



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: NOV 22 2013 OFFICE: NEW YORK

IN RE:

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to Section 212(h) of the Act, 8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, New York, New York. An appeal of the denial was summarily dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on motion. The motion will be granted but the appeal will remain dismissed.

The applicant is a native and citizen of the Dominican Republic. She was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (or Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. The record indicates that the applicant was convicted of numerous offenses. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h) in order to reside in the United States with her two adult U.S. citizen children and U.S. lawful permanent resident mother.

On February 21, 2012, the District Director denied the applicant's Form I-601 stating that the applicant failed to demonstrate that her qualifying relatives would suffer extreme hardship as a result of her inadmissibility. On appeal, counsel for the applicant indicated that a brief and/or evidence would be submitted to the AAO within 30 days of the filing of the appeal. The AAO did not receive any additional evidence from counsel or the applicant nor did the Form I-290B, Part 3, *specifically* identify any erroneous conclusion of law or statement of fact in the Field Office Director's decision. On motion, counsel submits documentation showing that a brief and supporting evidence was submitted to the New York District Office within 30 days of the prior appeal.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). The motion will be granted as the applicant has demonstrated that a brief and additional evidence was submitted within 30 days of the filing of their appeal. In the evidence submitted on appeal, counsel does not challenge the applicant's inadmissibility but states that the applicant has established extreme hardship to a qualifying relative.

In support of the waiver application, the record includes, but is not limited to: a brief from counsel for the applicant; biographical information for the applicant, her children, and her grandchild; affidavits from family members; documentation concerning the applicant's mother's health; medical and psychological records for the applicant's son; a psychoemotional assessment of the applicant's daughter; financial and employment records for the applicant, her daughter, and her mother; country conditions information concerning the Dominican Republic; and documentation in connection with the applicant's criminal and immigration history.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(2)(A)(i) 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.

...

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 record shows that the applicant was arrested and convicted of Petit Larceny in violation of New York Penal Law § 155.25 on over 10 occasions between July 23, 1982 and April 21, 2006. Additionally, it appears that she was convicted of other crimes in New York and New Jersey including: Receiving Stolen Property, Shoplifting; Contempt of Court; and Possession of Stolen Property.¹ The applicant's last conviction on record in violation of New York Penal Law § 155.25 occurred on April 21, 2006 and the applicant was given a sentence of one year of conditional discharge in addition to fines.

The BIA has determined that to constitute a crime involving moral turpitude, a theft offense must require the intent to permanently take another person's property. See *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973) ("Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended."). In *Matter of Jurado-Delgado*, 24 I&N Dec. 29, 33-34 (BIA 2006), the BIA held that retail theft is a crime involving moral turpitude because the

¹ The applicant has not submitted a full record of conviction or final disposition for all her arrests on record.

nature of retail theft is such that it is reasonable to assume such an offense would be committed with the intention of retaining merchandise permanently. Furthermore, although New York Penal Law § 155.25 does not make a distinction as to whether a conviction under these sections of the statute would constitute a permanent or temporary taking, New York courts have found that to establish larcenous intent, a permanent taking must be intended. *People v. Hoyt*, 92 A.D.2d 1079, 461 N.Y.S.2d 569, 570 (N.Y. App. Div. 3rd Dept. 1983). The AAO finds that the applicant's convictions for Petit Larceny are crimes involving moral turpitude, making the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act.² The applicant does not contest her inadmissibility.

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

(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.

...

² As the applicant's convictions for Petit Larceny are crimes involving moral turpitude, it is unnecessary to determine if her other convictions also involved moral turpitude.

A waiver of inadmissibility in this case, under section 212(h)(1)(B) 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 lawful permanent 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 two adult U.S. citizen children and her U.S. lawful permanent resident mother are qualifying relatives 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-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 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. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 885 (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*, 138 F.3d 1292, 1293 (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 hardship to each of the applicant's qualifying relatives will be considered in turn. We will first look to the hardship that counsel states will befall on the applicant's 31-year-old U.S. citizen daughter as a result of her mother's inadmissibility. Counsel states that the applicant's daughter will suffer both emotional and financial hardship if she were to be separated from her mother. In her affidavit, the applicant's daughter states that her mother's presence is extremely important to her and her son and that the applicant is the only person that she can trust to care for her son. She states that if she could no longer rely on her mother to care for her son she would have to quit her job and go on public assistance. The applicant's daughter's affidavit, however, is dated March 1, 2010 and the record does not contain any documentation to indicate what financial hardship the applicant's daughter would suffer once her son was able to attend public school and no longer rely on the applicant to provide day care for her son. The record indicates that the applicant's grandson is now six years old. A letter from the human resources department at [REDACTED] states that the applicant's daughter has been employed there on a full-time basis (37.50 hours) since October 27, 2008. A separate pay stub dated April 12, 2012 indicates that the applicant's daughter earns \$27.19 per hour and her W-2 for 2011 indicates that her income from [REDACTED] for that year was \$47,669.69. The record does not indicate if the applicant's daughter has an additional source of income nor does the record document any of the applicant's daughter's expenses. The record does not contain sufficient information to document the degree of financial hardship that the applicant's daughter would suffer in her mother's absence.

