U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

H2

FILE: [redacted] Office: PHOENIX, AZ Date: DEC 27 2006

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i)

ON BEHALF OF APPLICANT:

[redacted]

PUBLIC COPY

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, Phoenix, Arizona, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of the United Kingdom who was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i). The record reflects that the applicant has a U.S. citizen spouse and he seeks a waiver of inadmissibility in order to reside with his spouse in the United States.

The district director found that based on the evidence in the record, the applicant failed to establish extreme hardship to his U.S. citizen spouse and the application was denied accordingly. *Decision of the District Director*, dated February 9, 2006.

On appeal, counsel asserts that the fraud charge is incorrect and the evidence establishes extreme hardship. *Form I-290B*, dated February 24, 2006.

The record includes, but is not limited to, counsel's brief, the applicant's spouse's statement, photographs of the applicant and his spouse, and information on the United Kingdom. The entire record was reviewed and considered in arriving at a decision on the appeal.

The district director found that on October 20, 2001, the applicant misrepresented information on a Visa Waiver Program (VWP) application for admission into the United States. *Decision of the District Director*, at 1.[1]

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

> (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.

Section 212(i) of the Act provides that:

> (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, 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 the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

An applicant for admission to the United States under the Visa Waiver Program is required to submit Form I-94W, Arrival/Departure Card, to the inspecting officer. This form asks various questions regarding

[1] The AAO notes that the date of the VWP application for admission was actually February 21, 2000. *Applicant's Form I-94W*, dated February 20, 2001.

inadmissibility including whether the applicant has ever been "arrested or convicted for an offense or crime involving moral turpitude." *Form I-94W*, Side 2. The applicant's I-94W reflects that the applicant checked the "no" box. *Applicant's Form I-94W.* The district director states that the applicant marked on the form that he had not been arrested or convicted of an offense. *Decision of the District Director*, at 1. However, the question specifically asks only about arrests or convictions for an offense or crime involving moral turpitude, not about arrests or convictions for any offense. Therefore, the issue is whether domestic battery in Illinois is a crime involving moral turpitude.

The Board of Immigration Appeals (BIA) 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.

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 involving moral turpitude, the statute in question must involve moral turpitude. *Matter of Esfandiary*, 16 I&N Dec. 659 (BIA 1979).

Act 5 of the Illinois Criminal Code of 1961, §12-3.2 states, in pertinent part:

> (a) A person commits domestic battery if he intentionally or knowingly without legal justification by any means:
>
> > (1) Causes bodily harm to any family or household member as defined in subsection (3) of Section 112A-3 of the Code of Criminal Procedure of 1963, as amended;
> >
> > (2) Makes physical contact of an insulting or provoking nature with any family or household member as defined in subsection (3) of Section 112A-3 of the Code of Criminal Procedure of 1963, as amended.

The record reflects that the applicant was arrested in Illinois for domestic battery on or about August 25 and December 15, 2000.

*In re Sanudo*, 23 I&N Dec. 968 (BIA 2006) involved a respondent who was convicted of domestic battery in violation of sections 242 and 243(e)(1) of the California Penal Code. The BIA stated that section 242 of the California Penal Code, which defines the California offense of "battery," provides in its entirety that "[a] battery is any willful and unlawful use of force or violence upon the person of another." *In re Sanudo*, at 969. The BIA found that the California offense of domestic battery does not qualify categorically as a crime involving moral turpitude. *Id.* at 973. The BIA stated:

> The respondent was convicted of committing a "battery," as defined by section 242 of the California Penal Code. The minimal conduct necessary to complete such an offense in California is simply an intentional "touching" of another without consent. Thus, one may be convicted of battery in California without using violence and without injuring or even intending to injure the victim. Such an offense is in the nature of a simple battery, as traditionally defined, and on its face it does not implicate any aggravating dimension that would lead us to conclude that it is a crime involving moral turpitude. *Id.* at 972.

In Illinois, battery is defined as willful touching of another person and in order to establish "bodily harm" in a battery case, there is no requirement that the evidence demonstrate a visible injury such as bruising, scratching or bleeding. *People v. McEvoy*, 33 Ill.App.3d 409, 337 N.E.2d 437 (1975). The Illinois statute is similar to the California statute in that it is in the nature of a simple battery. The AAO finds that this is not a crime involving moral turpitude.

As the applicant has not been arrested or convicted of an offense or crime involving moral turpitude, he appropriately answered the question in the negative and did not misrepresent a material fact as his answer was accurate.

However, the Form I-485, Application to Register Permanent or Adjust Status, asks whether the applicant has ever been arrested for breaking any law and the applicant answered in the negative. *Applicant's Form I-485*, at 3, dated April 27, 2004. This misrepresentation shut off a line of inquiry which is relevant to the applicant's eligibility and which might well have resulted in a proper determination that he be excluded. As a result of this prior misrepresentation, the applicant is inadmissible under section 212(a)(6)(C) of the Act.

A section 212(i) waiver is dependent first upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse or parent of the applicant. 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).

*Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560 (BIA 1999) provides a list of factors the Board of Immigration Appeals deems relevant in determining whether an alien has established extreme hardship pursuant to section 212(i) of the Act. These factors include 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.

Therefore, an analysis under *Matter of Cervantes-Gonzalez* is appropriate in this case. Extreme hardship to the applicant's spouse must be established in the event that the applicant's spouse relocates to the United Kingdom or in the event that she remains 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 first part of the analysis requires the applicant to establish extreme hardship to his spouse in the event that she relocates to the United Kingdom. The record includes a list of seventy-five relatives of the applicant's spouse, although their legal status is not indicated on the list. Counsel states that the applicant's spouse moved to the United States when she was one year old, she is actively involved in her church, her insurance license is not recognized in the United Kingdom, she suffers from irritable bowl syndrome and depression, she is seeing a urologist related to a possible diagnosis of interstitial cystitis, and the quality of medical care is less in the United Kingdom. *Brief in Support of Appeal*, at 1-2, dated January 19, 2006. Counsel states that the applicant's spouse has no family in the United Kingdom, she would lose her home in the United States and she would not be able to find a well-paying job in her field. *Id.* at 3,6. The AAO notes that adapting to a new culture is a normal result of joining a spouse abroad, as is adapting to a new financial situation. There is no indication that the applicant's spouse cannot receive treatment in England for her medical problems. After a thorough review of the record, the AAO finds that extreme hardship has not been established in the event that the applicant's spouse relocates to the United Kingdom.

The second part of the analysis requires the applicant to establish extreme hardship in the event that his spouse remains in the United States. Counsel states that the applicant's spouse would lose the joy of seeing the applicant daily and her job would be in jeopardy due to the stress of managing two households and traveling to the U.K. *Id.* at 3. However, there is no evidence that the applicant cannot find employment to assist with their expenditures. The applicant's spouse's physician states that she has irritable bowl syndrome and depression, she needs the support of her husband to deal with these chronic medical issues and she will likely require ongoing treatment for both conditions and possible surgery. *Letter from* [redacted] dated December 12, 2005. The physician's letter is not clear as to the severity of her problems, the type of treatment she is receiving and the nature of her potential surgery. As such, the record does not reflect extreme hardship in the event that the applicant's spouse remains in the United States.

U.S. court decisions have 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. Moreover, the U.S. Supreme Court additionally held in *INS v. Jong Ha Wang*, 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

The AAO notes that a review of the documentation in the record fails to establish the existence of extreme hardship to a qualifying relative 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.

In proceedings for application for waiver of grounds of inadmissibility under section 212(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.