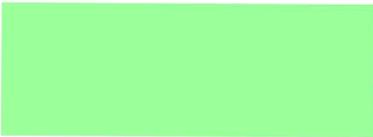


(b)(6)

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

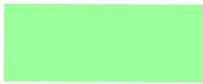


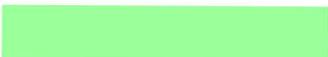
U.S. Citizenship  
and Immigration  
Services



Date: **MAY 09 2014**

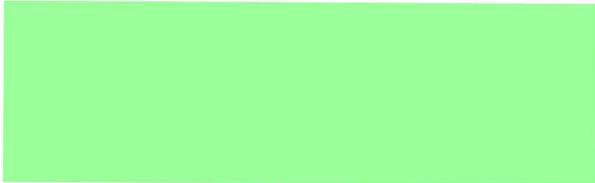
Office: ATLANTA, GA

FILE: 

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).

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg  
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Nigeria who was found to be inadmissible to the United States under 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 procured admission to the United States through fraud or misrepresentation and 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. The applicant is the spouse of a U.S. citizen and is the beneficiary of an approved Petition for an Alien Relative. The applicant seeks a waiver of inadmissibility in order to remain in the United States with her U.S. citizen husband and two U.S. citizen children.

In a decision, dated March 22, 2013, the acting field office director denied the applicant's waiver application stating that she did not warrant a favorable exercise of discretion. He based this finding on the applicant's history of immigration violations and her criminal record, stating also that she was convicted of an aggravated felony. He found that the applicant had been convicted, on November 18, 2008, of cruelty to children in the first degree, simple assault, and theft by shoplifting. The acting field office director did not make a finding regarding whether or not the applicant had shown extreme hardship to a qualifying relative.

On appeal, filed on April 18, 2013 and received by the AAO on December 1, 2013, counsel asserts that the applicant was convicted of simple assault and theft by shoplifting. Counsel does not state how the charge for cruelty to children was resolved. Counsel states that the acting field office director erred in failing to make a determination concerning extreme hardship to the applicant's spouse and as a result the decision did not correctly balance the equities in the applicant's case. Counsel states further that the applicant's daughter, who suffers from sickle cell anemia, is dependent on the applicant for care and would suffer extreme hardship as a result of the applicant's inadmissibility. Finally, counsel states that the applicant has been rehabilitated, evidenced by numerous character references in the record.

The record indicates that the applicant is inadmissible under Section 212(a)(2)(A) of the Act.

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.

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

(h) Waiver of subsection (a)(2)(A)(i)(I), (II), (B), (D), and (E)

The Attorney General [now the Secretary of Homeland Security, "Secretary"] may, in [her] discretion, waive the application of subparagraphs (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 . . .

(2) the [Secretary], in [her] discretion, and pursuant to such terms, conditions and procedures as [she] may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

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.)

For cases arising in the Eleventh Circuit, the determination of whether a conviction is a crime involving moral turpitude begins with a categorical inquiry that "depends upon the inherent nature of the offense, as defined in the relevant statute, rather than the circumstances surrounding a defendant's particular conduct." *Itani v. Ashcroft*, 298 F.3d 1213, 1215-16 (11th Cir. 2002); see also *Vuksanovic v. U.S. Att'y Gen.*, 439 F.3d 1308, 1311 (11th Cir. 2006) (citing *Taylor v. United States*, 495 U.S. 575, 600 (1990)); *Sosa-Martinez v. U.S. Att'y Gen.*, 420 F.3d 1338, 1342 (11th Cir. 2004). However, where the statute under which an alien was convicted is "'divisible'—that is, it contains some offenses that are [crimes involving moral turpitude] and others that are not[,] . . . the fact of conviction and the statutory language alone are insufficient to establish . . . under which subpart [the alien] was convicted." *Jaggernaut v. U.S. Att'y Gen.*, 432 F.3d 1346, 1354-55 (11th Cir. 2005). Under such circumstances, "the record of conviction – i.e., the charging document, plea, verdict, and sentence – may also be considered." *Fajardo v. U.S. Att'y Gen.*, 659 F.3d 1303, 1305 (11th Cir. 2011) (citing *Jaggernaut, supra*, at 1354-55). The Eleventh Circuit does not permit inquiry beyond

the record of conviction. *See Fajardo, supra*, at 1310 (11th Cir. 2011) (rejecting *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)).

