U. S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE FEB 04 2014 Office: COLUMBUS, OH

IN RE:

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT:

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.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Columbus, Ohio. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of the Palestinian Territories (West Bank) 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), for having been convicted of crimes involving moral turpitude. The applicant's spouse and child are U.S. citizens. 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.

The Field Office Director determined that the applicant failed to establish extreme hardship to a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility (Form I-601), accordingly. *Decision of the Field Office Director*, dated April 24, 2013.

On appeal, counsel asserts that the Field Office Director incorrectly applied the hardship standard and that the record contains sufficient evidence of hardship to the applicant's qualifying relatives. *Form I-290B, Notice of Appeal or Motion (Form I-290B)*, filed May 20, 2013.

The record includes, but is not limited to, counsel's brief, financial records, statements from the applicant and his spouse, the applicant's criminal records, photographs, information on trauma to children, and country-conditions information. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(2) of the Act states in pertinent part:

> Criminal and related grounds. —
>
> (A) Conviction of certain crimes. –
>
> (i) In general. – Except as provided in clause (ii), any 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, or
>
> . . . .
>
> (ii) Exception.-Clause (i)(I) shall not apply to an alien who committed only one crime if-
>
> . . . .

> (II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

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

> [M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general....
>
> In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

In *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. First, in evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a "realistic probability, not a theoretical possibility," that the statute would be applied to reach conduct that does not involve moral turpitude. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). A realistic probability exists where, at the time of the proceeding, an "actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien's own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude." *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

However, if a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, "the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude." 24 I&N Dec. at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage inquiry in which the adjudicator reviews the "record of conviction" to determine if the conviction was based on conduct involving moral turpitude. *Id.* at 698-699, 703-704, 708. The record of conviction consists

of documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.* at 698, 704, 708.

If review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. 24 I&N Dec. at 699-704, 708-709. However, this "does not mean that the parties would be free to present any and all evidence bearing on an alien's conduct leading to the conviction (citation omitted). The sole purpose of the inquiry is to ascertain the nature of the prior conviction; it is not an invitation to relitigate the conviction itself." *Id.* at 703.

The record reflects that on July 2, 2012 the applicant was convicted of illegal use of food stamps or WIC program benefits in violation of Ohio Revised Code § 2913.46(A), and telecommunications fraud in violation of Ohio Revised Code § 2913.05. The applicant received one year of community control sanctions under the basic supervision of the probation department, a six-month period of incarceration, with credit for three days in jail and the remainder suspended, and court and probation fees. As the applicant has not contested his inadmissibility on appeal, and the record does not show that determination to be in error, we will not disturb the finding of inadmissibility under section 212(a)(2)(A) of the Act.

The record also reflects that the applicant appears to be inadmissible under section 212(a)(6)(C)(i) of the Act. The AAO conducts appellate review on a *de novo* basis. *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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

> (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Section 212(i) of the Act provides that:

> (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

The record reflects that the applicant applied for a nonimmigrant visa on February 13, 2005, and was issued a B-1/B-2 visa on February 17, 2005. On his Form DS-156, Nonimmigrant Visa Application,

the applicant claimed he was married to [redacted] However, there is no evidence that he was actually married to [redacted]. The applicant now states that he was never married to [redacted]

In considering whether the misrepresentation on the applicant's nonimmigrant visa application bars his admission to the United States pursuant to section 212(a)(6)(C)(i) of the Act, the AAO will first consider whether it is a material misrepresentation for immigration purposes. A misrepresentation is generally material only if by it the alien received a benefit for which he would not otherwise have been eligible. *See Kungys v. United States*, 485 U.S. 759 (1988); *see also Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998); *Matter of Martinez-Lopez*, 10 I&N Dec. 409 (BIA 1962; AG 1964). A misrepresentation or concealment must be shown by clear, unequivocal, and convincing evidence to be predictably capable of affecting, that is, having a natural tendency to affect, the official decision in order to be considered material. *Kungys* at 771-72. The BIA has held that a misrepresentation made in connection with an application for visa or other documents, or for entry into the United States, is material if either:

1. the alien is excludable on the true facts, or

2. the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in proper determination that he be excluded.

