

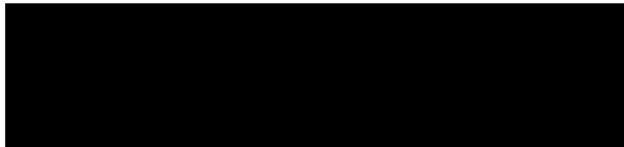
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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**

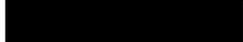
PUBLIC COPY



H6

Date: NOV 02 2011

Office: CIUDAD JUAREZ

FILE: 

IN RE:

Applicant: 

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

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

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

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, 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,

Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Mexico 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. The applicant is the spouse of a U.S. citizen. The applicant sought a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), so as to immigrate to the United States. The director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. The applicant filed a timely appeal.

On appeal, counsel states that the director erred for not considering evidence of the applicant's wife's pregnancy and having to raise three young children for ten years without their father, with whom she has been married since January 8, 2003. Counsel states that the applicant's wife developed major depression and suicidal ideation due to her responsibilities. In addition, counsel maintains that the applicant's four-year-old son has separation anxiety and requires medical evaluation for weakness in his legs. Counsel conveys that the family hardship imposed on the applicant's wife is more than the normal economic and social disruption involved in the removal of a family member. Furthermore, counsel declares that it is unlikely that the applicant and his wife will find that jobs in Mexico pay comparable wages as in the United States, and that applicant's wife will have access to comparable benefits to what she now has. Counsel also indicates that the U.S. Department of State reports that the minimum wage in Mexico does not provide a decent standard of living for a worker and family. Moreover, counsel contends that living in Mexico, particularly Ciudad Juarez, is dangerous and this will have an impact on the applicant's wife and her ability to raise her children. Lastly, counsel maintains that the applicant's wife worries about her husband living in a perilous environment for ten years, and having to travel and visit him there.

Although not addressed by the director, the record conveys that the applicant was convicted of offenses, wrongs to minor and destruction of private property, so we need to determine whether he is also inadmissible under 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the field office or service center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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.)

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

The record reflects that on May 16, 2007 the applicant was found guilty of the offense wrongs to minors in violation of section 34-46 of Chapter 34 of the Revised Municipal Code of the City and County of Denver. The applicant was ordered to serve 91 days in jail, which was conditionally suspended for 90 days, placed on supervised probation for 1 year and ordered to attend domestic violence counseling and have no contact with the victim for 1 year.

Section 34-46 of Chapter 34 of the Revised Municipal Code of the City and County of Denver states:

- (a) It shall be unlawful for any person knowingly, intentionally or negligently and without justifiable excuse, to cause:

- (1) The life of a minor to be endangered;
 - (2) The health or physical well-being of a minor to be injured or endangered;
 - (3) The punishment or tormenting of any minor not in the legal care, custody or control of such person; or
 - (4) The endangerment or impairment of the morals of any minor.
- (b) It shall be unlawful for any person having the legal care, custody or control of any minor knowingly, intentionally or negligently, and without justifiable excuse to:
- (1) Abandon any such minor;
 - (2) Torture, torment or cruelly punish any such minor;
 - (3) Deprive any such minor of food, clothing or shelter;
 - (4) Injure such minor unnecessarily in any other manner; or
 - (5) Allow any such minor to be so abandoned; tortured; tormented; cruelly punished; deprived of food, clothing or shelter; or injured unnecessarily in any other manner.
- (c) It shall be unlawful for any person to intentionally or knowingly provide a weapon to any minor.
- (d) It shall be unlawful for any parent or legal guardian of any minor, who knows such minor possesses or has been provided a weapon, to fail to remove the weapon from the minor's possession or control . . .

The maximum punishment for this crime is by a fine not exceeding \$1,000.00, or by imprisonment not exceeding one year, or by both fine and imprisonment. *See* Chapter 1-12, B.M.C., the Broomfield Penalty Ordinance.

In analyzing the elements of section 34-46 we find that not all of the proscribed conduct involves moral turpitude. A crime involves moral turpitude when a person's actions are accompanied by a vicious motive or corrupt mind and where knowing or intentional conduct is an element of the offense. Because section 34-46 of the Revised Municipal Code of the City and County of Denver criminalizes conduct that is not done intentionally or knowingly or with a vicious motion or corrupt mind, but is done negligently such as causing the health of children to be injured or for depriving minors of food, clothing or shelter, we find that the offense of wrongs to minors does not categorically involve moral turpitude.