The record reflects that on December 5, 2006 the applicant was charged with cruelty to children, simple assault, and theft by shoplifting. The current record indicates that on November 18, 2008, the applicant's spouse was found guilty of simple assault and theft by shoplifting. The documentation provided by the applicant indicates that she was sentenced to five years imprisonment for the theft offense and one year imprisonment for the offense of simple assault. The current record does not include the full record of conviction, but only includes the complaint for the theft charge and the final disposition for the simple assault and theft by shoplifting charges. The record is not clear as to the final disposition of the cruelty to children charge. The applicant's criminal record also includes 2003 and 2011 charges for shoplifting, both of which were not prosecuted.

At the time of the applicant's conviction Ga. Code Ann. § 16-8-14 stated, in pertinent part:

(a) A person commits the offense of theft by shoplifting when he alone or in concert with another person, with the intent of appropriating merchandise to his own use without paying for the same or to deprive the owner of possession thereof or of the value thereof, in whole or in part, does any of the following:

(1) Conceals or takes possession of the goods or merchandise of any store or retail establishment;

Generally, the crime of theft or larceny, whether grand or petty, involves moral turpitude. *Matter of Scarpulla*, 15 I&N Dec. 139, 140-41 (BIA 1974). The common law definition of larceny is a wrongful taking and carrying away of the personal property of someone else with the intent to permanently deprive the owner of that property. *See Matter of V-Z-S-*, 22 I&N Dec. 1338, 1346 (BIA 2000). The Model Penal Code defines theft as the unlawful taking of, or the unlawful exercise of control over, movable property of another with the intent to deprive him thereof. *Id.* at 1343; *see also* Model Penal Code § 223.2(1) (1980). The Board of Immigration Appeals has stated that under the common law, larceny is distinguishable from theft in that larceny includes all takings with a criminal intent to permanently deprive the owner of the rights and benefits of ownership. *Matter of V-Z-S-*, 22 I&N Dec. at 1345-46. By contrast, the Board has noted that theft statutes may encompass both temporary and permanent takings, and that a theft crime involves moral turpitude "only when a permanent taking is intended." *Matter of Grazley*, 14 I&N Dec. 330, 333 (BIA 1973). In *Matter of Jurado*, the Board found that violation of a Pennsylvania retail theft statute involved moral turpitude because the nature of retail theft is such that it is reasonable to assume such an offense would be committed with the intention of retaining merchandise permanently. 24 I&N Dec. 29, 33-34 (BIA 2006). Thus, the record establishes that the applicant's conviction for theft by shoplifting is a crime involving moral turpitude and that the conviction would not qualify for the petty offense exception

because the applicant was sentenced to five years imprisonment for the offense. The applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act, for having been convicted of a crime involving moral turpitude and is eligible to apply for a waiver of her inadmissibility under section 212(h) of the Act.

However, before we look to documentation concerning the applicant's waiver application we must discuss the applicant's other criminal charges and her inadmissibility for fraud or misrepresentation.

At the time of the applicant's conviction, Ga. Code Ann., § 16-5-20 stated:

(a) A person commits the offense of simple assault when he or she either:

- (1) Attempts to commit a violent injury to the person of another; or
- (2) Commits an act which places another in reasonable apprehension of immediately receiving a violent injury.

