

U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals  
20 Massachusetts Avenue, N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



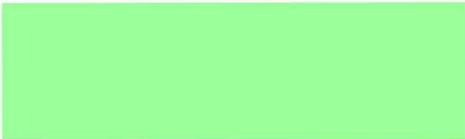
DATE: **MAY 21 2013** OFFICE: LONDON

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); section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i)

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 District Director, London, England, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of England who was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for procuring entry to the United States by fraud or willful misrepresentation. The applicant was also found to be inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having committed a crime involving moral turpitude and section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), for committing a crime relating to a controlled substance. The applicant seeks a waiver of inadmissibility in order to remain in the United States with his U.S. citizen spouse and children.

The District Director concluded that the record failed to establish the existence of extreme hardship for a qualifying relative and that the applicant did not merit a favorable exercise of discretion, and denied the application accordingly. *See Decision of the District Director*, dated June 19, 2012.

On appeal, counsel for the applicant asserts that the applicant has demonstrated that his qualifying relatives are facing extreme emotional and financial hardship upon separation. Counsel further asserts that the applicant's qualifying relatives cannot relocate to England to reside with the applicant because they would face extreme financial hardship and the applicant's son would lose the continuity of his medical care and could be exposed to a higher risk of suicide.

In support of the waiver application and appeal, the applicant submitted identity documents, family photographs, financial documentation, background information concerning mental health, a letter from the applicant, letters from the applicant's qualifying relatives, medical records concerning the applicant's spouse, medical records concerning the applicant's son, documents concerning the applicant's criminal record, and a letter from the applicant's spouse's church. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(6)(C) of the Act provides, in pertinent part:

- (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

The record reflects that the applicant attempted to enter the United States pursuant to the Visa Waiver Program on December 9, 2006. On that same date, the applicant indicated on his Form I-94W that he has never been arrested or convicted for a crime involving moral turpitude. Upon referral to secondary inspection, the applicant, in a sworn statement, told an immigration officer that he had never been arrested. Upon further questioning, the applicant admitted that he had been arrested more than once in London. The record also indicates that the applicant possesses a

criminal record spanning from August 15 1977 to May 26, 2000 with 15 criminal convictions. Amongst the applicant's criminal convictions, he has been convicted of crimes involving moral turpitude including two theft convictions from September 28, 1977 and March 17, 1978. The applicant does not dispute his inadmissibility to the United States pursuant to section 212(a)(6)(C)(i) of the Act.

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) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible

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.

The field office director also found the applicant to be inadmissible to the United States for having been convicted of a crime involving moral turpitude (CIMT) and a crime relating to a controlled substance. The applicant has two separate convictions for theft, the first in [REDACTED] Court on September 28, 1977 and the second in [REDACTED] on March 17, 1978. The applicant also has two separate convictions for robbery, the first in [REDACTED] on November 7, 1977 and the second in [REDACTED] on March 17, 1978. The applicant was also convicted of possession of cannabis in [REDACTED] on December 9, 1999.

It is noted that U.S. Courts have held that the crime of theft or larceny, whether grand or petty, involves moral turpitude. See *Matter of Scarpulla*, 15 I&N Dec. 139, 140 (BIA 1974)(stating, “It is well settled that theft or larceny, whether grand or petty, has always been held to involve moral turpitude . . .”); *Morasch v. INS*, 363 F.2d 30, 31 (9th Cir. 1966)(stating, “Obviously, either petty or grand larceny, i.e., stealing another’s property, qualifies [as a crime involving moral turpitude].”) However, the BIA has indicated that a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended. *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973). The AAO also notes that the Ninth Circuit Court of Appeals citing to the Second District Court of Appeal’s opinion in *People v. Albert*, held that the act of robbery, defined by the court as “larceny aggravated by use of force or fear,” requires an intended permanent taking. *Id.* (citing 47 Cal.App.4th 1004, 1007 (1996)). The applicant has not disputed the district director’s determinations on appeal. As the applicant has not disputed inadmissibility on appeal and the record does not show the district director’s finding of inadmissibility to be erroneous, the AAO will not disturb the district director’s inadmissibility finding.

Section 212(i) of the Act provides:

- (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General (Secretary), waive the application of clause (i) of subsection (a)(6)(C) in the case of an

immigrant who is the spouse, 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 (Secretary) that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien...

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 –

(1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General that-

(i) the alien is inadmissible only under subparagraph (D)(i) or (D)(ii) of such subsection or 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

(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 . . . .

As the applicant's controlled substance conviction took place on December 19, 1999, less than 15 years prior to the date of the applicant's instant appeal, he is not eligible to apply for a waiver pursuant to section 212(h)(1)(A) of the Act. Even if the applicant were eligible to apply for a waiver pursuant to this section, as the applicant has been convicted of assault on an officer and attempted grievous bodily harm with intent, dangerous and violent crimes, he must also demonstrate that the denial of his application would result in exceptional and extremely unusual hardship whether he seeks a waiver under section 212(h)(1)(A) or 212(h)(1)(B) of the Act.

