



U.S. Citizenship
and Immigration
Services

(b)(6)

Date: **APR 22 2014**

Office: NEWARK, NJ

FILE: [REDACTED]

IN RE: [REDACTED]

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:
[REDACTED]

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 Field Office Director, Newark, New Jersey, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Colombia 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 spouse and son.

In a decision, dated February 15, 2013, the field office director found the applicant inadmissible for having been convicted of endangering the welfare of a child under New Jersey Statutes Annotated section 2C:24-4(a). The field officer director concluded that despite the applicant's participation in the Pre Trial Intervention Program in New Jersey, he had been convicted for immigration purposes as defined under section 101(a)(48)(A) of the Act because he had pled guilty and had been punished. The field office director also concluded that the applicant did not establish that, as a result of his inadmissibility, his spouse and/or son would suffer extreme hardship as a result of separation or as a result of relocation. The applicant's waiver application was denied accordingly.

On appeal, filed on March 18, 2013 and received by the AAO on December 17, 2013, counsel asserts that the Act's interpretation of a conviction is not in line with the understanding of conviction when someone enters into a diversionary program, where the intent is to prevent an individual from having a formal criminal record. Counsel cites to an unpublished decision in the Superior Court of New Jersey that states it is improper for a prosecutor to condition entry into a diversionary program on a guilty plea and that on this basis the AAO should reconsider the field office director's finding of a conviction. Finally, counsel asserts that the field office director placed no weight on hardship evidence presented at the time of the waiver application and that the record does establish that the applicant's spouse and children would suffer extreme hardship upon separation and relocation.

We will first address whether the applicant has been convicted for the purposes of immigration law. The record establishes that the applicant has been convicted as it is defined in Section 101(a)(48)(A) of the Act.

Section 101(a)(48)(A) of the Act states:

The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where-

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

The record shows that the applicant pled guilty to Endangering the Welfare of a Child under New Jersey Statutes Annotated section 2C:24-4(a) as part of New Jersey's Pre Trial Intervention Program

and was placed on three years supervision while in the program. Because the applicant entered a guilty plea and was punished, by the restraint placed on his liberty as a result of his supervision, he is considered convicted for immigration purposes.

We also acknowledge counsel's assertions regarding the unpublished decision in New Jersey Superior Court, finding that the Pre Trial Intervention guidelines forbid a prosecutor from conditioning entry into the program on a guilty plea and that because the factual situation in regards to this conviction has been found to be improper, the AAO should void the finding that the applicant has been convicted. First, we note that this decision in New Jersey is unpublished and therefore, not binding on the AAO. Second, we are not in a position to vacate a guilty plea made by the applicant. A conviction vacated for rehabilitative or immigration reasons remains valid for immigration purposes, while one vacated because of procedural or substantive infirmities does not. *Id* at 624. See also *Pickering v. Gonzales*, 465 F.3d 263, 267 (6th Cir. 2006); *Murillo-Espinoza v. INS*, 261 F.3d 771 (9th Cir.2001); *Herrera-Inirio v. INS*, 208 F.3d 299 (1st Cir.2000); *Sandoval v. INS*, 240 F.3d 577 (7th Cir.2001). Thus, the applicant may have post-conviction relief available to him through the New Jersey court system, but for our purposes it is not within our jurisdiction to provide any such relief. Therefore, the applicant remains convicted for immigration purposes. We note that although the applicant was sentenced to no jail time, the maximum sentence possible for his offense is five years in prison.

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.

N.J.S.A. Sec 2C:24-4(a) states:

- a. (1) Any person having a legal duty for the care of a child or who has assumed responsibility for the care of a child who engages in sexual conduct which would impair or debauch the morals of the child is guilty of a crime of the second degree. Any other person who engages in conduct or who causes harm as described in this paragraph to a child is guilty of a crime of the third degree....

Because this statute includes acts that may not be considered crimes involving moral turpitude as well as acts that are crimes involving moral turpitude, we turn to the record of conviction to determine what acts the applicant committed. The Plea Transcript in the applicant's case indicates that the applicant engaged in sexual conduct with a [redacted] year old child, who was his [redacted] and who he knew was a minor. We note that the applicant was 41 years old at the time of this offense.

The Board has emphasized that "any intentional sexual conduct by an adult with a child involves moral turpitude, as long as the perpetrator knew or should have known that the victim was a minor." *Matter of Guevara Alfaro*, 25 I&N Dec. 417, 420-21 (BIA 2011) (citing *Matter of Silva-Trevino*, 24 I&N Dec. 687, 705-07 (A.G. 2008).