In regards to emotional and physical hardship, the applicant's daughter states that the applicant has helped her safely stay away from her son's father, who she says was verbally and physically abusive to her. She states she would no longer feel safe if she were no longer able to rely on her mother. The applicant's daughter also spoke of her father's abuse of her mother and a childhood that was tumultuous as a result of the abuse. In support of those statements, the record contains a Psychoemotional and Family Dynamic Assessment prepared by [REDACTED]

dated October 10, 2009. [REDACTED] concluded based on his assessment of the applicant's daughter that she was "experiencing a clinically significant anxious-depressive symptomatology with typical signs of emotional stress, mainly, if not exclusively, generated by the unsettling perspective of losing contact with her mother and the loving caretaker of her only son, also fearing for her relocation in an island-country seriously affected by chronic economic, unemployment and public safety concerns." He diagnosed the applicant's daughter with Adjustment Disorder with Mixed Anxiety and Depressed Mood and stated that this assessment was based on the applicant's daughter's loss of daily contact with her mother and based on loss of a daily care provider for her son. [REDACTED] did not mention any abuse experienced by the applicant's daughter in her relationship with her son's father or any role that the applicant has played in protecting her daughter from abuse. Although the record indicates that the applicant's daughter's son may no longer be at an age where he relies on the applicant for daily caregiving, the emotional hardship that the applicant's daughter would suffer as a result of separation from her mother with whom the record indicates that she has a close relationship is noted. Although the AAO notes that the applicant's daughter would likely endure emotional hardship as a result of long-term separation from the applicant, the record does not establish that the hardships considered in the aggregate rise to the level of "extreme" beyond the hardships normally experienced by families separated due to immigration inadmissibility.

In regards to the hardship that the applicant's daughter would experience if she were to relocate to the Dominican Republic, counsel states that the applicant's daughter would suffer hardship as result of the financial and physical safety concerns in that country. The record indicates that the applicant's daughter has held long term employment in the United States as a billing coordinator with [REDACTED] and supports her son. The record also indicates that she has a Bachelor's Degree in Business Administration from [REDACTED]. The country conditions information for the Dominican Republic, however, does not support counsel's conclusion that the applicant's daughter would be unable to obtain employment in that country. Although she may not obtain comparable income in the Dominican Republic, the fact that economic and educational opportunities may be better in the United States than in a foreign country does not itself establish extreme hardship. *See Matter of Kim*, 15 I&N Dec. at 89-90. Moreover, the record does not support counsel's assertion that the applicant's daughter would suffer hardship in the Dominican Republic as a result of being a U.S. citizen and therefore a target for criminals. The record does not indicate that the applicant's daughter would be unable to relocate to the Dominican Republic based on any medical issue or as a result of her responsibility for her child. The record also fails to establish the extent of the applicant's daughter's family ties in the United States beyond her close relationship with her mother. The record does not make clear the extent of her relationship with brother or grandmother or other family ties. Based on the information provided, considered in the aggregate, the evidence does not illustrate that the hardship suffered in this case, should the applicant's daughter relocate to the Dominican Republic to reside with her mother, would be beyond what is normally experienced by families dealing with removal or inadmissibility. *Matter of O-J-O*, 21 I&N Dec. at 383.

In regards to the hardship to the applicant's 25-year-old U.S. citizen son, counsel states that the applicant's son continues to reside with his mother as a result of his disabilities and that he would suffer extreme hardship if he were to be separated from her. In his affidavit dated March 1, 2010, the applicant's son states that he has been diagnosed with Attention-Deficit/Hyperactivity Disorder (ADHD), that he needs medication and therapy, and that he has relied on his mother his entire life. A letter from [REDACTED] dated April 5, 2012, states that the applicant's son began treatment with her on March 19, 2012. [REDACTED] states that the applicant's son has a long history of psychiatric treatment, beginning with treatment for ADHD at age 12. She also states that although the applicant's son previously took Ritalin, he stopped taking the medication in 2004 and was not presently taking any medication. [REDACTED] states that she made a referral to a psychiatrist for medication assessment and management, but the record does not contain any follow-up information from this referral. [REDACTED] also states that the applicant's son "verbalized his anxieties are triggered by [his] mother's pending deportation, unemployment and fear of being homeless again." She also went on to state that the applicant's son relayed to her that he has been in trouble with the law, uses marijuana as a stress reliever, and if it was not for the applicant, he "would be in jail or deeper into drugs." She reported that he was unemployed and that the applicant provided him food, shelter, and also financial support. Based on this information, Ms. [REDACTED] stated that the applicant's son's "anxieties are obviously triggered and exacerbated by his fears of being homeless, unemployed and mother's [sic] pending deportation." The record indicates that the applicant's son completed BASICS residential treatment program on March 12, 2010, after being admitted to the program on August 10, 2009. Although the record indicates that the applicant's son suffers from ADHD and has a history of drug abuse, no documentation in the record supports a conclusion that the applicant's son is unable to obtain employment and financially support himself as a result of a disability. Although the AAO notes that the applicant's son would likely suffer some hardship as a result of long-term separation from the applicant, the record does not establish that the hardships considered in the aggregate rise to the level of "extreme" beyond the hardships normally experienced by families separated due to immigration inadmissibility.

