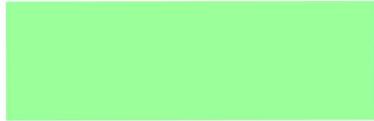


(b)(6)

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



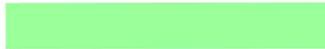
U.S. Citizenship
and Immigration
Services



DATE: **OCT 31 2013**

OFFICE: WASHINGTON

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 (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.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

f-r

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Washington, D.C. denied the waiver application and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of South Africa 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. The applicant seeks a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside with his U.S. citizen spouse and stepchildren.

The Field Office Director concluded that the record failed to establish the existence of extreme hardship for a qualifying relative and denied the application accordingly. *See Decision of the Field Office Director*, dated January 25, 2013.

On appeal, counsel for the applicant asserts that the applicant has demonstrated extreme financial and emotional hardship to a qualifying relative upon separation. Counsel also asserts that the applicant's spouse would lose her business and other ties to the United States upon relocation to South Africa. Counsel contends that relocation to South Africa for the applicant's spouse and stepchildren would also result in residence in a country with different languages, institutional systems, and unsafe country conditions.

In support of the waiver application and appeal, the applicant submitted identity documents, financial documents, letters of support, a letter from the applicant, a letter from the applicant's spouse, letters from the applicant's stepchildren, documents concerning the applicant's spouse's company, a psychological evaluation of the applicant's spouse and her children, family photographs, and background country conditions concerning South Africa. The entire record was reviewed and considered in rendering a decision on the 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.

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

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 reflects that the applicant was convicted of 134 counts of fraud in South Africa on February 13, 2004 and sentenced to eight years imprisonment, three of which were suspended. The Field Office Director found the applicant to be inadmissible to the United States for having been convicted of crimes involving moral turpitude. The applicant did not dispute this ground of inadmissibility on appeal, and the AAO found sufficient support for this finding in the record.

A section 212(h) waiver of the bar to admission resulting from section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawful permanent resident spouse, parent, or child of the applicant. Hardship to the applicant is not considered in section 212(h) waiver proceedings unless it causes hardship to a qualifying relative, in this case the applicant’s spouse and stepchildren. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (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 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, 883 (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 at 1293 (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 record reflects that the applicant is a 61 year-old native and citizen of South Africa. The applicant's spouse is a 53 year-old native of India and citizen of the United States. The applicant's stepchildren are 15 year-old and 11 year-old natives and citizens of the United States. The applicant is currently residing in [REDACTED] Virginia with his spouse and stepchildren.

The applicant's spouse asserts that if she were separated from the applicant, she would be forced to travel to visit him in South Africa. The applicant's spouse contends that she could not keep up these visits as she ages and continues to incur travel expenses. The record contains a Form I-864, Affidavit of Support, submitted by the applicant's spouse on the applicant's behalf. The applicant's spouse included the following yearly gross incomes listed on her tax returns: \$90,000 for 2012, \$205,658 for 2011, \$677,880 for 2010, and \$603,754 in 2009. It is noted that in 2009, the applicant's spouse filed as the head of household, rather than married filing jointly. There is no indication that the applicant's spouse would be unable to afford the expenses of travel to visit the applicant in South Africa. Further, there is no indication that the applicant's spouse suffers from medical conditions that would inhibit her travel in the future. It is also noted that the record contains a psychological evaluation stating that the applicant and his spouse sometimes act as sole caretakers for her children, depending upon whether the other is travelling for her company. The record does not indicate that the applicant's spouse would be unable to hire caretakers for her children, as necessary, during her periods of business travel.

Counsel for the applicant asserts that the applicant provides his spouse with a sense of security and love that she has not previously experienced. The applicant's spouse asserts that she could not survive without the applicant after her prior negative relationship and relies upon him as a partner at home and work. The record contains a letter from the applicant's spouse's company stating that the applicant is employed as the Director of International Projects. The record also reflects that the applicant's spouse's business employs 11 individuals, and there is no indication that the applicant's spouse would be unable to employ another individual to take on the work responsibilities of the applicant, as necessary. It is noted that the applicant's spouse's company was founded over 20 years ago.

The record also contains a psychological evaluation for the applicant's spouse stating that the applicant's spouse reported that her previous husband overspent, was depressed, drank excessively, and exhibited angry and erratic behavior. After testing, it was determined that there was nothing to support any diagnosis of mental disorder for the applicant's spouse. The evaluation does state that the applicant's spouse, with the applicant, has established her first adult relationship based on mutual love and responsibility, so that she would suffer severe and unusual psychological hardship upon separation. It is acknowledged that separation from a spouse nearly always creates a level of hardship for both parties, and the record indicates that the applicant's spouse will experience emotional hardship upon separation from the applicant. However, the applicant has not established that, in the aggregate, the hardship suffered by his spouse would rise to the level of extreme hardship, beyond the common results of separation from a close family member due to inadmissibility.

