

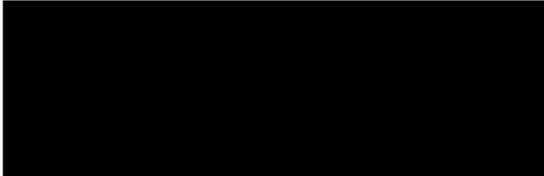
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



H5

FILE:



Office: VIENNA, AUSTRIA

Date:

MAY 12 2010

IN RE:

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

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer-in-Charge (OIC) Vienna, Austria. 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 Bosnia 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), as an alien convicted of a crime involving moral turpitude. The applicant was then found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for having attempted to procure admission into the United States by willful misrepresentation of his criminal record. The applicant is married to a U.S. citizen and has three lawful permanent resident children. He seeks a waiver of inadmissibility in order to reside in the United States.

In a decision dated March 27, 2007, the OIC finds the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of Domestic Battery on October 21, 2003. The OIC also finds the applicant inadmissible under section 212(a)(6)(C)(i) of the Act for failing to disclose this conviction when he applied for a visa to travel to the United States at the U.S. Embassy in Sarajevo. The OIC then finds that the applicant failed to establish extreme hardship to his qualifying relative as a result of his inadmissibility. The application was denied accordingly.

On appeal the applicant submits a statement of hardship dated April 11, 2007.

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.

(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 the recently decided *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. First, in evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a “realistic probability, not a theoretical possibility,” that the statute would be applied to reach conduct that does not involve moral turpitude. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability exists where, at the time of the proceeding, an “actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien’s own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude.” *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

However, if a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, “the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude.” 24 I&N Dec. at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage inquiry in which the adjudicator reviews the “record of conviction” to determine if the conviction was based on conduct involving moral turpitude. *Id.* at 698-699, 703-704, 708. The record of conviction consists of documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.* at 698, 704, 708.

If review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. 24

I&N Dec. at 699-704, 708-709. However, this “does not mean that the parties would be free to present any and all evidence bearing on an alien’s conduct leading to the conviction. (citation omitted). The sole purpose of the inquiry is to ascertain the nature of the prior conviction; it is not an invitation to relitigate the conviction itself.” *Id.* at 703.

The record indicates that on October 21, 2003 the applicant was convicted of Domestic Battery in violation of Indiana Code § 35-42-2-1.3, a class A misdemeanor, for events that took place on June 19, 2003.

At the time of the applicant’s conviction, Indiana Code § 35-42-2-1.3 provided, in pertinent parts:

Sec. 1.3. (a) A person who knowingly or intentionally touches an individual who:

- (1) is or was a spouse of the other person;
- (2) is or was living as if a spouse of the other person as provided in subsection (b); or
- (3) has a child in common with the other person;

in a rude, insolent, or angry manner that results in bodily injury to the person described in subdivision (1), (2), or (3) commits domestic battery, a Class A misdemeanor...

In addition, Indiana Code § 35-50-3-2 provided, “A person who commits a Class A misdemeanor shall be imprisoned for a fixed term of not more than one (1) year; in addition, he may be fined not more than five thousand dollars (\$5,000).”

The AAO notes that simple assault or battery has been found to not involve moral turpitude for purposes of immigration law, even if the intentional infliction of physical injury is an element of the crime. *Matter of Fualau*, 21 I&N Dec. 475,477 (BIA 1996). This rule does not apply, however, where an assault or battery involved some aggravating dimension, such as the use of a deadly weapon or the infliction of serious injury on persons whom society views as deserving of special protection, such as children, domestic partners or peace officers. See, e.g., *Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988). The statute and the record of conviction indicates that the applicant’s conviction for domestic battery involved aggravating dimensions, as the victim’s injuries were significant. The Domestic Violence Affidavit for Probable Cause, dated June 19, 2003, states that the applicant punched the victim several times causing bruises, swelling and pain to several parts of her body, including her head. The applicant also threatened to kill the victim, which caused her to seek the safety of a shelter. After the applicant came to the shelter to find the victim, the victim obtained an order of protection against the applicant. Given these facts, the AAO finds that the applicant’s conviction for Domestic Battery under Indiana Code § 35-42-2-1.3 is a conviction for a crime involving more turpitude and the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The AAO notes that the applicant was also found inadmissible to the United States under section 212(a)(6)(C) of the Act for having misrepresented his criminal record when applying for a visa to the United States.

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

- (i) 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.

The OIC found that the applicant misrepresented himself in an attempt to gain entry into the United States when he did not disclose his criminal conviction on his visa application. The AAO concurs that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act because his misrepresentation was material.

