



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

Date:

JUN 18 2015

FILE:

APPLICATION RECEIPT:

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) and under section 212(i) of the Act, 8 U.S.C. § 1182(i)

ON BEHALF OF APPLICANT:

[Redacted]

INSTRUCTIONS:

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Memphis, Tennessee, denied the application. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Sri Lanka who was found 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 applicant was also found to be inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for attempting to procure admission to the United States through fraud or misrepresentation. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) and seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen spouse.

The field office director concluded that although the applicant had established that extreme hardship would be imposed on his qualifying relative, he did not demonstrate that he merits a favorable exercise of discretion and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *See Decision of the Field Office Director*, dated May 21, 2014.

On appeal, filed on June 19, 2014, and received by the AAO on December 18, 2014, the applicant asserts that he did not intentionally misrepresent information about his criminal convictions and that the field office director abused discretion in denying the waiver application despite finding extreme hardship to a qualifying relative. With the appeal the applicant submits a statement, a resume with lists and documentation of his educational and professional accomplishments, and information about In-Vitro Fertilization. The record contains statements from the applicant and his spouse, financial documentation, medical documentation for the applicant's spouse, country information for Sri Lanka, and other evidence submitted in conjunction with the Application to Adjust Status (Form I-485). The entire record was reviewed and considered in rendering this decision.

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 (the 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.)

The record reflects that on [REDACTED] 1998, the applicant was convicted in the [REDACTED] Canada, of Uttering Threats to Cause Death or Bodily Harm in violation of Canada's Criminal Code Section 264.1(1)(a). Also on [REDACTED] 1998, the applicant was convicted of Sexual Interference in violation of Canada's Criminal Code Section 151. The applicant was sentenced to one month in jail for each offense, running concurrently, and one year probation. The field office director determined that the applicant has been convicted of two crimes involving moral turpitude and is thus inadmissible to the United States.

A foreign conviction can be the basis for a finding of inadmissibility only where the conviction is "for conduct which is deemed criminal by United States standards." *Matter of Ramirez-Rivero*, 18 I&N Dec. 135, 137 (BIA 1981) (citing *Matter of McNaughton*, 16 I&N Dec. 569, 572 (BIA 1978)). However, a foreign conviction need not conform to U.S. Constitutional guarantees in order to be conviction for immigration purposes. *Matter of Gutierrez*, 14 I&N Dec. 457, 458 (BIA 1973); *Matter of M--*, 9 I&N Dec. 132, 138 (BIA 1960).

Canada's Criminal Code Section 264.1, Uttering Threat to Cause Death or Bodily Harm, states:

264.1 (1) Every one commits an offence who, in any manner, knowingly utters, conveys or causes any person to receive a threat

(a) to cause death or bodily harm to any person;

(2) Every one who commits an offence under paragraph (1)(a) is guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

In *Matter of Ajami*, 22 I&N Dec. 949 (BIA 1999) the Board of Immigration Appeals (BIA) addressed whether a stalking offense that involves the making of credible threats against another constitutes a crime involving moral turpitude. The BIA concluded that “the intentional transmission of threats is evidence of a vicious motive or a corrupt mind,” and a crime encompassing such conduct involves moral turpitude. *Id.* at 952; *see also Chanmouny v. Ashcroft* 376 F.3d 810, 813-15 (8th Cir. 2004) (concluding that an offense for terroristic threats under Minnesota Statutes Annotated § 609.713 is a crime involving moral turpitude if the criminal act falls within the first of two clauses, that read: “Whoever threatens, directly or indirectly, to commit any crime of violence with purpose to terrorize another).

Based on the foregoing we find support that the applicant’s conviction for Uttering Threats to be a crime involving moral turpitude.

Canada’s Criminal Code Section 151, Sexual Interference, states:

151. Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of fourteen years is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or is guilty of an offence punishable on summary conviction.

A conviction for lewd or lascivious acts on a child under the age of 14 has been found to be a crime involving moral turpitude where the offense involves elements that are instrumental in a finding of moral turpitude: protected class – children under the age of 14 – and scienter. *See Nunez v. Holder*, 594 F.3d 1124 (9th Cir. 2010) (citing *Schoeps v. Carmichael*, 177 F.2d 391, 394 (9th Cir.1949)); *see also Matter of Guevara Alfaro*, 25 I&N Dec. 421 (BIA 2011) (stating that any intentional sexual conduct by an adult with a child involves moral turpitude, as long as the perpetrator knew or should have known that the victim was a minor).

Based on the evidence in the record, we concur with the finding that the applicant has been convicted of crimes involving moral turpitude and is therefore inadmissible under section

212(a)(2)(A)(i)(I) of the Act. The applicant has not contested the finding that he is inadmissible for being convicted of crimes involving moral turpitude.

The field office director also found the applicant inadmissible for attempting to procure an immigration benefit through fraud or misrepresentation at his December 13, 2012, interview for adjustment of status, when he stated under oath that he had only been arrested in the United States, but not outside the United States, and later claimed that while he was arrested in Canada, the charges were dismissed.

