



U.S. Citizenship
and Immigration
Services

(b)(6)

Date: **APR 01 2014** Office: NEBRASKA SERVICE CENTER

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:

SELF-REPRESENTED

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 Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native of Dominica and citizen of Canada who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having committed a crime involving moral turpitude. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with his U.S. citizen son.

In a decision, dated September 19, 2013, the director found the applicant inadmissible for having been convicted of assault in 1992. The director concluded that although the applicant's conviction for which he was found inadmissible occurred more than 15 years ago, he had not shown that he has been rehabilitated. The director also concluded that the applicant did not establish that, as a result of his inadmissibility, his son would suffer hardship rising to the level of extreme hardship. Finally, the director found that the applicant's conviction may be considered a violent or dangerous crime and may subject him to the heightened discretionary standards of 8 C.F.R. § 212.7(d). The applicant's waiver application was denied accordingly.

On appeal, the applicant states that he has been rehabilitated and his son would suffer extreme hardship if he is found inadmissible. He submits evidence of his attempts to obtain copies of the police reports for his arrests, indicating that many have been destroyed because they occurred more than 20 years ago. He requests more time to submit additional documentation and a brief.

We note that it has now been over five months and we have not received any additional documentation. The entire record will be reviewed on appeal.

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

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

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

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

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

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not

exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

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

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

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

(Citations omitted.)

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 indicates that the applicant has a criminal record of seven arrests spanning the time period from 1992 to 2013. One of these arrests is still pending and two arrests resulted in convictions. On January 30, 2008, in Connecticut, the applicant was convicted and fined for creating a public disturbance under Connecticut General Statutes § 53a-181a. On November 4, 1992, also in Connecticut, the applicant was convicted of Assault in the third degree under Connecticut General Statutes § 53a-61. The applicant was sentenced to one year imprisonment for this offense, the sentence was suspended, and he served two years probation.

At the time of the applicant’s conviction, Connecticut General Statutes § 53a-181a stated:

- (a) A person is guilty of creating a public disturbance when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he
 - (1) engages in fighting or in violent, tumultuous or threatening behavior; or
 - (2) annoys or interferes with another person by offensive conduct; or
 - (3) makes unreasonable noise.

Although the applicant’s conviction under Connecticut General Statutes § 53a-181a is for creating a public disturbance and not assault, we find, given the language specific to this statute, that case law related to assault is relevant to this analysis.

As a general rule, simple assault or battery is not deemed to involve moral turpitude. *Matter of Fualaau*, 21 I&N Dec. 475, 477 (BIA 1996). However, in cases involving assault or battery a finding of moral turpitude involves “an assessment of both the state of mind and the level of harm required to complete the offense.” *Matter of Solon*, 24 I&N Dec. 239, 242 (BIA 2007). Crimes committed intentionally or knowingly with the specific intent to inflict a particular harm, and with a resulting meaningful level of harm, constitute crimes involving moral turpitude, but “as the level of conscious behavior decreases, i.e., from intentional to reckless conduct, more serious resulting harm is required” for a finding of moral turpitude. *Id.* “[W]here no conscious behavior is required, there can be no finding of moral turpitude, regardless of the resulting harm.” *Id.*; see also *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992) (finding that third-degree assault under section 9A.36.031(1)(f) of the Revised Code of Washington is not a crime involving moral turpitude because neither intent nor recklessness is required for a conviction); *Matter of Fualaau*, 21 I&N Dec. at 478 (third-degree assault in Hawaii, an offense that involves recklessly causing bodily injury to another person, is not a crime involving moral turpitude); *Matter of P-*, 3 I&N Dec. 5, 8-9 (BIA 1947) (finding that assault without a deadly weapon but with the intent to cause great bodily harm is a crime involving moral turpitude).

We find that the applicant’s conviction under Connecticut General Statutes § 53a-181a does not involve moral turpitude because although it involves intentional and reckless conduct it does not involve a meaningful or serious level of harm.

We now turn to the applicant’s 1992 conviction for assault.

At the time of the applicant's conviction, Connecticut General Statutes § 53a-61 stated:

(a) A person is guilty of assault in the third degree when: (1) With intent to cause physical injury to another person, he causes such injury to such person or to a third person; or (2) he recklessly causes serious physical injury to another person; or (3) with criminal negligence, he causes physical injury to another person by means of a deadly weapon, a dangerous instrument or an electronic defense weapon.

