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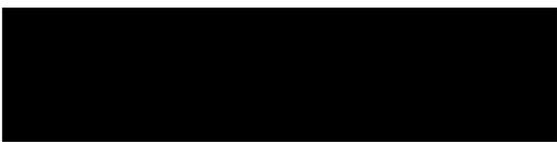
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
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Washington, DC 20529-2090

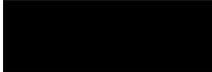


U.S. Citizenship
and Immigration
Services

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DATE: Office: HARLINGEN FILE: 

IN RE: **JAN 30 20** 

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

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,


for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application for waiver of inadmissibility was denied by the Field Office Director, Harlingen, Texas, 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 under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. The applicant is applying for a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his U.S. citizen qualifying relatives.

On March 25, 2009, the Field Office Director determined that the applicant failed to establish extreme hardship to a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On appeal, counsel does not contest the applicant's inadmissibility, but states that the applicant's U.S. citizen spouse will suffer extreme hardship if the applicant is not granted a waiver of inadmissibility.

In support of the waiver application, the record includes, but is not limited to a brief by the applicant's counsel, biographical information for the applicant and his U.S. citizen spouse and daughter, employment records for the applicant and his U.S. citizen spouse, medical records for the applicant's U.S. citizen daughter, a local police clearance for the applicant, and the applicant's criminal records.

We will first address the applicant's admissibility. The applicant was found to be inadmissible by the Field Office Director under INA § 212(a)(2)(A)(i)(I) for having been convicted of a crime involving moral turpitude. Additionally, in relation to a previous application for adjustment of status, the applicant was found inadmissible under INA § 212(a)(2)(A)(i)(II) for possession of a controlled substance.¹ The applicant does not contest his inadmissibility on appeal.

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

(A) Conviction of certain crimes. -

(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-

¹ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the original decision does not identify all of the grounds for denial. *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).

- (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 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.

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 *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General, clarified that for a crime to qualify as a crime involving moral turpitude for purposes of the INA, it “must involve both reprehensible conduct and some degree of scienter, whether specific intent, deliberateness, willfulness, or recklessness.” In *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General also 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 the applicant has multiple arrests and convictions. The applicant was first arrested on October 21, 1982 in Dallas, Texas and charged with Attempted Burglary of a Building.² He was convicted of that offense, a third degree felony, on December 20, 1982 in the 203rd Judicial District Court of Dallas County and was sentenced to two years of probation and ordered to pay court and probation fees. A court record dated December 26, 1984 indicates that the applicant successfully completed his probation for this offense. The applicant was next convicted of Unlawfully Carrying a Weapon in violation of then Section 46.06 of the Texas Penal Code, a class A misdemeanor, on October 2, 1986. He was sentenced to 180 days confinement and was ordered to pay a fine of \$250.00. A court record dated May 31, 1988 illustrates that the applicant successfully completed the terms of this sentence. The applicant was last arrested in Houston, Texas on November 14, 1991 and charged with possession of narcotics. For this offense, he was convicted of Possession of Marijuana (0-2 oz.) on January 29, 1992, a class B misdemeanor, in the District Court of Harris County, Texas. He was sentenced to 4 days in jail and fined \$100.

In regards to the applicant’s conviction for Attempted Burglary of a Building, the applicant has not presented and the AAO is unaware of a conviction for Burglary under the Texas Penal Code that does not involve moral turpitude. The Board of Immigration Appeals (BIA) has maintained that the determinative factor in assessing whether burglary involves moral turpitude is whether the crime intended to be committed at the time of entry or prior to the breaking out involves moral turpitude. *Matter of M-*, 2 I&N Dec. 721, 723 (BIA 1946). For example, the BIA has held that burglary with intent to commit theft is a crime involving moral turpitude. *See Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982). Section 30.02(a) of the Texas Penal Code provides, in pertinent part that “[a] person commits an offense if, without the effective consent of the owner, the person (1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony, theft, or an assault” or (2) remains concealed, with intent to commit a felony, theft, or an assault, in a building or habitation; or (3) enters a building or habitation and commits or attempts to commit a felony, theft, or an assault. The record of conviction for this offense, however, is not complete and does not include the indictment on which

² Although the applicant disclosed this conviction on his previous application for adjustment of status filed on August 1, 1987 and was granted adjustment of status, the record does not indicate whether it was determined that this offense was not a crime involving moral turpitude or otherwise a bar to adjustment, or that he has been granted a waiver of inadmissibility for the offense.

the conviction is based. As such, it is not possible to determine from the record whether the applicant's conviction involved moral turpitude. It is not necessary to reach a conclusion on this issue at this time as the applicant is inadmissible on other grounds, as detailed below.

