



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

Date: **APR 22 2014**

Office: SANTO DOMINGO

FILE: [Redacted]

IN RE:

[Redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(h) of the 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, Santo Domingo, Dominican Republic, and a subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on motion. The motion will be dismissed.

The applicant is a native and citizen of the Dominican Republic who was found to be inadmissible under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having committed a crime involving moral turpitude. The applicant is applying for a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his U.S. lawful permanent resident mother. The record does not contain documentation of the immigration status of the applicant's father.

On May 30, 2012, the Field Office Director denied the application for a waiver (Form I-601), finding that the applicant failed to establish extreme hardship to a qualifying relative.

On appeal, the applicant explained the circumstances of his conviction, submitted letters of support in regards to his character and asked to be reunited with his family in the United States. The applicant did not contest his inadmissibility on appeal. In support of this appeal the record included: a legal brief from counsel; a declaration from the complainant in the applicant's criminal case; letters of support regarding the applicant's moral character; medical records for the applicant's mother and father; copies of biographical information for the applicant's family members in the United States; documentation regarding the applicant's father's social security benefits; and documentation in connection with the applicant's criminal convictions and immigration history.

In our decision, dated June 12, 2013, we found the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of committing a crime involving moral turpitude. The record, although limited by the applicant's failure to provide the required English translations for his court documents, had not specifically challenged the applicant's inadmissibility under 212(a)(2)(A)(i)(I) of the Act. We noted that under the current statutory definition of "conviction" provided at section 101(a)(48)(A) of the Act, no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). Any subsequent, rehabilitative action that overturns a state conviction, other than on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings, is ineffective to expunge a conviction for immigration purposes. *Id.* at 523, 528. *See also Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378, 1379 (BIA 2000) (conviction vacated under a state criminal procedural statute, rather than a rehabilitative provision, remains vacated for immigration purposes). 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. Generally, we cannot go behind the judicial record to re-determine guilt or innocence for a criminal offense. *Matter of Khalik*, 17 I&N Dec. 518 (BIA 1980); *see also In Re Max Alejandro Madrigal-Calvo*, 21 I&N Dec. 323, 327 (BIA 1996)(citations omitted). Based on the documentation of record in English, we could not conclude that the appropriate post-conviction relief had occurred to negate the applicant's conviction for immigration purposes. Consequently, we did not disturb the finding that

the applicant was inadmissible under section 212(a)(2)(A)(i)(I) of the Act. We also noted the applicant's potential inadmissibility under section 212(a)(6)(C) of the Act for fraud or material misrepresentation because he failed to disclose his arrest in an effort to obtain a visa at the U.S. consulate.

In regards to whether the applicant's mother would suffer extreme hardship as a result of separation from the applicant, the record failed to document hardship that would rise to the level of extreme. However, in regards to the hardship that the applicant's mother would experience if she were to relocate to her native country, the Dominican Republic, the record established that the applicant's mother is of an advanced age, has medical problems, and has extensive family ties in the United States. In particular, the record established that the applicant's father suffers from very serious medical ailments, including Alzheimer disease and dementia for which he receives ongoing care in the United States. Noting that the applicant's mother and father have been married since 1964 and have ten children together, separation of the couple as a result of the mother's relocation would likely result in emotional hardship to the applicant's mother. The record also indicates that relocating the couple together to the Dominican Republic would not be feasible because of the father's age and medical problems. Thus, the record, considered in the aggregate, established that the applicant's mother would suffer extreme hardship as a result of relocation.

On motion, counsel asserts that the applicant was falsely accused of his crime and that his mother is suffering extreme hardship as a result of being separated from her only son. On motion counsel submits English translations of the applicant's criminal documents, medical documentation for the applicant's parents, affidavits from the applicant's siblings, letters of recommendation for the applicant, and photographs.

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 Service 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).

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 . . . 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.)

In *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General found that it is proper to make a categorical finding that a defendant's conduct involves moral turpitude when that conduct results in a conviction on the charge of intentional sexual conduct with a person the defendant knew or should have known was a minor.

The record reflects that the applicant was charged with violating Articles 354 and 355 of the Penal Code of the Dominican Republic, pertaining to the rape of a minor. The English translation of the applicant's offense indicates that he pled guilty to this offense in 2008, adjudication was withheld, and the applicant was sentenced to one year probation. On July 27, 2010, with the applicant having completed his probation, the charges against the applicant were dropped. We acknowledge the statement submitted by the victim's mother asserting that the relationship between the applicant and the victim was consensual and that he did not commit the crime stated above. However, absent a court vacating this conviction on a substantive basis, as opposed to a rehabilitative measure, we cannot find the applicant innocent of a crime a court has seen fit to punish him for committing. 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.