Section 212(a)(6)(C) of the Act provides, in pertinent part:

- (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.

The principal elements of a misrepresentation that renders an alien inadmissible under section 212(a)(6)(C)(i) of the Act are willfulness and materiality. In *Matter of S- and B-C*, 9 I&N Dec 436 (BIA 1960 AG 1961), the Attorney General established the following test to determine whether a misrepresentation is material:

A misrepresentation . . . is material if either (1) the alien is excludable on the true facts, or (2) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded. *Id.* at 447.

The Supreme Court has addressed the issue of material misrepresentations in its decision in *Kungys v. United States*, 485 U.S. 759 (1988). In that case, which involved misrepresentations made in the context of naturalization proceedings, the Supreme Court held that the applicant's misrepresentations were material if either the applicant was ineligible on the true facts, or if the misrepresentations had a natural tendency to influence the decision of the Immigration and Naturalization Service. *Id.* at 771.

In the present case, the applicant contends on appeal that he did not intend to misrepresent his criminal history as he believed that USCIS already had knowledge of his convictions, but rather he only wished to protect his spouse from knowledge of his past, and that this action does not constitute a willful misrepresentation of a material fact in order to procure an immigration benefit. The applicant asserts that had he been interviewed separately from his spouse he would have admitted his convictions. The record reflects that at his December 13, 2012, interview for adjustment of status the applicant was asked under oath whether he had been arrested outside of the United States, to which the applicant initially responded several times that he had only been arrested in the United States, but not outside the United States. The applicant then stated that he had in fact been arrested in Canada for threatening a female friend, that the charges had been dismissed, and that he had not been charged with any other offenses in Canada. As noted, the record reflects that

the applicant was convicted in Canada of Uttering Threats and of Sexual Interference, and the record further indicates that the applicant was given multiple opportunities to admit his convictions in Canada, but did not do so. Although the applicant asserts he would have revealed his convictions had he been interviewed separately, the record does not show that he requested an individual interview, and we further note that the applicant also indicated on his Form I-485 that he had only one conviction for disorderly conduct in Nevada but listed no other arrests. In failing to reveal his criminal history the applicant sought to shut off a line of inquiry relevant to his eligibility for adjustment of status, and we thus concur with the field office director's finding.

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

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

We find that the crimes involving moral turpitude for which the applicant was found inadmissible occurred more than 15 years prior to the applicant's application for a visa, so the applicant is eligible to apply for a waiver under section 212(h)(1)(A) of the Act. However, because the applicant has also been found inadmissible under section 212(a)(6)(C)(i) of the Act, no purpose would be served in discussing whether he meets the requirements necessary for a section 212(h)(1)(A) waiver.

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, parent, son or daughter of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. 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). The qualifying relative in the applicant's case is his U.S. citizen spouse.

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. *Salcido-Salcido v. I.N.S.*, 138 F.3d 1292 (9th Cir. 1998)(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.

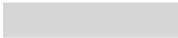
As noted above, the field office director concluded that the applicant had established extreme hardship to his spouse as a result of his inadmissibility. As such this criterion will not be reviewed in this decision. However, the field office director denied the waiver application as a matter of discretion. On appeal the applicant contends that more than 15 years have passed since his convictions and that he has completed counseling, has established a career as a professor, and has entered into marriage, all without incident. He states that more than 10 years have passed since a conviction in Nevada for disorderly conduct and he sought psychological counseling as instructed by Office of Student Conduct at the [REDACTED] after the incident that led to the conviction.¹ He states that he accepts responsibility for his actions, and that he has since functioned without further incident. The applicant reiterated the emotional, medical, and financial hardship his spouse will face if she were to remain in the United States without him or if she were to relocate to Sri Lanka, and emphasizes his academic and professional achievements.

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). We must "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." *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 300 (BIA 1996) (citations omitted).

Although the applicant asserts that he takes responsibility for his actions, he explains only minimally the circumstances about his conviction for Uttering Threats involving a woman whom he claims he had intended to marry. He has not explained or provided information about his Sexual Interference conviction which involved a child, who appears to have been about 10 years old at the time, when the applicant was 31 years old. The applicant states that in 2003 he was accused of inappropriate touching by a female student and charged with Open and Gross Lewdness, and subsequently attended counseling as instructed by Office of Student Conduct at [REDACTED]. He offers no additional explanation of the charges, but only states that he has had no further activities since 2003 incident.

The positive factors in the case are the hardship the applicant's U.S. citizen spouse will face and the applicant's academic and professional achievements in the United States. The negative factors are

¹ The record reflects that on [REDACTED] 2004, the applicant pled guilty in [REDACTED] e Court to Disorderly Conduct and was fined \$750 for events that occurred in 2003.



his three convictions and his failure to acknowledge those convictions at his 2012 interview for adjustment of status. In the present case the applicant, though not contesting the finding of inadmissibility, has not provided a statement about his conviction or indicated whether he views his actions involving a child as detrimental to the child.

Here we find that because of the seriousness of the crimes for which the applicant was convicted along with his failure to acknowledge the convictions at his adjustment of status interview, the negative factors outweigh the positive factors.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.