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U.S. Citizenship
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FILE:

Office: NEW DEHLI, INDIA

Date: OCT 30 2007

IN RE:

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B) and section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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 Officer-in-Charge, New Delhi, India. 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 India who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking readmission within 10 years of his last departure from the United States. The applicant was also 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), as an alien convicted of a crime involving moral turpitude. The applicant is married to a U.S. citizen and seeks a waiver of inadmissibility in order to reside in the United States.

The officer-in-charge found that based on the evidence in the record, the applicant failed to establish extreme hardship to his U.S. citizen spouse and he did not warrant a favorable exercise of the Secretary's discretion. The application was denied accordingly. *Decision of the Officer-in-Charge*, dated March 4, 2004.

On appeal, the applicant asserts that the officer-in-charge abused her discretion in denying his waiver application. He states that the officer-in-charge did not accord enough weight to the impact that the living conditions in India are having on his U.S. citizen spouse, child and step-children. He states that his spouse is suffering financial and emotional hardship as a result of her relocation to India. He also states that the absence of any criminal record since 1999 is evidence of his reformation and rehabilitation. *Form I-290B*, dated March 31, 2004.

On appeal, the applicant submits a letter from his spouse; a letter from his spouse's doctor in India; photographs of the family in India and in the United States; and a school letter and award related to one of his children. The entire record was reviewed and considered in rendering a decision on the appeal.

In the present application, the record indicates that the applicant entered the United States without inspection in 1991. The applicant remained in the United State until he was removed on August 15, 2000. Thus, the applicant accrued unlawful presence from April 1, 1997, the date of enactment of unlawful presence provisions under the Act, until August 15, 2000, the date he was removed from the United States. In applying for an immigrant visa, the applicant is seeking admission within 10 years of his August 15, 2000 departure from the United States. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

(B) Aliens Unlawfully Present.-

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

....

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

....

(v) Waiver. – The Attorney General [now the Secretary of Homeland Security (Secretary)] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

The present application also indicates that the applicant was convicted of Battery in 1992 and served 60 days in jail with 36 months probation; Infliction of Corporal Injury to a Spouse/Co-habitant in 1995 and served 60 months probation; and Infliction of Corporal Injury to a Spouse/Co-habitant again, on March 1, 1999, which he served one year in jail.

The AAO notes that the Board of Immigration Appeals (“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 BIA and U.S. courts have found that 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). 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) (finding no moral turpitude where the “statutory provision . . . encompasses at least some violations that do not involve moral turpitude”). As a general rule, if a statute encompasses acts that both do and do not involve moral turpitude, deportability cannot be sustained. *Hernandez-Martinez v. Ashcroft*, 329 F.3d 1117 (9th Cir. 2003), reh’g denied 343 F.3d 1075 (9th Cir. 2003). 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).

As a general rule, simple assault or battery is not deemed to involve moral turpitude for purposes of the immigration laws, even if the intentional infliction of physical injury is an element of the crime. *Matter of Fualacai*, 21 I&N Dec. 475, 477 (BIA 1996).

Regarding the applicant's conviction in 1992, California Penal Code Section 242 states:

A battery is any willful and unlawful use of force or violence upon the person of another.

Therefore, based on current case law, the applicant's conviction for Battery in 1992 was not an offense that is considered to be a crime involving moral turpitude.

However, his convictions in 1995 and 1999, under California Penal Code Section 273.5 for Infliction of Corporal Injury to a Spouse/Co-habitant are considered crimes involving moral turpitude.

California Penal Code Section 273.5 states in pertinent part:

- (a) Any person who willfully inflicts upon a person who is his or her spouse, former spouse, cohabitant, former cohabitant, or the mother or father of his or her child, corporal injury resulting in a traumatic condition, is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not more than one year, or by a fine of up to six thousand dollars (\$6,000) or by both that fine and imprisonment. ...

The BIA found in *In re Tran*, 21 I&N Dec. 291, (BIA 1996) that willful infliction of corporal injury on a spouse, co-habitant or parent of the perpetrator's child, in violation of section 273.5(a) of the California Penal Code, constitutes a crime involving moral turpitude. Thus, the applicant is subject to section 212(a)(2)(A) of the Act for his 1995 and 1995 convictions of Infliction of Corporal Injury to a Spouse/Co-habitant.

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 -
 - (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 . . .

The events leading up to the applicant's convictions in 1995 and 1999 occurred less than 15 years from the present time. Therefore, the applicant is not eligible for a waiver under section 212(h)(1)(A) of the Act, but he is eligible to apply for a waiver of section 212(h)(1)(B) of the Act as well as a waiver of section 212(a)(9)(B) of the Act for unlawful presence based on his marriage to a U.S. citizen.

