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



U.S. Citizenship
and Immigration
Services

[REDACTED]

DATE:

JUN 15 2015

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to Section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT:

[REDACTED]

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Los Angeles, California. 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 the Philippines who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. The applicant's two older daughters are U.S. citizens and her youngest daughter is a lawful permanent resident. The applicant 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 family.

The Field Office Director found 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, accordingly. *Decision of the Field Office Director*, dated July 10, 2014.

On appeal, the applicant, through counsel, asserts that the Field Office Director's decision was arbitrary and capricious and an abuse of discretion. She states that her three adult daughters would experience extreme hardship if her waiver application is denied. *Brief in Support of Appeal*, dated September 5, 2014.

The record includes, but is not limited to, counsel's brief, statements from the applicant and her family members, criminal records, medical records, photographs, a psychological evaluation and country-conditions information about the Philippines. The entire record was reviewed and considered in arriving at 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 –

(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.)

The record reflects that the applicant was convicted on May 16, 2011, of health care fraud in violation of 18 U.S.C. § 1347, and she received a sentence of three years of probation, a \$100 special assessment and \$118,397.53 in restitution. 18 U.S.C. § 1347 states:

(a) Whoever knowingly and willfully executes, or attempts to execute, a scheme or artifice—

(1) to defraud any health care benefit program; or

(2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program,

in connection with the delivery of or payment for health care benefits, items, or services, shall be fined under this title or imprisoned not more than 10 years, or both. If the violation results in serious bodily injury (as defined in section 1365 of this title), such person shall be fined under this title or imprisoned not more than 20 years, or both; and if the violation results in death, such person shall be fined under this title, or imprisoned for any term of years or for life, or both.

(b) With respect to violations of this section, a person need not have actual knowledge of this section or specific intent to commit a violation of this section.

Fraud has, as a general rule, been held to involve moral turpitude. The U.S. Supreme Court in *Jordan v. De George* concluded that "Whatever else the phrase 'crime involving moral turpitude' may mean in peripheral cases, the decided cases make it plain that crimes in which fraud was an ingredient have always been regarded as involving moral turpitude Fraud is the touchstone by which this case should be judged. The phrase 'crime involving moral turpitude' has without exception been construed to embrace fraudulent conduct." 341 U.S. 223, 232 (1951).

In *Matter of Serna*, 20 I&N Dec. 579, 583-84 (1992), the BIA stated that intent to defraud involves moral turpitude. Moreover, in *Matter of Flores*, 17 I&N Dec. 225, 228 (1980), the BIA stated that where fraud is inherent in an offense, it is not necessary for the statute to expressly require intent to defraud as an element of the crime.

In a 2013 decision, the Supreme Court held that sentencing courts may not apply the modified categorical approach when the crime of which the defendant was convicted has a single, indivisible set of elements. *Descamps v. United States*, 133 S. Ct. 2276 (2013). The Court noted that the

modified categorical approach was developed so that when a statute was divisible and referred to several different crimes, “courts could discover which statutory phrase, contained within a statute listing several different crimes, covered a prior conviction.” *Id.* at 2284-85 (quoting *Nijhawan v. Holder*, 557 U.S. 29, 41 (2009) (internal quotation marks omitted)); *see also Johnson v. United States*, 559 U.S. 133, 144 (2010) (“[T]he ‘modified categorical approach’ that we have approved permits a court to determine which statutory phrase was the basis for the conviction.”).

In *Matter of Chairez-Castrejon*, the BIA revisited its method of determining whether a statute is divisible and held that the approach to divisibility applied in *Descamps* also applied in the immigration context. 26 I&N Dec. 349, 352-5 (BIA 2014) (reconsidering *Matter of Lanferman*, 25 I & N Dec. 721 (BIA 2012), and ultimately “withdraw[ing] from that decision to the extent that it is inconsistent with *Descamps*.”). The BIA noted that after *Descamps*, a criminal statute is divisible “only if (1) it lists multiple discrete offenses as enumerated alternatives or defines a single offense by reference to disjunctive sets of ‘elements,’ more than one combination of which could support a conviction; and (2) at least one, but not all, of those listed offenses or combinations of disjunctive elements is a categorical match” to the relevant generic offense. *Id.* at 353. The BIA further explained that for purpose of determining whether a statute is truly divisible, an offense’s elements are those facts about the crime which “[t]he Sixth Amendment contemplates that a jury--not a sentencing court--will find . . . unanimously and beyond a reasonable doubt.” *Id.* at 353 (quoting *Descamps* at 2288 (citing *Richardson v. United States*, 526 U.S. 813, 817 (1999))). The BIA found that a statute was not divisible merely because it “disjunctively enumerated intent, knowledge, and recklessness as alternative mental states” and further stated that the statute “can be ‘divisible’ into three separate offenses with distinct mens rea only if . . . jury unanimity regarding the mental state” was required. *Id.* at 352-354. As it had not been established that jury unanimity was required, the BIA held that the alternative mens rea were merely alternative “means” of committing the crime rather than alternative “elements” of the offense. *Id.* at 355.

