

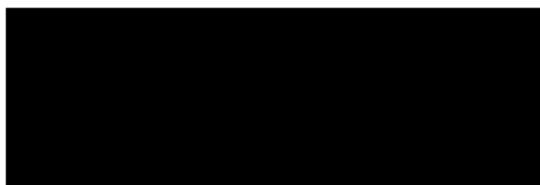
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U. S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



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



H6

Date: OCT 03 2011

Office: PORTLAND, OR

FILE: 

IN RE: 

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).

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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,

A handwritten signature in cursive script that reads "Michael Shumway".

for Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Field Office Director, Portland, Oregon. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal is sustained.

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 and seeking readmission within ten years of his last departure from the United States. The applicant is the spouse of a U.S. citizen and seeks a waiver of inadmissibility in order to reside in the United States.

In a decision dated November 13, 2008, the field office director found that the applicant failed to establish extreme hardship to his U.S. citizen spouse as a result of his inadmissibility and denied the waiver application accordingly. The field office director also stated that the applicant misrepresented a material fact on his immigrant V visa in order to gain admission to the United States.

The record indicates that the applicant entered the United States without inspection in July 1992. On December 12, 1995, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on a Petition for Alien Relative (Form I-130) filed by then spouse [REDACTED] and approved on November 24, 1995. However, on October 5, 1995, [REDACTED] died and the applicant failed to disclose this fact while continuing to apply for adjustment of status and the benefits associated with a pending adjustment application.

On April 20, 1998, through the Portland, Oregon District Office, the applicant was issued Authorization for Parole of an Alien into the United States (Form I-512), valid until December 31, 1998, and subsequently used the advance parole authorization to depart the United States on October 15, 1998 and reenter on November 1, 1998. The record does not establish any subsequent departures from the United States nor does it establish that the applicant ever applied for an immigrant visa and misrepresented his presence in the United States.

In regards to unlawful presence, section 212(a)(9)(B) of the Act provides:

(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 . . . prior to the commencement of proceedings under section 235(b)(1) or section 240, and again seeks admission within 3 years of the date of such alien's departure or removal, . . . is inadmissible.

(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.

The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary] as a period of stay for purposes of determining bars to admission under section 212(a)(9)(B)(i)(I) and (II) of the Act. *See Memorandum on Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act*, dated May 6, 2009. Thus, the applicant did not accrue any periods of unlawful presence. The AAO finds that no periods of unlawful presence can begin to accrue until April 1, 1997, the date of enactment of unlawful presence provisions under the Act and any subsequent periods of unlawful presence would not be triggered unless an applicant departed the United States. The applicant is, therefore, not inadmissible under section 212(a)(9)(B)(i) of the Act for being unlawfully present in the United States.

In regards to a possible misrepresentation by the applicant, section 212(a)(6)(C) of the Act provides, in pertinent part, that:

- (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

A misrepresentation is generally material only if by it the alien received a benefit for which he would not otherwise have been eligible. *See Kungys v. United States*, 485 US 759 (1988); see also *Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998); *Matter of Martinez-Lopez*, 10 I&N Dec. 409 (BIA 1962; AG 1964) and *Matter of S- and B-C-*, 9 I&N Dec. 436 (BIA 1950; AG 1961). In the applicant's case he received the benefit of advanced parole, which he would not have been entitled to if he had disclosed his wife's death. Thus, the AAO finds that the applicant's misrepresentation was willful in that he filed his adjustment application after his wife's death and it was material in that he sought that benefit and also gained a related benefit, advanced parole, which he would not have been issued had his wife's death been disclosed. Therefore, the applicant is inadmissible under section 212(a)(6)(C) of the Act and will require a waiver of this inadmissibility under section 212(i) of the Act.

The AAO also finds that the applicant has been convicted of a crime involving moral turpitude, but this conviction falls within the petty offense exception under section 212(a)(2)(A)(ii)(II) 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.

(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.

The record shows that on May 22, 2002, in Marion County, Oregon, the applicant pled guilty to Assault in the Fourth Degree, a Class A misdemeanor. The applicant was sentenced to two years probation and the maximum possible sentence for a Class A misdemeanor in Oregon is one year imprisonment.

§ 163.160 of the Oregon Revised Statutes states:

- (1) A person commits the crime of assault in the fourth degree if the person:
  - (a) Intentionally, knowingly or recklessly causes physical injury to another; or
  - (b) With criminal negligence causes physical injury to another by means of a deadly weapon.
- (2) Assault in the fourth degree is a Class A misdemeanor.