According to the Department of State's Foreign Affairs Manual, a misrepresentation 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 that is relevant to the alien's eligibility and that might well have resulted in a proper determination that he be excluded. *9 FAM 40.63 N61*. Because the applicant's conviction was for a crime involving moral turpitude, if he had disclosed his conviction, it would have resulted in his inadmissibility. Therefore, his conviction is material and the applicant's omission is a material misrepresentation. 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 US 759 (1988); see also *Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998); *Matter of Martinez-Lopez*, 10 I&N Dec. 409 (BIA 1962; AG 1964) and *Matter of S- and B-C-*, 9 I&N Dec. 436 (BIA 1950; AG 1961).

Thus, the applicant is inadmissible under both section 212(a)(6)(C)(i) and section 212(a)(2)(A)(i) of the Act. However, the applicant is eligible to apply for a waiver of these grounds of inadmissibility under sections 212(h) and 212(i) of the Act.

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

- (h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if -
 - (1) (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 [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 . . .

Section 212(i) of the Act provides that:

- (1) The Attorney General [now the Secretary of Homeland Security, “Secretary”] may, in the discretion of the Attorney General [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 Attorney General [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.

A section 212(i) waiver of the bar to admission resulting from section 212(a)(6)(C)(i) of the Act dependent upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse and/or parent of the applicant. A section 212(h) waiver of the bar to admission resulting from section 212(a)(2)(A) of the Act is dependent upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse, parent and/or child of the applicant. Hardship the applicant experiences due to separation is not considered in section 212(h) and section 212(i) waiver proceedings unless it causes hardship to the applicant’s spouse. The AAO notes that the applicant has three lawful permanent resident children and hardship to them is considered in section 212(h) waiver proceedings, but is not considered in section 212(i) waiver proceedings unless it is shown that the hardship to his children is causing hardship to his spouse. Thus, the applicant’s waiver application will be analyzed in accordance with the more restrictive, section 212(i) waiver proceedings.

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999), the BIA provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 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. 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 an exclusive list. *See id.*

Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact 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. *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996). (Citations omitted).

The AAO notes that in *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998), the Ninth Circuit Court of Appeals held that, “the most important single hardship factor may be the separation of the alien from family living in the United States”, and that, “[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion.” (Citations omitted). Although the present case did not arise in the Ninth Circuit, separation of family will be given appropriate weight in the assessment of hardship factors.

The AAO notes further, however, that U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. See *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). For example, in *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), the BIA held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), the Court defined “extreme hardship” as hardship that was unusual or beyond that which would normally be expected upon deportation. The Court emphasized that the common results of deportation are insufficient to prove extreme hardship. Moreover, the U.S. Supreme Court held in *INS v. Jong Ha Wang*, 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

An analysis under *Matter of Cervantes-Gonzalez* is appropriate. The AAO notes that extreme hardship to a qualifying relative must be established in the event that he or she accompanies the applicant and in the event that he or she remains in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant’s waiver request.

The record of hardship includes a statement from the applicant and two statements from the applicant’s spouse. In his statement dated April 11, 2007, the applicant states that he is sorry for his actions in the past, that he did not understand English very well, answered his immigrant visa questions incorrectly, and that he would like another chance to live in the United States with his spouse and children. In her statements the applicant’s spouse states life in the United States is extremely hard for her as a single mother of four children, two of whom still live with her. She states that her former husband died in the war in Bosnia and she greatly values family time together. She also states that she would like to further her education to earn higher wages, but it is financially difficult for her without the applicant in the United States. In addition, she states that she is currently living without health insurance because she cannot afford it. Finally, she states that her home needs improvements and the applicant has a good job waiting for him in the United States.

The AAO acknowledges that the inadmissibility of an immediate family member causes hardship, but for a waiver to be granted the applicant must show that his qualifying family member is experiencing hardship that is extreme. The applicant must show that his qualifying relative would suffer extreme hardship as a result of being separated from him and as a result of relocating to be with him. To show extreme hardship the applicant must submit details regarding the hardship being suffered and documentation supporting the applicant’s statements. The current record gives little detail concerning separation and no details concerning relocation. In addition, the record does not contain any supporting documentation. 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)).

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant’s spouse caused by the applicant’s inadmissibility to the United States. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

The AAO further notes that because the applicant's crime was a violent crime, he would not warrant a favorable exercise of discretion absent extraordinary circumstances, in accordance with the regulation at 8 C.F.R. § 212.7(d).

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) and 212(i) of the Act, the burden of proving eligibility remains entirely with the applicant. *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.