



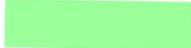
U.S. Citizenship
and Immigration
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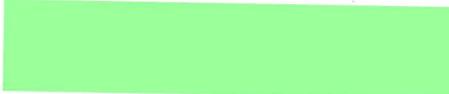


Date: **APR 23 2014**

Office: NEW YORK

FILE: 

IN RE:

Applicant: 

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. 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 Acting District Director, New York, New York, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Nigeria who was found inadmissible under 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 under 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 his U.S. citizen son.

The Acting District Director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *See Decision of the Field Office Director*, dated September 20, 2013.

On appeal, counsel contends that the evidence provided with the Form I-601, considered in the aggregate, establishes that the applicant's spouse would suffer extreme hardship if the waiver application is not approved. Counsel submits evidence that the applicant's spouse now takes medication for her diabetes and that the applicant has a U.S. citizen son, to whom the applicant provides financial support. In addition, counsel contends that the Acting District Director erred in applying the "clear and convincing" standard of evidence to find that the applicant failed to establish that his qualifying relative would experience extreme hardship if the waiver application is not approved.¹

The record includes, but is not limited to: a statement by applicant's counsel on Form I-290B, Notice of Appeal or Motion; a letter from counsel in support of the applicant's Form I-601; statements from the applicant's spouse and his son's mother; medical documentation for the applicant's spouse; financial documentation; country-conditions information about Nigeria; and the applicant's criminal records. 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 part:

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

¹ The AAO, in the exercise of its appellate review, follows the preponderance of the evidence standard. According to *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010), using this standard "the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true." While the Acting District Director referred to the clear and convincing standard in her decision, this standard applies to the government's burden in removal proceedings, not administrative proceedings. *See Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998). However, this error does not appear to have been determinative in the outcome of the applicant's case.

(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 released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of 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.)

The record shows that the applicant was convicted in the New Jersey Superior Court on October 12, 2012, of theft by deception in the fourth degree in violation of section 2C:20-4 of the New Jersey Statutes. A crime of the fourth degree is punishable by a term of imprisonment not to exceed 18 months and a fine not to exceed \$10,000, or double the amount of monetary loss to the victim, whichever is higher. N.J. Stat. Ann. § 2C:43-3, § 2C:43-6 (West 2000). The applicant was sentenced to 15 months' probation and 60 hours of community service.

At the time of the applicant's conviction, section 2C:20-4 of the New Jersey Statutes provided:

A person is guilty of theft if he purposely obtains property of another by deception. A person deceives if he purposely:

- a. Creates or reinforces a false impression, including false impressions as to law, value, intention or other state of mind; . . . but deception as to a person's intention to perform a promise shall not be inferred from the fact alone that he did not subsequently perform the promise;
- b. Prevents another from acquiring information which would affect his judgment of a transaction; or
- c. Fails to correct a false impression which the deceiver previously created or reinforced, or which the deceiver knows to be influencing another to whom he stands in a fiduciary or confidential relationship.

The term "deceive" does not, however, include falsity as to matters having no pecuniary significance, or puffing or exaggeration by statements unlikely to deceive ordinary persons in the group addressed.

This case arises under the jurisdiction of the Third Circuit Court of Appeals. For cases arising in the Third Circuit, the determination of whether a conviction is a crime involving moral turpitude requires a categorical inquiry into "the elements of the statutory state offense . . . to ascertain the least culpable conduct necessary to sustain conviction under the statute." *Jean-Louis v. Holder*, 582 F.3d 462, 465-66 (3d Cir. 2009) (citing *Knapik v. Ashcroft*, 384 F.3d 84, 88 (3d Cir. 2004)). The "inquiry concludes when [the adjudicator] determine[s] whether the least culpable conduct sufficient to sustain conviction under the statute 'fits' within the requirements of a [crime involving moral turpitude]." *Jean-Louis, supra*, at 470. However, if the "statute of conviction contains disjunctive elements, some of which are sufficient for conviction of [a crime involving moral turpitude] and others of which are not, [an adjudicator] . . . examin[es] the record of conviction for the narrow purpose of determining the specific subpart under which the defendant was convicted." *Id.* at 466. This is true "even when clear sectional divisions do not delineate the statutory variations . . ." *Id.* In so doing, an adjudicator may only look at the formal record of conviction. *Id.* The record of conviction is a narrow, specific set of documents which includes the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *See Matter of Louissaint*, 24 I&N Dec. 754, 757 (BIA 2009); *see also Shepard v. U.S.*, 544 U.S. 13, 16 (2005) (finding that the record of conviction is limited to the "charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented"). The Third Circuit does not permit inquiry beyond the record of conviction. *See Jean-Louis, supra*, at 473-82 (rejecting *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)).

