



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

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

MATTER OF J-S-

DATE: JUNE 3, 2016

APPEAL OF PHILADELPHIA, PENNSYLVANIA FIELD OFFICE DECISION

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

The Applicant, a native and citizen of Israel, seeks a waiver of the ground of inadmissibility for fraud or misrepresentation and a crime involving moral turpitude. *See* Immigration and Nationality Act (the Act) section 212(i), 8 U.S.C. § 1182(i), and 212(h), 8 U.S.C. § 1182(h). A foreign national seeking to be admitted to the United States as an immigrant or to adjust status to lawful permanent residence must be admissible or receive a waiver of inadmissibility. U.S. Citizenship and Immigration Services (USCIS) may grant this discretionary waiver if refusal of admission would result in extreme hardship to a qualifying relative or qualifying relatives.

The Field Office Director, Philadelphia, Pennsylvania, denied the application. The Director found the Applicant had been convicted of three crimes involving moral turpitude and had misrepresented a material fact when seeking a visitor's visa to enter the United States. The Director concluded that the Applicant had not established hardship to a qualifying relative and dismissed the application accordingly.

The matter is now before us on appeal. In the appeal, the Applicant submits new evidence and claims that his misrepresentation was not willful because a friend filled out his application for a visa, and that he has only been convicted of one crime involving moral turpitude which qualifies for the petty offense exception. The Applicant further claims that his convictions were over 15 years ago, that he has been rehabilitated and that the record establishes his spouse will experience extreme hardship.

Upon *de novo* review, we will sustain the appeal.

I. LAW

The Applicant is seeking to adjust status to lawful permanent resident and has been found inadmissible for having been convicted of crimes involving moral turpitude. The record indicates that the Applicant has been convicted of several crimes, including Possession of Stolen Property in violation of section 413 of the Israel Penal Code and Theft in violation of section 384 of the Israel Penal Code. Section 212(a)(2)(A) of the Act, 8 U.S.C. § 1182(a)(2)(A), provides, in pertinent parts:

(i) In General

Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—

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

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

(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).

Individuals found inadmissible under section 212(a)(2)(A) of the Act may seek a waiver of inadmissibility under section 212(h). Section 212(h) of the Act provides, in pertinent parts:

The [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if -

(1) (A) in the case of any immigrant it is established to the satisfaction of the [Secretary of Homeland Security] that -

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

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

(iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the [Secretary of Homeland Security] 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 . . . ; and

(2) The [Secretary of Homeland Security], in his discretion, an pursuant to such terms, conditions and procedures as he may be regulations prescribe, has consented to the alien's applying and reapplying for a visa, for admission to the United States, or adjustment of status.

The Applicant has also been found inadmissible for fraud or misrepresentation. Specifically, the record indicates that the Applicant applied for a visa to enter the United States by completing a Form DS-160, Online Nonimmigrant Visa Application, and attending an interview with a consular officer in Israel. The Applicant did not reveal his prior convictions on his Form DS-160 or during his consular interview. Section 212(a)(6)(C)(i) of the Act states:

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, 8 U.S.C. § 1182(i), provides, in pertinent part:

(1) The Attorney General may, in the discretion of the Attorney General, waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant 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 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 . . .

Decades of case law have contributed to the meaning of extreme hardship. The definition of extreme hardship "is not . . . fixed and inflexible, and the elements to establish extreme hardship are dependent upon the facts and circumstances of each case." *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999) (citation omitted). Extreme hardship exists "only in cases of great actual and prospective injury." *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (BIA 1984). An applicant must demonstrate that claimed hardship is realistic and foreseeable. *Id.*; see also *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968) (finding that the respondent had not demonstrated extreme

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hardship where there was “no showing of either present hardship or any hardship . . . in the foreseeable future to the respondent's parents by reason of their alleged physical defects”). The common consequences of removal or refusal of admission, which include “economic detriment . . . [,] loss of current employment, the inability to maintain one’s standard of living or to pursue a chosen profession, separation from a family member, [and] cultural readjustment.” are insufficient alone to constitute extreme hardship. *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996) (citations omitted); *but see Matter of Kao and Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which the qualifying relatives would relocate). Nevertheless, all “[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists.” *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994) (citations omitted). Hardship to the Applicant or others can be considered only insofar as it results in hardship to a qualifying relative. *Matter of Gonzalez Recinas*, 23 I&N Dec. 467, 471 (BIA 2002).

II. ANALYSIS

The issues on appeal are whether the Applicant has been convicted of crimes involving moral turpitude, whether the Applicant is inadmissible for fraud or misrepresentation under section 212(a)(6)(C)(i) of the Act for failing to inform a consular officer of his criminal record, and whether the Applicant has established extreme hardship to a qualifying relative. The Applicant claims that he has only been convicted of one crime involving moral turpitude, which qualifies for the petty offense exception, and, in the alternative, that he is eligible for a waiver under section 212(h)(1)(A) of the Act since his conviction was over 15 years ago. The Applicant also claims his misrepresentation regarding his criminal history was not willful because a friend helped him fill out the application and he was not aware the representations were false. The Applicant also claims that his spouse would experience emotional, financial and physical hardships if she were separated from him, and physical, economic and social hardships if she relocated with him to Israel.

