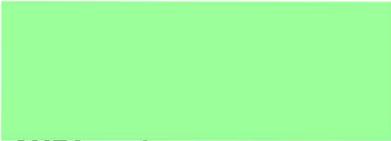


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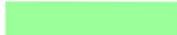


U.S. Citizenship
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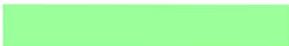


Date: **MAR 07 2013**

Office: LONDON

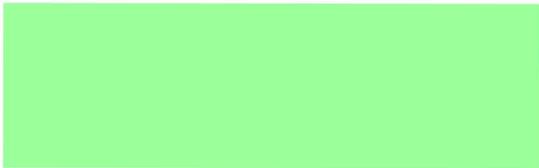
FILE: 

IN RE:

Applicant: 

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.

Thank you,

A handwritten signature in black ink that reads "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, London, United Kingdom. An appeal of the denial was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on motion. The motion will be granted and the underlying waiver application will be approved.

The applicant is a native and citizen of the United Kingdom who was found by the field office director to be inadmissible to the United States pursuant to 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 crimes involving moral turpitude. 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.

On appeal, the AAO agreed with the field office director's determination that the applicant was inadmissible for having been convicted of a crime involving moral turpitude. In addition, the AAO determined that the applicant was inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for seeking admission into the United States by fraud or willful misrepresentation. The AAO concurred with the field office director's conclusion that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and that the Application for Waiver of Grounds of Inadmissibility (Form I-601) would be denied.

Counsel argues that the AAO erred on appeal in citing *Spencer Enterprises, Inc. v. U.S.*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001) *aff'd*, 345 F.3d 683 (9th Cir. 2003), and *Soltane v. U.S. Dept. of J.*, 381 F.3d 143, 145-46 (3d Cir. 2004), as the basis to add misrepresentation as a new ground of inadmissibility because the AAO had not added a new ground of inadmissibility in these cases. Counsel asserts that the AAO deprived the applicant of the opportunity to address the new ground of inadmissibility as well as the evidence supporting it, and cites 8 C.F.R. § 103.2(b)(16) and *Matter of Pradiou*, 19 I&N Dec. 419 (BIA), as allowing inspection of the record of proceeding that constitutes the basis for the denial, and *de la Llana-Castellon v. I.N.S.*, 16 F.3d 1093, 1096 (10th Cir. 1994), as entitling factfinding based on the record that is before the decision maker.

Counsel contends that the AAO had not made a formal finding that the applicant failed to reveal his crime involving moral turpitude (CIMT) on the Nonimmigrant Visa Waiver Arrival-Departure Record (Form I-94W) or to the inspecting officer, and had erroneously speculated that because the applicant committed a CIMT and was admitted to the United States, the applicant must not have completed the Form I-94W truthfully or revealed his crime to the inspecting officer. Counsel asserts that the applicant may have revealed his CIMT on the Form I-94W or to the inspecting officer, and that the inspecting officer may have decided to admit the applicant, regardless of the CIMT. Thus, counsel argues that the evidence is insufficient for finding willful misrepresentation. Furthermore, counsel contends that even if the applicant answered "no" to the question at Part B on Form I-94W ("Have you ever been arrested or convicted for an offense or crime involving moral turpitude?"), the AAO has not established willful intent. Counsel cites *Kungys v. U.S.*, 485 U.S. 759, 768 (1988), as indicating that a checked box, without more, does not constitute fraud as there must be a finding of intentional fraud. Counsel argues that the AAO had not asserted that the applicant knew that he had committed CIMTs or was ineligible to travel to the United States because of them. Counsel contends that whether a crime is a CIMT is often litigated and it is not clear that the applicant knew he had been arrested or convicted for an offense or CIMT when he responded to the question at Part

B on Form I-94W. Counsel argues that as intentional misrepresentation has not been established and the applicant has not been shown the I-94 card in which he allegedly marked “No” to the question at Part B on Form I-94W, misrepresentation should not be added as a new ground of inadmissibility without first providing the applicant with an opportunity to review the evidence and address the charge. Counsel asserts that even assuming that the AAO can raise this new ground of inadmissibility and the evidence supports it, the applicant amends his waiver to include a section 212(i) waiver.