The AAO notes that assault may or may not involve moral turpitude. *See Matter of Danesh*, 19 I&N Dec. 669, 670 (BIA 1988). The BIA has stated that offenses characterized as “simple assaults” are generally not considered to be crimes involving moral turpitude. *See Matter of Perez-Contreras, supra; Matter of Short*, 20 I&N Dec. 136, 139 (BIA 1989). In addition, the BIA has recognized that not all crimes involving the injurious touching of another person reflect moral depravity on the part of the offender. *See Matter of Sanudo*, 23 I&N Dec. 968, 971 (BIA 2006).

More recently, in *Matter of Solon*, 24 I&N Dec. 239, 242 (BIA 2007), the BIA stated:

[I]n the context of assault crimes, a finding of moral turpitude involves an assessment of both the state of mind and the level of harm required to complete the offense. Thus, intentional conduct resulting in a meaningful level of harm, which must be more than mere offensive touching, may be considered morally turpitudinous. However, as the level of conscious behavior decreases, i.e., from intentional to reckless conduct, more serious resulting harm is required in order to find that the crime involves moral turpitude.

Moreover, where no conscious behavior is required, there can be no finding of moral turpitude, regardless of the resulting harm.

The indictment in the applicant's case, dated May 7, 2002, states that the applicant knowingly caused physical injury to his then girlfriend. In accordance with *Matter of Solon*, the AAO finds that the applicant's crime constitutes a crime involving moral turpitude, because it involved knowing conduct which resulted in physical injury. However, the applicant's conviction qualifies for the petty offense exception as the maximum possible sentence for a Class A misdemeanor in Oregon is one year imprisonment and the applicant was not sentenced to a term of imprisonment. The record establishes that the applicant was convicted of only one crime involving moral turpitude, that the crime qualifies under the petty offense exception to inadmissibility, and that the applicant is not otherwise inadmissible.

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

- (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [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 Attorney General [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.

A waiver of inadmissibility under section 212(i) 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 children 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-Morales*, 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.

The record of hardship includes a statement from the applicant's spouse, a statement from the applicant, medical records, and financial documents. The record indicates that the applicant's spouse has three children and a long history of mental health problems. In his statement the applicant states that his spouse is a recovering methamphetamine addict who has spent two years in a women's correctional facility because her addiction led her into criminal activity. He also states that his spouse only has a sixth grade education and very limited work experience, and that with her lack of education and criminal history it would be very hard for her to find employment to support their children. The applicant states further that his wife and his son have mental health problems for which they are attending counseling. The applicant states that he has been the main provider and caregiver for their children and that if he were to be removed his spouse would not be able to deal with the emotional stress his departure would cause to his children.

In her statement the applicant's spouse states that she is scared and worried that she will not be able to handle all of the pressure that would come with the applicant's departure. She also states that if the applicant returns to Mexico she will lose all of her medical benefits as her insurance is with the applicant's employer and that she has been looking for employment for the last two years, but has not been able to find a job. She states that she cannot imagine moving to Mexico because she does not speak Spanish and she would not receive her medical and mental health services in Mexico.

Medical documentation included in the record supports the statements regarding the applicant's spouse's mental health, addiction recovery, felony convictions, and time served in prison. A letter from the family's current therapist, [REDACTED], dated January 2, 2009, states that she has been providing individual counseling to the applicant's son and family counseling to the applicant's family since September 28, 2008. She states that the applicant's son hears voices, sees things that are not there, and has outbursts of anger. She states that the applicant's spouse is under a great deal of emotional stress and that it is her opinion that the applicant's spouse's current recovery and mental health are in jeopardy of collapsing if the applicant is removed from the United States. She states that the applicant is the main mental, emotional, physical, and financial support to the family. The AAO notes that financial documentation indicates that the applicant is the sole financial support of the family.

The AAO finds that the applicant's spouse will suffer extreme emotional hardship as a result of the applicant's inadmissibility. The applicant's spouse's mental health problems and addiction recovery make separating from her husband and caring alone for three children, one of whom has mental health problems of his own, an extreme hardship. Exacerbating the applicant's spouse's situation is the difficulty she would face in finding employment to support her family because of her lack of education and her felony criminal record. The AAO also finds that the applicant's spouse would suffer extreme emotional hardship as a result of relocation. The applicant's spouse is not familiar with the culture, does not speak the language, and would not have an established support group of mental health professionals; given her mental health issues, when all the factors are viewed cumulatively, they rise to level of extreme hardship to the applicant's spouse.

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-Morales*, 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 factors in the present case are the applicant's criminal record and misrepresentation.

The favorable factors in the present case are the extreme hardship to the applicant's spouse and children if the applicant were to be found inadmissible; the lack of a criminal record or offense since 2002; and the emotional and financial support he has provided for his spouse and his children.

The AAO finds that the immigration violation and crime 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.

**ORDER:** The appeal is sustained.