In *Nugent v. Ashcroft*, the Third Circuit held that theft by deception under section 3922 of the Pennsylvania Statutes constituted a crime involving moral turpitude. 367 F.3d 162, 165 (3d Cir. 2004). The Third Circuit noted that theft by deception under the Pennsylvania Statutes "is taken

word for word from § 223.3 of the Model Penal Code (“Code”) promulgated by the American Law Institute (“ALI”) in 1962.” 367 F.3d 162, 168. Theft by deception under the New Jersey Statutes is an analogous offense in that it is similarly “taken word for word” from section 223.3 of the Model Penal Code. Although *Nugent* does not explicitly apply the categorical analysis, it was the approach employed the Third Circuit at the time of its decision. See *Jean-Louis v. Holder*, 582 F.3d 462, 465 (3rd Cir. 2009)(“In determining whether a state law conviction constitutes a CIMT, the agency, and we, have historically applied a ‘categorical’ approach . . .”). Therefore, pursuant to the holding in *Nugent*, the AAO finds that section 2C:20-4 of the New Jersey Statutes is categorically a crime involving moral turpitude.

Therefore, the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having committed a crime involving moral turpitude. He does not qualify for the exception to this ground of inadmissibility under section 212(a)(2)(A)(ii), because he was 48 years old when he committed the offense and the maximum penalty possible for the crime exceeded one year. The applicant does not contest this determination on appeal.

In addition, the applicant also pleaded guilty on March 5, 2012, in the Criminal Court of the City of New York, New York to Petit Larceny under New York Penal Law § 155.25, following his arrest on December 10, 2011. The applicant was sentenced to one year conditional discharge and ten days of community service.

New York Penal Law § 155.25 states, “[a] person is guilty of petit larceny when he steals property. Petit larceny is a class A misdemeanor.” New York Penal Law § 155.05 states, in pertinent part:

(1) A person steals property and commits larceny when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof.

Under New York Penal Law § 155.00, the term “deprive” means

(a) to withhold [property] or cause it to be withheld from [another] permanently or for so extended a period or under such circumstances that the major portion of its economic value or benefit is lost to him, or (b) to dispose of the property in such manner or under such circumstances as to render it unlikely that an owner will recover such property.

The BIA has determined that to constitute a crime involving moral turpitude, a theft offense must require the intent to permanently take another person's property. See *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973) (“Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended.”). The AAO notes that although the statute does not make a clear distinction as to whether a conviction under this section of the statute constitutes a permanent or temporary taking, New York courts have found that to establish larcenous intent, a permanent taking must be intended. New York courts have also indicated that larcenous intent is shown when the defendant intends to exercise control over another's property for so an extended period or under such circumstances as to acquire the major portion of its economic value or benefit. See *People v. Jennings*, 69 N.Y.2d 103, 118-122, 504 N.E.2d 1079, 1086-89 (N.Y. 1986). In *People v. Hoyt*, 92

A.D.2d 1079, 461 N.Y.S.2d 569, 570 (N.Y. App. Div. 3rd Dept. 1983) the court found that to warrant a larceny conviction, intent to permanently deprive the owner of his property must be established and that a temporary withholding of property, by itself, would not constitute larcenous intent.

In *Ponnapula v. Spitzer*, the Second Circuit Court of Appeals found that the acts covered by New York Penal Law § 155.00 are permanent takings that manifest larcenous intent. 297 F.3d 172, 183-84 (2nd Cir. 2002). The court observed that while the intent to temporarily deprive an owner of property does not constitute larcenous intent, such a temporary deprivation occurs only where a person borrows property without permission with the intent to return the property in full to the owner after a short and discrete period of time. *Id.* at 84. Thus, the AAO finds that the applicant's conviction for Petit Larceny under New York Penal Law § 155.25 required the intent to permanently take another person's property and is thus a conviction for a crime involving moral turpitude.

As the applicant has not disputed on appeal that his convictions are for crimes involving moral turpitude, and the record does not show the finding of inadmissibility to be erroneous, we will therefore not disturb the director's finding that the applicant is inadmissible under Section 212(a)(2)(A)(i) of the Act.

As a person found to be inadmissible under section 212(a)(2)(A) of the Act, the applicant is eligible to apply for a waiver under section 212(h) of the Act.²

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

(h) The Attorney General [now the Secretary of Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraphs (A)(i)(I)...of subsection (a)(2)... if—

...

(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 established to the satisfaction of the [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.