If the crime does not categorically involve moral turpitude, we apply the modified categorical approach. This involves examination of the record of conviction and any evidence relevant to making a determination of whether the applicant's conviction entailed elements of a crime involving moral turpitude. To meet his burden, the applicant must, at a minimum, submit the available documents comprising the record of conviction and any relevant evidence and show that they fail to establish that his conviction was based on conduct involving moral turpitude. To the extent such documents are not available, this fact is to be established in accord with the requirements under 8 C.F.R. § 103.2(b)(2). In the instant case, in response to a request by the director for all court dispositions and arrest records, the applicant submitted copies of his docket pertaining to the wrongs to minors offense. But the docket, which lists the court's proceedings, does not demonstrate that the applicant's offense of wrongs to minors was not a crime involving moral turpitude. Accordingly, the AAO cannot conclude based on the record before it that, under the modified categorical approach, the applicant's crime is not a crime involving moral turpitude.

The applicant was also convicted of destruction of private property in violation of section 38-71 of Chapter 38 of the Revised Municipal Code of the City and County of Denver, which states:

(a) It shall be unlawful for any person knowingly to damage, deface, destroy or injure the real or personal property of one (1) or more other persons in the course of a single episode where the aggregate damage to the real or personal property is less than one thousand dollars (\$1,000.00).

(b) Deface as used in subsection (a) shall include, but not be limited to, the writing, painting, inscribing, drawing, scratching or scribbling upon any wall or surface owned, operated or maintained by any person, unless there is written permission for said writing, painting, inscribing, drawing, scratching or scribbling.

Essentially, section 38-71 punishes a person for knowingly damaging, defacing, destroying or injuring another's property.

In *Rodriguez-Herrera v. INS*, 52 F.3d 238, 240 (9th Cir. 1995), the Ninth Circuit found that the offense of malicious mischief in violation of the Revised Code of Washington statute, RCW § 9A.48.080(1)(a) does not involve moral turpitude. That statute provides, in relevant part:

(1) A person is guilty of malicious mischief in the second degree if he knowingly and maliciously:

(a) Causes physical damage to the property of another in an amount exceeding two hundred fifty dollars;....

Maliciously is defined in Section 9A.04.110(12), which provides:

"[m]alice" and "maliciously" shall import an evil intent, wish, or design to vex, annoy, or injure another person. Malice may be inferred from an act done in wilful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a wilful disregard of social duty.

The Ninth Circuit stated that crimes like malicious mischief are not of the gravest character and are not at the level of depravity or fraud. The Ninth Circuit found that malicious mischief is a relatively minor offense, and a person could be convicted for destroying as little as \$250.00 of another's property with only an evil wish to annoy. The Ninth Circuit stated that even though the Washington statute has an element of malice under RCW § 9A.04.110(12), such evil intent may be too "attenuated to imbue the crime with the character of fraud or depravity that we have associated with moral turpitude." 52 F.3d 238 at 240-241. Thus, the Ninth Circuit found that a person who, with malice or malicious intent, physically causes damage to the property in violation of the Revised Code of Washington statute, RCW § 9A.48.080(1)(a) has not committed a crime of moral turpitude.

Unlike the crime under RCW § 9A.48.080(1)(a), the crime under section 38-71 of Chapter 38 of the Revised Municipal Code of the City and County of Denver does not have as an element the mens rea of malice. A person is punished under the code for knowingly damaging, defacing, destroying or injuring another's property. Similar to the Washington statute, the offense under the Denver code

does not involve fraud or depravity. Thus, since the Ninth Circuit found that the crime under RCW § 9A.48.080(1)(a), which had an element malice or malicious intent, is not a crime involving moral turpitude, we find that the crime of damaging, defacing, destroying or injuring the property of another under the Revised Municipal Code of the City and County of Denver, which does not have the element of malice or malicious intent, also is not a crime involving moral turpitude.

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

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if -

...

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . .

The AAO will now address the finding of inadmissibility for unlawful presence, which is found under section 212(a)(9)(B) of the Act. That section provides, in part:

(B) Aliens Unlawfully Present

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

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . and again seeks admission within 3 years of the date of such alien's departure or removal, or

(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.

.....

