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

U.S. Citizenship and Immigration Services

H5

[redacted]

FILE: [redacted] Office: LONDON, ENGLAND Date: FEB 0 2 2011

IN RE: Applicant: [redacted]

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

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 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, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Michael Shumway

for: Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of the United Kingdom 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), for having been convicted of committing crimes involving moral turpitude; and under section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), for seeking admission into the United States by fraud or willful misrepresentation. The field office director indicated that the applicant sought waivers of inadmissibility pursuant to sections 212(h) and 212(i) of the Act, 8 U.S.C. §§ 1182(i) and 1182(h). The field office 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.

On appeal, the applicant describes the circumstances leading to his criminal convictions and indicates that for the past 26 years he has been a law abiding. He contends that he did not intentionally misrepresent his criminal record in completing the Form I-94W, Visa Waiver Arrival Record. He asserts that from 2002 until 2006 he and his wife operated a pub in England, and their lease ended when the lessor filed for liquidation. He maintains that they have not been able to secure permanent employment due to economic conditions in the pub and hotel trade in England. The applicant conveys that they exhausted their financial resources, sold their home in England, and live in accommodations provided by a friend. He indicates that they provide some financial support to his mother-in-law, who is ill, and to their grandchild, who has cerebral palsy. The applicant states that they own a home in the United States, and that if the waiver were approved his wife would work as a licensed practical nurse, and he would work in the restaurant and hotel industry in Florida. He conveys that their eldest daughter resides in the home they maintain in the United States.

The AAO will first address the director's finding that the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of committing crimes involving moral turpitude. 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 (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.)

In *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.

On September 9, 1982, the applicant was sentenced to three months imprisonment for burglary and theft of a non-dwelling. On the same date, he was convicted of burglary with intent to steal (non-dwelling), two counts of taking conveyance without authority, theft, and going equipped for theft. He was sentenced to two months concurrent imprisonment for each of those crimes. On May 8, 1976, the applicant was convicted of burglary and theft non dwelling, and was ordered to perform community service. On June 26, 1975, he was convicted of making a false statement or representation in order to obtain benefit and was granted a conditional discharge after two years. On June 20, 1975 he was convicted of handling and was ordered to serve 2 years of probation. Finally,

on May 5, 1973, he was convicted of assault occasioning actual bodily harm, and was ordered to pay a fine.[1]

The applicant was convicted of burglary and theft of a non-dwelling, and burglary with intent to steal (non-dwelling). The Board (and Attorney General) had found that breaking into a building involved moral turpitude only if the crime the perpetrator intended to commit after breaking into the building involved moral turpitude. *See Matter of M-*, 2 I&N Dec. 721 (BIA, AG 1946). Furthermore, in *Matter of R-*, 1 I&N Dec. 540 (BIA 1943), the Board held that violation of section 404(1) of the New York Penal Code, burglary in the 3rd degree, is a crime involving moral turpitude when the conviction record shows the defendant broke in and entered a shop with intent to commit larceny.

In the instant case, the applicant's most recent convictions are for theft of a non-dwelling-house and burglary with intent to steal (non-dwelling). Though the applicant did not provide his full record of conviction for those offenses, there appears to be no dispute that the crimes would be and were committed with the intent of a permanent taking. Thus, we find that these convictions involve moral turpitude, rendering the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The record also conveys that the applicant was convicted of assault occasioning actual bodily harm under section 47 of the Offenses Against the Person Act 1861. In the letter submitted on appeal, the applicant indicates that his assault conviction involved a fist fight. Section 47 of the Offenses Against the Person Act 1861 describes the following injuries as normally being prosecuted: loss or breaking of tooth or teeth; temporary loss of sensory functions, which may include loss of consciousness; extensive or multiple bruising; displaced broken nose; minor fractures; minor, but not merely superficial, cuts of a sort probably requiring medical treatment (e.g. stitches); psychiatric injury that is more than mere emotions such as fear, distress or panic.

The Board determined that assault and battery offenses involve moral turpitude where there is an aggravating factor such as the use of deadly weapon, the intentional infliction of serious bodily injury, and bodily harm upon individuals deserving of special protection such as a child, domestic partner, or a peace officer. *See In re Sanudo*, 23 I&N Dec. 968 (BIA 2006).