In *Matter of Silva-Trevino*, the Attorney General analyzed whether violation of section 21.11(a)(1) of the Texas Penal Code, which criminalizes acts of "indecent with a child," should be deemed a crime involving moral turpitude. 24 I&N Dec. at 688. Tex. Penal Code § 21.11(a)(1) prohibits "sexual contact with a child younger than 17 years old who is not the person's spouse, unless the person is not more than three years older than the victim and of the opposite sex." *Id.* at 690 (citations omitted). The Attorney General stated that "so long as the perpetrator knew or should have known that the victim was a minor, any intentional sexual contact by an adult with a child involves moral turpitude. Such contact is 'inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general' . . ." *Id.* at 705 (citation omitted). Thus, the applicant has been convicted of a crime involving moral turpitude.

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.

Since the activities that are the basis for the applicant's criminal conviction occurred less than 15 years ago, the applicant is only eligible to apply for a waiver under section 212(h)(1)(B) of the Act, which is dependent first upon a showing that the bar imposes an extreme hardship on the citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant is not a consideration under the statute and will be considered only to the extent that it results in hardship to a qualifying relative. The qualifying relatives in this case are the applicant's spouse and son. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Moralez*, 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 of hardship includes: counsel’s brief, a statement from the applicant, a statement from the applicant’s spouse, and information on health care in Colombia.

The applicant asserts that his spouse and child will suffer extreme hardship as a result of relocation to Colombia because his spouse is unable to write in Spanish and will not be able to find employment in the country; the father of his three step-children will not allow his spouse to take these children to Colombia, so she will be separated from three of her children; and country conditions in Colombia, particularly the health care system and violence make it unsafe for relocation. In support of these assertions the applicant submits a statement from himself, a statement from his spouse, and a report on the status of health care in Colombia. We note, the current U.S. State Department Travel Warning for Colombia, dated April 14, 2014, indicates that violence and kidnappings in the country are a problem, particularly on roads connecting major cities. We also note that although the report on health care in Colombia indicates that there needs to be reform in the country, it does not show that the care is such that the applicant and his family would suffer extreme hardship by relocating. Moreover, the record fails to include documentation to support the assertions of hardship. The record fails to include documentation showing that the applicant’s step-children would not be permitted by their biological father to relocate. We also acknowledge that although not being able to write in Spanish would hinder the applicant’s spouse’s chances for employment, the record does not show that the applicant would be unable to find employment to support the family.

In regards to separation, the applicant states that his spouse will suffer extreme emotional and financial hardship as a result. The record fails to include specificity as to the degree and severity of any emotional hardship that would result from the applicant’s absence and how their situation would rise above what would normally be expected upon the removal of a spouse and father. Furthermore, the record indicates that the applicant’s spouse earns only 8% to 10% percent of the household income and the record fails to show the detriment his absence in providing childcare would cause to the family financially.

The assertions of the applicant and his spouse are relevant evidence and have been considered. However, absent supporting documentation, these assertions cannot be given great weight. See *Matter of Kwan*, 14 I&N Dec. 175, 177 (BIA 1972) (“Information contained in an affidavit should not be disregarded simply because it appears to be hearsay. In administrative proceedings, that fact merely affects the weight to be afforded [it] . . .”). Going on record without supporting 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’r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)). Thus, 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 field office director, that even if the applicant establishes extreme hardship to his U.S. citizen spouse and/ son, he would be subject to the heightened discretionary standards of 8 C.F.R. § 212.7(d) because endangering the welfare of a child, as it is defined in New Jersey is a dangerous crime. We note that the Complaint and the Pre-Trial Intervention Recommendation in the record indicate that the applicant’s crime was committed with force and had a significant and ongoing impact on the victim. These documents indicate that not only was the applicant’s offense dangerous, he would not warrant the favorable exercise of discretion.

The regulation at 8 C.F.R. § 212.7(d) provides:

The Attorney General [Secretary, Department of Homeland Security], in general, will not favorably exercise discretion under section 212(h)(2) of the Act (8 U.S.C. 1182(h)(2)) to consent to an application or reapplication for a visa, or admission to the United States, or adjustment of status, with respect to immigrant aliens who are inadmissible under section 212(a)(2) of the Act in cases involving violent or dangerous crimes, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an 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. Moreover, depending on the gravity of the alien’s underlying criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act.

In proceedings regarding a waiver of grounds of inadmissibility under sections 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. See 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.