8 C.F.R. § 212.7(d) provides, in pertinent part:

Criminal grounds of inadmissibility involving dangerous or violent crimes. The Attorney General [Secretary], in general, will not favorably exercise discretion

under section 212(h)(2) of the Act . . .in cases involving violent or dangerous crimes, except...in cases in which the alien clearly demonstrates that the denial of the application for adjustment of status or an immigrant visa or admission as an immigrant would result in exceptional and extremely unusual hardship. . . .

Section 8(1) of the Theft Act of 1968 provides:

A person is guilty of robbery if he steals, and immediately before or at the time of doing so, and in order to do so, he uses force on any person or puts or seeks to put any person in fear of being then and there subjected to force

The AAO notes that the words “violent” and “dangerous” and the phrase “violent or dangerous crimes” are not further defined in the regulation, and the AAO is aware of no precedent decision or other authority containing a definition of these terms as used in 8 C.F.R. § 212.7(d). A similar phrase, “crime of violence,” is found in section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F). It provides that a “crime of violence,” as defined under 18 U.S.C. § 16, for which the term of imprisonment is at least one year, is an aggravated felony. As such, “crime of violence” is limited to those crimes specifically listed in 18 U.S.C. § 16. It is not a generic term with application to any crime involving violence, as that term may be commonly defined. That the DOJ chose not to use the language of section 101(a)(43)(F) of the Act or 18 U.S.C. § 16 in promulgating 8 C.F.R. § 212.7(d) indicates that “violent or dangerous crimes” and “crime of violence” are not synonymous. The Department of Justice clarified the relationship between these distinct terms in the interim final rule codifying 8 C.F.R. § 212.7(d):

[I]n general, individuals convicted of aggravated felonies would not warrant the Attorney General's use of this discretion. In fact, the proposed regulations stated that even if the applicant can meet the "exceptional and extremely unusual hardship" standard for the exercise of discretion, depending upon the severity of the offense, this might "still be insufficient" to obtain the waiver. See 67 FR at 45407. That language would substantially limit the circumstances under which an individual convicted of an aggravated felony would be granted a waiver as a matter of discretion. Therefore, the Department believes that this language achieves the goal of the commenter while not unduly constraining the Attorney General's discretion to render waiver decisions on a case-by-case basis.

67 Fed. Reg. 78675, 78677-78 (December 26, 2002).

Therefore, the fact that a conviction constitutes an aggravated felony under the Act may be indicative that an alien has also been convicted of a violent or dangerous crime, but it is not dispositive. Decisions to deny waiver applications on the basis of discretion under 8 C.F.R. § 212.7(d) are made on a factual “case-by-case basis.” The AAO interprets the phrase “violent or dangerous crimes” in accordance with the plain or common meaning of its terms, consistent with any published precedent decisions addressing discretionary denials under 8 C.F.R. § 212.7(d) or the standard originally set forth in *Matter of Jean*. Given that the applicant’s crimes involve the

threat of and actual physical attack, the AAO finds that the applicant's conviction renders him subject to the heightened discretion standard of 8 C.F.R. § 212.7(d).

Accordingly, the applicant must show that "extraordinary circumstances" warrant approval of the waiver. 8 C.F.R. § 212.7(d). Extraordinary circumstances may exist in cases involving national security or foreign policy considerations, or if the denial of the applicant's admission would result in exceptional and extremely unusual hardship. *Id.* Finding no evidence of foreign policy, national security, or other extraordinary equities, the AAO will consider whether the applicant has "clearly demonstrate[d] that the denial of . . . admission as an immigrant would result in exceptional and extremely unusual hardship" to a qualifying relative. *Id.*

The exceptional and extremely unusual hardship standard is more restrictive than the extreme hardship standard. *Cortes-Castillo v. INS*, 997 F.2d 1199, 1204 (7th Cir. 1993). Since the applicant is subject to 8 C.F.R. § 212.7(d), merely showing extreme hardship to his qualifying relatives under section 212(h) of the Act is not sufficient. He must meet the higher standard of exceptional and extremely unusual hardship.<sup>1</sup>

The record reflects that the applicant is a 54-year-old native and citizen of England. The applicant's spouse is a 42-year-old native of England and citizen of the United States. The applicant has two sons, 21- and 19-year-old natives of England and citizens of the United States. The applicant has one son, a 10-year-old native and citizen of the United States. The applicant resides in England and his spouse and children reside in [REDACTED], Florida.

