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



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



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FILE: [REDACTED] Office: LIMA, PERU Date: **JUL 13 2011**

IN RE: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B) and section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT:
[REDACTED]

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.

Thank you,

Michael Shumway

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer in Charge (OIC), Lima, Peru. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Bolivia who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking readmission within ten years of his last departure from the United States. The applicant was also found to be inadmissible under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for being convicted of a crime involving moral turpitude. The applicant is married to a U.S. citizen and has one U.S. citizen child. He seeks a waiver of inadmissibility in order to reside in the United States.

In a decision dated February 7, 2008, the OIC found that the applicant's conviction for corporal injury to a spouse was a violent or dangerous crime. He then found that although the applicant has shown that his spouse would suffer extreme hardship as a result of relocation, the applicant did not show that she would suffer extreme hardship as a result of separation. The OIC also found that the applicant failed to show that his spouse or children would suffer unusual hardship or extraordinary circumstances in accordance with 8 C.F.R. 212.7(d) of the Act. Finally the officer in charge found that even if extreme hardship had been found, a favorable discretionary decision was undeserved. The application was denied accordingly.

In a Notice of Appeal to the AAO (Form I-290B), dated March 3, 2008, counsel states that the officer in charge erred and abused his discretion in applying an incorrect standard in denying the applicant's unlawful presence waiver. Counsel states that the officer in charge found that the applicant's spouse would suffer extreme hardship as a result of relocating to Bolivia, but would not as a result of separation. Counsel states that this decision is in error as this is not the standard applied by case law to determine extreme hardship.

The present application indicates that the applicant was arrested and convicted for corporal injury to a spouse under California Penal Code section 273.5(a). The record states two different dates for the applicant's arrest as being June 28 or 29 of 2004. The record does indicate that the conviction date for this arrest was February 9, 2005.

Section 212(a)(2)(A) of the Act states, in pertinent parts:

(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –

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

(ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

The Board of Immigration Appeals (BIA) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

[M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general....

In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

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

convictions under the statute may categorically be treated as ones involving moral turpitude.” *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

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

If review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. 24 I&N Dec. at 699-704, 708-709. However, this “does not mean that the parties would be free to present any and all evidence bearing on an alien’s conduct leading to the conviction. (citation omitted). The sole purpose of the inquiry is to ascertain the nature of the prior conviction; it is not an invitation to relitigate the conviction itself.” *Id.* at 703.

California Penal Code section 273.5 states:

- (a) Any person who willfully inflicts upon his or her spouse, or any person who willfully inflicts upon any person with whom he or she is cohabiting, or any person who willfully inflicts upon any person who is the mother or father of his or her child, corporal injury resulting in a traumatic condition, is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not more than one year, or by a fine of up to six thousand dollars (\$6,000) or by both.

The BIA found in *In re Tran*, 21 I&N Dec. 291, (BIA 1996), that willful infliction of corporal injury on a spouse, co-habitant or parent of the perpetrator’s child, in violation of section 273.5(a) of the California Penal Code, constitutes a crime involving moral turpitude. *See also Grageda v. INS*, 12 F.3d 919, 922 (9th Cir. 1993) (“Because spousal abuse is an act of baseness or depravity contrary to accepted moral standards, and willfulness is one of its elements . . . spousal abuse under section 273.5(a) is a crime of moral turpitude.”); *Guerrero de Nodahl v. INS*, 407 F.2d 1405, 1406-07 (9th Cir. 1969) (“[W]e rule that inflicting ‘cruel or inhuman corporal punishment or injury’ upon a child is so offensive to American ethics that the fact that it was done purposely or willingly (the California definition of ‘willful’) ends debate on whether moral turpitude was involved. When the crime is this heinous, willful conduct and moral turpitude are synonymous terms.”). Therefore, the applicant’s conviction under California Penal Code section 273.5(a) is for a crime involving moral turpitude.

However, in his brief counsel asserts that the applicant’s conviction qualifies for the petty offense exception. Counsel states that the applicant’s conviction was for a misdemeanor under a California,

“alternative felony-misdemeanor statute,” that the applicant was not sentenced to more than one year in prison, and that by definition a misdemeanor carries a sentence of six months or less.