(b) Assault in the third degree is a class A misdemeanor.

At the time of this conviction, Connecticut General Statutes § 53a-3 stated, in pertinent part:

Except where different meanings are expressly specified, the following terms have the following meanings when used in this title:

...

(3) "Physical injury" means impairment of physical condition or pain;

(4) "Serious physical injury" means physical injury which creates a substantial risk of death, or which causes serious disfigurement, serious impairment of health or serious loss or impairment of the function of any bodily organ;

...

(11) A person acts "intentionally" with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct;

...

(13) A person acts "recklessly" with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregarding it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation;

(14) A person acts with "criminal negligence" with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation;

In the applicant's case, his conviction under Connecticut General Statutes § 53a-61 involves three types of conduct: intentionally causing physical injury to another; recklessly causing serious physical injury to another; and criminally negligently causing physical injury to another by means of a deadly

weapon or dangerous instrument. Thus, the statute under which the applicant was convicted is divisible, with some conduct involving moral turpitude and some not.

As stated above, in cases involving assault or battery a finding of moral turpitude involves “an assessment of both the state of mind and the level of harm required to complete the offense.” *Matter of Solon* at 242. Crimes committed intentionally or knowingly with the specific intent to inflict a particular harm, and with a resulting meaningful level of harm, constitute crimes involving moral turpitude, but “as the level of conscious behavior decreases, i.e., from intentional to reckless conduct, more serious resulting harm is required” for a finding of moral turpitude. *Id.*

Additionally, recklessness, as defined by Connecticut, can be a sufficient mental state for a finding of moral turpitude for crimes also involving significant harm or aggravating factors. *Matter of Leal*, 26 I&N Dec. 20, 22-23 (BIA 2012); see also *Knapik v. Ashcroft*, 384 F.3d 84, 89-90 (3d Cir. 2004); *Matter of Franklin*, 20 I&N Dec. 867, 869-71 (BIA 1994) (finding that a conviction for involuntary manslaughter to be a crime involving moral turpitude because the statute requires “recklessly caus[ing] the death of another person.”); *Matter of Ruiz-Lopez*, 25 I&N Dec. 551, 553-54 (BIA 2011) (a conviction for driving in “wanton or willful disregard for the lives or property of others while attempting to elude a pursuing police vehicle” is a crime involving moral turpitude because “wanton or willful disregard” connoted recklessness); *Matter of Medina*, 15 I&N Dec. 611, 613-14 (BIA 1976) (moral turpitude attached to an Illinois aggravated assault statute that required the use of a deadly weapon and a *mens rea* of recklessness.)

However, unlike recklessness, criminal negligence does not involve “actual awareness of the risk created by the criminal violator’s action.” *Matter of Medina*, 15 I&N Dec. at 613-14. In *Matter of Perez-Contreras*, the Board found that moral turpitude was not inherent in a Washington third-degree assault statute, because neither intent nor recklessness was required for a conviction for causing bodily harm with criminal negligence. 20 I&N Dec. 615, 619 (BIA 1992). Thus, while “moral turpitude [may be] present in criminally reckless conduct,” criminal negligence does not involve moral turpitude because it exists when a person fails to contemplate the risk of injury involved in his or her actions. *Id.* at 618..

We find that conduct under Connecticut General Statutes § 53a-61(a)(1) and (3) does not involve moral turpitude. Connecticut General Statutes § 53a-61(a)(1) is akin to simple assault where although intentional conduct is involved, a meaningful level of harm is not. In addition, although Connecticut General Statutes § 53a-61(a)(3) involves a dangerous or deadly weapon, it does not involve a serious level of harm, and it involves criminally negligent conduct, which is not intentional conduct and does not involve an awareness of a substantial risk. However, we do find that under Connecticut General Statutes § 53a-61(a)(2) recklessly causing serious physical injury to another is a crime involving moral turpitude because it involves a sufficient mental state for a finding of moral turpitude and serious physical harm. Therefore, the applicant’s inadmissibility rests with which conduct under Connecticut General Statutes § 53a-61 he was convicted.