In regard to the finding of no extreme hardship, counsel argues that the AAO made errors of law and failed to consider, in the aggregate, the hardship factors if the applicant’s wife were permanently separated from the applicant, and if the applicant’s wife joined the applicant to live in the United Kingdom. Counsel contends that the AAO erred in citing *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), *Hassan v. INS*, 927 F.2d 465 (9th Cir. 1991), and *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), as they do not involve permanent family separation. Counsel asserts that the AAO abused its discretion and failed to properly consider that permanent spousal separation is more than a mere “common result” of removal, and cited *Salcido-Salcido*, 138 F.3d at 1292, 1293 (9th Cir. 1998), *Gutierrez-Centeno v. INS*, 99 F.3d 1529, 1533 (9th Cir. 1996), *Bastidas v. INS*, 609 F.2d 101 (3rd Cir. 1979), and *Tovar v. INS*, 612 F.2d 794 (3rd Cir. 1980) as establishing that family separation is a significant hardship factor. Counsel cited *Matter of O-J-O-*, 21 I&N Dec. 381, 419 (BIA 1996), as establishing that the Board found that extreme hardship need not be construed narrowly or considered “unique” in order to be found “extreme.” As to emotional hardship, counsel asserts that the AAO failed to consider the hardship to the applicant’s 50-year-old wife in regard to her family members as well as to the applicant, particularly because permanent separation from the applicant is a de-facto divorce. Counsel declares that the applicant’s wife had a bad first marriage, but has a close relationship with the applicant, which removes this case from the typical “common consequences” of removal. In regard to financial hardship, counsel asserts that the AAO erred in concluding that the applicant’s wife would not suffer economic detriment in remaining in the United States without the applicant. Counsel declares that the applicant’s wife has limited income, her rental property is losing money and requires the applicant’s management, and the applicant’s wife cares for and supports her daughter, grandchild, and parents. Counsel asserts that the applicant’s wife’s monthly expenses of \$2,988 exceed her monthly income of \$2,210.

In regard to joining the applicant to live in the United Kingdom, counsel contends that the AAO erroneously dismissed the applicant’s wife’s separation from her daughter and grandchild as “consequences of removal.” Counsel cited *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994), as holding that “[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists.” Counsel contends that the AAO failed to apply this legal standard in the instant case. Counsel argues that the AAO expressed a personal opinion about the applicant’s wife’s medical condition and failed to consider the hardship her condition will cause in relocation to the United Kingdom. Counsel cited *Matter of Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001), and asserted that the applicant’s wife’s hardship was more extreme than that of the adolescent in *Kao & Lin*, who was forced to relocate to Taiwan with her parents. In relocating to the United Kingdom, counsel contends that the applicant’s wife will have to sell her real estate at a loss, lose her relationship with her daughter and grandchild, and be thrust into a country where, at the age of 50 and with few job skills, will have to seek a job.

The AAO will grant the motion to reopen, and for the reasons set forth in this decision will deny the underlying waiver application.

We first turn to the argument that *Spencer Enterprises, Inc.* and *Soltane* provided no basis for the AAO to have added misrepresentation under section 212(a)(6)(C)(i) of the Act. The AAO cited these cases for the standard against which we review appeals, which is on a de novo basis. These cases also indicate that on appeal the AAO employs de novo review and may deny an application or petition on new and different grounds from those identified by a director. *Spencer Enterprises, Inc.*, 229 F. Supp. 2d 1025 at 1043 (acknowledged the AAO had denied the EB-5 application “on new and different grounds” not identified by the service center) and *Soltane*, 381 F.3d 143 at 145-146 (acknowledged that the AAO reviewed the record de novo).

Counsel asserts that the AAO deprived the applicant of the opportunity to address the new ground of inadmissibility as well as the evidence supporting it, and cites 8 C.F.R. § 103.2(b)(16) and *Matter of Pradiou*, 19 I&N Dec. 419 (BIA), as allowing inspection of the record of proceeding that constitutes the basis for the denial, and *de la Llana-Castellon v. I.N.S.*, 16 F.3d 1093, 1096 (10th Cir. 1994), as entitling factfinding based on the record before the decision maker. However, the legal issue in *Matter of Pradiou* is not relevant to the instant case. *Pradiou* involved the Service's failure to comply with the final consent judgment entered in *Stokes v. INS*, No. 74 Civ. 1022 (S.D.N.Y. Nov. 10, 1976) (“the Stokes judgment”), a judgment that specifically governs adjudication of spouse visa petitions filed in the New York District Office. 19 I&N Dec. 419 at 420. Our case does not involve the New York District Office.