On September 21, 2010, the AAO issued a Request for Further Evidence (RFE) in the applicant’s case stating that based on the record the AAO could not accurately determine if the applicant’s conviction qualified for the petty offense exception because the record did not contain the court records for the conviction. The record did not contain documentation to establish the finding of guilt and sentencing beyond assertions from counsel and statements by the consular officer at the U.S. Embassy. The AAO then requested that the applicant submit all court records related to his conviction and any other documentation establishing the conviction and sentence.

In response to the RFE counsel submitted a supplemental brief, court dispositions for the applicant’s conviction, a psychological evaluation for the applicant’s spouse, copies of the applicant’s children’s lawful permanent resident cards and social security cards, documentation that the applicant’s spouse is regularly sending money to the applicant, and a letter from the applicant’s sister-in-law.

The AAO notes that the court dispositions submitted indicate that the applicant was convicted of a misdemeanor under California Penal Code section 273.5(a) and sentenced to two days in jail and three years probation. The AAO notes that the Ninth Circuit Court of Appeals found in *Garcia-Lopez v. Ashcroft*, 334 F.3d 840 (9th Cir. 2003), that the state court’s designation of an offense as either a misdemeanor or a felony was binding on the Board of Immigration Appeals. Thus, the applicant’s conviction is for a misdemeanor, which carries a maximum sentence of one year in prison. *See also Mendez-Mendez v. Mukasey*, 525 F.3d 828 (9th Cir. 2008). The AAO finds that the applicant’s conviction does qualify for the petty offense exception as the maximum penalty possible for his conviction is one year in prison and he was sentence to less than six months in prison. Thus, the applicant is not inadmissible under section 212(a)(2)(A)(i) of the Act. However, the applicant is inadmissible under 212(a)(9)(B) of the Act for being unlawfully present in the United States for more than one year.

The record indicates that the applicant entered the United States on a tourist visa in June 1988 and did not depart the United States until February 22, 2007. During his period of unauthorized stay the applicant applied for political asylum on February 6, 1997, tolling his unlawful presence until July 2, 2002 when the Board of Immigration Appeals (BIA) affirmed the immigration judge’s decision denying the applicant’s case. Thus, the applicant accrued unlawful presence from July 2, 2002 until February 22, 2007. In applying for an immigrant visa the applicant is seeking admission within ten years of his February 2007 departure from the United States. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

(B) Aliens Unlawfully Present.-

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

....

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

....

(v) Waiver. - The Attorney General [now the Secretary of Homeland Security (Secretary)] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or 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 such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

Section 212(a)(9)(B)(v) of the Act provides for a waiver of section 212(a)(9)(B)(i) inadmissibility as follows:

The Attorney General [now Secretary of Homeland Security] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established . . . that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

A waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant or his child can be considered only insofar as it results in hardship to a qualifying relative. The applicant's spouse is the only qualifying relative in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (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*, 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 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). Therefore, 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*, 138 F.3d at 1293 (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 of hardship contains two briefs from counsel, a supplemental brief from counsel, a declaration from the applicant's spouse, a psychological evaluation for the applicant's spouse, copies of the applicant's children's lawful permanent resident cards and social security cards, documentation that the applicant's spouse is regularly sending money to the applicant in Bolivia, two letters from the applicant's sister-in-law, country condition information for Bolivia, a college transcript for the applicant's spouse, and documents regarding the applicant's children's performance in school.

In his supplemental brief, dated November 24, 2010, counsel states that the applicant's spouse and the applicant's children are suffering extreme hardship as a result of the continued separation from the applicant. Counsel also notes that the OIC found that the applicant's spouse would suffer extreme hardship as a result of relocating to Bolivia. He states that the applicant's spouse can no longer survive economically in the United States without the applicant. In his brief, dated, April 1, 2008, counsel states that the applicant's spouse is suffering in the United States without the applicant and her step-children. He states that the applicant's spouse's suffering is not normal considering that she had a previous marriage that failed.

In regards to conditions in Bolivia, counsel submits country condition reports and states that Bolivia has been classified by the U.S. Department of States as a medium to high crime threat country and that visitors should avoid being alone in the streets, especially at night. He states that the drastic drop in living standards that is occurring to the Vegas family while in Bolivia is not common, ordinary, or usual and should be considered a significant factor in evaluating hardship. Counsel also states that the applicant's spouse will suffer by seeing her step-children's future jeopardized by staying in Bolivia. The AAO notes that throughout counsel's brief he mentions the close relationship between the applicant's spouse and the applicant's children, but during her psychological evaluation the applicant's spouse states that since the applicant's children received their lawful permanent residence, she no longer has any contact with them.

