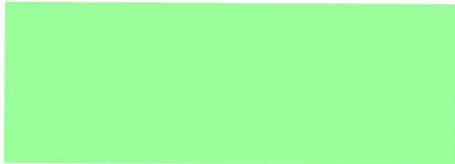


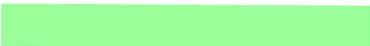


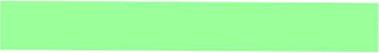
(b)(6)



DATE: **MAR 31 2014**

Office: NEW DELHI



IN RE: Applicant: 

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

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 Acting Field Office Director, New Delhi, India, denied the waiver application, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Bangladesh who was found to be 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 a crime involving moral turpitude (CIMT). He is also inadmissible under section 212(a)(6)(C)(i), 8 U.S.C. § 1182(a)(6)(C)(i), for procuring or attempting to procure an immigration benefit by fraud or misrepresentation. The derivative beneficiary of the approved Petition for Alien Relative (Form I-130) filed on behalf of his wife by her sister, he contests the inadmissibility, but alternatively seeks a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his wife.

The field office director found the applicant ineligible for a waiver for having been convicted of an aggravated felony after being admitted for permanent residence, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601), accordingly, *Decision of the Field Office Director*, August 1, 2012.

On appeal, the applicant submits a brief contending that USCIS erred in finding the applicant's conviction was for a crime involving moral turpitude (CIMT), and asserts he has established the extreme hardships that a qualifying relative will suffer as a result of the applicant's inadmissibility. In support of the appeal, the applicant submits a brief. The record also includes: the applicant's statements; supportive statements; criminal history and deportation documents; an immigrant visa and immigrant visa application; a bank statement; and copies of a Form I-485 and related documents. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(2)(A) of the Act provides, in pertinent part:

(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

....

is inadmissible.

(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 record shows that, after entering the country without inspection, the applicant procured conditional U.S. residence on October 3, 1996 based on the spousal petition of a U.S. citizen. However, after he was admitted as a conditional resident, the applicant was placed in deportation proceedings and charged with deportability under section 241(a)(1) of the Act as excludable under section 212(a)(2)(A)(i)(I) of the Act at the time of his adjustment of status because of his February 19, 1993 conviction for indecency with a child under Texas Penal Code (TPC) section 21.11, a crime involving moral turpitude. He was also charged with deportability under section 241(a)(2)(A)(iii) of the Act for having been convicted of an aggravated felony as defined in section 101(a)(43)(A) of the Act. On December 9, 1997, an Immigration Judge ordered the applicant deported, and the applicant was deported to Bangladesh on January 12, 1998.

In assessing whether a conviction is a crime involving moral turpitude, the adjudicator must first “determine what law, or portion of law, was violated.” *Matter of Esfandiary*, 16 I&N Dec. 659, 660 (BIA 1979). The adjudicator engages in a categorical inquiry, considering the “inherent nature of the crime as defined by statute and interpreted by the courts,” not the underlying facts of the criminal offense. *Matter of Short*, 20 I&N Dec. 136, 137 (BIA 1989); see also *Matter of Louissaint*, 24 I&N Dec. 754, 757 (BIA 2009) (citing *Taylor v. United States*, 495 U.S. 575, 599-600 (1990)). If the statute “defines a crime in which turpitude necessarily inheres, then the conviction is for a crime involving moral turpitude.” *Matter of Short*, *supra*, at 137.

Where the statute includes some offenses involving moral turpitude and some which do not – where there is a *realistic probability* that the statute would be applied to conduct not involving moral turpitude – the adjudicator looks to the record of conviction to determine the offense for which the applicant was convicted. See *Matter of Guevara Alfaro*, 25 I&N Dec. 417, 421 (citing *Matter of Silva-Trevino*, 24 I&N Dec. 687, 689-90, 696-99 (A.G. 2008)); see also *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability, as opposed to a theoretical possibility, exists where there is an actual prior case, possibly the applicant’s own case, in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. *Matter of Silva-Trevino*, *supra*, at 708. The record of conviction is a narrow, specific set of documents which includes the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Matter of Louissaint*, *supra*, at 757; see also *Shepard v. U.S.*, 544 U.S. 13, 16 (2005) (finding that the record of conviction is limited to the “charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.”)