We affirm that the knowing and willful execution of a scheme or artifice to defraud a health care benefit program involves moral turpitude, as does obtaining money or property from a health care benefit program “by means of false or fraudulent pretenses, representations, or promises.” The prescribed conduct under 18 U.S.C. § 1347 categorically involves moral turpitude, rendering the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The applicant does not contest her inadmissibility on appeal. The applicant requires a waiver under section 212(h) of the Act.

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

The Attorney General [now Secretary of the Department 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 children. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. See *Matter of Mendez-Morales*, 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 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.

The applicant, through counsel, asserts that the Field Office Director cut and pasted legal reasoning to support the decision without meaningfully reviewing the evidence; she did not analyze individual factors; she did not notify the applicant of derogatory information before denying the waiver, thus violating her due process¹; and she should have reopened the case to consider the evidence pursuant to 8 C.F.R. § 103.3(a)(2)(iii). The record reflects that the Field Office Director reviewed the facts of the case and applied relevant case law to analyze the facts. We will, however, review the case *de novo* based on the evidence presented and relevant case law.²

In addition, 8 C.F.R. § 103.3(a)(2)(iii) states:

(iii) *Favorable action instead of forwarding appeal to AAU.* The reviewing official shall decide whether or not favorable action is warranted. Within 45 days of receipt of the appeal, the reviewing official may treat the appeal as a motion to reopen or reconsider and take favorable action. However, that official is not precluded from reopening a proceeding or reconsidering a decision on his or her own motion under §103.5(a)(5)(i) of this part in order to make a new decision favorable to the affected party after 45 days of receipt of the appeal.

This regulation does not require the Field Office Director to treat the applicant's appeal as a motion; rather it gives the Field Office Director an option to do this to determine whether favorable action is warranted. Because the Field Office Director forwarded this appeal to the AAO, it is reasonable to conclude that she determined that favorable action was not warranted in this case.

¹ Constitutional issues are not within our appellate jurisdiction; therefore this assertion concerning the applicant's due process rights will not be addressed in the present decision.

² The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)

The applicant also asserts that the Field Office Director should have advised her of derogatory information to give her an opportunity to rebut it. The applicant cites to 8 C.F.R. § 103.2(b)(16)(i), which states, in pertinent part:

If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by the Service and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section.

The Field Office Director's decision, however, does not reflect reliance on derogatory information that the applicant did not present as evidence herself. The applicant, moreover, does not describe the specific derogatory information that she believes formed the basis of the Field Office Director's denial. We conclude that the record, therefore, does not reflect that the Field Office Director erred in this respect.

We now will address evidence the applicant submits relating to hardship her qualifying relatives would experience upon relocation to the Philippines. The record reflects that the applicant's daughters are 36, 31, and 25 years old, respectively. The applicant submits a 2013 psychological evaluation of her oldest daughter, prepared jointly by a social worker and a family therapist, who state that her oldest daughter claims to have been in the United States for the past 11 years; her family, community ties and support network are in the United States; she is accustomed to American culture; and she plans to attend a master's degree program in California.

According to the evaluation, the applicant's oldest daughter cannot move to the Philippines, as she relies on her income in the United States; she is worried about the lack of employment opportunities; there are many opportunities for her children in the United States; her income would only be one-fourth of her current income if she found a job in the Philippines; she would not be able to cover her student loans and debt and would have to file for bankruptcy; and she would worry about her youngest sister's safety, as the applicant would not be with her. The evaluation also indicates that the applicant's oldest daughter is a registered nurse. The counselors conclude the applicant's older daughter's "mental health is very fragile, and leaving behind [her] support [and] close relationships [and] access to mental health care would be extremely detrimental to her condition."

