



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF D-M-V-

DATE: JAN. 28, 2016

APPEAL OF DETROIT FIELD OFFICE DECISION

APPLICATION: FORM I-601, APPLICATION FOR WAIVER OF GROUNDS OF  
INADMISSIBILITY

The Applicant, a native and citizen of Vietnam, seeks a waiver of inadmissibility. *See* Immigration and Nationality Act (the Act) § 212(h), 8 U.S.C. § 1182(h). The Field Office Director, Detroit, Michigan, denied the application. The matter is now before us on appeal. The appeal will be sustained.

The Applicant was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of crimes involving moral turpitude. He filed a Form I-601, Application for Waiver of Grounds of Inadmissibility, on October 10, 2014. The Applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his U.S. citizen family members.

In a decision dated April 2, 2015, the Director denied the Form I-601 as a matter of discretion, citing to a lack of evidence of rehabilitation or family contribution, additional criminal convictions, and sporadic employment as the negative factors that outweighed the positive factors in determining that discretion was not warranted.

On appeal, the Applicant asserts that the Director did not consider all of the evidence, including evidence of the Applicant's mental health condition, and failed to consider all of the hardship factors in the aggregate or follow and apply relevant case law, particularly *Matter of Mendez-Morales*, 21 I&N Dec. 296, 299 (BIA 1996), with regard to the exercise of discretion. The Applicant submits a brief and resubmits evidence filed with the Form I-601.

The record contains, but is not limited to, the Applicant's brief; statements from some of the Applicant's family members and friends; copies of birth certificates; copies of tax forms for the Applicant; copies of previous immigration documents and other official records such as the Applicant's Form I-94, a previous Employment Authorization Document, and Michigan Driver's License; tax records and financial documents of the Applicant's family members; copy of a Repatriation Agreement between Vietnam and the United States; copy of psychological evaluation of the Applicant; copy of the Pre-Sentence Investigation of the Applicant by the Michigan Department of Corrections; and court records relating to the Applicant's criminal record.

*Matter of D-M-V-*

We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record has been reviewed and considered in rendering a decision on the appeal.

Section 212(a)(2)(A) of the Act, 8 U.S.C. § 1182(a)(2)(A), states, in pertinent parts:

(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 (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

In assessing whether a conviction is a crime involving moral turpitude, we must first “determine what law, or portion of law, was violated.” *Matter of Esfandiary*, 16 I&N Dec. 659, 660 (BIA 1979). We conduct a categorical inquiry for that statutory offense, considering the “inherent nature of the crime as defined by statute and interpreted by the courts,” not the underlying facts of the crime committed. *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)). This categorical inquiry focuses on whether moral turpitude necessarily inheres in the minimal conduct for which there is a realistic probability of prosecution under the statute. See *Short, supra*; *Louissaint, supra*; *Moncrieffe v. Holder*, 133 S.Ct. 1678, 1684-1685 (2013); *Gonzales v. Duenas-Alvarez*, 127 S.Ct. 815, 822 (2007).

Where a criminal statute does not contain a single, indivisible set of elements, but rather encompasses multiple distinct criminal offenses, “some . . . which involve moral turpitude and some which do not,” we engage in a modified categorical inquiry. *Short, supra*, at 137-138. A statute is divisible only if it lists “potential offense elements in the alternative, render[ing] opaque which element played a part in the defendant’s conviction.” *Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013).

The record indicates that the Applicant has been convicted of two crimes involving moral turpitude: Check No Account – Attempted, in violation of Michigan Penal Code Section 750.131 3(a)(1), a misdemeanor, on [REDACTED] 2003; and Uttering and Publishing – Attempt, in violation of Michigan Penal Code Section 750.249(A), a felony on [REDACTED] 2013. The offenses for which the Applicant was convicted both involve the intent to defraud. The U.S. Supreme Court had found that “the phrase ‘crime involving moral turpitude’ has, without exception, been construed to embrace fraudulent conduct.” *Jordan v. De George*, 341 U.S. 223, 232 (1951). As such, these convictions

render the Applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The Applicant does not contest his inadmissibility for these convictions.

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

The Secretary, Homeland Security, (“Secretary”) may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) . . . if –

(1) (A) . . . it is established to the satisfaction of the Attorney General that –

(i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(iii) the alien has been rehabilitated; or

(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 Attorney General 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 . . .

In order to obtain a waiver under Section 212(h)(1)(B) of the Act, the Applicant must demonstrate that denial of the application would result in extreme hardship to a qualifying relative or relatives. In this case, the qualifying relatives are the Applicant’s parents. Hardship to the Applicant or others can be considered only insofar as it results in hardship to a qualifying relative. *Matter of Gonzalez Recinas*, 23 I&N Dec. 467, 471 (BIA 2002).

The definition of extreme hardship “is not . . . fixed and inflexible, and the elements to establish extreme hardship are dependent upon the facts and circumstances of each case.” *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999) (citation omitted). Extreme hardship exists “only in cases of great actual and prospective injury,” *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (BIA 1984), but hardship “need not be unique to be extreme.” *Matter of L-O-G-*, 21 I&N Dec. 413, 418 (BIA 1996). The common consequences of removal or refusal of admission, which include “economic detriment . . . [,] loss of current employment, the inability to maintain one’s standard of living or to pursue a chosen profession, separation from a family member, [and] cultural readjustment,” are insufficient alone to constitute extreme hardship. *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996) (citations omitted); *see also Matter of Shaughnessy*, 12 I&N Dec. 810 (BIA 1968) (separation of family members and financial difficulties alone do not establish extreme hardship); *but see Matter of Kao and Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* 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 the qualifying relatives would relocate). Nevertheless, all “[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists.” *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994) (citations omitted).

