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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: SAINT PAUL, MN

Date:

DEC 18 2008

IN RE:

[REDACTED]

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:

[REDACTED]

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

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

The applicant is a native and citizen of Mexico 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 a crime involving moral turpitude. The applicant seeks a waiver of his ground of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain the United States with his United States citizen spouse and three children.

The District Director determined that the applicant had failed to establish a qualifying family member would suffer extreme hardship if the applicant were denied admission to the United States. The applicant's Form I-601, Application for Waiver of Ground of Excludability (now referred to as Inadmissibility), was denied accordingly.

On appeal, counsel for the applicant submits a brief, dated June 27, 2006. The entire record was reviewed and considered in rendering a decision on the appeal.

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

(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.

Crimes involving moral turpitude are generally defined as an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man. *See Jordan v. De George*, 341 U.S. 223, 71 S.Ct. 703 (1951); *Matter of Serna* 20 I&N Dec. 579, 581 (BIA 1992). It is the “inherent nature of the crime as defined by statute and interpreted by the courts and as limited and described by the record of conviction” and not the facts and circumstances of the particular person’s case that determines whether the offense involves moral turpitude. *See, e.g., Matter of Short*, 20 I&N Dec. 136, 137 (BIA 1989); *Omagah v. Ashcroft*, 288 F.3d 254, 260 (5th Cir. 2002); *Goldeshtein v. INS*, 8 F.3d 645 (9th Cir. 1993). 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). Although evil intent signifies a crime involving moral turpitude, willfulness in the commission of the crime does not, by itself, suggest that it involves moral turpitude. *Goldeshtein v. INS, supra*. Under the statute, evil intent must be explicit or implicit given the nature of the crime. *Gonzalez-Alvarado, v. INS*, 39 F.3d 245, 246 (9th Cir. 1994).

The record reveals that on July 3, 2000, the applicant pled guilty to the offense of *Aggravated Battery* in violation of Chapter 720, Section 5/12-4(a) of the Illinois Compiled Statutes, as amended. The

punishment for a conviction of *Aggravated Battery* is a maximum term of imprisonment for five years. 730 Ill. Comp. Stat. § 5/5-8-1 (West 2000). The applicant was sentenced to a period of probation for 30 months. The sentence of probation is a restraint on the applicant's liberty and, therefore, constitutes a conviction pursuant to section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A).

Chapter 720, Section 5/12-4(a) of the Illinois Compiled Statutes Annotated provides, in pertinent part, that:

Aggravated Battery.

(a) A person who, in committing a battery, intentionally or knowingly causes great bodily harm, or permanent disability or disfigurement commits aggravated battery.

U.S. courts have held that battery with the intent or knowledge to cause great bodily harm, permanent disability or disfigurement constitutes a crime involving moral turpitude. *See Nguyen v. Reno*, 211 F.3d 692, 694-95 (1st Cir 2000)(stating, "It is intrinsically wrong to cause serious injury intentionally to another person. We know of no civilian moral code, secular or religious, that permits one to seriously injure another person by assault while *intending* to do so."). This crime was committed after the applicant's eighteenth birthday and the maximum penalty for this crime is five years, therefore, the applicant does not qualify for an exception under section 212(a)(2)(A)(iii) of the Act. Accordingly, the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The applicant does not contest this finding of inadmissibility.

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

The Attorney General [now, Secretary, Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2)

(1)(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 Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999), the Board of Immigration Appeals (BIA) provided a list of relevant factors in determining whether an alien has established extreme hardship to a qualifying relative. The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in the United States; 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 Board held in *Matter of Ige*, 20 I&N Dec. 880, 882, (BIA 1994), that, "relevant [hardship] factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists."

The record reflects that the applicant married [REDACTED] a U.S. Citizen, on October 10, 1996. The applicant and his wife have two children that were born in the United States, [REDACTED] and [REDACTED]. The applicant's waiver application shows that he also has a third child, [REDACTED] however no birth certificate was furnished for this child. The applicant's wife and his two children, [REDACTED] and [REDACTED] are qualifying family members for section 212(h) of the Act extreme hardship purposes.

The only supporting documentation in this case is a brief from the applicant's counsel. Counsel asserts the following in her brief:

[REDACTED] and [REDACTED] have worked out an understanding that allows her to stay home with the children, and [REDACTED] to work to provide for the family. . . . This denial would bring immeasurable harm to these children who currently live with their parents under the same roof, share meals, share homework together, and depend upon one another for emotional support.

The financial situation is very difficult at best. If [REDACTED] were forced to return to Mexico, [REDACTED] would not be able to continue making the rent payment, credit card payments, utility bills and caring for the children on her own. It would be impossible for Thelma to cover her debts on her income alone. And because of her lack of education, her employability is limited. If she leaves to join her husband, he would not be able to maintain both his wife and all of their children. Her abandoning her debts to join her husband in Mexico would also have adverse affects on her credit history, and her reputation as an accountable, responsible citizen. This would make it very difficult for her to return to the United States at a later time if she is unable to make it in Mexico.

[REDACTED] is from Chicago. She has few aunts in Mexico, but she has no other relatives there. She is very close with her family members in Chicago and Minnesota, including her siblings and parents. Separating her from her family would increase her emotional stress. She has a very close relationship with her family and is with [sic] daily contact with both her sisters and her parents. If she is forced to move to Mexico, the impact here would not only affect her, but her children and family as a whole. They all live in close proximity of each other.