The current record does not include the record of conviction for this offense or if the record of conviction is no longer available, it fails to include any documentation as to which part of Connecticut General Statutes § 53a-61 the applicant was convicted. Unlike a removal hearing in which the government bears the burden of establishing a respondent’s removability, the burden of proof in the present proceedings is on the applicant to establish his admissibility for admission to the

United States “to the satisfaction of the Attorney General [Secretary of Homeland Security].” See Section 291 of the Act, 8 U.S.C. § 1361. Here the applicant has failed to meet his burden of proof and as a result we find that he is inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

We note that the applicant’s conviction does not qualify for the petty offense exception because the applicant was sentenced to more than six months imprisonment.

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

The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if -

(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.

Section 212(h)(1)(A) of the Act provides that the Secretary may, in his discretion, waive the application of subparagraph (A)(i)(I) of subsection (a)(2) if the activities for which the applicant is inadmissible occurred more than 15 years before the date of the applicant’s application for a visa, admission, or adjustment of status. An application for admission to the United States is a continuing application, and admissibility is determined on the basis of the facts and the law at the time the application is finally considered. *Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992).

Since the criminal conviction for which the applicant was found inadmissible occurred more than 15 years ago, the inadmissibility can be waived under section 212(h)(1)(A) of the Act. Section 212(h)(1)(A) of the Act requires that the applicant’s admission to the United States not be contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated. We find that the current record does not indicate that the applicant satisfies these requirements.

The record indicates that the applicant has a history of seven arrests in the United States with the

most recent occurring in 2013. We acknowledge that the 2013 arrest for driving under the influence is still pending and that the applicant was not convicted as a result of his arrests in 2012 for assault, breach of the peace, and disorderly conduct (stemming from two separate incidents), but the pattern of arrests in his criminal record indicates that the applicant has not been rehabilitated, but has continually perpetuated behavior that could be considered disruptive to societal norms. The record does include a statement from the applicant, the applicant's son and six other reference letters. In these statements the applicant, his son, and numerous family friends indicate that the applicant is a kind, generous, and hardworking person, who is always willing to help others and whose problems with law enforcement were not of his causing. These statements stand in contrast to the criminal record before the AAO which includes: an arrest for driving under the influence on December 18, 2013; an arrest for assault and breach of the peace on October 12, 2012; an arrest for disorderly conduct on March 27, 2012; an arrest in 2008 for assault and breach of the peace; an arrest and conviction in 2007 for creating a public disturbance; an arrest in 1999 for assault; and finally the arrest and conviction in 1992 for assault. We note that it is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the applicant submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). We have carefully reviewed the reference letters submitted by the applicant, but find that the applicant's criminal record is in such contradiction to these references that without independent objective evidence substantiating the claims made in the references we cannot find the applicant is rehabilitated. Thus, the applicant has not shown he qualifies for a waiver under section 212(h)(1)(A) of the Act.

The applicant is also eligible to apply for a waiver of inadmissibility pursuant to section 212(h)(1)(B) of the Act. A waiver under section 212(h)(1)(B) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent or child of the applicant. Hardship the applicant experiences upon removal is not considered in section 212(h)(1)(B) waiver proceedings; the relevant hardship in the present case is hardship suffered by the applicant's son.¹

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.

¹ We note that the record references the applicant having two additional U.S. citizen children, but documentation establishing their existence is not in the record and no hardship claims have been made on their behalf. As a result, we will consider only the hardship to the applicant's son.

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 of hardship includes: a statement from the applicant and a statement from the applicant's son. In their statements the applicant and his son indicate that they have a very close relationship and would like to live close to one another so that the applicant could help emotionally and financially with his son's efforts to obtain a college degree, work full time, and raise his son. We find that these hardship claims do not rise to the level of extreme and the applicant has not indicated whether his son would suffer extreme hardship as a result of relocation to Canada. Therefore, the applicant has not established that he qualifies for a waiver under section 212(h)(1)(B) of the Act.

Moreover, we find, in accordance with the director, that even if the applicant establishes extreme hardship to his U.S. citizen son, if he was convicted for conduct under Connecticut General Statutes

§ 53a-61(a)(2), he would be subject to the heightened discretionary standards of 8 C.F.R. § 212.7(d). Reckless conduct causing serious physical harm is considered a dangerous crime.

Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing 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.