The full record of conviction is not in the record, but we note that the applicant has not disputed on appeal that this crime was a crime involving moral turpitude. Regardless, to meet his burden, the applicant must, at a minimum, submit the available documents that comprise the record of conviction and show that these fail to establish that his conviction was based on conduct involving moral turpitude. To the extent such documents are unavailable, this fact must be established pursuant to the requirements in 8 C.F.R. § 103.2(b)(2). The AAO notes that the record only contains a "rap" sheet from the British National Identification Service with basic information about the applicant's convictions but no additional details about the nature of the offenses. The applicant has

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[1] With regard to the applicant's other criminal convictions, which were committed when the application was under the age of 18, section 212(a)(2)(A)(ii) of the Act states, in part, that an alien is not inadmissible for the crimes committed when the alien was under 18 years of age, if the crime was committed more than 5 years before the date of application for a visa and the date of application for admission to the United States.

not established, in accordance with the requirements in 8 C.F.R. § 103.2(b)(2), that the documents comprising his record of conviction are unavailable. The submitted rap sheet does not demonstrate that the applicant's offense of assault occasioning actual bodily harm was not a crime involving moral turpitude, and the applicant has not disputed the finding that it was such a crime. Accordingly, we will not disturb the finding that the applicant's conviction of assault occasioning actual bodily harm is a crime involving moral turpitude.

Since the applicant's theft of a non-dwelling, burglary with intent to steal (non-dwelling), and assault occasioning actual bodily harm offenses involve moral turpitude, rendering him inadmissible under section 212(a)(2)(A)(i)(I) of the Act, we need not consider whether his other convictions involve 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:

> (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) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] 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
> > >
> > > (ii) the alien has been rehabilitated . . .

We will now address the finding of inadmissible under section 212(a)(6)(C) of the Act, which 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 field office director stated that the applicant failed to disclose his arrest or conviction for committing a crime involving moral turpitude in the Forms I-94W that he submitted on September 25, 2007, April 29, 2007, December 14, 2006, September 7, 2006, January 21, 2005, January 19, 2004, May 22, 2003, January 28, 2003, January 7, 2002, January 21, 2001, and July 13, 2000.

An applicant who applies for admission pursuant to the visa waiver program must complete Form I-94W, Arrival Record. The reverse side of Form I-94W, at Part B, asks an applicant the following: "Have you ever been arrested or convicted for an offense or crime involving moral turpitude . . . ?" The applicant's criminal record discloses that in England from April 28, 1967 until September 9,

1982, he had nine convictions including burglary, taking a conveyance without authority, fraud, theft, and assault occasioning actual bodily harm, and that he had committed 17 offenses. We acknowledge that the term "moral turpitude," as used in the Act, is a legal term of art, and a lay person may not know what the term means in the context of immigration law. There is no indication in the record that the applicant was aware that his crimes are crimes involving moral turpitude and that any misrepresentation of his criminal record on the Form I-94W was willful. In addition, nothing in the record suggests that the applicant was ever asked during his inspections whether he was ever arrested or convicted for an offense or crime involving moral turpitude. The applicant is therefore not inadmissible under section 212(a)(6)(C) of the Act for seeking admission into the United States by fraud or willful misrepresentation.

As previously stated, the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having committed crimes involving moral turpitude. With regard to the waiver for inadmissibility under section 212(a)(2)(A)(i)(I), section 212(h)(1)(A) of the Act provides that the Attorney General may, in his discretion, waive the application of subparagraph (A)(i)(I) of subsection (a)(2) if 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. Since the convictions rendering the applicant inadmissible occurred in 1982, which is more than 15 years ago, they are waivable under section 212(h)(1)(A) of the Act.