In an undated declaration the applicant's spouse states she and the applicant were married in 2004 and that she has two children from a previous marriage, ages 19 and 23 years old. The applicant's spouse states that she has strong family ties to the United States with two brothers and three sisters who she sees on a regular basis. She also states that her 93-year-old father heavily relies on her for care as none of her siblings live in close proximity to her father and that he is the reason she has to work part-time. The AAO notes that subsequent statements from the applicant's spouse reveal that her father died before the writing of this decision.

In her declaration the applicant's spouse also states that she and the applicant have never been separated and that she needs him to support her emotionally and psychologically. She states that the applicant makes her feel young, wanted, secure, and safe. She also states that she cannot relocate to Bolivia because she cannot abandon her father and she does not want to leave her children or her strong economic and educational ties in the United States.

In a psychological evaluation, dated October 20, 2010, a [REDACTED] Personality Inventory and found the applicant's spouse to be emotionally unstable as compared to other female adults. He states that the applicant's spouse states that she normally feels lonely,

sometimes feeling completely worthless, and that she often feels like giving up. [REDACTED] also found that the applicant's spouse tends to shy away from others, is not a cheerful person, and prefers to do things by herself. In performing the [REDACTED] found the applicant's spouse to have a focused worry with unproductive ruminative thought. He also found the applicant's spouse to be mentally drained with fears and with an obsessive compulsive feature of forever losing her husband. [REDACTED] found the applicant's spouse to appear tense with possible attention problems and he found that she has clinically significant daily stress levels while suffering from fearfulness and anxiety.

The applicant's spouse stated to [REDACTED] that she feels alone and poor because with the applicant gone she has lost 30% of her income. She stated that her job, driving inner-city buses at night, is dangerous and that she misses having the applicant to consult with. [REDACTED] asserts that the applicant's spouse stated that when the applicant was in the United States she worked part-time, but now she must work full-time and that if the applicant was in the United States she could go back to working in graphic printing. The applicant's spouse also stated to [REDACTED] that she has no support from her family, she sends the applicant \$400 each month, and she has no support from friends.

[REDACTED] also states that the applicant's spouse stated that it would be very difficult for her to relocate to South America because she does not want to leave her children, she does not speak Spanish, she does not want to lose her car and her job, and even after selling her condominium she would still owe \$50,000 on her mortgage. Finally, [REDACTED] diagnoses the applicant's spouse with Adjustment Disorder with Mixed Anxiety and Depressed Mood. He finds that with more excessive delays the applicant's spouse's emotional state is likely to exacerbate into a Major Depression Disorder.

The AAO notes that the record contains a large volume of Western Union receipts showing that the applicant is receiving money transfers from his spouse on a regular basis.

The record also contains letters from the applicant's sister-in-laws. In a letter, dated February 10, 2007, the applicant's sister-in-law states that it is essential for her sister to stay in Long Beach, California as long as her father is still alive because the family relies on her to provide him with continued care.

The AAO notes that the record of hardship is substantial in that the applicant's spouse has shown that she is suffering emotional hardship as a result of separation from the applicant and would suffer emotional hardship as a result of relocating to Bolivia. Thus, in considering these hardship factors cumulatively: the diminished standard of living, the crime, the separation from family members and employment in the United States, the AAO finds that the applicant has shown that his spouse will suffer extreme hardship as a result of his inadmissibility.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the alien bears the burden of proving eligibility in terms of 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).

In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of 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 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).

See Matter of Mendez-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance 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).

The adverse factor in the present case is the applicant's 2005 conviction for corporal injury to his spouse and his unlawful presence in the United States.

The favorable factors in the present case are the extreme hardship to the applicant's spouse and hardship to the applicant's child if he were to be denied a waiver of inadmissibility; the lack of a criminal record or offense since 2005; and letters from the applicant's spouse and child attesting to the applicant's character as a supportive and loving husband and father.

The AAO finds that the crime and immigration violations committed by the applicant are serious in nature and cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

The AAO notes that on the Form I-290B submitted by counsel and dated March 3, 2008, counsel states that he is appealing both the applicant's waiver application and his application for permission to reapply for admission. The AAO notes that there has not been a final decision issued on the applicant's application for permission to reapply for admission, thus it will not be considered on appeal.

ORDER: The appeal is sustained.