In addition, *de la Llana-Castellon* is not relevant to the instant case. The Court concluded in *de la Llana-Castellon* that the Board's denial of asylum to petitioners on the basis of facts administratively noticed violated their right to due process. The Court stated that in “the adjudicative context, due process entitles a person to factfinding based on a record produced before the decisionmaker and disclosed to that person . . . and an individualized determination of his interests . . . it requires that the decisionmaker actually consider the evidence and argument that a party presents.” Our case is different from *de la Llana-Castellon* in that we found the applicant inadmissible for misrepresentation on the basis of the record before us and known to the applicant for it consisted of of the applicant's criminal convictions, immigrant visa interview, and travel to the United States through the Visa Waiver Program. Accordingly, the AAO did not error in finding the applicant inadmissible for a ground which was not identified by the director. Furthermore, this point is moot, as upon further review, we determine that there is insufficient basis for the finding of inadmissibility under section 212(a)(6)(C)(i) of the Act, as discussed below.

Counsel contends that the applicant did not intentionally misrepresent his conviction on the Form I-94W or to the immigration inspector. The applicant stated the following in the supplemental statement submitted on appeal.

I had traveled to the United States numerous times, but until the interview at the US Embassy I had no idea that I was not allowed to do so. . . . At the time of my travel in September of last year, we had not seen each other for nearly 6 months and at that time [redacted] was not feeling very well. It is with considerable regret that whilst advised not to travel I inexcusably did due to the mentioned circumstances. I really

needed to see my wife. I beg you to forgive my weakness. I have not travelled to the US since then. When I was entering the US last time I explained to the immigration officer my situation, he carefully reviewed my file, he even took me aside for that, and then allowed me to enter without ever advising me that I was violating any of the US immigration laws.

Former counsel stated in the brief submitted on appeal that the applicant was informed at the immigrant visa interview that he was inadmissible because of his convictions. Specifically, counsel stated:

On July 5, 2007, Appellant presented himself for an interview at the U.S. Embassy in London, U.K. in connection with his applicant for an immigrant visa based on his marriage to a U.S. Citizen. In the course of the interview, Appellant handed to the interviewing officer police records relating to both of his conviction[s] and orally discussed these convictions with the officer. He was advised that he is subject to certain grounds of inadmissibility because of his convictions and that he may apply for a waiver of inadmissibility on Form I-601. He was also advised that he could not travel to the U.S. as a visitor because of his prior criminal history.

From August 26, 2007 to September 9, 2007, Appellant traveled to the U.S. on a visa waiver program to see his ill wife, despite having been advised not to do so at his immigrant interview at the U.S. Embassy in London.

Appellant, however, fully disclosed his case upon his enter to the U.S. to an immigration officer, who held the final authority of whether to let him in, and was lawfully admitted for a stay as a visitor.

U.S. Citizenship and Immigration Services interprets the term “willfully” as knowingly and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the factual claims are true. In order to find the element of willfulness, it must be determined that the alien was fully aware of the nature of the information sought and knowingly, intentionally, and deliberately misrepresented material facts. *See generally Matter of G-G-*, 7 I&N Dec. 161 (BIA 1956). To be willful, a misrepresentation must be made with knowledge of its falsity. 7 I&N Dec. at 164. To determine whether a misrepresentation was willful, we examine the circumstances as they existed at the time of the misrepresentation, and we “closely scrutinize the factual basis” of a finding of inadmissibility for fraud or misrepresentation because such a finding “perpetually bars an alien from admission.” *Matter of Y-G-*, 20 I&N Dec. 794, 796-97 (BIA 1994) (citing *Matter of Shirdel*, 19 I&N Dec. 33, 34-35 (BIA 1984)); *see also Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28-29 (BIA 1979). With relevance to the present matter, we acknowledge that the term “moral turpitude” is not in common usage, and it is unlikely that the average person is aware of its meaning and application in U.S. immigration law. Nevertheless, as the burden is on the applicant to establish that he or she is not inadmissible, the applicant has the burden of showing that any misrepresentation was, in fact, not willful. *See* section 291 of the Act, 8 U.S.C. § 1361.