TPC section 21.11, "Indecency with a Child," provides, in pertinent part:

(a) A person commits an offense if, with a child younger than 17 years and not the person's spouse, whether the child is of the same or opposite sex, the person:

(1) engages in sexual contact with the child or causes the child to engage in sexual contact; or

(2) with the intent to arouse or gratify the sexual desire of any person:

(A) exposes the person's anus or any part of the person's genitals, knowing the child is present, or

(B) causes the child to expose the child's anus or any part of the child's genitals

(d) An offense under Subsection (a)(1) is a felony of the second degree and an offense under Subsection (a)(2) is a felony of the third degree.

The applicant claims that he did not possess the *mens rea* to commit a crime involving moral turpitude and that the offense was committed due to "inadvertent negligence." He further claims that he should be considered for the petty offense exception because he was not sentenced to time in prison. The AAO notes that in addition to being deportable as an aggravated felon, the immigration judge found the applicant to be deportable as excludable at the time of his adjustment of status because of his conviction of a crime involving turpitude. *See also Matter of Silva-Trevino*, 24 I & N Dec. 687 (A.G. 2009) (holding that a conviction for indecency with a child under section 21.11(a)(1) of the Texas Penal Code involves moral turpitude where the perpetrator knew or should have known that the victim was a minor).

The February 19, 1993 record of conviction establishes that the applicant pleaded nolo contendere to sexual contact and indecent exposure with a child in violation of TPC §§ 21.11(a)(1) and (a)(2). The record of conviction further shows that the court accepted the applicant's plea to an indictment charging that sexual contact occurred between the applicant and a minor less than 17 years old, as well as that exposure of genitalia occurred. The indictment charged that the applicant "knowingly and intentionally engage[d] in sexual contact with ... a child then younger than 17 years...." *True Bill of Indictment*, July 17, 1992. In accepting the applicant's plea, the court found that "the evidence of record substantiates the defendant's guilt of the offense shown...." *Court Record, Vol. 344, Page 152*, February 19, 1993. These offenses are, respectively, second and third degree felonies under subsection (d) and punishable by imprisonment for between two and 20 years and up to a \$10,000 fine. *See* TPC § 12.33. Therefore, the petty offense exception for CIMTs under the Act does not apply. *See* section 212(a)(2)(A)(ii)(II) of the Act.

We conclude that the applicant has not met his burden under section 291 of the Act, 8 U.S.C. § 1361 of showing the field office director erred in determining he was inadmissible under section

212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude. He therefore requires a waiver under section 212(h) of the Act.¹

In addition to being found inadmissible under section 212(a)(2)(A)(i)(I) of the Act, the applicant was found inadmissible under section 212(a)(6)(C) of the Act for having sought a visa through fraud or misrepresentation.

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

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)(1) of the Act provides:

The [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 shows that the applicant denied under oath before a Consular Officer interviewing him for an immigrant visa on March 12, 2009 having ever been arrested in the United States or deported from the country. As his deportation after having been convicted of an aggravated felony rendered him permanently inadmissible under section 212(a)(9)(A) of the Act, both denials are material misrepresentations made to obtain an immigration benefit. Further, U.S. State Department (DOS) records reflect that, using a false birthdate, the applicant was twice refused a nonimmigrant visa, in December 1999 and August 2000, for being an intending immigrant under section 214(b) of the Act, before being issued a B1/B2 visa in February 2001 on his third attempt.

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

¹ The applicant was admitted as a conditional permanent resident on October 3, 1996 and issued an order to show case placing him in deportation proceedings on January 31, 2007. Pursuant to section 212(h)(2) of the Act, "No waiver shall be provided under this subsection in the case of an alien who has been previously admitted to the United States as an alien lawfully admitted for permanent residence if . . . the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States. . . ." As the applicant entered the country without admission or parole in 1992, was admitted for permanent residence in 1996, and was placed into deportation proceedings in 1997, the record reflects that he had not lawfully resided in the country for the seven years required to qualify for a waiver under section 212(h). *See Matter of Koljenovic*, 25 I&N Dec. 219, 221 (BIA 2010).

