children including adjustment to a country in which they have not resided and that all were born in the United States where they have lived their entire lives and enjoy close family and community ties. The AAO has additionally considered that they have not resided with the applicant for 10 years and would have to adapt to this change in addition to adapting to a country and culture so different from their own. With regard to the applicant's spouse, the AAO has considered that she currently enjoys steady employment in the United States which she would lose upon relocation. With regard to the applicant's children, the AAO has considered that [REDACTED] may not have access in the Dominican Republic to the special education programs he currently enjoys in the United States for his learning disability as evidenced by a country conditions document submitted for the record. Considered in the aggregate, the AAO finds the evidence sufficient to demonstrate that the applicant's qualifying relative spouse and his son, [REDACTED] would suffer extreme hardship were they to relocate to the Dominican Republic to be with the applicant.

Although the applicant has demonstrated that his qualifying relative spouse and son would experience extreme hardship were they to relocate to the Dominican Republic to join him, we can find extreme hardship warranting a waiver of inadmissibility only where an applicant has shown extreme hardship to a qualifying relative in the scenario of relocation *and* the scenario of separation. 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 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 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 a qualifying relative in this case. Accordingly, the applicant has not established that he is statutorily eligible for a waiver under section 212(h) of the Act.

The applicant has, therefore, failed to demonstrate that the challenges his spouse and children face are unusual or beyond the common results of removal or inadmissibility to the level of extreme hardship. Accordingly, the AAO finds that the applicant has failed to demonstrate extreme hardship to a qualifying relative, and he is statutorily ineligible for a waiver under section 212(h) of the Act. As the applicant has not established extreme hardship to a qualifying relative 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 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.