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



U.S. Citizenship
and Immigration
Services

Date: JUN 09 2014

Office: LOS ANGELES, CALIFORNIA

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:

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,

A handwritten signature in black ink that reads "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Los Angeles, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of El Salvador. The director found that the applicant was 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 committing a crime involving moral turpitude (CIMT). The applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h). The director denied the waiver application, concluding that the applicant had failed to establish that the bar to admission would result in extreme hardship to a qualifying relative.

On appeal, filed on April 22, 2013 and received by the AAO on February 6, 2014, counsel for the applicant asserts that the Field Office Director adjudicated the applicant's waiver under the impression that he had been convicted of three CIMT's, not one. Counsel further asserts that the applicant established extreme hardship to a qualifying relative, citing the financial, physical and psychological effects on the applicant's spouse and child.

The record contains, but is not limited to, the following documents: a brief from counsel; statements from family members and friends of the applicant and his spouse; statements from the applicant and his spouse; a record of conviction for the applicant's CIMT's and other court records related to the applicant's conviction; background materials on the country conditions in El Salvador; copies of financial documents; and medical documents for the applicant's spouse.

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.)

In *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General, clarified that for a crime to qualify as a crime involving moral turpitude for purposes of the INA, it “must involve both reprehensible conduct and some degree of scienter, whether specific intent, deliberateness, willfulness, or recklessness.”

The record reflects that on June 5, 2009, the applicant pled guilty to and was convicted of “lewd and lascivious acts” in violation Cal. Penal Code § 288(c)(1). The applicant was sentenced to 365 days in jail, three years of probation, fined court fees and was ordered to register as a sex offender pursuant to Cal. Penal Code § 290. The applicant, who was born in 1983, was 25 years old at the time he committed the crime that resulted in his conviction.

California Penal Code § 288, in pertinent part, states:

Lewd or lascivious acts; penalties; psychological harm to victim

- (a) Except as provided in subdivision (i), any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years.

- (c) (1) Any person who commits an act described in subdivision (a) with the intent described in that subdivision, and the victim is a child of 14 or 15 years, and that person is at least 10 years older than the child, is guilty of a public offense and shall be punished by imprisonment in the state prison for one, two, or three years, or by imprisonment in a county jail for not more than one year. In determining whether the person is at least 10 years older than the child, the difference in age shall be measured from the birth date of the person to the birth date of the child.

It is well-settled law that a violation of California Penal Code § 288(a) is categorically a crime involving moral turpitude because it contains the elements that are instrumental in a finding of moral turpitude: protected class – children– and scienter. *See Nunez v. Holder*, 594 F.3d 1124 (9th Cir. 2010) (citing *Schoeps v. Carmichael*, 177 F.2d 391, 394 (9th Cir.1949)).

Counsel for the applicant does not contest the applicant was convicted of a CIMT, but he asserts that the Field Office Director mistakenly concluded the applicant had been convicted of three CIMTs, rather than one, and that this would have changed the Field Office Director’s attitude with regard to

the adjudication. The record reflects that the Field Office Director found the applicant had been convicted of three counts of lewd and lascivious behavior. Court records reflect that all but one of the counts were dismissed, so the Field Office Director erred in the finding. The fact remains that the applicant was convicted of one CIMT and requires a waiver under section 212(h) of the Act.

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

The Attorney General may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), (D), and (E) or subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana

....

[I]n 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 [now the Secretary of Homeland Security (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.

A waiver of inadmissibility under section 212(h) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative. Under section 212(h), qualifying relatives include U.S. citizen or lawful permanent resident spouses, parents, sons and daughters. The applicant must demonstrate extreme hardship to his U.S. citizen spouse and or child. Hardship to the applicant is considered only to the extent it results in hardship to the qualifying relative. If extreme hardship to a qualifying relative is established, we then assess whether an exercise of discretion is warranted. See *Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996).

As a qualifying relative is not required to depart the United States as a consequence of an applicant's inadmissibility, two distinct factual scenarios are possible should a waiver application be denied: either the qualifying relative will join the applicant to reside abroad or the qualifying relative will remain in the United States. Ascertaining the actual course of action to be taken is difficult, and it is complicated by the fact that an applicant may easily assert a plan for the qualifying relative to relocate abroad or to remain in the United States depending on which scenario presents the greatest prospective hardship, even though no intention exists to carry out the alleged plan in reality. Cf. *Matter of Ige*, 20 I&N Dec. 880, 885 (BIA 1994) (addressing separation of minor child from both parents applying for suspension of deportation). Thus, we interpret the statutory language of the various waiver provisions in section 212 of the Act to require an applicant to establish extreme hardship to his or her qualifying relative(s) under both possible scenarios. To endure the hardship of separation when extreme hardship could be avoided by joining the applicant abroad, or to endure the hardship of relocation when extreme hardship could be avoided by remaining in the United States, is a matter of choice and not the result of removal or inadmissibility. As the Board stated in *Matter of Ige*:

[W]e consider the critical issue . . . to be whether a child would suffer extreme hardship if he accompanied his parent abroad. If, as in this case, no hardship would ensue, then the fact that the child might face hardship if left in the United States would be the result of parental choice, not the parent's deportation.