Upon examination of the Applicant’s convictions, we find that he is inadmissible under section 212(a)(2)(A) of the Act for having been convicted of a crime involving moral turpitude. The record also supports a determination that the Applicant willfully misrepresented material facts before a consular officer and is inadmissible under section 212(a)(6)(C)(i) of the Act. We further find that the Applicant has established extreme hardship to a qualifying relative and that he merits a waiver in the exercise of discretion.

A. Inadmissibility

1. Crime Involving moral turpitude

As stated above, the Applicant has been found inadmissible under section 212(a)(2)(A) of the Act for a crime involving moral turpitude. Specifically, the Director found that the Applicant has been convicted of three crimes involving moral turpitude, including Theft in violation of section 384 of the Israel Penal Code, on [REDACTED] 1999.

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With regard to the Applicant's [REDACTED] 1999, theft conviction, the Applicant concedes on appeal that it is a crime involving moral turpitude. In assessing whether a conviction is a crime involving moral turpitude, we must first "determine what law, or portion of law, was violated." *Matter of Esfandiary*, 16 I&N Dec. 659, 660 (BIA 1979). We conduct a categorical inquiry for that statutory offense, considering the "inherent nature of the crime as defined by statute and interpreted by the courts." not the underlying facts of the crime committed. *Matter of Short*, 20 I&N Dec. 136, 137 (BIA 1989); *see also Matter of Louissaint*, 24 I&N Dec. 754, 757 (BIA 2009) (citing *Taylor v. United States*, 495 U.S. 575, 599-600 (1990)). This categorical inquiry focuses on whether moral turpitude necessarily inheres in the minimal conduct for which there is a realistic probability of prosecution under the statute. *See Short, supra; Louissaint, supra; Moncrieffe v. Holder*, 133 S.Ct. 1678, 1684-1685 (2013); *Gonzales v. Duenas-Alvarez*, 127 S.Ct. 815, 822 (2007).

The record contains a copy of court documents submitted by an Israeli attorney, including a translated copy of the indictment, plea agreement and penalty provision of the Israeli Penal Code. The documents indicate that the Applicant was charged with three other individuals, then he moved to have himself severed from the proceedings and pled guilty to the charge of Theft in separate proceedings.

Section 383 of the Israel Penal Code provides, in relevant part:

Definition of theft

383. (a) A person commits theft if he –

(1) takes and carries away a thing capable of being stolen, without the owner's consent, fraudulently and without the claim of a right in good faith, intending when he takes it to deprive its owner of it permanently.

Section 384 of the Israel Penal Code contains the penalty for theft:

384. A person who commits theft is liable to three years imprisonment and that if no other penalty is set for the theft because of its circumstances or because of the nature of the stolen object.

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 Board of Immigration Appeals (the Board) has determined that to constitute a crime involving moral turpitude, a theft offense must require the intent to permanently take another person's property. *See Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973) ("Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended.").

An examination of the statute in question indicates that the minimal conduct resulting in a violation would involve a permanent taking and fraudulent intent. As such, we conclude that Theft under the Israel Penal Code is categorically a crime involving moral turpitude. The maximum penalty for a violation under this statute is three years imprisonment. As such, this conviction does not qualify as a petty offense exception under section 212(a)(2)(A)(ii)(II) of the Act.

As stated by the Applicant, this conviction occurred over 15 years ago, and he would be eligible to apply for a waiver under section 212(h)(1)(A) of the Act, which requires a determination that he has been rehabilitated and that his entry would not be contrary to the welfare, safety and security of the United States. However, the Applicant is also inadmissible for misrepresentation under section 212(a)(6)(C)(i) of the Act and must apply for a waiver under Section 212(i) of the Act, which requires that the Applicant establish extreme hardship to a qualifying relative.

2. Fraud or misrepresentation

For a misrepresentation to be willful, it must be determined that the Applicant was fully aware of the nature of the information sought and knowingly, intentionally, and deliberately misrepresented material facts. *See generally Matter of G-G-*, 7 I&N Dec. 161 (BIA 1956). To be willful, a misrepresentation must be made with knowledge of its falsity. 7 I&N Dec. at 164. To determine whether a misrepresentation was willful, we examine the circumstances as they existed at the time of the misrepresentation, and we “closely scrutinize the factual basis” of a finding of inadmissibility for fraud or misrepresentation because such a finding “perpetually bars an alien from admission.” *Matter of Y-G-*, 20 I&N Dec. 794, 796-97 (BIA 1994); *see also Matter of Tijam*, 22 I&N Dec. 408, 425 (BIA 1998) and *Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28-29 (BIA 1979).

