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



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

PUBLIC COPY

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FILE:

Office: LOS ANGELES, CALIFORNIA Date:

NOV 09 2010

IN RE:

Applicant:

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

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Los Angeles, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of Columbia who was 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 seeking admission into the United States by fraud or willful misrepresentation. The applicant sought a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i). The director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. The applicant submitted a timely appeal.

On appeal, counsel argues that the director failed to consider in the hardship analysis that the applicant and his wife will be in danger in Columbia on account of the Revolutionary Armed Forces of Columbia (FARC). He asserts that the applicant's wife's family ties to the United States are important in the hardship analysis.

The AAO will first address the finding of inadmissibility for seeking admission into the United States by fraud or willful misrepresentation, which is under section 212(a)(6)(C) of the Act. That section 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 record indicates that on August 10, 2004 at the Miami International Airport the applicant sought to gain admission into the United States by presenting his passport containing a photo-substituted United States nonimmigrant visa. In the record of sworn statement, the applicant states that he purchased the visa from a man who he had met outside the American Embassy in Bogota. Based on the foregoing, the applicant is inadmissible under section 212(a)(6)(C) of the Act for seeking to procure admission into the United States based on the willful misrepresentation of the material fact of his eligibility for admission to the United States.

Section 212(i) of the Act provides a waiver for fraud and material misrepresentation. That section states 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.

Although not addressed by the officer, review of the record reveals that the AAO needs to make a determination as to whether the applicant's conviction under 18 U.S.C. § 1546(a) renders him inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

Section 212(a)(2) 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 record indicates that in 2004 in Florida the applicant was convicted of knowingly using and attempting to use a counterfeited, altered and falsely made United States visa under 18 U.S.C. § 1546(a). He was sentenced to imprisonment for one month and granted supervised release. The provision under 18 U.S.C. § 1546(a) under which the applicant was convicted provides, in pertinent parts:

- (a) Whoever knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, or utters, uses, attempts to use, possesses, obtains, accepts, or receives any such visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained; or

. . . .

Shall be fined under this title or imprisoned not more than 25 years . . .

- (b) Whoever uses--

- (1) an identification document, knowing (or having reason to know) that the document was not issued lawfully for the use of the possessor,
- (2) an identification document knowing (or having reason to know) that the document

is false, or

(3) a false attestation,

for the purpose of satisfying a requirement of section 274A(b) of the Immigration and Nationality Act, shall be fined under this title, imprisoned not more than 5 years, or both. . . .

The Board of Immigration Appeals (Board) 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.)

To determine if a crime involves moral turpitude, the Ninth Circuit Court of Appeals first applies the categorical approach. *Nunez v. Holder*, 594 F.3d 1124, 1129 (9th Cir. 2010) (citing *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 999 (9th Cir.2008)). This approach requires analyzing the elements of the crime to determine whether all of the proscribed conduct involves moral turpitude. *Nicanor-Romero*, *supra* at 999. In *Nicanor-Romero*, the Ninth Circuit states that in making this determination there must be "a realistic probability, not a theoretical possibility, that the statute would be applied to reach conduct that did not involve moral turpitude. *Id.* at 1004 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability can be established by showing that, in at least one other case, which includes the alien's own case, the state courts applied the statute to conduct that did not involve moral turpitude. *Id.* at 1004-05. *See also Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008) (whether an offense categorically involves moral turpitude requires reviewing the criminal statute to determine if there is a "realistic probability, not a theoretical possibility," that the statute would be applied to conduct that is not morally turpitudinous).

If the crime does not categorically involve moral turpitude, then the modified categorical approach is applied. *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1161 (9th Cir. 2009). This approach requires looking to the "limited, specified set of documents" that comprise what has become known as the record of conviction—the charging document, a signed plea agreement, jury instructions, guilty pleas, transcripts of a plea proceeding and the judgment—to determine if the conviction entailed admission to, or proof of, the necessary elements of a crime involving moral turpitude. *Id.* at 1161 (citing *Fernando-Ruiz v. Gonzalez*, 466 F.3d 1121, 1132-33 (9th Cir. 2006)).

In *Omagah v. Ashcroft*, 288 F.3d 254, 261 (5th Cir. 2002), the Fifth Circuit states that the Board parsed section 1546 in a manner that is consistent with the Fifth Circuit's precedent. The Board interpreted section § 1546 as:

[S]eparately prohibiting (1) simple, knowing possession of illegal documents, (2) possession of illegal documents with an intent to use them, and (3) forgery of illegal documents. Section 1546 prohibits a wide variety of crimes relating to the forgery of immigration papers: forging papers, owning blank papers, lying on applications, and impersonating another person. 18 U.S.C. § 1546(a)-(b).

The Fifth Circuit found reasonable and upheld the Board's decision "that conspiracy to possess forged immigration documents with intent to use them involved moral turpitude." *Id.* at 261-262.