The record establishes that the applicant has been convicted, for the purposes of immigration, as defined under § 101(a)(48)(A) of the Act.

§ 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.

In the applicant's case, despite adjudication of the charge being withheld, he pled guilty to the offense and was sentenced to one year probation. Thus, the applicant was convicted, for immigration purposes, of a crime involving moral turpitude.

The waiver of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act is found under section 212(h) of the Act, which provides, in pertinent parts:

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

(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; or

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 relative in this case is the applicant's lawful permanent resident mother. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. See *Matter of Mendez-Morales*, 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 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.

As stated above, the record previously established that the applicant's mother would suffer extreme hardship as a result of relocation to the Dominican Republic. Thus, we will not disturb this finding, but will review whether the applicant's mother is suffering extreme hardship as a result of separation from the applicant.

On appeal, the applicant asserted that his mother was suffering extreme hardship as a result of separation because she needed his help in caring for herself due to her medical conditions of "HTN," hyperlipidemia, and depression. The record did not provide any additional information concerning the meaning of "HTN" or the extent of the mother's other conditions. The record also failed to establish the degree of the applicant's mother's depression and the reasons for her condition, if any, as they relate to the applicant's inadmissibility. Additional medical records were submitted; however, they were either not legible or they were prepared for use by a medical professional and are not discernible. We noted that absent an explanation in plain language from the treating physician of the exact nature and severity of any condition and a description of any treatment or family assistance needed, the AAO is not in the position to reach conclusions concerning the severity of a medical condition or the treatment needed. The record also failed to indicate that the applicant's mother's nine other children could not provide for any needed care in the applicant's absence. The record failed to provide documentation that her other children were unable to provide for and care for their mother. With the initial waiver application, counsel for the applicant stated that the applicant, as a single adult, was particularly suited to care for his mother, but the record did not document the marital status or capabilities of the applicant's mother's other children or that the applicant's mother was not presently receiving the care that she needed. The record also does not establish the extent of the applicant's relationship with his mother as the record does indicate that they have been living separately for over 16 years.

On motion, counsel submits additional medical documentation, affidavits from the applicant's siblings, character references for the applicant, and photographs. Affidavits from the applicant's siblings indicate that they are concerned over their parents' condition and how it has worsened with the applicant in the Dominican Republic. The record establishes that the applicant's mother and father lost their home in a fire as well as the father's government benefits and they are now living with another son. Medical documentation in the record indicates that, in August 2013, sometime after the fire occurred, the applicant's mother went to the emergency room and was diagnosed with anxiety. The record also states that she has high blood pressure and depression.

The record on motion does not overcome the deficiencies in the record on appeal. We recognize that the applicant's mother is suffering emotional hardship as a result of her anxiety and depression, but the record fails to establish that these hardships are caused by the separation from her son. We acknowledge that the applicant's mother has significant stressors in her life including: her husband's medical condition and the loss of her home. However, the record does not establish a connection between her emotional and physical hardship being caused by the absence of her son or even being improved by his presence. The applicant's mother has been living apart from him for years and she has a large family of other children who have not shown that they are unable or unwilling to care for her. Although the record indicates that the applicant's mother is enduring emotional hardship, she has not shown that this hardship is a result of being separated from her son.

As stated in our previous decision, although the applicant's qualifying relative's concern over the applicant's immigration status is 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.

We can find extreme hardship warranting a waiver of inadmissibility; however, only where an applicant has demonstrated extreme hardship to a qualifying relative in the scenario of separation *and* the scenario of relocation. A claim that a qualifying relative will relocate and thereby suffer extreme hardship can easily be made for purposes of the waiver even where there is no actual intention to relocate. *Cf. Matter of Ige*, 20 I&N Dec. 880, 886 (BIA 1994). Furthermore, to relocate and suffer extreme hardship, where remaining the United States and being separated from the applicant would not result in extreme hardship, is a matter of choice and not the result of inadmissibility. *Id.*, also *cf. Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996). As the applicant has not demonstrated extreme hardship from separation, we cannot find that refusal of admission would result in extreme hardship to the qualifying relative in this case.

In this case, the record does not contain sufficient evidence to show that the hardships faced by the qualifying relative, considered in the aggregate, rises 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 he merits a waiver as a matter of discretion. We do note that in the event the applicant is able to establish extreme hardship to his qualifying relative, he will be required to prove extraordinary circumstances as set forth in 8 C.F.R. § 212.7(d) as rape of a minor, including statutory rape, could be considered, at the very least, a dangerous crime.

Furthermore, documentation in the record indicates that the applicant's acts constitute a violent crime under Article 355 of the Dominican Republic's Penal Code.

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 motion is dismissed.

ORDER: The motion is dismissed.