The applicant was also convicted of Unlawfully Carrying a Weapon under the Texas Penal Code. In regards to this offense, the BIA held in *Matter of Granados* that a conviction for possession of a concealed sawed-off shotgun is not a crime involving moral turpitude. 16 I&N Dec. 726, 728 (BIA 1979). But, in *Matter of S-*, the BIA held that carrying a concealed and deadly weapon with intent to use against the person of another is a crime involving moral turpitude because "the use of a dangerous weapon against the person of another is motivated by an evil, base, and vicious intent. The essence of the offense is the carrying of the dangerous weapon with a base, evil and vicious intent to injure another." 8 I&N Dec. 344, 346 (BIA 1959) (citations omitted). The record indicates that the applicant was in possession of brass knuckles, which led to his conviction. There is no indication in the portions of the record of conviction before us that the applicant had an evil, base, and vicious intent to injure another as described in *Matter of S-*. Accordingly, we cannot find that the applicant's October 2, 1986 conviction under then Texas Penal Code § 40.46 is a crime involving moral turpitude.

Lastly, the applicant was convicted of Possession of Marijuana (0-2 oz.) on January 29, 1992, presumably in violation Texas Health and Safety Code § 481.121. For this offense, the applicant is inadmissible under INA § 212(a)(2)(A)(i)(II) for possession of a controlled substance. As the record makes clear that the applicant's conviction involved 30 grams or less of marijuana, a waiver is available for this ground of inadmissibility at INA § 212(h).

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

The Attorney General [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 Attorney General [Secretary] 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 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 . . . ; and

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

Section 212(h)(1)(A) of the Act provides that the Secretary may, in her discretion, waive the application of subparagraph (A)(i)(II) of subsection (a)(2) if 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. An application for admission to the United States is a continuing application, and admissibility is determined on the basis of the facts and the law at the time the application is finally considered. *Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992).

Since the activities that are the basis for the applicant's criminal conviction occurred more than 15 years ago, on November 14, 1991, he is eligible for a waiver under section 212(h)(1)(A) of the Act. Section 212(h)(1)(A) of the Act requires that the applicant's admission to the United States not be contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated. Evidence in the record to establish the applicant's eligibility under section 212(h)(1)(A)(ii) and (iii) of the Act consists of a criminal history clearance from the Mission Police Department indicating that the applicant does not have a criminal record with that police department. The applicant has not submitted any other evidence of rehabilitation, such as the successful completion of a substance abuse course. Additionally, the applicant has not submitted evidence to illustrate that his admission would not be contrary to the national welfare, safety, or security of the United States. Although the record indicates that the applicant's wife is gainfully employed, the only record of the applicant's employment is an affidavit written by the applicant himself, dated July 26, 2007. The applicant indicates that he is self-employed and does carpentry work, but he does not provide letters from his clients or others who can verify his employment or moral character. The last tax returns submitted in the record are from 2006, but evidence of additional tax return filings were not included with the appeal submitted in 2009. Also, the record indicates that the applicant has a U.S. citizen daughter, but there is no evidence in the record of the role that the applicant plays in his daughter's life. There are no statements in the record regarding the applicant's moral character from the applicant, his spouse, his daughter, or other relatives or members of the community.

Moreover, counsel for the applicant states that the applicant departed the United States and lives in Mexico. More specifically, the attorney's brief dated May 20, 2009 states that since the applicant's spouse "left with her husband to Mexico, [her] life has been turned upside down and her hardship has in fact been very extreme." The attorney's brief also states that the applicant and his wife have two children together, both males. This information not only indicates the potential for other grounds of inadmissibility, it contradicts the information of record which illustrates that the applicant has one daughter with his wife. It is incumbent upon the applicant to resolve any

inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the applicant submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The AAO finds that the applicant has not provided sufficient credible evidence to demonstrate that his admission to the United States is not contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated, as required by section 212(h)(1)(A)(ii) and (iii) of the Act.