In regards to the hardship that the applicant's son would experience if he were to relocate to the Dominican Republic, counsel states that the applicant's son would face crime and unsafe conditions in that country, as well as economic and physical hardship. The AAO notes that the conditions in the Dominican Republic, but the record does not establish what hardships in particular the applicant's son would face as a result of those conditions. The record does not establish the extent of the applicant's son's family ties to the United States apart from his mother. Additionally, the record fails to establish that the applicant suffers from any medical or psychological condition for which he would not be able to obtain treatment in the Dominican Republic. There is no indication in the record that treatment for ADHD or drug abuse would be unavailable to the applicant's son. In her affidavit, counsel makes claims about the availability of treatment in the Dominican Republic, but those assertions are not supported by documentary evidence. Without supporting evidence, the assertions of counsel will not satisfy the applicant's burden of proof. The unsupported assertions of counsel do not constitute evidence. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Based on the

information provided, considered in the aggregate, the evidence does not illustrate that the hardship suffered in this case, should the applicant's son relocate to the Dominican Republic to reside with his mother, would be beyond what is normally experienced by families dealing with removal or inadmissibility. *Matter of O-J-O-*, 21 I&N Dec. at 383.

In regards to the hardship to the applicant's 65-year-old U.S. lawful permanent resident mother, the applicant's mother, in her affidavit dated February 17, 2010, states that the applicant is her only child and she is suffering from depression as a result of thinking that she may be separated from her. She also states that she is taking medication for her depression and high blood pressure. She states that she also worries about her grandson if her daughter is no longer able to care for him. In addition to this emotional and physical hardship, the applicant's mother states that she would suffer financial hardship as a result of having to send money to the Dominican Republic to support her daughter. [REDACTED] dated March 26, 2012 states that the applicant's mother suffers from hypertension, osteopenia, rhinitis, and edema lower/upper extremity. There is no documentation in the record to indicate to what extent the applicant's mother relies on the applicant for assistance with her physical ailments. Additionally, the record does not support the conclusion that the applicant's mother's physical or emotional health would be affected by separation from her daughter. It is unclear from the record how often the applicant and her mother interact.

In regards to financial hardship, a letter from [REDACTED] dated March 23, 2012, indicates that the applicant's mother has been employed in the kitchen at the market since January 1996 and earns \$12.40 per hour. Her 2011 W-2 statement from [REDACTED] states that her total income for that year was \$33,685.95. There is no documentation on record of her expenses. The record does not make clear what financial hardship the applicant's mother would suffer if she were to send financial support to her daughter in the Dominican Republic. Although the AAO notes that the applicant's mother would likely endure hardship as a result of long-term separation from the applicant, the record does not establish that the hardships considered in the aggregate rise to the level of "extreme" beyond the hardships normally experienced by families separated due to immigration inadmissibility.

In regards to the hardship that the applicant's mother would suffer if she were to relocate to her native country to reside with the applicant, counsel again cites the country conditions in that country. Although the record establishes that the applicant's mother has had long term employment in the United States, the record does not establish that she would be unable to support herself should she relocate to the Dominican Republic. The record does not make clear what her expenses would be in that country and what resources she may have to assist her in relocation. Additionally, although the record indicates that the applicant's mother suffers from various medical conditions as listed above, there is no indication in the record that treatment is unavailable for those conditions in the Dominican Republic or that the applicant's mother would be unable to afford any available treatment. Based on the information provided, considered in the aggregate, the evidence does not illustrate that the hardship suffered in this case, should the applicant's mother relocate to the Dominican Republic, would be beyond what is normally experienced by families dealing with removal or inadmissibility. *Matter of O-J-O-*, 21 I&N Dec. at 383.

Although the applicant's qualifying relatives' concerns over the applicant's immigration status are neither doubted nor minimized, the fact remains that Congress provided for a waiver of inadmissibility only under limited circumstances. In nearly every qualifying relationship, whether between husband and wife or parent and child, there is a deep level of affection and a certain amount of emotional and social interdependence. While, in common parlance, the prospect of separation or involuntary relocation nearly always results in considerable hardship to individuals and families, in specifically limiting the availability of a waiver of inadmissibility to cases of "extreme hardship," Congress did not intend that a waiver be granted in every case where a qualifying relationship, and thus the familial and emotional bonds, exist. The point made in this and prior decisions on this matter is that the current state of the law, viewed from a legislative, administrative, or judicial point of view, requires that the hardship, which meets the standard in section 212(h) of the Act, be above and beyond the normal, expected hardship involved in such cases.

In this case, the record does not contain sufficient evidence to show that the hardships faced by any of the qualifying relatives, each considered individually 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 failed to establish extreme hardship to a qualifying relative as required under section 212(h) of the Act. As the applicant has not established extreme hardship to a qualifying family member, no purpose would be served in determining whether she merits a waiver as a matter of discretion.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. The motion is granted, but the appeal remains dismissed.

ORDER: The appeal remains dismissed.