Section 212(h)(1)(A)(ii) and (iii) of the Act requires that the applicant's admission to the United States not be contrary to the national welfare, safety, or security of the United States; and that the applicant establish his rehabilitation. Evidence in the record to establish the applicant's eligibility under section 212(h)(1)(A)(ii) and (iii) of the Act consists of letters commending his character. [redacted] states in his letter dated July 16, 2008, that he has known the applicant since August 2004 and holds him in high regard. [redacted] conveys in his letter dated January 31, 2008, that the applicant has had to overcome considerable adversity in his early years and that he is a hard-working man. [redacted] states in his letter dated February 8, 2008 that the applicant worked for him as a chef in 1992 and is reliable, trusted, and sincere. The applicant's wife describes her husband as kind, caring, and supportive in her hardship statement. In view of the record, which shows that the applicant has not committed any crimes since 1982; has worked as a chef and has owned a pub from February 2002 until July 2006; and is commended by his wife, solicitor, and friends, the AAO finds that the applicant has provided sufficient evidence to demonstrate that his admission to the United States is not contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated, as required by section 212(h)(1)(A)(ii) and (iii) of the Act.

However, the applicant's conviction for assault occasioning actual bodily harm is a violent or dangerous crime under 8 C.F.R. § 212.7(d). Accordingly, the applicant must show that "extraordinary circumstances" warrant approval of the waiver. 8 C.F.R. § 212.7(d). Extraordinary circumstances may exist in cases involving national security or foreign policy considerations, or if the denial of the applicant's admission would result in exceptional and extremely unusual hardship. Finding no evidence of foreign policy, national security, or other extraordinary equities, the AAO will consider whether the applicant has "clearly demonstrate[d] that the denial of . . . admission as an immigrant would result in exceptional and extremely unusual hardship" to a qualifying relative.

In the instant case, the applicant must demonstrate that denial of admission would result in exceptional and extremely unusual hardship to a qualifying relative, who in the instant case are the applicant's U.S. citizen spouse and stepdaughter.

In *Matter of Monreal-Aguinaga*, 23 I& N Dec. 56, 62 (BIA 2001), the Board determined that exceptional and extremely unusual hardship in cancellation of removal cases under section 240A(b) of the Act is hardship that "must be 'substantially' beyond the ordinary hardship that would be expected when a close family member leaves this country." However, the applicant need not show that hardship would be unconscionable. *Id.* at 61. The AAO notes that the exceptional and extremely unusual hardship standard in cancellation of removal cases is identical to the standard put forth by the Attorney General in *Matter of Jean, supra*, and codified at 8 C.F.R. § 212.7(d).

The Board stated that in assessing exceptional and extremely unusual hardship, it would be useful to view the factors considered in determining extreme hardship. *Id.* at 63. 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 the lower standard of extreme hardship. 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 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 an exclusive list. *Id.*

In *Monreal*, the Board provided additional examples of the hardship factors it deemed relevant for establishing exceptional and extremely unusual hardship:

> [T]he ages, health, and circumstances of qualifying lawful permanent resident and United States citizen relatives. For example, an applicant who has elderly parents in this country who are solely dependent upon him for support might well have a strong case. Another strong applicant might have a qualifying child with very serious health issues, or compelling special needs in school. A lower standard of living or adverse country conditions in the country of return are factors to consider only insofar as they may affect a qualifying relative, but generally will be insufficient in themselves to support a finding of exceptional and extremely unusual hardship. As with extreme hardship, all hardship factors should be considered in the aggregate when assessing exceptional and extremely unusual hardship.

23 I&N Dec. at 63-4.

In the precedent decision issued the following year, *Matter of Andazola-Rivas*, the Board noted that, "the relative level of hardship a person might suffer cannot be considered entirely in a vacuum. It must necessarily be assessed, at least in part, by comparing it to the hardship others might face." 23 I&N Dec. 319, 323 (BIA 2002). The issue presented in *Andazola-Rivas* was whether the Immigration Judge correctly applied the exceptional and extremely unusual hardship standard in a cancellation of removal case when he concluded that such hardship to the respondent's minor

children was demonstrated by evidence that they "would suffer hardship of an emotional, academic and financial nature," and would "face complete upheaval in their lives and hardship that could conceivably ruin their lives." *Id.* at 321 (internal quotations omitted). The Board viewed the evidence of hardship in the respondent's case and determined that the hardship presented by the respondent did not rise to the level of exceptional and extremely unusual. The Board noted:

> While almost every case will present some particular hardship, the fact pattern presented here is, in fact, a common one, and the hardships the respondent has outlined are simply not substantially different from those that would normally be expected upon removal to a less developed country. Although the hardships presented here might have been adequate to meet the former "extreme hardship" standard for suspension of deportation, we find that they are not the types of hardship envisioned by Congress when it enacted the significantly higher "exceptional and extremely unusual hardship" standard.