[REDACTED] is a very good citizen and she is very proud to be an American Citizen. She has never intended to live in Mexico and the United States is all the [sic] she knows. She

completely supports the United States with all her being. If she is forced to leave this country to live with her husband, then she is being forced to choose between her country and her husband. This forced departure would cause her even more pain and suffering. Of course, her U.S. Citizen children will also suffer as they learn that their father whom they love is not allowed to stay and live with them.

is a very involved mother in her community and with her church. If she leaves to Mexico, her departure will also affect her school and community.

and her children would suffer extreme and unusual hardship if forced to return to Mexico. They would not have access to adequate health care, they have never been educated in the Spanish language and therefore they cannot read or write in Spanish. In addition there [sic] spoken Spanish is extremely limited. Lastly, if forced to move to Mexico they the [sic] would be force to move to a country the children have never known, leaving the majority of their family and friends behind.

Counsel contends that the applicant's wife and children would suffer extreme hardship if they accompanied the applicant to Mexico. Counsel notes that the applicant's wife would be separated from her siblings and parents; the applicant's wife would lose her ties to her community, church and native country; the applicant's children would not have access to adequate health care; and the applicant's children are not proficient in Spanish.

Court decisions have found extreme hardship in cases where the language capabilities of the children were not sufficient for them to have an adequate transition to daily life in the applicant's country of origin. For example, *Matter of Kao and Lin*, 23 I&N Dec. 45, 50 (BIA 2001), the BIA concluded that the language capabilities of the respondent's 15-year-old daughter were not sufficient for her to have an adequate transition to daily life in Taiwan. The girl had lived her entire life in the United States and was completely integrated into an American life style. The BIA found that uprooting her at this stage in her education and her social development to survive in a Chinese-only environment would constitute extreme hardship. In *Ramos v. INS*, 695 F.2d 181, 186 (5th Cir. 1983), the circuit court stated that "imposing on grade school age citizen children, who have lived their entire lives in the United States, the alternatives of . . . separation from both parents or removal to a country of a vastly different culture where they do not speak the language," must be considered in determining whether extreme hardship has been shown.

Given the applicant's children's unfamiliarity with Mexican culture, customs and their lack of proficiency in the Spanish language, and the applicant's wife's strong ties to her extended family in the United States, it has been established that the applicant's wife and children would suffer extreme hardship were they to relocate to Mexico due to the applicant's inadmissibility.

Although hardship to the applicant's wife and children in the event that they accompany the applicant to Mexico is material for establishing eligibility for a waiver under section 212(h) of the Act, it is not the only factor to be considered. Extreme hardship to the applicant's wife and children must be established in the event that they accompany the applicant 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. In the present case, the applicant has not established that his wife and children would suffer extreme hardship if they remained in the United States without him.

Counsel indicates in her brief that the applicant's wife is unemployed and would be financially unable to support her family without her husband. Counsel states that the applicant's wife is staying at home to care for their children. Counsel contends that if the applicant were forced to return to Mexico, his wife would not be able to continue making the rent payment, credit card payments, utility bills and caring for their children on her own. However, counsel has not provided any documentation of these or any other household expenses. Nor has she provided any documentation of the applicant's current gross earnings. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the applicant's burden of proof. The unsupported 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).

Although counsel contends that the applicant's wife is staying at home to care for her children, the applicant's children are of the age to be attending full-time school. Their birth certificates show that [REDACTED] is nearly seven years old and [REDACTED] is ten years old.¹ Furthermore, the record shows that the applicant's wife has maintained full-time employment in the past. The Wage and Tax Statements (Forms W-2), that were filed with the applicant's wife's Form I-864, Affidavit of Support, show that she was employed from 2002 through 2004. According to her 2004 Wage and Tax Statements, she earned \$21,142.11 during that year. This salary is nearly identical to the salary earned by the applicant in 2004. The applicant's 2004 Wage and Tax Statements show that he earned \$25,704.58 during that year. This documentation indicates that the applicant's wife has the same earning potential as the applicant, allowing her to equally manage their household expenses if she were to return to work. Therefore, the record does not support a finding of financial loss that would result in an extreme hardship to the applicant's wife and children if the applicant were denied admission to the United States.

While the AAO recognizes that the denial of the applicant's admission to the United States may cause economic detriment to his wife and children, a reduction in standard of living does not necessarily result in extreme hardship. U.S. courts have held that demonstrated financial difficulties alone are generally insufficient to establish extreme hardship. *See INS v. Jong Ha Wang*, 450 U.S. 139 (1981) (upholding BIA finding that economic detriment alone is insufficient to establish extreme hardship); *Matter of Shaughnessy*, 12 I&N Dec. 810 (BIA 1968) (holding that separation of family members and financial difficulties alone do not establish extreme hardship); *Shooshtary v. INS*, 39 F.3d 1049 (9th Cir. 1994) ("the extreme hardship requirement . . . was not enacted to insure that the family members of excludable aliens fulfill their dreams or continue in the lives which they currently enjoy. The uprooting of family, the separation from friends, and other normal processes of readjustment to one's home country after having spent a number of years in the United States are not

¹ As stated, the applicant has not furnished a birth certificate for [REDACTED] therefore his age cannot be determined.

therefore his age cannot be

considered extreme, but represent the type of inconvenience and hardship experienced by the families of most aliens in the respondent's circumstances.”)

Furthermore, 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 addition, *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. *Hassan v. INS, supra*, held further 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 wife and children will endure hardship as a result of separation from the applicant. However, their situation if they remain in the United States, is typical to individuals separated as a result of deportation or exclusion and does not rise to the level of extreme hardship.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's spouse and children caused by his inadmissibility to 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(h) 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. The application is denied.