Id. See also *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (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*, 22 I&N Dec. 560, 565-66 (BIA 1999), the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. *Id.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of deportation, removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. See generally *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *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.*

We observe that 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., *In re 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).

Counsel asserts on appeal that the applicant's spouse is struggling financially without the applicant to assist her, and that she has had to seek public assistance in order to meet her financial obligations. Counsel further states that the applicant's spouse is suffering from depression, insomnia, anxiety and bilateral upper extremity paresthesia. Counsel also asserts that the applicant's daughter will experience hardship related to the applicant's inadmissibility, and that when the hardships to the applicant's qualifying relatives are considered in the aggregate they rise to the level of extreme hardship.

The applicant's spouse has submitted a letter stating that she is suffering financial, physical and emotional hardship. She describes not being able to sleep at night, crying frequently and states that she still suffers back pain from a work injury incurred in 2006. She states that her doctor told her she has high blood pressure and cholesterol, bilateral paresthesia, insomnia and hypertension. She explains that she needs the applicant in the United States to assist her with her medical needs, to provide financial support and to help raise their daughter. She further states that she fears for the applicant's safety if he were to be removed to El Salvador because of the violence and gangs there, and that she would be afraid of taking her daughter to visit the applicant in El Salvador. The applicant's spouse also notes that she has her entire family in the United States, with no family ties in El Salvador, and that she would need the applicant's income earned as a Journeyman for Commercial Roofing to support their family and meet their financial obligations.

The record contains a letter from the Women's group of [REDACTED] dated April 15, 2013. The letter states that the applicant's spouse was seen on January 10, 2013, and diagnosed with insomnia, hypertension, bilateral upper extremity paresthesias and obesity. It further states that she was seen on April 15, 2013, and diagnosed with depression, insomnia, anxiety and bilateral upper extremity paresthesia. The record contains a copy of a prescription from from the Women's Group of [REDACTED] as well as two pharmacy receipts for an allergy medication and a high blood pressure medication. While the single statement from the Women's Group is not fully probative of the applicant's spouse's diagnosis and prognosis, it is sufficient to establish that the applicant's spouse is experiencing medical problems.

The record contains a number of documents related to the income and financial obligations of the applicant and his spouse, including W2's, tax returns, wire transfer receipts, rent receipts and invoices for insurance coverage. The tax returns demonstrate that the applicant was earning substantial income while employed in the United States. Letters submitted into the record also indicate the applicant would have promising employment prospects in commercial roofing. While there was no evidence submitted to support the contention that the applicant's spouse is currently receiving financial aid, this evidence demonstrates that the applicant's spouse is likely experiencing a significant financial impact due to separation from the applicant.

The record contains letters from employers and family members of the applicant attesting to his moral character and skills as a roofer.

The background materials submitted with regard to El Salvador are also probative of the hardships and conditions that the applicant would face if returned to El Salvador. These materials discuss the socio-economic conditions of El Salvador and highlight the drug and gang violence occurring in the country. In addition, the AAO notes that on March 1, 2001, El Salvador was designated for Temporary Protected Status (TPS) due to conditions in the country that prevent persons from returning there safely. The status was extended through March 9, 2015. This establishes that the conditions in El Salvador are such that relocation there would present uncommon physical and financial hardship upon relocation as well as a heightened emotional hardship on the applicant's spouse.

When the hardships upon separation are considered in the aggregate, the record reflects that the applicant's spouse would experience physical, medical and emotional hardships rising to the level of extreme hardship due to separation.

With regard to hardship upon relocation, the applicant's spouse has explained that she would have to sever her family and community ties she has in the United States and would be fearful of visiting El Salvador. As discussed above, the conditions in El Salvador would result in unusually difficult physical hardship on the applicant and his spouse upon relocation. In addition, as the applicant's spouse is experiencing various medical conditions, she would have to disrupt her continuity of medical care in order to relocate. The record also contains sufficient evidence to establish that the applicant's spouse has a network of family members in the United States, and that relocating to El Salvador would result in having to separate from them.

When these hardships are considered in the aggregate, the record also establishes that the applicant's spouse would experience hardship rising to the level of extreme hardship upon relocation.

As the record establishes that a qualifying relative would experience extreme hardship due to the applicant's inadmissibility, we may now consider whether the applicant warrants a waiver as a matter of discretion. In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. See *Matter of T-S-Y*, 7 I&N Dec. 582 (BIA 1957).

In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien 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 and seriousness, and the presence of other evidence indicative of the 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 alien began 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 or service in 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).

See Matter of Mendez-Morales, 21 I&N Dec. 296, 301 (BIA 1996). We must then "balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Id.* at 300 (Citations omitted).

The applicant has been convicted of a serious CIMT, a lewd and lascivious act against a minor 14 or 15 years of age while he was at least 10 years older. There are some favorable factors to consider, such as the hardship to the applicant's spouse and child if he were removed, and statements made on the applicant's behalf by members of his family, church and employers, however, they do not outweigh the seriousness of the applicant's crime. The conduct resulting in the applicant's conviction, contained in the applicant's record of conviction, is disturbing, and thus the seriousness of the applicant's crime as a negative factor outweighs the positive factors in the case and the waiver will be denied as a matter of discretion.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that he is eligible for the benefit sought. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.