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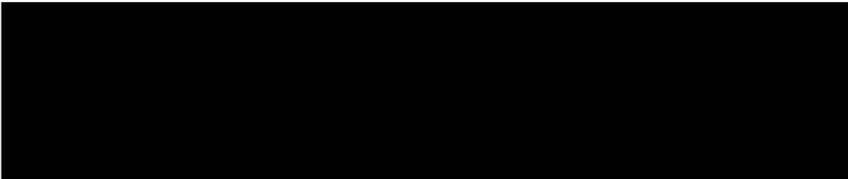
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FILE: [REDACTED] Office: LOS ANGELES, CALIFORNIA Date: **APR 10 2008**

IN RE: [REDACTED]

PETITION: 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 PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Los Angeles, California and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States 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 the spouse of a U.S. citizen and the father of three U.S. citizen children. He now seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), so that he may reside in the United States with his spouse and children.

The District Director concluded that the applicant had failed to establish that extreme hardship would be imposed upon a qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the District Director*, dated September 28, 2005.

On appeal, counsel contends that Citizenship and Immigration Services (CIS) erred as a matter of law in finding that the applicant failed to meet the burden of establishing extreme hardship to his qualifying relative necessary for a waiver under 212(h) of the Act. *Form I-290B*.

In support of these assertions, counsel submits a brief. The record also includes, but is not limited to, statements from the applicant's spouse; statements from the applicant's children; family photographs; employment letters for the applicant and his spouse; tax statements for the applicant and his spouse; and criminal records. The entire record was considered in rendering a decision on the appeal.

The applicant has the following criminal history. In October 1993 the applicant pled guilty to theft under California Penal Code section 484(a). *Criminal records, Municipal Court of Antelope Judicial District, Los Angeles, California*. He received a sentence of 30 days in jail and was placed on probation for three years. *Id.* In February 1995 the applicant pled nolo contendere to inflicting corporal injury on his spouse under California Penal Code section 273.5(a). *Id.* He received a sentence of 360 days in the Los Angeles County Jail of which 349 days were suspended. *Id.* The applicant also was placed on probation for three years. *Id.* According to counsel, in October 2005 the applicant pled guilty to sexual battery by restraint under California Penal Code section 243.4(a). As the record does not include any court documents regarding this crime, its disposition is unclear.

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

- (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 . . . or an attempt or conspiracy to commit such a crime . . . is inadmissible.

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) . . . of subsection (a)(2) . . . if -

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

Section 212(h) of the Act provides that a waiver of inadmissibility is dependent first upon a showing that the bar to admission imposes an extreme hardship on a qualifying family member. If extreme hardship is established, the Secretary then assesses whether an exercise of discretion is warranted.

In *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), the Board of Immigration Appeals (Board) held 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.) Neither the seriousness of the criminal offense nor the severity of the sentence imposed is determinative of whether a crime involves moral turpitude. *Matter of Serna*, 20 I&N Dec. 579, 581 (BIA 1992). Before one can be convicted of a crime of moral turpitude, the statute in question by its terms, must necessarily involve moral turpitude. *Matter of Esfandiary*, 16 I&N Dec. 659 (BIA 1979); *Matter of L-V-C*, 22 I&N Dec. 594, 603 (BIA 1999).

The record establishes that the applicant has been convicted of theft of property under California Penal Code (CPC) section 484(a). The AAO notes that a crime of theft may or may not involve moral turpitude, depending on whether the crime involves the intent to permanently deprive the owner of property. In the present case, the CPC section under which the applicant was convicted includes theft of property offenses involving moral turpitude as well as those where there may be no intent to permanently deprive an owner of property. The AAO notes that the record fails to provide evidence of the specific charges on which the applicant was convicted and, therefore, does not demonstrate the nature of his violation of section 484(a) of the CPC. Accordingly, the applicant has failed to establish that his conviction for theft of property does not fall under a subsection of 484(a) that defines a crime involving moral turpitude and, therefore, bars his admission to the United States. The burden of proof in this proceeding is on the applicant to establish his admissibility to the United States. Section 291 of the Act, 8 U.S.C. § 1361.

There is no similar uncertainty as to whether the applicant's conviction for inflicting corporal injury on a spouse under CPC section 273.5(a) is a crime involving moral turpitude. In *Matter of Tran*, 21 I&N Dec. 291 (BIA

1996), the Board of Immigration Appeals (BIA) has specifically held that willful infliction of corporal injury on a spouse, cohabitant, or parent of the perpetrator's child in violation of section 273.5(a) of the CPC is a crime involving moral turpitude. The applicant's 2005 conviction for sexual battery, as reported by counsel, also constitutes a crime involving moral turpitude. The AAO notes that, in 2000, the Court of Appeals of the State of California, Third Appellate District, concluded that sexual battery, unlike simple battery, is a "specific intent crime" and constitutes a crime of moral turpitude.¹ See *People v. Chavez* (2000) 84 Cal.App.4th 25 [100 Cal.Rptr.680]. Accordingly, the applicant is inadmissible to the United States under section 212(a)(2)(A)(i)(I) for having committed a crime of moral turpitude.

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999), the Board of Immigration Appeals (BIA) provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship. These factors included the presence of lawful permanent resident or United States citizen family ties to 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.