The applicant's spouse asserts that her sons have developed a close relationship with the applicant and need him in their lives to grow into men. The applicant's spouse contends that her sons experienced the death of their biological father in 2008, at the ages of six and ten, respectively, after discovering their father unconscious in his home. The record contains a psychological evaluation for the applicant's stepchildren stating that they are at risk for psychological pain and problems after experiencing a potentially traumatic event, and separation from the applicant could increase that vulnerability. The evaluation notes that the applicant's stepchildren call him "Papa,"

and the applicant helps them with their homework, attends their soccer games, makes them dinner, and takes them on vacation. The record contains a letter from a school counselor stating that the applicant has helped his stepchildren through their grieving process and they are now adjusting positively to their new family. The record also contains letters from the applicant's stepson's teacher stating that the applicant is involved and participating in his stepson's academic life. The psychological evaluation further states that if the applicant is not allowed to remain with his stepchildren, it will be the second loss of a father in their lives. The record is sufficient to demonstrate that the applicant's stepchildren would experience extreme hardship upon separation from the applicant.

Counsel for the applicant asserts that the applicant's spouse founded and currently directs a company in the United States that would suffer significant losses if she relocated to South Africa. Counsel contends that the applicant's spouse's company, [REDACTED] is based on the high level of personal attention given by the applicant's spouse to her clients. The applicant's spouse submitted a letter on September 10, 2012 asserting that her business was in its 20th year of business and employed 11 employees. The applicant's spouse contends that she regularly visits and sees her clients within the United States, so it is vital that she remain in the United States for her business to thrive.

The applicant's spouse asserts that her children are in school and take music lessons in the United States and that remaining in the United States is crucial to their development. As noted, the applicant's spouse is a native of India and citizen of the United States and her children are natives and citizens of the United States. The applicant's spouse contends that her entire family lives in Canada or the United States and that they are all very close to one another. The record contains letters of support submitted by the applicant's spouse's mother, sister, and niece. The applicant's spouse contends that she and her children have no family in South Africa and would be losing their close relatives upon relocation.

The applicant's spouse asserts that her family has visited South Africa in the past, but that the language and security issues would be problematic if they resided in that country. The applicant's spouse contends that the applicant's family's conversations in South Africa are conducted exclusively in Afrikaans, which she and her children do not speak.

The applicant's spouse also asserts that she would fear for the safety of herself and her children if they were to relocate to South Africa. The applicant asserts that he was a police officer in South Africa so that he is aware that property crimes in his native country include a frightening level of violence. The applicant contends that his own family members have suffered from violent crime in South Africa, including his mother, who was stabbed and killed, and his daughter and brother-in-law, who were victims of violent property crimes. It is noted that the U.S. Department of State has not issued a travel warning for South Africa, but that the Country Specific Information for South Africa, dated April 1, 2013, states that criminal activity is prevalent and violent crimes are common. In the aggregate, the record contains sufficient evidence to find that the applicant's spouse and her children would suffer extreme hardship upon relocation to South Africa. As such, the applicant has demonstrated extreme hardship to a qualifying relative, as the applicant's

stepchildren would suffer extreme hardship upon separation from the applicant or relocation to South Africa.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Id.* at 299. The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on her behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

The AAO notes that *Matter of Marin*, 16 I & N Dec. 581 (BIA 1978), involving a section 212(c) waiver, is used in waiver cases as guidance for balancing favorable and unfavorable factors and this cross application of standards is supported by the Board of Immigration Appeals (BIA). In *Matter of Mendez-Moralez*, the BIA, assessing the exercise of discretion under section 212(h) of the Act, stated:

We find this use of *Matter of Marin*, *supra*, as a general guide to be appropriate. For the most part, it is prudent to avoid cross application, as between different types of relief, of particular principles or standards for the exercise of discretion. *Id.* However, our reference to *Matter of Marin*, *supra*, is only for the purpose of the approach taken in that case regarding the balancing of favorable and unfavorable factors within the context of the relief being sought under section 212(h)(1)(B) of the Act. *See, e.g., Palmer v. INS*, 4 F.3d 482 (7th Cir.1993) (balancing of discretionary factors under section 212(h)). We find this guidance to be helpful and applicable, given that both forms of relief address the question of whether aliens with criminal records should be admitted to the United States and allowed to reside in this country permanently.

Matter of Mendez-Moralez at 300.

In *Matter of Mendez-Moralez*, in evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the BIA stated that:

The factors adverse to the applicant include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature, recency and seriousness, and the presence of other evidence indicative of an alien's bad character or undesirability as a permanent resident of this country. . . . The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where the alien began his residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence

of value and service to the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends, and responsible community representatives).

Id. at 301.

The BIA further states that upon review of the record as a whole, a balancing of the equities and adverse matters must be made to determine whether discretion should be favorably exercised. The equities that the applicant for section 212(h)(1)(B) relief must bring forward to establish that he merits a favorable exercise of administrative discretion will depend in each case on the nature and circumstances of the ground of exclusion sought to be waived and on the presence of any additional adverse matters, and as the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence. *Id.* at 301.

The favorable factors include the extreme hardship the applicant's stepchildren would experience whether they remained in the United States, separated from the applicant, or accompanied the applicant to South Africa; the extreme hardship the applicant's spouse would experience upon relocation to South Africa; the evidence that the applicant is employed and paying taxes in the United States; evidence of the applicant's remorse and rehabilitation following his criminal convictions; and letters of support submitted on his behalf. The unfavorable factor in this matter is the applicant's criminal conviction in South Africa, constituting a crime involving moral turpitude.

Although the applicant's criminal and immigration violation cannot be condoned, the positive factors in this case outweigh the negative factors. In these proceedings, the burden of establishing eligibility for the waiver rests entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met his burden and the appeal of the applicant's Form I-601 denial will be sustained.

ORDER: The appeal is sustained.