



U.S. Citizenship
and Immigration
Services

(b)(6)

Date: **AUG 01 2014**

Office: SANTA ANA, CA

FILE: [REDACTED]

IN RE:

Applicant: [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:

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 Field Office Director, Santa Ana, California, denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) and a subsequent appeal to the Administrative Appeals Office (AAO) was dismissed. The matter is now before the AAO on the applicant's second motion. The motion will be granted and the prior decisions of the AAO are affirmed. The waiver application remains denied.

The applicant is a native and citizen of the Republic of Korea ("South Korea") who was found to be inadmissible to the United States 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) (2012), for having committed crimes involving moral turpitude. The record reflects that in 1992 the applicant was convicted in California of sexual battery. The record also reflects that in 2010 the applicant was convicted in Arizona of criminal impersonation. 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.

The Field Office Director found the applicant failed to establish that a qualifying relative would experience extreme hardship as a consequence of his inadmissibility. The application was accordingly denied. *See Decision of the Field Office Director* dated February 08, 2013.

On appeal, the AAO found that the applicant's 1992 conviction for sexual battery was not only a crime involving moral turpitude, but also a "violent or dangerous crime" as contemplated by 8 C.F.R. § 212.7(d) (2014). *See AAO decision*, October 1, 2013. The AAO further found the applicant had not demonstrated that a qualifying relative would experience extreme hardship in light of his inadmissibility. *Id.* The appeal was consequently dismissed.

The AAO held in a subsequent motion that, despite the fact that the applicant's sexual battery conviction occurred over 15 years ago, the applicant's waiver application required a favorable exercise of discretion, and therefore, he remained subject to the heightened discretionary standard in 8 C.F.R. § 212.7(d). *See AAO decision on motion*, February 19, 2014. The AAO also affirmed that the applicant's conviction for criminal impersonation qualified as a crime involving moral turpitude. *Id.* In conclusion, the AAO held the applicant had not established that a qualifying relative would experience extreme hardship due to his inadmissibility. *Id.*

On this second motion, the applicant submits: a brief; a marriage certificate; documentation of criminal proceedings; medical records and medical bills; a 2011 letter from a physician; copies of United States passport pages; and a birth certificate for the applicant's son. In the brief, the applicant contends that 8 C.F.R. § 212.7(d), which took effect on January 27, 2003, should not apply retroactively to the applicant's 1992 conviction. In addition, the applicant asserts that this conviction does not constitute a violent or dangerous crime, and in any event, the attorney who handled the 1992 case has since been disbarred. The entire record was reviewed and considered in rendering this decision.

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.

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 reflects that on June 22, 1992, the applicant was convicted of one count of sexual battery in violation of California Penal Code Section (“CPC”) 243.4(a),¹ which provided at the time:

(a) Any person who touches an intimate part of another person while that person is unlawfully restrained by the accused or an accomplice, and if the touching is against the will of the person touched and is for the purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of sexual battery. A violation of this subdivision is punishable by imprisonment in a county jail for not more than one year, and by a fine not exceeding two thousand dollars (\$2,000); or by imprisonment in the state prison for two, three, or four years, and by a fine not exceeding ten thousand dollars (\$10,000).

The applicant was sentenced to five years of probation and ordered to pay restitution to the victim of his crime. The AAO found on appeal, and affirmed on motion, that this June 22, 1992, conviction rendered him inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

¹ The decision of the Field Office Director incorrectly indicates that the applicant was convicted of California Penal Code Section 222.

On this second motion, the applicant does not contest the AAO's finding that this 1992 conviction constitutes a crime involving moral turpitude, nor does he assert that it does not qualify as a conviction for immigration purposes. Rather, the applicant contends that his conviction does not constitute a conviction for a violent or dangerous crime, and that 8 C.F.R. § 212.7(d) does not apply in his case because the regulation took effect after his 1992 conviction.

The applicant, however, made the same assertions, using the same language, in his initial appeal brief. *See appeal brief*, March 6, 2013. Consequently, the applicant did not respond to the AAO's finding on appeal that his conviction under CPC § 243.4(a) qualifies as a violent or dangerous crime because the Ninth Circuit Court of Appeals held in *Lisbey v. Gonzales*, 420 F.3d 930 (9th Cir. 2005), that sexual battery under CPC § 243.4(a) is a crime of violence under 18 U.S.C. §16(b). *See AAO decision*, October 1, 2013.

The applicant also did not present any new support for his contention that 8 C.F.R. § 212.7(d) should not apply retroactively to his June 22, 1992, conviction. The language of 8 C.F.R. § 212.7(d) clearly indicates that its application is not tied to the date of conviction, but rather, that it applies when an alien, like the applicant, requests a visa, admission to the United States, or adjustment of status:

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.

As the applicant is now applying for a waiver of his inadmissibility and adjustment of status, we affirm that 8 C.F.R. § 212.7(d) presently applies, even though the regulation was enacted after his June 22, 1992, conviction.

The applicant further contends that the attorney who handled his 1992 sexual battery case mistreated his defense, and that he was subsequently disbarred in 1996. A printout from the California state bar website is submitted in support. However, these assertions of attorney misconduct are insufficient to show that the applicant's 1992 conviction should not render him inadmissible. The applicant has provided no evidence to establish that this 1992 criminal

conviction was overturned on the merits, or for a violation of constitutional or statutory rights. *See Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). Without such documentation, we again affirm that the applicant remains “convicted” within the meaning of section 101(a)(48)(A) of the Act.

