



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE: **MAY 28 2014**

OFFICE: WEST PALM BEACH

FILE: [Redacted]

IN RE:

[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:

[Redacted]

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 waiver application was denied by the Field Office Director, West Palm Beach, Florida, and the matter now comes to the AAO on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Russia 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 committed a crime involving moral turpitude. She seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), to remain in the United States with her U.S. citizen spouse.

The director concluded 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. *See Decision of the Field Office Director*, dated May 10, 2013. The director also outlined several discrepancies in the applicant's and her spouse's testimony from the applicant's interview.

On appeal, counsel addresses the interview discrepancies the director mentioned by asserting that the applicant's due process rights were violated when the interviewing officer did not allow the applicant to use an interpreter and made comments that intimidated her. Counsel also asserts that the applicant has established that her spouse would suffer extreme hardship. *See Form I-290B, Notice of Appeal or Motion* (Form I-290B), filed June 7, 2013, and counsel's brief.

Although the applicant submits evidence on appeal alleging that the interviewing officer behaved inappropriately, appeals are not the proper forum for concerns involving officer conduct during field office interviews. Moreover, constitutional issues are not within our appellate jurisdiction; therefore the applicant's right to due process will not be addressed in the present decision.

The record contains, but is not limited to: counsel's briefs; Forms I-290B¹; various immigration forms and applications; the applicant's conviction documents; statements by the applicant, the applicant's spouse, interpreter, employers, and friends; the applicant's spouse's psychological report; naturalization, marriage, divorce and birth certificates; medical documents for the applicant's spouse and his mother; financial documents; lease and insurance documents; country-conditions information about Russia; and photographs. The entire record was reviewed and considered in rendering a decision on the appeal.

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 director denied the applicant's first waiver application on April 7, 2010. The applicant then appealed the denial of Form I-485, which we rejected for lack of appellate jurisdiction on April 2, 2012. The applicant filed a second waiver application, which is the subject of the instant appeal.

(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.)

The present case falls within the jurisdiction of the Eleventh Circuit Court of Appeals. 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)).

The record reflects that the applicant was convicted on September 2, 2009 of grand theft in the third degree, for less than ten thousand dollars but greater than five thousand dollars, under Florida Statute (Fl. Stat.) § 812.014(2)(c) for her conduct on October 17, 2008. She was sentenced to five years of probation, which she completed on June 18, 2013, and costs.

At the time of the applicant’s conviction, Fl. Stat. § 812.014 provided, in pertinent parts:

(1) A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:

(a) Deprive the other person of a right to the property or a benefit from the property.

(b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.

(2) . . .

(c) It is grand theft of the third degree and a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if the property stolen is:

1. Valued at \$300 or more, but less than \$5,000.

2. Valued at \$5,000 or more, but less than \$10,000.

In the instant case, the statute under which the applicant was convicted, Fl. Stat. § 812.014, is divisible, because it addresses both temporary and permanent takings. A plain reading of Fl. Stat. § 812.014 shows that it can be violated by knowingly obtaining or using the property of another with intent to, either temporarily or permanently, deprive an individual of his or her property or appropriate the property to his or her own use. The BIA has determined that to constitute a crime involving moral turpitude, a theft offense must require the intent to permanently take another person’s property. *See Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973) (“Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended.”).

Therefore, we cannot find that a violation of Fl. Stat. § 812.014 is categorically a crime involving moral turpitude.

Since the full range of conduct proscribed by the statute at hand does not constitute a crime involving moral turpitude, we will apply the modified categorical approach and review the record of conviction to determine under which part of the statute the applicant was convicted. The submitted record of conviction includes the plea agreement, order of supervision, indictment, and complaint/arrest affidavit.