Matter of S- and B-C-, 9 I&N Dec. 436, 448-449 (BIA 1960; AG 1961).

An applicant for a nonimmigrant visa is required to show that he or she has a residence in a foreign country with no intention of abandoning it and that his or her intention is to remain in the United States temporarily. *See* 9 FAM § 41.31 N1. Additionally, 9 FAM § 41.31 N3.4 states that applicants "must demonstrate permanent employment, meaningful business or financial connections, close family ties, or social or cultural associations, which will indicate a strong inducement to return to the country of origin."

An applicant who is married to someone living in his or her country of residence has a tie to that country that supports concluding he or she intends to return. If the applicant had truthfully represented that he was not married, a further line of inquiry may have been made concerning whether he intended to abandon his foreign residence and the temporary nature of his travel to the United States, which might well have resulted in a proper determination that he was inadmissible under section 212(a)(7)(A)(i)(I) of the Act as an intending immigrant. Because he misrepresented his marital status, he is therefore inadmissible under section 212(a)(6)(C)(i) of the Act for procuring a visa to the United States by willful misrepresentation of a material fact.

A waiver of inadmissibility under section 212(i) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant or his child can be considered only insofar as it results in hardship to a qualifying relative, in this case the applicant's spouse. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible

for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296, 301 (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 AAO will first address hardship to the applicant's spouse if she relocates to the Palestinian Territories (West Bank). Counsel states that the applicant's spouse was born and raised in the United States and has spent her entire life here; she would suffer hardship due to her separation from the applicant's child or due to her worries about the child if the child is allowed to relocate with them; she is employed; she has no ties to the West Bank; and ninety-eight percent of the population there is Muslim. Counsel also states that the Palestinian Territories are in a constant state of conflict; medical care is limited, particularly for mental-health issues; there is an economic and social crisis; and religious tension and persecution are prevalent.

The applicant's spouse states that she is a Christian; the Palestinian Territories are unsafe and no place to raise an American child; and she and the applicant would not be able to find employment there.

The applicant states that interfaith marriage is not accepted in the Palestinian Territories and he is not sure that his family would accept his spouse. He worries that their marriage would not survive the stresses of living there. He reiterates his spouse's concerns about safety and the lack of adequate health-care facilities in the West Bank.

The record includes articles which detail high unemployment rates and mental-health disorders in the West Bank. The applicant also submits articles on safety issues, social issues and medical care in the West Bank. The record additionally includes an article on trauma-related needs of young children.

The record reflects that before entering the United States, the applicant resided in which is in the West Bank. The U.S. Department of State Travel Warning for Israel, the West Bank and Gaza, dated June 19, 2013, states that, "[d]emonstrations and violent incidents can occur without warning, and vehicles are regularly targeted by rocks, Molotov cocktails, and gunfire on West Bank roads. U.S. citizens can be caught in the middle of potentially dangerous situations, and some U.S. citizens involved in political demonstrations in the West Bank have sustained serious injuries." Additionally, the Israeli government has restricted access to and imposed curfews in the West Bank occasionally. The Department of State adds that, "Security conditions in the West Bank may hinder the ability of consular staff to offer timely assistance to U.S. citizens."

The record reflects that the applicant's spouse's family ties all are in the United States. She does not have ties, other than the applicant, to the West Bank. In addition, according to the Department of State, her safety and security would be compromised in the West Bank. The applicant's spouse's religious minority status and her interfaith marriage are potential sources of hardship. Based on the

financial information provided and her lack of ties to the West Bank, the applicant's spouse would have difficulty in finding employment. General conditions, including the unavailability or inadequacy of medical care, would also be a source of hardship. Lastly, the applicant's spouse would be raising the applicant's child in a difficult social and economic environment. Based on the totality of the hardship factors presented and also considering the normal results of relocation, the AAO finds that the applicant's spouse would experience extreme hardship if she relocated to the West Bank.

The AAO will now address hardship to the applicant's spouse if she remains in the United States. Counsel states that the applicant's spouse will be separated from the applicant after three years of marriage; she and the applicant have created a life and family together; the permanent separation of spouses is a significant hardship; she will be separated from the applicant's child, who she has come to think of as her own, whether the child relocates to the West Bank or is placed in the foster-care system in Ohio; and she will be consumed with worry over her family members' well-being due to the violent civil conflict and economic and social crises in the West Bank.