We note that in *Matter of Serna*, 20 I&N Dec. 579, 586 (BIA 1992), the Board analyzed whether possession of an altered document in violation of section 1546(a) involved moral turpitude. The Board held that "possession of an altered immigration document with the knowledge that it was altered, but without its use or proof of any intent to use it unlawfully, is not a crime involving moral turpitude." The Board reasoned that there may be circumstances under which the respondent might not have had the intent to use the altered immigration document in his possession unlawfully. *Id.*

By its terms, section 1546(a) convicts a person for conduct that both does and does not involve moral turpitude. A person may be convicted for simple, knowing possession of illegal documents without having any intent to use those illegal documents, which *Serna* and *Omagah* indicate does not involve moral turpitude. Conversely, a person may be convicted under section 1546(a) for possession of illegal documents with an intent to use them, which conduct involves moral turpitude. Therefore, the AAO cannot find that a violation of section 1546(a) 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 engage in a second-stage inquiry by reviewing the record of conviction to determine if the conviction was based on conduct involving moral turpitude. *Silva-Trevino* 24 I&N Dec. 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, we will then consider any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. *Id.* at 699-704, 708-709.

The record of conviction establishes that the applicant was convicted of knowingly using and attempting to use a counterfeited, altered and falsely made United States visa. Thus, we find that based on the aforementioned cases, wherein a person's unlawful use of an altered immigration document with the knowledge that it was altered is a crime involving moral turpitude, we find the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude.

The waiver for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act is found under section 212(h) of the Act. That section provides, in pertinent part:

A waiver is available for inadmissibility under section 212(a)(2)(A)(i)(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 -

. . .

(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 . . .

A waiver of inadmissibility under sections 212(i) and 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. Under section 212(i), the only qualifying relatives are U.S. citizen or lawful permanent resident spouses and parents. The applicant must demonstrate extreme hardship to his U.S. citizen spouse. Hardship to the applicant and is considered only to the extent it results in hardship to the qualifying relative. If extreme hardship to a qualifying relative is established, USCIS then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996).

As a qualifying relative is not required to depart the United States as a consequence of an applicant's inadmissibility, two distinct factual scenarios are possible should a waiver application be denied: either the qualifying relative will join the applicant to reside abroad or the qualifying relative will remain in the United States. Ascertaining the actual course of action to be taken is difficult, and it is complicated by the fact that an applicant may easily assert a plan for the qualifying relative to relocate abroad or to remain in the United States depending on which scenario presents the greatest prospective hardship, even though no intention exists to carry out the alleged plan in reality. *Cf. Matter of Ige*, 20 I&N Dec. 880, 885 (BIA 1994) (addressing separation of minor child from both parents applying for suspension of deportation). Thus, we interpret the statutory language of the various waiver provisions in section 212 of the Act to require an applicant to establish extreme hardship to his or her qualifying relative(s) under both possible scenarios. To endure the hardship of separation when extreme hardship could be avoided by joining the applicant abroad, or to endure the hardship of relocation when extreme hardship could be avoided by remaining in the United States, is a matter of choice and not the result of removal or inadmissibility. As the Board stated in *Matter of Ige*:

[W]e consider the critical issue . . . to be whether a child would suffer extreme hardship if he accompanied his parent abroad. If, as in this case, no hardship would ensue, then the fact that the child might face hardship if left in the United States would be the result of parental choice, not the parent's deportation.

Id. See also *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (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*, 22 I&N Dec. 560, 565-66 (BIA 1999), the Board 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. *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 deportation, 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. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *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.*

We observe that 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., In re 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).

In rendering this decision, the AAO will consider all of the evidence in the record such as declarations, academic records, the oral decision of the immigration judge, photographs, the U.S. Department of State Country Reports on Human Rights Practices – 2006 for Columbia, information by Human Rights Watch on Columbia, and other documentation.

With regard to remaining in the United States without the applicant, the applicant's spouse states in her declaration dated March 7, 2008, that she has a close relationship with her husband, to whom she has been married for two years. If separated from her husband, she asserts that "I would feel like a great part of my life is apart from me. I love my husband with all my heart and without him I would feel empty." [REDACTED] indicates in the letter dated July 29, 2010, that the applicant's spouse is currently pregnant. The applicant's wife states in her declaration that she is a student and works part time, and is financially supported by her husband. She indicates that without her husband she will have to place her career on hold in order to pay her expenses. The record contains the unofficial student academic record from California State University, Northridge.

Family separation has been found to be a common result of inadmissibility or removal in some cases. *See Matter of Shaughnessy*, 12 I&N Dec. at 813. Nevertheless, family ties are to be considered in analyzing hardship. *See Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 565-66. The question of whether family separation is the ordinary result of inadmissibility or removal may depend on the type of familial relationship considered. For example, in *Matter of Shaughnessy*, the Board considered the scenario of parents being separated from their soon-to-be adult son, finding that this separation would not result in extreme hardship to the parents. *Id.* at 811-12; *see also U.S. v. Arrieta*, 224 F.3d 1076, 1082 (9th Cir. 2000) ("Mr. Arrieta was not a spouse, but a son and brother. It was evident from the record that the effect of the deportation order would be separation rather than relocation."). In *Matter of Cervantes-Gonzalez*, the Board considered the scenario of the respondent's spouse accompanying him to Mexico, finding that she would not experience extreme hardship from losing "physical proximity to her family" in the United States. 22 I&N Dec. at 566-67.