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

The applicant's misrepresentations concerning his criminal conviction and deportation, both in writing on his 2008 Form DS-230 and verbally at his 2009 immigrant visa interview, are material because under the true facts the applicant is inadmissible and required to obtain a waiver of inadmissibility and permission to reapply for admission after deportation. The record establishes that the applicant misrepresented the fact of his prior undocumented presence in the United States, his criminal record, and his deportation, and he therefore requires a waiver of this inadmissibility in order to pursue an immigrant visa.

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 can be considered only insofar as it results in hardship to a qualifying relative. The applicant's U.S. citizen spouse is the only qualifying relative in this case. 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-Morales*, 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 applicant has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). 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; the Board added that not all of these factors need be analyzed in any given case and emphasized that the list is 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, while 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, or cultural readjustment 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, although 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 v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); conversely, 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 case-by-case whether denial of admission would result in extreme hardship to a qualifying relative.

Regarding whether the applicant has established that his wife would suffer extreme hardship by returning to Bangladesh, the record contains no documentary evidence that relocating would involve hardship that rises to the level of extreme. The record contains no evidence the applicant’s wife visited the United States before her 2009 immigration and shows that their child was born in Bangladesh. The qualifying relative states that she has never been employed outside the home, either here or in Bangladesh, and there is no indication she has established ties to the United States that exceed those she has overseas. The record reflects that she immigrated to the United States in May 2009 and resides with the sister who filed an immigrant petition on her behalf, but also indicates that she returned to Bangladesh and was employed as a Senior Executive from August 2010 to January 2012. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Regarding the claim of emotional hardship due to separation from the applicant, the record reflects that she and her husband married in 2001 and had a child in 2004. The record reflects that his wife decided to immigrate to the United States upon issuance of her immigrant visa though she knew the applicant was inadmissible. The applicant claims that his wife underwent treatment for mental illness in Bangladesh, but the record contains no documentation or details regarding the claimed condition. Although the AAO acknowledges the applicant's contention that his spouse will experience emotional hardship were she to reside in the United States while he remains in Bangladesh, the record does not establish the severity of this hardship or the effects on her daily lives.

Regarding financial hardship from separation, the applicant's wife states that she and their son are living with her sister, who is helping to support them, but there is no documentation of their expenses or overall financial situation or evidence that the applicant's spouse would be unable to find employment and support herself in the United States. Further, the record contains bank statements showing the applicant's Bangladesh bank account activity through February 2013 indicating financial resources there, and the applicant claims to be the proprietor of a travel agency in Bangladesh. The record fails to show the applicant's presence in the United States will lessen his wife's financial burden, or that his absence will impair her economic situation.

For all these reasons, the cumulative effect of the emotional and financial hardships the applicant's wife will experience due to her husband's inadmissibility do not rise to the level of extreme. We are sensitive that the applicant's inability to immigrate to the United States will impose some hardship on his wife. The AAO concludes, however, based on the evidence provided that, were his wife to remain in the United States without the applicant due to his inadmissibility, she would not suffer extreme hardship that is beyond those problems normally associated with family separation.

The documentation on record, when considered in its totality, reflects the applicant has not established that his spouse will suffer extreme hardship if he is unable to live in the United States. The AAO recognizes that the applicant's wife will endure hardship as a result of the applicant's inability to immigrate. However, her situation is typical of individuals affected by removal or inadmissibility, and the AAO thus finds that the applicant has failed to establish extreme hardship to his wife as required under the Act.

Where the applicant is statutorily ineligible for a waiver under section 212(h) of the Act, the field office director properly denied the Form I-601. Although the applicant is statutorily ineligible for a waiver of criminal grounds of inadmissibility, we further considered his claims under section 212(i) before determining he has made an insufficient showing of extreme hardship.

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, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.