As a general rule, simple assault or battery is not deemed to involve moral turpitude. *Matter of Fualaau*, 21 I&N Dec. 475, 477 (BIA 1996). However, a finding of moral turpitude involves "an assessment of both the state of mind and the level of harm required to complete the offense." *Matter of Solon*, 24 I&N Dec. 239, 242 (BIA 2007). Crimes committed intentionally or knowingly with the specific intent to inflict a particular harm, and with a resulting meaningful level of harm, constitute crimes involving moral turpitude, but "as the level of conscious behavior decreases, i.e., from intentional to reckless conduct, more serious resulting harm is required" for a finding of moral turpitude. *Id.* "[W]here no conscious behavior is required, there can be no finding of moral turpitude, regardless of the resulting harm." *Id.*; see also *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992) (finding that third-degree assault under section 9A.36.031(1)(f) of the Revised Code of Washington is not a crime involving moral turpitude because neither intent nor recklessness is required for a conviction); *Matter of Fualaau*, 21 I&N Dec. at 478 (third-degree assault in Hawaii, an offense that involves recklessly causing bodily injury to another person, is not a crime involving moral turpitude); *Matter of P-*, 3 I&N Dec. 5, 8-9 (BIA 1947) (finding that assault without a deadly weapon but with the intent to cause great bodily harm is a crime involving moral turpitude).

Georgia case law indicates that for a conviction under Ga. Code Ann., § 16-5-20 only general intent to commit the act which leads to the victim's injury or reasonable apprehension of harm is required. Specific intent to cause the injury is not required. *Wroge v. State*, 2006, 278 Ga.App. 753, 629 S.E.2d 596 and *Maynor v. State*, 2002, 257 Ga.App. 151, 570 S.E.2d 428.

However, the mere threat to commit a violent injury on a victim, without more, does not constitute an assault under Georgia law; there must be a present ability on the part of the assailant to inflict an

immediate injury on the victim; there must be a violent act coupled with the ability to inflict an injury as to cause the victim to reasonably fear immediate violent injury unless he or she retreats. See *Johnson v. State*, 1981, 158 Ga.App. 432, 280 S.E.2d856; *McGuire v. State*, 2004, 266 Ga.App. 673, 598 S.E.2d 55; *Payne v. DeKalb County*, 2004, 414 F.Supp.2d 1158.

Based on this case law, it can be concluded that a conviction under Ga. Code Ann., § 16-5-20 could involve acts which would constitute a crime involving moral turpitude and acts that would not. Without the full record of conviction, a determination as to whether this offense is a crime involving moral turpitude cannot be made. Of particular concern is that if this conviction is for a crime involving moral turpitude it would be considered a violent and/or dangerous crime due to the elements of the statute requiring a violent act and an injury or fear of injury to the victim. The current record, which does not include the full record of conviction, does not indicate whether serious injury to the victim occurred in the commission of the applicant's crime.

Similarly, the record does not include a final disposition for the charge of cruelty to children in the first degree under Ga. Code Ann., § 16-5-70, another crime that would be considered violent or dangerous.

At the time of the applicant's conviction, Ga. Code Ann., § 16-5-70, stated:

- (a) A parent, guardian, or other person supervising the welfare of or having immediate charge or custody of a child under the age of 18 commits the offense of cruelty to children in the first degree when such person willfully deprives the child of necessary sustenance to the extent that the child's health or well-being is jeopardized.

The applicant is seeking a section 212(h) waiver of the bar to admission resulting from a violation of section 212(a)(2)(A)(i)(I) of the Act. A waiver under section 212(h) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent or child of the applicant.

Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. See *Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996). In most discretionary matters, the alien bears the burden of proving eligibility simply by showing equities in the United States which are not outweighed by adverse factors. See *Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957). However, as stated above, the record indicates that the applicant may be subject to the heightened discretion standard of 8 C.F.R. § 212.7(d) for applicant's who have committed violent and/or dangerous crimes and would have to show exceptional or extremely unusual hardship to a qualifying relative for a waiver to be granted as a matter of discretion.

The regulation at 8 C.F.R. § 212.7(d) provides:

The Attorney General [Secretary, Department of Homeland Security], in general, will not favorably exercise discretion under section 212(h)(2) of the Act (8 U.S.C. 1182(h)(2)) to consent to an application or reapplication for a visa, or admission to the United States, or adjustment of status, with respect to immigrant aliens who are inadmissible under section 212(a)(2) of the Act in cases involving violent or dangerous crimes, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of the application for adjustment of status or an immigrant visa or admission as an immigrant would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the alien's underlying criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act.