The AAO notes that extreme hardship to the applicant's spouse or children must be established in the event that they reside in Mexico or the United States, as they are not required to reside outside of the United States based on the denial of the applicant's waiver request. **The AAO will consider the relevant factors in adjudication of this case.**

If the applicant's spouse travels with the applicant to Mexico, the applicant needs to establish that his spouse would suffer extreme hardship. The applicant's spouse was born in the United States, although her father was born in Mexico. *Form G-325A, Biographic Information sheet, for the applicant's spouse*. The record does not indicate what family members the applicant's spouse may have in Mexico. Counsel states that it would be impossible for the applicant's spouse to accompany the applicant to a foreign country with a substandard educational system that would impact their children. *Attorney's brief*. The AAO acknowledges the assertions made by counsel regarding the educational system in Mexico. However, it notes that the record fails to include any documentary evidence, such as published country conditions reports, to support such assertions. Without supporting documentation, the assertions of counsel are not sufficient to meet the burden of proof in these proceedings. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The applicant's spouse notes that the applicant is the economic provider for their household, which consists of the three children they have together, one child from the applicant's spouse's previous marriage, and a niece. *Statement from the applicant's spouse; Tax statements for the applicant and his spouse*. She believes they would not be able to provide for their family in the same way if they were not in the United States. *Statement from the applicant's spouse*. While the AAO acknowledges these statements, it notes that the record does not demonstrate that the applicant's spouse or the applicant would be unable to sustain themselves and contribute to their family's financial well-being in Mexico. When looking at the

¹ The individual in the matter before the appeals court had been convicted of sexual battery under 243.4(d) of the CPC, rather than 243.4(a), as in the present case. However, the AAO finds the court's conclusions to be equally applicable to the crime of sexual battery as defined under 243.4(a) of the CPC.

aforementioned factors, the AAO does not find that the applicant demonstrated extreme hardship to his spouse if she were to reside in Mexico.

If the applicant's spouse resides in the United States, the applicant needs to establish that his spouse would suffer extreme hardship. The applicant's spouse's mother, children, and niece reside in the United States. *Form G-325A, Biographic Information sheet, for the applicant's spouse; Statement from the applicant's spouse.* The applicant's spouse states that without her husband, it would be difficult to pay the bills, car payments, and care for five children. *Statement from the applicant's spouse.* The AAO observes that the applicant's spouse has consistently worked in the United States. *See employment letters for the applicant's spouse; tax statements for the applicant's spouse; Form G-325A, Biographic Information sheet, for the applicant's spouse.* Furthermore, as previously noted, there is nothing in the record to demonstrate that the applicant would be unable to contribute to his family's financial well-being from a location other than the United States. According to counsel, the applicant and his spouse have been married for many years and have lived together as husband and wife during the entire period of their marriage. *Attorney's brief.* They have a very strong and loving relationship and the applicant's spouse would suffer extreme hardship if separated from her husband for an indeterminate amount of time. *Id.* U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. *See Hassan v. INS, 927 F.2d 465, 468 (9th Cir. 1991).* For example, *Matter of Pilch, 21 I&N Dec. 627 (BIA 1996),* held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In the present case, the applicant has failed to provide evidence that would distinguish the hardship that would be suffered by his spouse from that experienced by other individuals separated as a result of removal. When looking at the aforementioned factors, the AAO does not find that the applicant has demonstrated extreme hardship to his spouse if she were to reside in the United States without him.

If the applicant's children travel with the applicant to Mexico, the applicant needs to establish that at least one of his children would suffer extreme hardship. The applicant's children are not fluent in Spanish. *Attorney's brief.* According to counsel, one of the applicant's children is displaying academic problems and is being recommended by the school to begin an Individualized Education Program. *Id.* The AAO observes that the record does not include any documentation from the school attended by the applicant's child noting any special needs he may have. Furthermore, there is nothing in the record to demonstrate that applicant's child would be unable to access special educational programs in Mexico. Going on record without supporting documentary evidence will not meet the burden of proof of this proceeding. *See Matter of Soffici, 22 I&N Dec. 158, 165 (Comm. 1998)(citing Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972)).* Through counsel, the applicant's spouse has not conceded that her children would readily adjust to a new life in Mexico. *Attorney's brief.* While the AAO acknowledges these difficulties, it notes that adjusting to a new country is a common result of being removed from the United States. *Perez v. INS, 96 F.3d 390 (9th Cir. 1996),* held that the common results of deportation are insufficient to prove extreme hardship and defined extreme hardship as hardship that was unusual or beyond that which would normally be expected upon deportation. When looking at the aforementioned factors, the AAO does not find that the applicant has demonstrated extreme hardship to his children if any of them were to reside in Mexico.

If the applicant's children reside in the United States, the applicant needs to establish that at least one of his children would suffer extreme hardship. The applicant's children do not want to be separated from their father because they love him and their father helps them with sports and things in the house. *Statements from*

the applicant's children. Counsel states that the applicant's children are at an age where they need a stable environment and the love of both parents, and they may exhibit behavioral changes if their father is removed to Mexico. *Attorney's brief.* Counsel further asserts that the District Director failed to consider the emotional and psychological harm that would arise if the applicant's children were separated from their father. *Id.* The AAO finds that counsel's assertions are insufficient proof that the applicant's children would experience emotional harm if he is removed. There is nothing in the record from a licensed health professional to document the psychological impact upon the applicant's children. As previously noted, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In addition, *Hassan v. INS*, *supra*, held that the uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported. The AAO recognizes that the applicant's children will endure hardship as a result of separation from the applicant. However, their situation, if they remain in the United States, is typical of individuals separated as a result of removal and does not rise to the level of extreme hardship. When looking at the aforementioned factors, the AAO does not find that the applicant demonstrated extreme hardship to his children if they were to reside in the United States.

Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.