Section 212(h) of the Act provides that a waiver of inadmissibility 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. The applicant has two qualifying relatives: his U.S. citizen spouse and a U.S. citizen

² In her decision the Acting District Director incorrectly referred to section 212(i) of the Act, the waiver provisions for inadmissibility under section 212(a)(6)(C) of the Act. Although 212(i) and 212(h) define "qualifying relative" differently, the applicant's spouse qualifies under both sections of the Act; therefore this incorrect citation did not affect the case's outcome.

child. If extreme hardship is established to one of his qualifying relatives, the Secretary then assesses whether an exercise of discretion is warranted.

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. *Salcido-Salcido v. INS*, 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.

Counsel contends that the applicant's spouse is experiencing hardship related to her medical condition, type II diabetes. The applicant's spouse, in her statement accompanying the Form I-601 application, claimed she was trying to control her diabetes through diet and exercise. On appeal, counsel notes that the applicant's spouse now has been prescribed medication to help control her diabetes and submits evidence of the medication prescribed. Diabetes is a condition that can cause serious problems if left uncontrolled, and the applicant submits articles that link stress to diabetes. However, the record fails to establish that the applicant's spouse cannot control her diabetes in the applicant's absence.

Counsel and the applicant's spouse assert that if the applicant were to return to Nigeria, the separation would cause the applicant's spouse emotional and psychological problems. While the AAO acknowledges that the applicant's spouse will experience some emotional hardship if she is separated from the applicant, the record fails to establish that this hardship experienced would be extreme, atypical, or unique compared to others separated from a spouse. *See Perez v. INS*, 96 F.3d 390 (9th Cir. 1996) (holding that the common results of deportation are insufficient to prove extreme hardship and defining extreme hardship as hardship that was unusual or beyond that which would normally be expected upon deportation).

The AAO recognizes that the applicant's spouse will endure hardship in caring for her diabetes condition and some emotional hardship as a result of separation from the applicant. However, her situation, if she remains in the United States, is typical to individuals separated as a result of removal and does not rise to the level of extreme hardship based on the evidence in the record, considered in its cumulative effect.

Regarding the hardship she would experience if she were to relocate with the applicant, the applicant's spouse states that she has resided in the United States since the age of five and that all her immediate family are U.S. citizens living in the United States. The record corroborates claims that the applicant's spouse was born in Nigeria. She asserts, however, that she has not returned to Nigeria since her departure at age five.

Counsel contends that the applicant's spouse would suffer hardship if she were to relocate to Nigeria due to economic, social, and political conditions there. The U.S. Department of State's travel warning, updated on January 8, 2014, cautions U.S. citizens about travel to Nigeria and specifically advises avoiding travel to the northern states of Adamawa, Borno, and Yobe, which are under states of emergency. The travel warning also recommends against travel to the states of Adamawa, Bauchi, Bayelsa, Borno, Delta, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Niger, Plateau, Sokoto, Yobe, and Zamfara, due to the risks of kidnappings, robberies, and other armed attacks. The record, however, indicates that the applicant was born in Lagos, and his parents still reside there.

Lagos is not mentioned as an area of concern in the State Department's travel warning. Although country-conditions information regarding political and human-rights issues in Nigeria was submitted, counsel does not assert that such conditions would adversely affect the qualifying spouse specifically.

While counsel asserts that the poverty rate and unemployment rate are high in Nigeria, counsel has not established that the applicant would be unable to support his spouse were they to relocate to Nigeria or that his spouse would face harm related to security concerns in certain states. Further, while the record indicates that applicant's parents reside in Nigeria, he does not address the nature and extent of his family ties there. Based on the evidence on the record, the applicant has not established that his spouse would suffer hardship beyond the common results of removal if she were to relocate to Nigeria to reside with him.

With respect to the hardship that the applicant's one year-old U.S. citizen son would experience, the mother of the applicant's son states that though she earns a good living as a teacher, she would not be able to manage her monthly expenses without the applicant's assistance. She asserts that the applicant provides approximately \$200 weekly for their child's support. However, the record contains no documentation to support her assertions. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

With respect to relocation, the record indicates that the applicant's son resides with his mother, who has no apparent connections to Nigeria. However, the applicant does not address the possibility of his son relocating to Nigeria and does not assert he would experience hardship there. Because the record contains no assertions of hardship related to his son's relocation, the AAO cannot speculate in this regard. Accordingly, the AAO finds the evidence insufficient to demonstrate that the applicant's qualifying relative son would suffer extreme hardship were he to relocate to Nigeria to be with him.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that the applicant's spouse or son will face extreme hardship if the applicant is unable to reside in the United States. Rather, the record demonstrates that they will face no greater hardship than the unfortunate but expected difficulties arising whenever a loved one is removed from the United States. Although the AAO is not insensitive to the situation of the applicant's spouse and son, the record does not establish that the hardship they face rises to the level of extreme, as contemplated by statute and case law. Moreover, 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.

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

ORDER: The appeal is dismissed.