Unlike a removal hearing in which the government bears the burden of establishing a respondent's removability, the burden of proof in the present proceedings is on the applicant to establish his admissibility for admission to the United States "to the satisfaction of the Attorney General [Secretary of Homeland Security]." See Section 291 of the Act, 8 U.S.C. § 1361. The applicant has not shown that her criminal convictions were not dangerous or violent.

Regardless of whether the applicant has been convicted of a violent or dangerous crime, she is also inadmissible under section 212(a)(6)(C) of the Act and must establish extreme hardship to her U.S. citizen spouse in order to be eligible for a waiver under section 212(i) of the Act.

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

- (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.

Section 212(i) of the Act provides:

- (1) The [Secretary] may, in the discretion of the [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 [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.

The record reflects that on or around September 5, 1995 the applicant entered the United States by presenting a fraudulent passport for admission. This is not contested on appeal. The applicant is

therefore inadmissible under section 212(a)(6)(C)(i) of the Act for having attempted to procure admission to the United States through fraud or misrepresentation. The applicant's qualifying relative under section 212(i) of the Act is her U.S. citizen spouse.

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. *Id.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. *See generally Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator "must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation." *Id.*

The actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. *See, e.g., Matter of Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from

family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. *See Salcido-Salcido v. I.N.S.*, 138 F.3d 1292 (9th Cir. 1998) (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *but see Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

The record contains references to hardship the applicant's daughter would experience if the waiver application were denied. It is noted that Congress did not include hardship to an applicant's children as a factor to be considered in assessing extreme hardship under section 212(i) of the Act. In the present case, the applicant's spouse is the only qualifying relative for the waiver under section 212(i) of the Act, and hardship to the applicant's children will not be separately considered, except as it may affect the applicant's spouse.<sup>1</sup>

The record of hardship includes: medical documentation concerning the applicant's daughter's condition, financial documentation, country conditions information for Nigeria, and numerous letters pertaining to the applicant's character.

Counsel asserts that the applicant's spouse would suffer financially if the applicant were removed. The record fails to specify or explain the dynamics of the applicant's relationship with her husband and how he would be affected upon relocation or upon separation. The record establishes that the applicant's daughter suffers from sickle cell anemia, and requires frequent medical care and attention. The record also indicates that residing in Nigeria would be detrimental to the applicant's daughter's health due to the numerous complications associated with her condition and the poor health conditions in Nigeria. This extraordinary circumstance, the need to care for a child with a significant illness, combined with general conditions in Nigeria establishes that it would be extreme hardship for the applicant's spouse to relocate to Nigeria. However, the record fails to include supporting documentation to show what affect the applicant's absence would have on her spouse either emotionally or financially or whether the applicant's spouse would have help from other friends and/or family members in caring for his two children. The record also fails to establish that the applicant's spouse cannot care for his children on his own. Thus, the record fails to show that the applicant's spouse would suffer extreme hardship as a result of separation.

In this case, the record does not contain sufficient evidence to show that the hardships faced by the qualifying relative, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship. The AAO therefore finds that the applicant has failed to establish extreme hardship to her U.S. Citizen spouse as required under section 212(i) of the Act.

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<sup>1</sup> While the applicant also requires a waiver under section 212(h) of the Act for her conviction of a CIMT, and her children would be qualifying family members under that statute, she must first establish eligibility for a waiver under the more restrictive requirements of section 212(i) of the Act.

We can find extreme hardship warranting a waiver of inadmissibility only where an applicant has demonstrated extreme hardship to a qualifying relative in the scenario of separation *and* the scenario of relocation. A claim that a qualifying relative will relocate and thereby suffer extreme hardship can easily be made for purposes of the waiver even where there is no actual intention to relocate. *Cf. Matter of Ige*, 20 I&N Dec. 880, 886 (BIA 1994). Furthermore, to relocate and suffer extreme hardship, where remaining the United States and being separated from the applicant would not result in extreme hardship, is a matter of choice and not the result of inadmissibility. *Id.*, *also cf. Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996). As the applicant has not demonstrated extreme hardship from separation, we cannot find that refusal of admission would result in extreme hardship to the qualifying relative(s) in this case.

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 she merits a waiver as a matter of discretion.

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