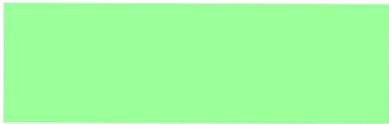


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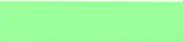
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

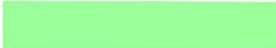


U.S. Citizenship
and Immigration
Services



Date: **SEP 23 2014** Office: OAKLAND PARK, FL

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,

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, Oakland Park, Florida, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Colombia. 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, counsel for the applicant asserts the applicant is eligible for the petty offense exception and is not inadmissible, and that his qualifying relatives will experience extreme hardship.

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; court records related to the applicant's convictions; a birth certificate for the applicant's daughter; tax records for the applicant and his spouse; documents filed in relation to an Affidavit of Support filed by the applicant's spouse; a mental health evaluation of the applicant's spouse; and photographs of the applicant, his spouse and their family.

Section 212(a)(2) of the Act states that:

(A)(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.

(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 *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 petty offense exception applies where the alien has committed only one crime involving moral turpitude. In *Matter of Garcia-Hernandez*, 23 I&N Dec. 590, 594 (BIA 2003), the Board held that a respondent who was convicted of more than one crime, only one of which was a crime involving moral turpitude, was eligible for the petty offense exception under section 212(a)(2)(A)(ii) of the Act.

Counsel asserts that because the applicant was only sentenced to probation that he is eligible for the petty offense exception. However, counsel’s assertion is not supported by the record because the record establishes that the applicant has been convicted of more than one CIMT.

The applicant was also convicted of Assault in the 3rd degree under New York Penal Law § 120.00. The record reflects that on June [REDACTED] the applicant was convicted in the Supreme Court of the State of New York, [REDACTED], of assault in the second degree in violation of New York Penal Law § 120.00(1).

In *Matter of Solon*, the BIA addressed whether the offense of assault in the third degree under New York Penal Law 120.00(1), a class A misdemeanor, is a crime involving moral turpitude. 24 I&N Dec. 239 (BIA 2007). The alien in *Matter of Solon* was convicted of a violation of New York Penal Law § 120.00(1), the statute in question here, which provides that a person is guilty of assault in the third degree when, “[w]ith intent to cause physical injury to another person, he causes such injury to such person or to a third person.” 24 I&N Dec. at 243. The BIA concluded that:

[A] conviction for assault in the third degree under section 120.00(1) of the New York Penal Law requires, at a minimum, (1) that the offender acts with the conscious objective to cause another person impairment of physical condition or substantial pain of a kind meaningfully greater than mere offensive touching, and (2) that such impairment of physical condition or substantial pain actually results. Thus, a conviction under this statute requires, at a minimum, intentionally injurious conduct that reflects a level of depravity or immorality appreciably greater than that associated with the crime at issue in *Matter of Sanudo, supra*, at 971-72 (stating that the minimal conduct necessary for a battery conviction under section 242 of the California Penal Code was in the nature of a simple battery). Accordingly, we conclude that a conviction under section 120.00(1) of the New York Penal Law is a conviction for a crime involving moral turpitude.

24 I&N Dec. at 245. As such, the applicant has been convicted of two CIMTs. In addition, Assault in the 3rd Degree under NYPL 120.00 is a violent or dangerous crime. Thus, the applicant must meet the requirements of 8 C.F.R. § 212.7(d) to warrant a favorable exercise of discretion.

Based on the fact that the applicant has been convicted of at least two CIMTs, he is not eligible for the petty offense exception.

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).

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.

All relevant evidence has been considered in rendering this decision.

On appeal, counsel for the applicant asserts the applicant's spouse will experience emotional and financial hardships if the applicant is removed. Counsel asserts that the applicant owns a construction business which is the primary financial support for the applicant's family. He further asserts that the applicant's spouse is experiencing emotional hardship at the prospect of the applicant's removal, and references a psychological evaluation submitted into the record. The applicant's spouse has also submitted a statement asserting that the applicant is a supportive husband and father and provides financial resources to help the family meet its obligations. She further asserts that she is overwhelmed by the prospect that he would be removed and that his absence would be devastating to her and her entire family.

An examination of the record indicates that any financial support provided by the applicant is minimal. A Form I-864 Affidavit of Support filed with the applicant's adjustment of status application indicates that the applicant's income for that year was \$0, and that the applicant's spouse provided all of the household income. A tax return for 2012 contains a Schedule C-EZ for the applicant's construction business and indicates that the business income was \$6500. The applicant's spouse's income for that year was \$30,138. This evidence contradicts counsel's assertion that the applicant is the source of financial support for his family. While the record contains a copy of a residential lease, there is insufficient evidence of other expenses to demonstrate that the applicant's spouse would be unable to meet her financial obligations if the applicant were removed, or that any financial hardship arising from the applicant's departure would rise beyond the level commonly experienced by the relatives of inadmissible aliens.

The record contains a copy of a psychological evaluation of the applicant's spouse, which concludes that she is experiencing symptoms of depression and anxiety. While this evidence is sufficient to demonstrate that the applicant's spouse would experience some emotional hardship, it does not demonstrate, even when considered in light of other hardships due to separation, that she would experience extreme hardship. The record does not contain sufficient evidence to demonstrate that the financial and emotional hardships to the applicant's spouse would rise above the common hardships to a degree of extreme hardship.

Counsel for the applicant asserts the applicant's spouse cannot relocate to Colombia because she has lived in the United States all her life and most of her family resides in the United States. Counsel further states that the applicant's daughter does not speak Spanish, is enrolled in school in the United States, and it would constitute a hardship for her to disrupt her education and relocate to Colombia. The applicant's spouse notes that she has very strong family ties to the United States and that it would be difficult for her to relocate to Colombia. She further notes that her daughter is enrolled in school in the United States and that any relocation would be devastating to her.

The record contains a copy of a birth certificate for the applicant's daughter, as well as photographs and letters from friends and family attesting to the applicant's role in supporting his family. However, the record does not contain evidence which supports the claimed hardships the applicant's spouse would experience if she relocated to Colombia with the applicant. As such, even when considered in the aggregate, the record fails to establish that the hardship upon relocation would rise to the level of extreme hardship.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that the applicant's spouse faces extreme hardship if he is refused admission. The AAO recognizes that the applicant's spouse states she will suffer some financial and emotional hardships as a result of separation from the applicant. These assertions, however, are common hardships associated with removal and separation, and do not rise to the level of "extreme" as informed by relevant precedent. U.S. court decisions have repeatedly held that the common results of removal or inadmissibility are insufficient to prove extreme hardship. See *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). In addition, *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined extreme hardship as hardship that was unusual or beyond that which would normally be expected upon deportation.

As noted above, the applicant has been convicted of at least two CIMTs, one of which is considered a violent or dangerous crime. An applicant who has been convicted of a dangerous or violent crime requires that an applicant meet the exceptional and extremely unusual hardship standard under section 212.7(d). As the applicant has not met the extreme hardship standard in this case, no purpose would be served in examining the hardship under section 212.7(D).

Even if the applicant had established that a qualifying relative would experience extreme hardship, his application would be denied as a matter of discretion due to an extensive criminal record. The applicant has been convicted of two CIMTs, one of which is considered a violent and dangerous crime requiring that he establish exceptional and extremely unusual hardship standard. In addition to these crimes, the applicant has also been convicted of numerous drinking and driving related convictions and a conviction as a habitual offender for driving while knowing that his license was suspended. These convictions demonstrate that he is a danger to the community and favorable discretion would not be warranted.

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.