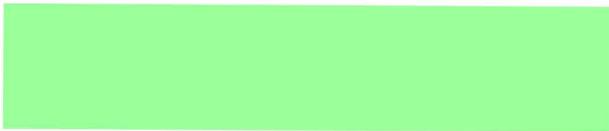
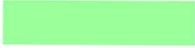


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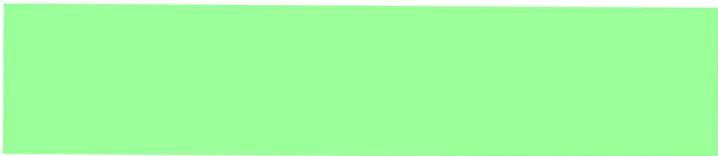


Date: **JUL 09 2014** Office: OAKLAND PARK FIELD OFFICE FILE: 

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,


for

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Oakland Park, Florida, and a subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The motion is granted and the prior AAO decision dismissing the appeal is affirmed.

The applicant is a native and citizen of Jamaica who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of crimes involving moral turpitude. The record indicates that the applicant has two U.S. citizen daughters and seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his children.

The field office director found that the applicant had failed to establish extreme hardship would be imposed on his children and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director* dated May 7, 2013.

In appealing the decision counsel for the applicant asserted that the applicant's two convictions were not for crimes involving moral turpitude so he is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act, and that the applicant's children would suffer extreme hardship as a result of his inadmissibility.

On appeal we determined that the applicant was convicted of a crime involving moral turpitude as it necessarily involved wanton or malicious intent, as well as actions that would produce death or great bodily harm.¹ We also affirmed the field office director's determination that the qualifying relatives will not suffer extreme hardship. *Decision of the AAO* dated December 24, 2013.

In support of the motion, counsel submits a brief and copies of previously-submitted conviction documents. The record contains a psychological evaluation of the applicant's oldest daughter, human rights reports for Jamaica, financial documentation, and conviction documentation. 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 –

¹ The record shows that in 1995 the applicant was convicted of petty theft under Florida Statutes § 812.014 for his conduct in 1994. The record of conviction is not in the record and counsel provided evidence that these records were destroyed. The previous AAO decision did not address whether the applicant's theft offense is a crime involving moral turpitude because it was found that his conviction under Florida Statutes § 790.19 is a crime involving moral turpitude rendering him inadmissible.

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

(ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or

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

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

[M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general....

In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

In dismissing the appeal we found that the record shows the applicant was convicted under Florida Statutes § 790.19 for throwing a rock into an occupied dwelling. The applicant was sentenced to 12 months of probation. As a second degree felony, a conviction under Florida Statutes § 790.19 carries a maximum sentence of 15 years in prison.

At the time of the applicant's conviction Florida Statutes § 790.19 stated:

Whoever, wantonly or maliciously, shoots at, within, or into, or throws any missile or hurls or projects a stone or other hard substance which would produce death or great bodily harm, at, within, or in any public or private building, occupied or unoccupied, or public or private bus or any train, locomotive, railway car, caboose, cable railway car, street railway car, monorail car, or vehicle of any kind which is being used or occupied by any person, or any boat, vessel, ship, or barge lying in or plying the waters of this state, or aircraft flying through the airspace of this state shall be guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

We found that the statute requires “wantonly or maliciously” as the intent underlying the criminal act. The decision stated that given the potential for great harm or death and the required mens rea, we find the statute requires inherently base, vile, or depraved conduct accompanied by a vicious motion or corrupt mind, and therefore the applicant’s conviction is for a crime involving moral turpitude.

On motion counsel asserts that the modified categorical approach should have been applied to the applicant’s conviction and that he was convicted of a lesser offense than cited by the AAO. Counsel contends that when looking beyond the record of conviction to determine under what prong of the statute the applicant was convicted, there is no evidence that the stones thrown by the applicant would produce death or great bodily harm. Counsel asserts that the police report is silent on this point. Counsel asserts that the police report contains no statement from the applicant’s spouse as to her fear of being killed or maimed, or the size of the stone that was thrown. Counsel further asserts that the applicant could not see the occupants of the house so he did not aim towards them, and that the record of conviction shows that the applicant was convicted of the lesser charge of attempt to throw into a building.

With the appeal counsel submits court documents with handwritten notes indicating that the applicant was convicted of “Attempted shoot/throw in occup dwell (Add statute 777.04 and it becomes 3 degree felony)” and that the applicant was sentenced to 12 months’ probation and costs and ordered to have no contact with the victim and enroll in an outpatient psychological program.

At the time of the applicant’s conviction, Florida Statutes Chapter 777, Principal; Accessory; Attempt; Solicitation; Conspiracy stated:

777.04 Attempts, solicitation, and conspiracy --

- (1) A person who attempts to commit an offense prohibited by law and in such attempt does any act toward the commission of such offense, but fails in the perpetration or is intercepted or prevented in the execution thereof,

commits the offense of criminal attempt, ranked for purposes of sentencing as provided in subsection (4).

the offense of criminal attempt, criminal solicitation, or criminal conspiracy is a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