The applicant's spouse states that she does not have children; the applicant's child is the only child she may ever be able to raise; she considers the applicant's child to be her child and cannot live without her; the applicant works and supports them; he is an incredible father; and the applicant has fought hard for custody of his daughter. Her statements concerning the child's custody are corroborated by court documents reflecting that the applicant obtained custody of his daughter and that the child's mother had abused and neglected her. The record also includes photographs of the applicant and his spouse and daughter.

To support assertions of financial hardship to his spouse if they lived separately, the applicant submits a 2011 Form 1099-MISC that reflects nonemployee compensation of $14,069. The applicant and his spouse's 2011 tax forms reflect total income of $22,039. The record also includes copies of various bills for the applicant and his spouse, and a notice of delinquency concerning the applicant's spouse's student loan payments. Additionally, the record includes four bank notices for insufficient funds.

The applicant's spouse's claims related to her concerns about the applicant's safety in the West Bank are supported by the record. In addition, the applicant earns a significant amount of the family income, and the applicant and his spouse provide documentation of some of their expenses and their current financial issues. Moreover, because the bar for his inadmissibility is permanent, the applicant's spouse would be permanently separated from the applicant and she also would be separated from the applicant's child if the child relocated to the West Bank. She would also be separated from the child if the child remained in the United States and was placed in foster care, as she does not have custody of the child. The record reflects that the applicant's spouse is emotionally close to the applicant's child. Based on the totality of the hardship factors presented, the AAO finds that the applicant's spouse would experience extreme hardship if she remained in the United States without the applicant.

Considered in the aggregate, the evidence shows that the applicant's spouse would face extreme hardship if the applicant's waiver request is denied.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Id.* at 299. The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

The AAO notes that *Matter of Marin*, 16 I & N Dec. 581 (BIA 1978), involving a section 212(c) waiver, is used in waiver cases as guidance for balancing favorable and unfavorable factors and this cross application of standards is supported by the Board of Immigration Appeals (BIA). In *Matter of Mendez-Moralez*, the BIA, assessing the exercise of discretion under section 212(h) of the Act, stated:

> We find this use of *Matter of Marin, supra*, as a general guide to be appropriate. For the most part, it is prudent to avoid cross application, as between different types of relief, of particular principles or standards for the exercise of discretion. *Id.* However, our reference to *Matter of Marin, supra,* is only for the purpose of the approach taken in that case regarding the balancing of favorable and unfavorable factors within the context of the relief being sought under section 212(h)(1)(B) of the Act. *See, e.g., Palmer v. INS*, 4 F.3d 482 (7th Cir.1993) (balancing of discretionary factors under section 212(h)). We find this guidance to be helpful and applicable, given that both forms of relief address the question of whether aliens with criminal records should be admitted to the United States and allowed to reside in this country permanently.

Matter of Mendez-Moralez at 300.

In *Matter of Mendez-Moralez*, in evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the BIA stated that:

> The factors adverse to the applicant include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature, recency and seriousness, and the presence of other evidence indicative of an alien's bad character or undesirability as a permanent resident of this country. . . . The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where the alien began his residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value and service to the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends, and responsible community representatives).

Id. at 301 (citation omitted).

The BIA further states that upon review of the record as a whole, a balancing of the equities and adverse matters must be made to determine whether discretion should be favorably exercised. The equities that the applicant for section 212(h)(1)(B) relief must bring forward to establish that he merits a favorable exercise of administrative discretion will depend in each case on the nature and circumstances of the ground of exclusion sought to be waived and on the presence of any additional adverse matters, and as the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence. *Id.* at 301.

The favorable factors include the applicant's U.S. citizen spouse, brother and child; the extreme hardship to his spouse and hardship to his child that would be caused by his removal; and the filing of U.S. tax returns. The applicant's efforts to remove his daughter from difficult circumstances are additional evidence of good moral character. The unfavorable factors include the applicant's recent convictions, his misrepresentation, and his period of unauthorized stay and unauthorized employment.

The AAO finds that the crimes and immigration violations committed by the applicant are serious in nature; nevertheless, when taken together, we find the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted.

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 been met. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.