A section 212(a)(9)(B)(v) waiver of the bar to admission resulting from section 212(a)(9)(B)(i)(II) of the Act is dependent upon a showing that the bar imposes an extreme hardship to a U.S. citizen or lawfully resident spouse and/or parent of the applicant. A section 212(h) waiver of the bar to admission resulting from section 212(a)(2)(A) of the Act is dependent upon a showing that the bar imposes an extreme hardship to a U.S. citizen or lawfully resident spouse, parent or child of the applicant. Hardship the alien himself experiences due to separation is irrelevant to section 212(a)(9)(B)(v) and section 212(h) waiver proceedings unless it causes hardship to the applicant's qualifying relative. The AAO notes that hardship to the applicant's children is considered in section 212(h) waiver proceedings, but is not considered in section 212(a)(9)(B)(v) waiver proceedings unless it is shown that hardship to the children is causing the applicant's spouse and/or parent hardship. The AAO will therefore first analyze the hardship in this case under the more restrictive requirements of section 212(a)(9)(B)(v) considering the applicant's eligibility for a waiver under section 212(h) of the Act only if the applicant is found to have established his eligibility for a waiver of his unlawful presence. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. See *Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

The concept of extreme hardship to a qualifying relative "is not . . . fixed and inflexible," and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals set forth a list of non-exclusive factors relevant to determining whether an applicant has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. These factors include, with respect to the qualifying relative, the presence of family ties to U.S. citizens or lawful permanent residents in the United States, family ties outside the United States, country conditions where the qualifying relative would relocate and family ties in that country, the financial impact of departure, and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 566.

Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact 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.

Matter of O-J-O-, 21 I&N Dec. 381, 383 (BIA 1996) (citations omitted).

The AAO notes that extreme hardship to the applicant's spouse must be established in the event that she resides in India or in the event that she resides in the United States, as she is 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.

The AAO notes that the applicant and his spouse were married on October 8, 2000 in India after the applicant's removal from the United States. The applicant's spouse is currently residing in India with her three children and the applicant. The applicant's spouse states that she and her children are suffering emotionally and financially. *Spouse's Letter*, dated August 11, 2005. She states that she owns a business in the United States and that because she is not in the United States, her income from that business has been depleted. *Spouse's Letter*, dated November 27, 2002. She further states that her father died in the United States shortly before she relocated to India and that her mother's health is now deteriorating. She explains that her mother lives with her niece because she is unable to maintain her home and feed herself. The applicant's spouse states that she needs to return to the United States to help care for her mother. *Id.* The AAO notes that the record contains no financial documentation regarding the applicant's spouse's business or the condition of her mother.

With regard to her life in India, the applicant's spouse states that she and her children are living in sub-human conditions and that she is suffering from depression as a result of her family's status and having to decide between living in India or living in the United States without her husband. *Spouse's Letter*, dated August 11, 2005. She expresses suicidal ideations in stating that her family's situation frustrates her to the point of ending her life and that ending her life would be a far better choice than living without her husband. *Id.* She states that if she leaves India and lives alone in the United States her depression would worsen and she would not be able to work and care for her children. *Id.* In support of her assertions regarding the poor living conditions in India, the applicant's spouse submitted photographs of the apartment where her family is living and her children's school. In support of her statements regarding her mental state, the applicant's spouse submitted a letter from [REDACTED] states that the applicant's spouse has been under his treatment since June 10, 2005, when she came to his office with complaints of pains and aches, loss of appetite, sleeplessness, listlessness and difficulty walking. *Letter from* [REDACTED] dated September 8, 2005. He states after a thorough examination he concluded that she was suffering from depression. He states further that after confronting the applicant's spouse with his diagnosis, she admitted experiencing severe mental trauma. He states that she shows signs of suicidal tendencies. *Id.* [REDACTED] states that he prescribed medications to alleviate the applicant's spouse's depression. He also mentions that the applicant was admitted to the hospital a couple of times for episodes of depression. *Id.* [REDACTED] does not, however, indicate the cause of the depression experienced by the applicant's spouse or offer any prognosis for her condition. The AAO also notes that the record does not include any other documentation of the treatment provided to the applicant's spouse, including the records of her hospital visits. Neither does it document the medications that [REDACTED] indicates he prescribed to alleviate the applicant's spouse's depression or the effects of these medications on her condition. Although the AAO acknowledges the photographs submitted to demonstrate the

poor living conditions of the applicant's spouse, it finds the record to offer no documentation that establishes the applicant and/or his spouse are unable to find work in India and earn a living wage to support themselves and their children. Thus, the AAO finds that the current record does not establish that the applicant's spouse is suffering extreme hardship as a result of relocating to India.

The record also fails to demonstrate that it would be an extreme hardship for the applicant's spouse to reside in the United States without the applicant. There is no evidence that indicates the applicant's spouse would be financially dependent on the applicant were she to return with the applicant's children to the United States. Neither, as previously discussed, does the record establish that the applicant's mental health continues to require treatment or that separation from the applicant would constitute an extreme emotional hardship for his spouse. Therefore, the AAO finds that the current record does not establish that the applicant's spouse would suffer extreme hardship as a result of being separated from the applicant.

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.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's spouse caused by the applicant's 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. Further, for the reasons previously discussed, the AAO will also not consider whether the applicant may be eligible for a waiver under section 212(h) of the Act.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B) 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.