According to the information document filed in November 2008, the object of the applicant’s theft was money. The documents reflect that the applicant attempted to fraudulently receive a mortgage loan from a bank by presenting herself as a buyer of a property. The BIA found in *Matter of Grazley* that theft of money reflects a permanent intent to deprive. *Id.* at 333. Thus, the record supports concluding that she committed theft with the intent to permanently deprive the owner of the property, and her act constitutes a crime involving moral turpitude. The applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act and therefore requires a waiver under section 212(h) of the Act. The applicant does not contest her inadmissibility on appeal.

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

The Attorney General [now Secretary of Homeland Security, “Secretary”] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), . . . of subsection (a)(2) . . . if –

....

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the [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 section 212(h)(1)(B) waiver of the bar to admission resulting from violation of section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant is not a consideration under the statute and will be considered only to the extent that it results in hardship to a qualifying relative, in this case the applicant’s spouse. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Moralez*, 21 I&N Dec. 296 (BIA 1996).

Extreme hardship is “not a definable term of fixed and inflexible content or meaning,” but “necessarily depends upon the facts and circumstances peculiar to each case.” *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, the BIA 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 BIA 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 BIA 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 BIA 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 applicant's spouse is a 52 year-old native of Latvia who became a naturalized citizen of the United States in 2008. He states that he has been living in the United States for over 16 years. He explains that he suffers from medical problems and psychological issues and requires the applicant for support. Medical documents from 2001 indicate that the applicant's spouse survived an accident when the truck he drove overturned, causing injuries to his back and neck. Additional medical records for a three-year period between 2001 and 2004 indicate that he received ongoing treatment to improve his pain, including physical therapy and acupuncture. He states, and medical documents corroborate, that he also had a bleeding ulcer, hypertension and obesity. According to the most recent medical documents, dated November 2012, the applicant's spouse has diabetes and has seen a doctor for abdominal pain.

The applicant explains that her husband suffers from serious medical conditions and needs her assistance on a daily basis. Counsel asserts in two briefs dated October 2009 and June 2012 that the applicant visits the doctor every month and takes medication daily. The applicant states in her July 2012 affidavit that her spouse has not seen a doctor because they have been unable to afford visits and a comprehensive medical report. The record lacks details and evidence corroborating these claims. The record also lacks details concerning how the applicant helps her husband with his medical conditions. Without documentary evidence to support these claims, the assertions of counsel will not satisfy the petitioner's burden of proof. Moreover, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The applicant states that she supports her husband emotionally. A psychological report from July 2012 indicates that the applicant's spouse would suffer significant hardship without her because, according to the psychologist, the applicant's spouse had a difficult childhood that caused him to develop "an adaptive toughness." The psychologist also notes that the applicant's spouse has a gregarious personality but has difficulty speaking of his youth. The psychologist concludes that the applicant provides her spouse with stability.

Counsel further asserts that the applicant's spouse will suffer financial hardship without the applicant. Counsel states that the applicant would not be able to afford to maintain two households, one in the United States and one in Russia, because the applicant would not be able to gain employment in Russia. The record contains several articles showing that the unemployment rate in Russia reached an all-time high of approximately ten percent in 2009. Reports in the record from 2012 indicate that approximately 12 percent of the population lives below the subsistence minimum, an improvement from 2011. The record lacks evidence showing that the applicant would not be able to find employment in Russia. Her tax forms and letters from her employers indicate she has worked as a housekeeper and nanny. The record does not show that she would not be able to be employed in similar positions in Russia. The record also lacks information about financial support she may receive from family or friends in Russia.

Moreover, counsel also states that the applicant and her spouse contribute equally to the household, which would cause the applicant's spouse to suffer financial hardship without her. The record

contains tax forms, letters from employers, and evidence of various expenses. According to a 2009 letter from the applicant's spouse's employer, he earns approximately \$24,000 a year as a limousine driver. Tax forms for the applicant indicate that her wages ranged from approximately \$3,200 in 2007 to \$12,000 in 2008. Their lease from 2011 and 2012 and their renter's insurance include the applicant's cousin. The record does not address whether the applicant's cousin contributes to the household and their shared expenses. The evidence also does not reflect the applicant's financial contributions. 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)).