The Director determined that the record contained sufficient evidence to demonstrate that the Applicant’s mother would experience extreme hardship due to the Applicant’s inadmissibility. After a review of the evidence in the record, we concur with the Director that extreme hardship to a qualifying relative has been established, and we will not disturb this finding.

We now consider whether the Applicant merits a waiver of inadmissibility as a matter of discretion. The burden is on the Applicant to establish that a waiver of inadmissibility is warranted in the exercise of discretion. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 299 (BIA 1996). We must “balance the adverse factors evidencing an alien’s undesirability as a permanent resident with the social and humane considerations presented on the alien’s behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country.” *Id.* at 300 (citations omitted). In evaluating whether to favorably exercise discretion,

the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country’s immigration laws, the existence of a criminal record, and if so, its nature, recency and seriousness, and the presence of other evidence indicative of the alien’s bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country’s Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien’s good character (e.g., affidavits from family, friends and responsible community representatives).

*Id.* at 301 (citations omitted). We must also consider “[t]he underlying significance of the adverse and favorable factors.” *Id.* at 302. For example, we assess the “quality” of relationships to family, and “the equity of a marriage and the weight given to any hardship to the spouse is diminished if the parties married after the commencement of [removal] proceedings, with knowledge that the alien might be [removed].” *Id.* (citation omitted).

In denying the application as a matter of discretion, the Director cited to a lack of evidence regarding the Applicant’s rehabilitation and contribution to the support of his family, his sporadic employment, and his criminal convictions and the Applicant’s lack of status since he entered the United States in 1992.

*Matter of D-M-V-*

On appeal, the Applicant responds that it was improper to consider work history because the Applicant has only had sporadic employment authorization while in the United States. The Applicant also notes that he entered the United States with an indefinite Public Interest Parole, which is clearly established by his stamped I-94 card contained in the record, and was thus not “out of status” as the Director suggested. The Applicant also asserts the Director either ignored or dismissed the sentiments expressed in statements by the Applicant’s family and friends, and that it was inappropriate to consider criminal charges that were never prosecuted against the Applicant as a negative factor.

After a thorough review of the record we find that the positive factors in this case outweigh the negative factors and that the Applicant warrants a favorable exercise of discretion.

The record contains statements from a relative of the Applicant and friends of the Applicant’s family in support of the waiver application. In a letter dated February 17, 2015, a family relative states that the Applicant’s mother has suffered through many tragedies, including the 2003 death of the Applicant’s brother, and relies on the Applicant to “pass the stages of misery and grief,” and the Applicant also helps her financially. Other letters state that the Applicant’s mother is the sole source of income for the eight relatives that live in the house, and that granting the Applicant’s waiver would allow him to adjust his status and obtain employment and assist his mother.

The record also contains evidence of hardship the Applicant would experience in Vietnam if he were removed from the United States. While hardship to an Applicant may not be considered when determining extreme hardship to a qualifying relative, it may be considered when determining whether an Applicant merits a favorable exercise of discretion. A Pre-Sentence Report, conducted as part of his 2013 conviction for Uttering and Publishing, and the February 4, 2015, mental health examination report by [REDACTED] make clear that the Applicant does not have more than a fifth grade education, is functionally illiterate, suffers from symptoms of depression and Post Traumatic Stress Disorder (PTSD), and may have retrograde effects from a traumatic brain injury. The Applicant asserts that because of his mental health condition and his need for continued access to treatment, he would experience hardship in Vietnam and would be unable to work and support himself and be vulnerable, with people likely to take advantage of him.

The record establishes that the Applicant has deep and extensive family ties in the United States. The Applicant resides with 7 other family members, many of whom suffer from mental health issues, and currently his mother is the only one who is able to provide income. As noted above, the Director determined that the Applicant’s mother would experience extreme hardship if the Applicant were removed based on concern for the Applicant’s welfare in Vietnam and being overwhelmed with having to provide emotional and financial support to family members. The record further indicates that the Applicant has resided in the United States for 24 years; suffers from symptoms of depression, PTSD, and possible traumatic brain injury; has only a fifth grade education, and is functionally illiterate. Returning him to Vietnam and separating him from his family, mental health treatment providers, and residence of 24 years, would result in hardship to the Applicant and to his parents and other family members.

The negative factors in this case are the Applicant's two convictions for crimes involving moral turpitude and his order of removal. Although the Applicant's convictions are for serious crimes, they are not crimes of violence, and the Applicant has served less than six months jail time for all convictions on his criminal record.<sup>1</sup> While counsel for the Applicant does assert in his brief that the Applicant regrets having committed crimes involving moral turpitude, we note that there is no statement from the Applicant himself concerning his crimes. The Applicant's more recent conviction was in 2013 for conduct occurring that year, and the record does not contain evidence of rehabilitation. The Applicant asserts that, due to his illiteracy and mental health conditions, it is not possible for him to meaningfully engage in rehabilitation activities. The evidence in the record, discussed above, supports the Applicant's assertion, and we further note that, prior to the Applicant's guilty plea to his conviction for Check No Account – Attempted, he was referred to a competency hearing by the court.

When considering the totality of the circumstances, we find that the positive factors in this case, including the Applicant's family ties, length of residence in the United States, and hardship to himself and his family members if he is removed, outweigh the negative factors, and he merits a favorable exercise of discretion.

The Applicant has the burden of proving eligibility for a waiver of inadmissibility. *See* section 291 of the Act, 8 U.S.C. § 1361. The Applicant has met that burden. Accordingly, we will sustain the appeal.

**ORDER:** The appeal is sustained.

Cite as *Matter of D-M-V-*, ID# 15302 (AAO Jan. 28, 2016)

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<sup>1</sup> The Applicant also has other convictions related to motor vehicle laws and a littering conviction, but these crimes do not involve moral turpitude and did not result in any jail time.