The applicant does not contest that his July 9, 2010, conviction in Arizona under A.R.S. § 13-2006 on three counts of Criminal Impersonation, a Class 6 felony, constitutes a conviction for a crime involving moral turpitude. The record thus establishes that the applicant has been convicted of two crimes involving moral turpitude, which renders him inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The waiver for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act is found under section 212(h) of the Act.

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

(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 . . .

As the applicant's second conviction was for conduct that occurred less than 15 years ago, he must seek a waiver under section 212(h)(1)(B) of the Act. A section 212(h)(1)(B) waiver of the bar to admission resulting from violation of section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the 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 current spouse and a son by his former spouse. 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 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.

As with the applicant's statements with respect to his 1992 conviction, much of his contentions on extreme hardship in the present brief are identical in language to the contentions made in his March 6, 2013, brief. In addition to those contentions, on the matter of hardship his spouse will experience without him, the applicant claims his spouse, who is 52 years old, relies on the applicant for financial support, food, clothing, and shelter. The applicant explains that without any skills or a college degree, the spouse will not be able to work meaningfully in the United States or in South Korea. With respect to hardship the spouse will experience if she returns to South Korea with the applicant, the applicant contends that family separation from her two children from a previous relationship, and she will have to take care of the applicant, who is ill.

The applicant also asserts that his son will suffer severe emotional heartache if he stays in the United States to pursue his education, as he will not be able to remain close to the applicant who may experience cardiac arrest at any time. The applicant states that if his son returns to South Korea as well, he will be deprived of an education and separated from his mother, who is the applicant's ex-spouse.

In support, however, the applicant submits no new evidence, only copies of previously-submitted documents. As such, the applicant did not supplement the record with new evidence to overcome deficiencies described in the AAO's October 1, 2013, and February 19, 2014, decisions. For instance, the record does not contain any evidence to establish that his son's psychological difficulties will cause hardships above and beyond those experienced by relatives who separate as a result of inadmissibility. Nor does the applicant provide documentation to demonstrate that the son, who is now 21 years old, would experience hardship due to separation from his mother, as the record still lacks evidence that the mother has no other options for care related to her medical conditions, or that the son has responsibilities with respect to her care. The applicant has also not submitted additional documentation on the educational difficulties his son will experience in South Korea. Therefore, as on appeal and on the applicant's first motion, we cannot conclude that the applicant has met his burden in demonstrating his son would experience extreme hardship given his inadmissibility.

In addition, the applicant did not submit any new evidence to overcome similar deficiencies in documentation related to the extreme hardship his spouse would experience. There are no additional documents regarding the spouse's psychological difficulties upon separation, nor are there updated financial documents on the spouse's current income, expenses, assets, and liabilities, or her overall financial situation, to support assertions of financial hardship in the event of separation. The applicant also does not provide any new evidence to demonstrate that his spouse would be unable to obtain adequate employment in South Korea. Moreover, the applicant does not explain or provide other evidence on the family-related hardship his spouse would experience upon relocation to South Korea if she were separated from her two children from a prior relationship, who are now 26 and 21 years old. As such, we cannot find the applicant has

supplemented the record with sufficient evidence to establish his spouse would experience extreme hardship upon separation from him or upon relocation to South Korea.

In this case, the record does not contain sufficient evidence to show that the hardships faced by the qualifying relatives, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship, and the applicant would therefore fail to demonstrate exceptional and extremely unusual hardship to a qualifying relative, a standard more restrictive than the extreme hardship standard. *See Cortes-Castillo v. INS*, 997 F.2d 1199, 1204 (7th Cir. 1993). As the applicant has not established hardship to a qualifying family member, no purpose would be served in determining whether the applicant merits a waiver as a matter of discretion.

In addition to inadmissibility due to the applicant's criminal convictions, we find the applicant is also inadmissible pursuant to section 212(a)(6)(E) of the Act, for which there is no waiver.

Section 212(a)(6)(E) of the Act provides, in pertinent part:

- (i) In General. Any alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is inadmissible.

....

- (iii) Waiver authorized. For provision authorizing waiver of clause (i), see subsection (d)(11) of this section.

Section 212(d)(11) of the Act provides:

The [Secretary] may, in [her] discretion for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, waive application of clause (i) of subsection (a)(6)(E) in the case of any alien lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of removal, and who is otherwise admissible to the United States as a returning resident under section 211(b) and in the case of an alien seeking admission or adjustment of status as an immediate relative or immigrant under section 203(a) (other than paragraph (4) thereof), if the alien has encouraged, induced, assisted, abetted, or aided only an individual who at the time of the offense was the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

The record reflects that on October 25, 2001, the U.S. Department of State ("DOS") revoked the applicant's B-1/B-2 nonimmigrant visa, which he used to procure admission on September 28, 2001. The DOS revoked the visa because the applicant had participated in visa brokering activities as a document forger for several individuals, unrelated to the applicant, who then obtained fraudulent visas to the United States. In revoking the visa, the DOS found the applicant was inadmissible under section 212(a)(6)(E) of the Act.

In a March 1, 2010, decision, denying the applicant's Application to Register Permanent Residence or Adjust Status (Form I-485), the Field Office Director also found that the applicant was inadmissible for alien smuggling under section 212(a)(6)(E) of the Act. In light of the documentation of record, we affirm the DOS and the Field Office Director's finding of inadmissibility pursuant to section 212(a)(6)(E) of the Act. Moreover, the record does not establish that the individuals the applicant aided to illegally enter the United States with fraudulent visas were immediate family members. Accordingly, the applicant is statutorily ineligible for a waiver under section 212(d)(11) of the Act and no other waiver is available for this ground of inadmissibility.

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 motion is granted and the prior AAO decisions are affirmed. The waiver application remains denied.