We have considered all assertions of separation-related hardship to the applicant's spouse, including emotional, psychological and potential financial hardship. Considered cumulatively, the record is not sufficient to demonstrate that the applicant's spouse would suffer extreme hardship without the applicant that is distinguished from those hardships ordinarily associated with a loved one's removal.

The applicant's spouse states that he cannot relocate to Russia because of his close ties to his mother in the United States; lack of family ties there; financial difficulties; and concerns about Russia's health-care system, safety and security. The applicant's spouse states that he visits his mother twice a week, takes her grocery shopping, and takes her to doctor appointments once a month. Counsel states in briefs from 2012 and 2013 that the applicant's spouse's mother has macular degeneration and is "rapidly becoming blind," "is blind," and "is practically blind." In a 2009 letter a physician states that the applicant's mother's medical conditions include blindness. This physician also states that she requires assistance for her daily needs, such as bathing, dressing, and hygiene. The record does not include other evidence about the applicant's spouse's mother's conditions. The applicant and her spouse assert that his mother is not in an assisted living facility or nursing home, and she relies solely on him. The record does not indicate how the applicant's spouse's mother is able to function without the applicant's spouse or if anyone else helps her with day-to-day necessities. Nevertheless, counsel explains that the applicant's spouse has a very close relationship to his mother and living apart from her in Russia would be psychologically and emotionally devastating. He also states that traveling internationally to visit his mother would be financially difficult.

Counsel asserts that the applicant's spouse would be unable to gain employment in Russia and pay his credit-card debt in the United States. The record contains articles about Russia's economic crisis in 2008 to 2009 and the unemployment rate that has decreased since the crisis. The applicant's spouse also states that his inability to speak Russian and his advanced age would deter employers from hiring him. The reports and articles submitted do not indicate that the applicant's spouse would be unable to find employment in Russia. The applicant, moreover, does not address how her spouse's experience and skills- including speaking English and working as a driver- would affect his ability to be similarly employed in Russia. The record also lacks evidence of credit-card debt and his inability to pay his debt, given his and the applicant's earnings.

Country-conditions reports and articles corroborate assertions of an ailing health-care system and poor safety and security in Russia. The record includes articles and reports regarding general

conditions in Russia from 2008 to 2012. Reports from 2011 indicate that Russia has shortages of medical supplies and a lack of comprehensive primary care, although some people travel to Russia for medical treatment that is more expensive or prohibited in the United States. However, the record lacks evidence regarding the applicant's spouse's current medical conditions, as noted above, and the evidence does not establish that her spouse would be able to obtain adequate treatment for those conditions in Russia.

The reports also address corruption and violence in Russia, especially against ethnic minorities. Additionally, the U.S. Department of State issued a travel alert for Russia, dated March 14, 2014, that advises U.S. citizens to avoid the Ukrainian border area due to on-going military exercises there. See <http://travel.state.gov/content/passports/english/alertswarnings/russia-travel-alert-events-in-ukraine.html>, last accessed May 16, 2014. The evidence in the record, however, does not support concluding that the applicant's spouse would face threats to his safety or security, particularly because it is not clear that he would relocate to an area experiencing threats or violence. Nevertheless, we will give some weight to counsel's safety-related assertions when considering that factor in the hardship analysis.

We have considered all assertions and evidence of relocation-related hardship to the applicant's spouse, including his length of residence in the United States, his loss of employment and the potential negative financial impact of living in Russia, the strain on his relationship to his elderly mother in the United States, and concerns about conditions in Russia. While the applicant has shown that her spouse tends to his mother weekly, the record lacks sufficient evidence regarding her condition and daily care, and his ability to find work, receive adequate health care, and live safely in Russia, as mentioned above. Considered in the aggregate, the record is insufficient to establish a finding that the applicant's spouse would suffer extreme hardship were he to relocate to Russia to live with the applicant.

As the applicant has not established extreme hardship to a qualifying family member, no purpose would be served in determining whether she 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 appeal is dismissed.