The applicant also submits articles and reports about country conditions in the Philippines, specifically concerning typhoon damage, crime, and age-based discrimination in employment practices there.

The record reflects that the applicant's oldest daughter was born and raised in the Philippines. The record does not include sufficient evidence to establish that she would have difficulty finding suitable employment there. Moreover, the applicant submits no evidence to corroborate claims of her oldest daughter's debts in the United States. It is reasonable to conclude that the applicant's oldest daughter would experience some emotional difficulty in relocating to the Philippines with her

children. Based on the evidence in the record, however, we find that there is insufficient corroborative documentary evidence of emotional, financial, medical or other types of hardship that, considered in their totality, establish that the applicant's oldest daughter would experience extreme hardship upon relocation to the Philippines.³

We will now address hardship to the applicant's qualifying relatives upon remaining in the United States. The applicant's oldest daughter describes emotional hardship she would experience upon separation from the applicant, stating that the applicant provided support and strength for her and her sisters to overcome the obstacles of growing up as immigrants; the applicant has helped her and her sisters throughout their lives; the applicant's love and support has helped her and her sisters progress in their education and careers; the applicant helps her care for her children; and she and her sisters will be devastated without the applicant.

The psychological evaluation the applicant submits shows that a therapist and social worker have diagnosed the applicant's oldest daughter with major depressive disorder, severe and recurrent without psychotic features. The psychologist and social worker state that the applicant's oldest daughter expressed fears for the applicant's safety and psychological well-being in the Philippines due to the high crime rate, noting that her uncle, who was a taxi-driver, was killed by a group of passengers. According to the psychological evaluation, the applicant's oldest daughter's health and well-being have declined due to her worries about the applicant's safety in the Philippines; and her symptoms are at risk of worsening, with the likelihood of suicidal thoughts and ideation.

The applicant's oldest daughter also asserts she would experience financial hardship without the applicant, because she would have to send money to support the applicant in the Philippines, where the applicant is unlikely to find employment; and because she would have nobody to care for her children, she also would have to pay for child care; she and her spouse live paycheck to paycheck; and she and her spouse owe \$10,000 in credit card bills and \$45,000 in student loans.

The applicant, through counsel, states that the applicant stays at her daughters' respective residences, depending on who has the greatest need; and she spends the most time with her youngest daughter, who has cerebral palsy and scoliosis and recently had a baby. The applicant's youngest daughter states that she was born with cerebral palsy; the applicant did everything to make her feel normal; she took her to speech and physical therapists when she was young; she cannot care for her baby alone; and she cannot control her grip due to her condition. The record includes a 2013 prescription note in which a doctor states that the applicant's youngest daughter has cerebral palsy, which gives her speech, mental and movement problems; and she needs caregiving that her husband or the applicant could provide. The applicant's son-in-law, in his declaration submitted on appeal, states that he works as a chemist and his job is extremely demanding; the applicant helps take care of her youngest daughter, his spouse; it is impossible for him to care for his spouse and their child without the applicant; he cannot afford to hire someone to care for his spouse and child; the applicant also

³ The record does not include claims of hardship to the applicant's two younger daughters if they relocate to the Philippines.

cooks, cleans and does laundry for them; and his spouse cannot carry the baby for a long time due to pain.

The record reflects that given their close relationship and the support the applicant has provided them, the applicant's oldest and youngest daughters would experience emotional difficulty without the applicant. The applicant, however, does not indicate that she would live in a particularly dangerous part of the Philippines. In addition, the applicant has not provided sufficient documentary evidence to establish the level of financial hardship her daughters would experience, if any, without her assistance. Moreover, though the applicant submits many special-education and related medical records for her youngest daughter, these records do not provide details to corroborate claims about her daughter's current medical condition, abilities and limitations, if any. Based on the evidence in the record we find that there is insufficient documentary evidence of emotional, financial, medical or other types of hardship that, considered in their totality, establish that a qualifying relative would experience extreme hardship upon remaining in the United States.

The documentation in the record does not establish the existence of extreme hardship to a qualifying relative caused by the applicant's inadmissibility to the United States. Therefore, we find that no purpose would be served in discussing 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.