The decision in *Cervantes-Gonzalez* reflects the norm that spouses reside with one another and otherwise establish a life together, such that separating from one another is likely to result in substantial hardship. It is common for both spouses to relocate abroad if one of them is not allowed to stay in the United States, which typically results in separation from other family members living in the United States. Other decisions reflect the expectation that minor children will remain with their parents, upon whom they usually depend for financial and emotional support. *See, e.g., Matter of Ige*, 20 I&N Dec. at 886 ("[I]t is generally preferable for children to be brought up by their parents."). Therefore, the most important single hardship factor may be separation, particularly where spouses and minor children are concerned. *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *Cerrillo-Perez*, 809 F.2d at 1422.

Regardless of the type of familial relationship involved, the hardship resulting from family separation is based on the actual impact of separation on an applicant, and all hardships must be considered in determining whether the combination of hardships takes the case beyond the consequences ordinarily associated with removal or inadmissibility. *Matter of O-J-O-*, 21 I&N Dec. at 383. Indeed, the specific facts of a case may dictate that even the separation of a spouse and children from an applicant does not constitute extreme hardship. In *Matter of Ngai*, for instance, the Board did not find extreme hardship because the claims of hardship conflicted with evidence in the record and because the applicant and his spouse had been voluntarily separated from one another for 28 years. 19 I&N Dec. at 247. Nevertheless, though we require an applicant to show that a qualifying relative would experience extreme hardship both in the event of relocation and in the event of separation, in analyzing the latter scenario, we give considerable, if not predominant, weight

to the hardship of separation itself, particularly in cases involving the separation of spouses from one another and/or minor children from a parent. *Salcido-Salcido*, 138 F.3d at 1293.

The hardship factor asserted in the instant case, and demonstrated by the record, is the emotional impact to the applicant's wife as a result of separation from her husband, with whom she has been married to for two years and is expecting a child, and who supports her financially. In view of the substantial weight that is given to this type of family separation in the hardship analysis, and in light of the significant impact that separation will have on the applicant's wife, we find the applicant has established that the hardship that his wife will experience as a result of separation is extreme.

With regard to the hardship of relocating to Columbia, the applicant's spouse asserts in her declaration that her mother, who is her best friend, will want to die if they are separated. The applicant's wife conveys that she is the first in her family to graduate from high school, and that she does not believe she will be able to continue her education in Columbia. The applicant's wife indicates that she was born in the United States and that she and her husband have no family members in Columbia. She avers that her husband's family members left Columbia and now live in Spain or the United States on account of the war. She asserts that she is afraid to live in Columbia because her life will be in jeopardy, particularly in view of what previously happened to her husband in Columbia. We note that the oral decision by the immigration judge dated August 31, 2005, indicates that the applicant's husband asserted that he was targeted by ██████ in 2002 to pay money for their cause. The immigration judge observed that it was not clear that ██████ was responsible for assaulting the applicant in June and August of 2002, particularly because the submitted newspaper articles reflect that the assailants were "unidentified subjects."

The hardship factors asserted in the instant case are the emotional impact to the applicant's wife as a result of separation from family members in the United States, living in a dangerous country, and not being able to continue her education in Columbia. Though we recognize that the applicant's spouse will endure emotional hardship as a result of separation from family members in the United States, particularly her mother, we note that the record reflects that she is an adult and does not have the same financial and emotional dependence upon a parent as might a minor child. In regard to conditions in Columbia, the U.S. Department of State, Bureau of Consular Affairs, Travel Warning, Columbia (March 5, 2010) indicates that security in Colombia has improved significantly in recent years, and that "the incidence of kidnapping in Colombia has diminished significantly from its peak at the beginning of this decade." The AAO acknowledges that Columbia currently has problems with terrorist groups and other criminal organizations. However, in view of the U.S. Department of State, Bureau of Consular Affairs, Country Specific Information for Columbia (June 25, 2010), which indicates that Colombia is a medium-income nation with a population of 44 million people, we find that the applicant has not fully demonstrated that his wife will be singled out and that her life will be in danger. Moreover, we note that the immigration judge indicated that it was not established that ██████ had assaulted the applicant. The applicant has not demonstrated that his wife will be able to continue her education in Columbia. When all of the alleged hardship factors are considered in the aggregate, we find that they fail to establish that the hardship to be endured by the applicant's wife as a result of joining the applicant to live in Columbia meets the standard of "extreme hardship."

Based upon the record before the AAO, the applicant in this case fails to establish extreme hardship to a qualifying family member for purposes of relief under sections 212(i) and 212(h) of the Act.

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.

In proceedings for application for waiver of grounds of inadmissibility under sections 212(i) and 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.