For cases arising in the Eleventh Circuit, the determination of whether a conviction is a crime involving moral turpitude begins with a categorical inquiry that “depends upon the inherent nature of the offense, as defined in the relevant statute, rather than the circumstances surrounding a defendant’s particular conduct.” *Itani v. Ashcroft*, 298 F.3d 1213, 1215-16 (11th Cir. 2002); see also *Vuksanovic v. U.S. Att’y Gen.*, 439 F.3d 1308, 1311 (11th Cir. 2006) (citing *Taylor v. United States*, 495 U.S. 575, 600 (1990)); *Sosa-Martinez v. U.S. Att’y Gen.*, 420 F.3d 1338, 1342 (11th Cir. 2004). However, where the statute under which an alien was convicted is “‘divisible’—that is, it contains some offenses that are [crimes involving moral turpitude] and others that are not[,] . . . the fact of conviction and the statutory language alone are insufficient to establish . . . under which subpart [the alien] was convicted.” *Jaggernaut v. U.S. Att’y Gen.*, 432 F.3d 1346, 1354-55 (11th Cir. 2005). Under such circumstances, “the record of conviction – i.e., the charging document, plea, verdict, and sentence – may also be considered.” *Fajardo v. U.S. Att’y Gen.*, 659 F.3d 1303, 1305 (11th Cir. 2011) (citing *Jaggernaut, supra*, at 1354-55). The Eleventh Circuit does not permit inquiry beyond the record of conviction. See *Fajardo, supra*, at 1310 (11th Cir. 2011) (rejecting *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)).

Counsel’s assertion is that the applicant did not commit a crime involving moral turpitude as he did not see the occupants in the house so he did not aim towards them with intent to cause harm, and that the stones he threw were too small to cause harm. As noted above we are unable to look beyond the applicant’s record of conviction.

The applicant was convicted of attempt to commit a crime in violation of section 790.19. We found a conviction under this statute to be a crime involving moral turpitude. Section 212(a)(2)(A) of the Act includes attempt to commit a crime involving moral turpitude as rendering an alien inadmissible. Thus, irrespective of the commission or attempt at commission of the crime we find the applicant to be inadmissible for having committed a crime involving moral turpitude. The conviction necessarily involved wanton or malicious intent, as well as actions that would produce death or great bodily harm. There is extensive case law indicating that where such elements are present, the crime involves moral turpitude. For example, in cases involving assault, an assessment concerning the state of mind and level of harm involved in the commission of the crime is necessary to ascertain whether the crime is one of moral turpitude. *Matter of Solon*, 24 I&N Dec. 239, 242 (BIA 2007). Thus, where intentional or malicious conduct is involved, any level of meaningful harm may make the conduct morally turpitudinous, but as the level of conscious behavior decreases to reckless or wanton, the level of harm must rise in order for the crime to be considered a crime of moral turpitude. *Id.* In the applicant’s case, his conviction involved the potential for great bodily harm or death. Finally, even in cases

involving only damage to property, courts have found moral turpitude when the statute requires a malicious intent. See *Matter of M*, 2 I&N Dec. 686 (BIA 1946); *Matter of C-*, 2 I&N Dec. 716 (BIA 1947); *Matter of B*, 2 I&N Dec. 867 (BIA 1947), *Matter of N-*, 8 I. & N. Dec. 466 (BIA 1959), *Rodriquez-Herrera v. INS*, 52 F.3d 238 (9th Cir. 1995). Section 212(a)(2)(A) of the Act includes attempt to commit a crime involving moral turpitude as rendering an alien inadmissible. Thus, we find the applicant to be inadmissible for having been convicted of a crime involving moral turpitude.

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

(h) Waiver of subsection (a)(2)(A)(i)(I), (II), (B), (D), and (E).—The Attorney General [now the Secretary of Homeland Security, “Secretary”] may, in [her] discretion, waive the application of subparagraphs (A)(i)(I)...of subsection (a)(2) if—

(1) (A) in the case of any immigrant it is established to the satisfaction of the [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 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...

(2) the [Secretary], in [her] discretion, and pursuant to such terms, conditions and procedures as [she] may by regulations prescribe, has consented to the alien’s applying or reapplying for a visa, for admission to the United States, or adjustment of status.

A waiver under section 212(h) of the Act 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. Hardship the applicant experiences upon removal is not considered in section 212(h) waiver proceedings; the relevant hardship in the present case is hardship suffered by the applicant's two U.S. citizen daughters.

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

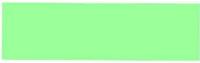
experiences as a result of aggregated individual hardships. *See, e.g., Matter of Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States 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.

On appeal we noted that counsel had not submitted additional documentation of hardship to a qualifying relative and found that the record does not provide details regarding the applicant's relationship with his daughters, how separation and relocation would affect their daily lives, or what hardship someone with the background of the applicant's oldest daughter would experience relocating to Jamaica. On motion counsel did not address or submit evidence to show the applicant's daughters would experience extreme hardship due to separation from the applicant or if they were to relocate abroad to reside with him.

The psychological assessment pertains to the applicant's older daughter and refers to stress in her life, including the death of her mother, two failed marriages, and being a single parent. It states that the applicant and his daughter have now developed a relationship and separation from the applicant would be another emotional loss for his daughter. The report provided does not establish, however, that the hardships the applicant's daughter would experience are beyond the hardships normally associated when a family member is found to be inadmissible. Financial documentation in the record does not show that the applicant's daughters would experience economic hardship as a result of separation from the applicant. Thus, the record fails to establish that the qualifying relatives would suffer extreme hardship as a consequence of being separated from the applicant.

The record also fails to establish that the applicant's daughters would experience extreme hardship if they were to relocate to Jamaica. The psychological assessment states the applicant's older daughter would be unable to relocate to Jamaica because of her job and the prospect of no employment or medical benefits. Country information submitted to the record describes general human rights conditions in Jamaica, but the record does not indicate how conditions specifically affect the applicant's daughters and fails to establish that they would be at risk as a result of relocation to Jamaica.

Since the record does not contain sufficient evidence to show that the hardships faced by the applicant's U.S. citizen children, considered in the aggregate, rise beyond the common results of



removal or inadmissibility to the level of extreme hardship, it fails 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 the applicant 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 motion to reopen is granted and the prior AAO decision dismissing the appeal is affirmed.