The Applicant claims that his misrepresentation was not willful because a friend filled out his visa application and that he disclosed his criminal convictions to the consular officer at his visa interview. Because USCIS applications are signed “under penalty of perjury,” an applicant, by signing and submitting the application or materials submitted with the application is attesting that his or her claims are truthful. Policy Manual Volume 8, Admissibility, Part J – Fraud and Willful Misrepresentation, Chapter 3(D)(1). *See also* 9 FAM-e 302.9-4(B)(4)(b)(“It is no defense for an applicant to say that the misrepresentation was made because someone else advised the action unless it is found that the applicant lacked the capacity to exercise judgment.”). In this case, the Form DS-160, Online Nonimmigrant Visa Application, stated that the Applicant’s signature was required on the form, and that by signing the form the Applicant certified that he had “read and understood the questions in this application and that [his] answers are true and correct.”

The Act makes clear that a foreign national seeking admission must establish admissibility “clearly and beyond doubt.” *See* section 235(b)(2)(A) of the Act; *see also* section 240(c)(2)(A) of the Act. The same is true for demonstrating admissibility in the context of an application for adjustment of status. *See generally Kirong v. Mukasey*, 529 F.3d 800, 804 (8th Cir. 2008); *Rodriguez v. Mukasey*, 519 F.3d 773, 776 (8th Cir. 2008); *Blanco v. Mukasey*, 518 F.3d 714, 720 (9th Cir. 2008). The Applicant has not provided evidence to support his claims that he was unaware of the contents of the

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visa application that he signed or that he later disclosed his criminal record to the consular officer. We therefore find that he is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act for misrepresenting his criminal record when applying for a visa.

B. Waiver

The Applicant's spouse explains on appeal that she suffers from tension headaches, for which she has had to seek treatment, and that she was diagnosed with basal cell carcinoma, a form of skin cancer, in February 2014. Her skin cancer condition requires routine check-ups and thorough examinations of skin growths. The record contains multiple medical visitation records documenting her headache condition, as well as a letter from her doctor discussing her condition and treatment records for her basal cell carcinoma. The materials for the basal cell carcinoma warn of sun exposure, something the Applicant's spouse has expressed concern about if she were to relocate to Israel. Based on this evidence we can conclude that if the Applicant's spouse were to relocate to Israel with the Applicant, she would have to disrupt the continuity of her medical care for her skin condition and headaches.

The Applicant's spouse has also expressed concern about the unsafe situation in parts of Israel and the discrimination she would experience as the spouse of an Israeli-Arab and as a female. She states that the Applicant's family is from the [REDACTED] in the north of Israel and that when the Applicant previously resided there he worked at a job where rockets regularly landed around them. An examination of the Travel Warning for Israel, published in February 2015 by the U.S. Department of State, indicates that parts of Israel were still experiencing long-range rocket attacks and short-range mortar attacks across the border, including cities in the north of Israel. Other documents, such as the U.S. State Department's Country Reports on Human Rights Practices and an article from an Israeli newspaper, discuss the institutionalized discrimination against Palestinian-Arab Israelis and the diminished legal rights of women. This evidence supports the Applicant's spouse's claim that she would be concerned for her safety and well-being due to the conditions in Israel.

With regard to the family and community ties that the Applicant's spouse would have to sever if she relocated to Israel, the record contains numerous letters from friends and acquaintances of the Applicant and her spouse. There is a letter in the record from the church official who presided over the marriage of the Applicant and his spouse discussing their deep religious convictions and how that will compel the Applicant's spouse to relocate to Israel if the Applicant is denied admission. Other letters in the record attest to the emotional bonds between the Applicant and his spouse and the Applicant's spouse's commitment to her church and the Mennonite school where she teaches. As discussed above, the Applicant's spouse also suffers from medical conditions requiring her to visit local doctors familiar with her medical history and conditions. If she were to relocate she would have to sever the ties with her community, church, medical care providers and the school where she works.

When the hardships upon relocation are considered in the aggregate, we find they rise to the level of extreme hardship. We find that the record contains sufficient documentation to establish that she would experience extreme hardship upon relocation to Israel.

C. Discretion

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

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

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

The negative factors in this case include the Applicant’s multiple convictions, his misrepresentation, and unauthorized employment in the United States. While the Applicant’s convictions are negative factors in this case, the convictions are not for violent crimes, the Applicant has expressed remorse for his convictions, and all occurred over 15 years ago. The positive factors in this case include the presence of the Applicant’s spouse, the hardship she would experience due to the Applicant’s inadmissibility and the value of his volunteer service to their church and the Mennonite school where his spouse is employed. The record also contains numerous attestations of the Applicant’s good moral character and the strong marital bonds he shares with his spouse. Although the

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Applicant's criminal and immigration violations are a serious matter, we find that in this case the positive factors outweigh the negative factors and the Applicant merits a favorable exercise of discretion.

III. CONCLUSION

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

ORDER: The appeal is sustained.

Cite as *Matter of J-S-*, ID# 16244 (AAO June 3, 2016)