U.S. Citizenship and Immigration Services (USCIS) records reflect that the applicant entered the United States without inspection in 2000. The applicant began to accrue unlawful presence since 2000 until October 2007, when he left the country and triggered the ten-year bar, rendering him inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

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. A waiver under section 212(h)(1)(B) 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, parent, son, or daughter of the applicant. In that the hardship standard under section 212(a)(9)(B)(v) of the Act is the more difficult to meet, that is the hardship standard that will be applied here. Thus, hardship to the applicant or his children can be considered only insofar as it results in hardship to a qualifying relative. The applicant's U.S. citizen 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 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*, 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.

In rendering this decision, the AAO will consider all of the evidence in the record, which consists of an evaluation report of the applicant’s wife, information about suicidal ideation, newspaper articles, birth certificates of the applicant’s wife and children, a marriage certificate, letters, and other documentation.

The applicant’s wife stated in the letter dated January 3, 2008 that her husband was charged with domestic violence (the incident occurring on March 31, 2007), and is required to attend provocation therapy classes for one year. She indicated that her husband has taken only 15 of the required 36 classes because he has been in Mexico. The applicant’s wife stated that the classes are helpful to her husband in making him a better parent, husband, and person. She maintained that she and her young children need the applicant. Lastly, she stated that she cannot stay with her husband in Mexico because of her pregnancy and her daughter’s need to attend school where “they speak her language.” Moreover, the applicant’s wife stated in the letter dated January 28, 2008 that she and her children are suffering since the applicant has been in Mexico. She conveyed that she is pregnant and does not work and needs the applicant’s help to provide for their children.

In addition, the record contains an evaluation report dated March 1, 2009 from [REDACTED] an unlicensed psychotherapist. In the evaluation [REDACTED] stated that the applicant’s 25-year-old wife was born in Virginia and is looking for a job. She further stated that the applicant’s wife lived with the applicant for eight years and has been married to him for six years. [REDACTED] indicated that the applicant and his wife have three children, who are six, four, and eleven months old, and that

the applicant's wife is stressed and depressed while looking for work because they have no more money. She further indicated that the applicant's children are exhibiting behavioral problems and the applicant's son has aches and weakness in his legs. Lastly, [REDACTED] stated that in her professional opinion the applicant's wife has major depression and "may be having suicidal thoughts." While we will take into consideration [REDACTED] statements regarding the hardships of the applicant's wife and children, because [REDACTED] is not a licensed psychotherapist in the state of Colorado, the weight of her statements about the mental health of the applicant's wife will be diminished accordingly in the hardship determination.

The asserted hardships to the applicant's wife are economic and emotional in nature. The applicant's wife stated that she is experiencing financial hardship without the applicant. However, the applicant has not submitted any evidence reflecting her financial hardship and has not described how she has managed to provide for her children since their separation. While we acknowledge that the applicant's wife has declared that she will have the emotional and financial hardship of raising three young children alone and, in addition, is concerned about the affect of separation on her children, we find that the applicant has not fully demonstrated that the hardship factors to his wife in remaining in the United States without him, when considered together, are more than the common or typical result of removal and inadmissibility.

Moreover, the applicant has not fully demonstrated that his wife will experience extreme hardship if she joined him in Mexico. The applicant claims that he will not be able to obtain a job in Mexico that will provide a sufficient income in which to ensure his family does not live in poverty. The record reflects that the applicant has lived in the United States for only seven years, and has not claimed to have severed his social and family ties to Mexico. Consequently, we find that in view of these factors the applicant has not fully demonstrated that he will not be able to obtain a job in Mexico for which he is qualified and that will provide an income that will ensure his family does not live in poverty. In addition, although the applicant asserted that his wife will not have comparable benefits in Mexico, the applicant has provided no documentation of the benefits his wife currently has in the United States. Lastly, the submitted newspaper articles describe problems in Ciudad Juarez, Mexico. However, the record indicates that the applicant lived in Iztapalapa, Mexico, his entire life prior to coming to the United States, and the applicant has not stated that he now lives in Ciudad Juarez or expects his family to live there. When the hardship factors are considered together, they fail to demonstrate extreme hardship to the applicant's wife if she joins him to live in Mexico.

Because the applicant is statutorily ineligible for relief, no purpose is served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden.

ORDER: The appeal is dismissed. The waiver application is denied.