Counsel for the applicant asserts that the applicant's spouse is working a full-time job to support her children, but that her expenditures are greater than her income. Accordingly, counsel contends that the applicant's spouse has depleted all of her savings. The applicant submitted a list of itemized monthly expenditures and a screenshot of the applicant's spouse's savings account indicating a nearly depleted balance. It is noted that the record does not contain supporting evidence for the itemized expenditures. There is also no information concerning the applicant's spouse's prior savings balance or an indication that the applicant's spouse has been unable to meet her financial obligations. There is also no indication that the applicant has ever been employed in the U.S.; counsel states that the applicant is currently unemployed in England. It is also noted that the applicant's spouse asserts that her oldest son is employed and helping with the household bills. Going on record without supporting documentary evidence generally is not sufficient for purposes of meeting the burden of proof in these proceedings. *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 applicant's spouse asserts that it is difficult to live day by day without the applicant. Counsel contends that the applicant's spouse appears to be suffering from depression because of her

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<sup>1</sup> As the applicant's application for a 212(h) waiver is subject to the heightened standard of exceptional and extremely unusual hardship, which is more restrictive than the extreme hardship standard of his 212(i) waiver application, his appeal will be adjudicated in accordance with his 212(h) waiver application.

situation, but there is no medical documentation supporting this observation. The applicant's sons assert that they miss the applicant and need him in their lives. The applicant's spouse also asserts that their middle son has been diagnosed as bipolar and is currently in therapy after an attempted suicide in September 2011. The applicant's spouse states that her son is doing better now and getting back on track, but that he needs his the applicant around for stability and a male influence. The applicant's middle son submitted a letter stating that if he had the applicant in his life in the past, he wouldn't have made so many mistakes. The applicant's middle son contends that he could live a productive, stable life with the help of the applicant.

Counsel for the applicant asserts that the applicant's middle son suffers from oppositional defiant disorder and was admitted to a hospital on May 19, 2011. The record indicates that the applicant's middle son was hospitalized on that date for homicidal and suicidal thoughts, psychosis, and severe depression. The applicant's son was again hospitalized for intentional overdose of Tylenol and suicidal ideation on September 15, 2011. Counsel alleges that not having the applicant with him has caused the applicant's son's oppositional defiant disorder to worsen. It is noted that there is no medical documentation in the record supporting counsel's assertion. Further, the applicant's middle son's therapy notes indicate that he has a strong relationship with his older brother and hopes to regain a strong relationship with his mother, but does not mention the applicant. Counsel for the applicant submitted a letter from a physician stating that the applicant's middle son could benefit from having another family member, such as the applicant, close to him helping him with anything he needs. The record also contain a physician's letter stating that the applicant's three children have long and serious medical histories including the youngest son's asthma and the middle son's psychological issues so that the children's needs can only be met by both parents to provide prescribed medications and interventions. There is no explanation as to why the applicant's spouse would be unable to provide medication to her children, as necessary, or what type of intervention is contemplated concerning the applicant. There is insufficient evidence in the record, in the aggregate, to find that the applicant's qualifying relatives are suffering exceptional and extremely unusual hardship upon separation from the applicant

The applicant's spouse asserts that she cannot relocate to England because there is too much crime where the applicant is residing, too much damp, and not enough space for their family. The applicant's middle son asserts that he suffers less from his asthma in the United States and there are more opportunities in this country. The applicant's youngest son says that he loves it in the United States and has been in the same school for four years. It is noted that the applicant's spouse and two older sons are both natives of England.

Counsel for the applicant asserts that moving to England would disrupt the applicant's middle child's care in the United States and since England has high suicide rates, relocation would increase the probability of a further suicidal episode. It is noted that there is no medical documentation from any of the applicant's middle child's physicians supporting counsel's claim that residing in England would elevate the probability of a suicidal episode. The record contains a physician's letter stating that the applicant's medically complex children would receive optimal care in the United States, but there is no indication that the applicant's children would be unable to receive the same level of medical care in England.

Counsel for the applicant also asserts that the applicant's qualifying relatives do not have the resources to relocate to England and that the applicant's spouse would be unlikely to find employment. The record does not contain any supporting documentation for counsel's assertion that the applicant's spouse would be unlikely to secure a position in England. It is noted that the applicant's spouse is currently employed as a receptionist and group coordinator and there is no indication that these skills would not be transferable to England. In fact, the applicant's spouse's Form G-325A indicates that she was employed as a secretary in the same position for 16 years while residing in England. The record indicates that the applicant and his spouse also have family members residing in England and there is no indication as to the extent to which they can or will assist in their relocation. It is also noted that the applicant is not employed in England and there is no information as to how he is currently supporting himself in that country. The record contains insufficient evidence to find that the applicant's qualifying relatives would suffer exceptional or extremely unusual hardship upon relocation to England.

In this case, the record does not contain sufficient evidence to show that denial of the present waiver application would result in exceptional and extremely unusual hardship. As the applicant has not established the requisite level of hardship, the applicant does not merit 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.