In the present case, the applicant was convicted of crimes in 1977 and 1992, and thereafter traveled to the United States through the Visa Waiver Program. Counsel asserts that the applicant was not aware that his convictions rendered him inadmissible to the United States. After the immigrant visa interview on July 5, 2007, the applicant knew his convictions rendered him inadmissible to the United States and that he needed a waiver of inadmissibility in order to travel to the United States. The denial form from the Immigrant Visa Branch with the U.S. Embassy in London specifically stated to the applicant that the applicant's visa was denied under section 212(a)(2)(A)(i)(I) of the Act, and "[a]s a result of this ineligibility, you cannot travel to the United States on the Visa Waiver Program at any time," and the applicant had to file a waiver.

Counsel contends that as to the applicant's August 26, 2007 admission to the United States, the applicant may have revealed his CIMT on the Form I-94W or to the inspecting officer, who may have decided to admit the applicant regardless of the CIMT, and that the AAO has not demonstrated that the applicant did not reveal his CIMTs on the Form I-94W or to the inspecting officer.

In the context of a visa waiver, nonimmigrants seeking a waiver of inadmissibility are required to file an Application for Advance Permission to Enter as Nonimmigrant (Form I-192), directly with U.S. Customs and Border Protection (CBP) before travel. The applicant asserts that he disclosed his crimes at the port of entry to the inspecting officer, who took him aside and reviewed his file, and decided to allow him to enter the United States. Given that the inspecting officer may also have had access to information from the applicant's prior encounter with the Immigrant Visa Branch with the U.S. Embassy in London, we cannot rule out the possibility that the inspecting officer in some way "waived" the applicant's ground of inadmissibility and admitted him without an approved Form I-192, even though such action would have been contrary to accepted procedures. As the applicant's account is not contradicted by the record before the AAO and there is insufficient evidence from which we can conclude that the applicant intentionally concealed his criminal convictions, the applicant is not inadmissible under section 212(a)(6)(C)(i) of the Act for seeking admission into the United States by fraud or willful misrepresentation.

As stated earlier, the applicant is inadmissible for having committed crimes involving moral turpitude. He is eligible to apply for a waiver of inadmissibility under section 212(h) of the Act. That section provides:

(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 -

(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 . . .

Section 212(h)(1)(A) of the Act provides that the Attorney General may, in his discretion, waive the application of subparagraph (A)(i)(I) 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 or adjustment is a "continuing" application, adjudicated on the basis of the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992). Since the most recent criminal activities for which the alien is inadmissible occurred on September 10, 1992, more than 15 years ago, his crimes are waivable under section 212(h)(1)(A) of the Act.

Section 212(h)(1)(A)(ii) and (iii) 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 the applicant establish his rehabilitation. Evidence in the record to establish the applicant's eligibility under section 212(h)(1)(A)(ii) and (iii) of the Act consists of the affidavit by his wife dated September 16, 2010 commending the applicant's trustworthiness, the affidavit dated September 16, 2010 from the applicant's daughter-in-law stating that the applicant provides emotional support for her mother, the letter dated March 28, 2008 from the warehouse manager with [REDACTED] stating that the applicant has worked there since 1994 and is hardworking, the applicant's ownership of real estate in England, and the statement by the applicant in which he expressed regret for his crimes. In view of the evidence in the record, we find that the applicant has demonstrated 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.

In *Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996), the Board of Immigration Appeals (Board) stated that once eligibility for a waiver is established, an adjudicator must then "balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Id.* at 300. (Citations omitted).

The adverse factors in the present case are the criminal convictions for taking a motor vehicle without consent in October 1977, and unlawful wounding and assault occasioning actual bodily harm in September 1992. The favorable factors in the present case are the letters by the applicant's spouse and stepdaughter attesting to the applicant's good character; the applicant's close relationship with his wife through the years; the applicant's stable employment and work ethic; the applicant's ownership of real estate, and the passage of 20 years since the convictions rendering the applicant inadmissible to the United States. We acknowledge that the crimes committed by the applicant are serious in nature. However, when we consider the favorable factors in the present case together,

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they outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the waiver application will be approved.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility rests with the applicant. *See* section 291 of the Act. Here, the applicant has now met that burden. The waiver application will be approved.

ORDER: The motion is granted. The waiver application is approved.