The applicant is also eligible for a waiver of inadmissibility if he demonstrates that a qualifying relative would suffer extreme hardship if he were not admitted to the United States. A waiver of inadmissibility under section 212(h) 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 child of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. The applicant's spouse and daughter are the only qualifying relatives in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and the AAO 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 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. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 885 (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.*

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). All hardships must be considered in determining whether the combination of hardships takes the case beyond the consequences ordinarily associated with removal or inadmissibility. *Matter of O-J-O*, 21 I&N Dec. at 383.

On appeal, counsel for the applicant asserts that the applicant’s U.S. citizen spouse will suffer extreme hardship if he is not admitted to the United States. An analysis under *Matter of Cervantes-Gonzalez* is appropriate. 22 I&N Dec. at 566-67. The AAO notes that extreme hardship to qualifying relatives must be established in the event that they accompany the applicant abroad or in the event that they remain in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant’s waiver request. Counsel for the applicant states on appeal that the applicant’s spouse resides in Mexico with the applicant and their two sons, contradicting other evidence in the record illustrating that the applicant and his spouse have one daughter and reside in the United States. Statements of counsel are not evidence and the AAO will analyze the hardship in this case based on the documentary evidence of record, and not on the statements of counsel. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

The record indicates that the applicant’s spouse was last employed full-time on July 26, 2007 as an “attendant” with [REDACTED] in McAllen, Texas earning \$6.50 per hour. Without any evidence of the applicant’s spouse’s expenses or the contributions that the applicant makes to cover those expenses, it is not possible to make any conclusions regarding any financial hardship that the applicant’s spouse would suffer if the applicant were not granted admission to the United States. Additionally, there is no indication of emotional or medical hardship to the applicant’s spouse submitted in the evidence of record. A document from Mission Hospital, Inc, dated March 1, 2009 shows that the applicant’s daughter visited the hospital emergency room, but it is not clear from that document the nature of the applicant’s daughter’s illness, whether that illness persists, or

how the applicant's immigration status affects his daughter's health. In fact, there is no indication in the record of the role that the applicant plays in caring for his daughter. The bills from the emergency room visit are addressed to the applicant's spouse.

There is no evidence in the record indicating the hardship that the applicant's spouse or daughter would suffer if they were to relocate to Mexico with the applicant. Even were the AAO to take notice of general conditions in Mexico, the record lacks evidence demonstrating how the applicant's qualifying relatives would specifically be affected by any adverse conditions there. It is not clear from the record whether the applicant's daughter continues to suffer from any medical condition, and if so, what that condition is, and if it is treatable in Mexico. Additionally, the applicant has not presented any evidence that his spouse could not obtain employment or meet her basic needs in Mexico. Accordingly, the record does not show that relocation to Mexico would cause extreme hardship to the applicant's spouse or children. *See Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 565-66.

A review of the documentation in the record, when considered in the aggregate fails to reflect that the applicant's U.S. citizen spouse or children would suffer extreme hardship if he were not permitted to reside in the United States. The applicant has not provided enough evidence for the AAO to determine that any hardship that his spouse and daughter would suffer is connected to his inadmissibility and that the level of hardship rises to the level of extreme hardship required by the statute. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991); *Perez*, 96 F.3d at 392 (defining "extreme hardship" as hardship that was unusual or beyond that which would normally be expected upon deportation); *Matter of Pilch*, 21 I&N Dec. at 631. The burden of proof is upon the applicant to establish he is eligible for the benefit sought. Section 291 of the Act, 8 U.S.C. § 1361.

The AAO therefore finds that the applicant has failed to establish extreme hardship to his U.S. citizen spouse and daughter as required under section 212(h) of the Act. Having found the applicant ineligible for relief under section 212(h) of the Act, no purpose would be served in discussing whether the applicant merits a waiver as a matter of discretion.

In these proceedings, the burden of establishing eligibility for the waiver rests entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has not met his burden and the appeal will be dismissed.

ORDER: The appeal is dismissed.