23 I&N Dec. at 324.

However, the Board in *Matter of Gonzalez Recinas*, a precedent decision issued the same year as *Andazola-Rivas*, clarified that "the hardship standard is not so restrictive that only a handful of applicants, such as those who have a qualifying relative with a serious medical condition, will qualify for relief." 23 I&N Dec. 467, 470 (BIA 2002). The Board found that the hardship factors presented by the respondent cumulatively amounted to exceptional and extremely unusual hardship to her qualifying relatives. The Board noted that these factors included her heavy financial and familial burden, lack of support from her children's father, her U.S. citizen children's unfamiliarity with the Spanish language, lawful residence of her immediate family, and the concomitant lack of family in Mexico. 23 I&N Dec. at 472. The Board stated, "We consider this case to be on the outer limit of the narrow spectrum of cases in which the exceptional and extremely unusual hardship standard will be met." *Id.* at 470.

An analysis under *Monreal-Aguinaga* and *Andazola-Rivas* is appropriate. *See Gonzalez Recinas*, 23 I&N Dec. at 469 ("While any hardship case ultimately succeeds or fails on its own merits and on the particular facts presented, *Matter of Andazola* and *Matter of Monreal* are the starting points for any analysis of exceptional and extremely unusual hardship."). The AAO notes that exceptional and extremely unusual hardship to a qualifying relative must be established in the event that he or she accompanies the applicant or 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 applicant's wife conveys in her hardship statement that she has a close relationship with the applicant, whom she has been with for nine years and to whom she has been married for six years. She indicates that all of her family members, inclusive of are her mother, daughter, and grandchildren, live in the United States, and that denial of the waiver application is forcing her to choose between living with her husband and them. She avers that her 75-year-old mother is becoming senile and needs her help, and that [redacted] her three-year-old granddaughter, has cerebral palsy. She states that her daughter has lived in the United Kingdom for the past six years, and recently moved to the United States for [redacted] physical therapy. The applicant's wife indicates

that she and her husband are the main support system for her daughter, and that they intended to coordinate their moves to the United States so they could look after the grandchildren and take therapy and provide her with daily exercise. She states that she has a job offer as a nurse in the United States. The article in the dated February 4, 2008, conveys that mother is raising money in order to take to the United States for specialist medical treatment. The article indicates that was diagnosed with cerebral palsy and will travel to Florida to receive treatment that could help her to walk. states that will have physiotherapy two to three times a week, which is no longer available in England, and that the cost of three months of physiotherapy in England will fund them for a year in America. The child development report dated March 9, 2006, conveys that father works full-time, and that her maternal grandparents are "shortly to move back to the United States, which will further reduce the family's local support."

In view of the submitted evidence we find that the record is not sufficient to demonstrate that the applicant's wife will experience "exceptional and extremely unusual hardship" if she were to remain in the United States without her husband. Though the applicant and his wife have been together for nine years and have a close relationship, the applicant's wife has not fully described the hardship that she would experience as a result of separation from her husband. Further, we find that the record fails to demonstrate that the applicant's wife would experience "exceptional and extremely unusual hardship" if she were to remain in the United Kingdom. Although the applicant's wife asserts that she needs to help her daughter and in the United States, she has not elaborated on the type of assistance that her daughter and require of her. Moreover, we find the submitted documentation about economic conditions in the United Kingdom's pub and hotel industry is not sufficient to establish that the applicant and his wife have limited employment prospects there.

In conclusion, the applicant has not demonstrated that the hardships meet the "exceptional and extremely unusual hardship" standard as required in 8 C.F.R. § 212.7(d), and we therefore find that there are not extraordinary circumstances warranting a favorable exercise of discretion in this case.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility rests with the applicant. *See* section 291 of the Act. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed and the waiver application will be denied.

ORDER: The appeal is dismissed.