U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Citizenship and Immigration Services

H2

[redacted]

FILE: [redacted] Office: LOS ANGELES Date: JUN 19 2006

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The District Director, Los Angeles, California, denied the waiver application and it 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 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 is the spouse of a U.S. citizen and father of a U.S. citizen son and a U.S. citizen daughter. He seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h) in order to 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 on a qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the District Director*, dated October 18, 2004.

The record reflects that, on September 13, 1990, the applicant was convicted of battery of a police officer, in violation of section 243(b) of the California Penal Code and was sentenced to 180 days in jail. On the same day, the applicant was convicted of attempted grand theft, in violation of section 487h(a) of the California Penal Code and was sentenced to 360 days in jail. On June 4, 1999, the applicant's conviction was set aside and the charges were dismissed pursuant to section 1203.4a because it had been more than one year since he had completed his sentence and he had no further arrests or convictions.

On July 19, 1997, the applicant married his spouse, [redacted] Ms [redacted] a naturalized U.S. citizen. On September 24, 1997, the applicant filed an Application to Register Permanent Resident or Adjust Status (Form I-485), based on a Petition for Alien Relative (Form I-130) filed by the applicant's U.S. citizen spouse. On February 5, 2003, the applicant filed the Form I-601 with documentation supporting his claim that the denial of the waiver would result in extreme hardship to his family members.

On appeal, counsel asserts that the applicant's convictions are not for crimes involving moral turpitude. *See Applicant's Brief,* dated December 13, 2004. In support of the appeal, counsel only submitted the above-referenced brief. The entire record was reviewed and considered in rendering a decision on the appeal.

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

> (1) Criminal and related grounds. —
>
> (A) Conviction of certain crimes. –
>
> (i) In general. – Except as provided in clause (ii), any 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.

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

> Waiver of subsection (a)(2)(A)(i)(I)
>
> The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I). . . if
> (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 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 district director based the finding of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act on the applicant's admission to and convictions for battery of a police officer and attempted grand theft.

Counsel contends that the applicant's conviction for grand theft under section 487 of the California Penal Code is not a crime involving moral turpitude because the code under which he was convicted is silent as to any mens rea necessary for a finding of guilt. Counsel cites to the Board of Immigration Appeals' (BIA) decision in *Matter of K,* 2 I&N Dec. 90 (BIA 1944), in which the court found that where guilty knowledge is not essential to sustain a theft conviction, the crime is not one of moral turpitude. Counsel asserts that the code under which the applicant was convicted does not require guilty knowledge, rendering applicant's theft conviction one that does not involve moral turpitude. However, in *Matter of K*, the BIA found that a conviction for possession of stolen property where the evidence of record indicates the property was acquired without guilty knowledge and without wrongful intent was not a crime involving moral turpitude. As such, the applicant's conviction for attempted grand theft is distinguishable. In *Matter of D,* 1 I&N Dec. 143 (BIA 1941), the BIA held that while those theft crimes that include the deprivation of possession from the owner for a temporary period without intent to steal are not crimes involving moral turpitude, those cases which would by their nature necessarily constitute theft or stealing as those offenses are known in common law, are crimes involving moral turpitude.

The California Penal Code states, in pertinent part:

> 487h. (a) Every person who steals, takes, or carries away cargo of another, when the cargo taken is of a value exceeding four hundred dollars ($400), except as provided in Sections 487, 487a, and 487d, is guilty of grand theft.

The plain language of the statute constitutes theft as it is known in common law. Moreover, in *Rashtabadi v. INS,* 23 F 3d. 1562 (9th Circuit), the Ninth Circuit Court of Appeals (9th Circuit) held that a conviction for grand theft under section 487 of the California Penal Code is a conviction of a crime involving moral turpitude.

Counsel contends that the applicant's conviction for battery of a police officer is not a crime involving moral turpitude because it is a simple assault. 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. Assault may or may not involve moral turpitude. Simple assault is generally not considered to be a crime involving moral turpitude.

Counsel contends that, in *Ciambelli v. Johnson,* 12 F. 2d 465 (D. Mass. 1926) the U.S. District Court held that simple assault on a police officer did not involve moral turpitude. However, the AAO finds that *Ciambelli* did not hold that simple assault on a police officer did not involve moral turpitude. The BIA has found that *Ciambelli* suggested a deliberate assault for the purpose of interfering with the performance of an officer's official duties might be considered as one involving moral turpitude since it evidences an inclination toward lawlessness. *Matter of Danesh,* 19 I & N Dec. 669 (BIA 1988).

The California Penal Code states, in pertinent part:

> 242. A battery is any willful and unlawful use of force or violence upon the person of another.
>
> 243.
> (b) When a battery is committed against the person of a peace officer . . . engaged in the performance of his or her duties, whether on or off duty . . . and the person committing the offense knows or reasonably should know that the victim is a peace officer . . . engaged in the performance of his or her duties . . . the battery is punishable by a fine not exceeding two thousand dollars ($2,000), or by imprisonment in a county jail not exceeding one year, or by both that fine and imprisonment.

The AAO finds that the applicant was convicted of a deliberate assault on a police officer for the purpose of interfering with the performance of the officer's official duties and was, therefore, convicted of a crime involving moral turpitude.

Therefore, the AAO finds that the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

Hardship to the alien himself is not a permissible consideration under the statute. A section 212(h) waiver is therefore dependent upon a showing that the bar to admission imposes an extreme hardship on the U.S. citizen or lawfully resident spouse, parent, son or daughter of the applicant.

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 at 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 alien has established extreme hardship to a qualifying relative. 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. The BIA has held:

> 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).

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 record reflects that Ms. [redacted]o is a native of Mexico who became a lawful permanent resident of the United States in 1989 and a naturalized U.S. citizen in 1995. The applicant and Ms. [redacted] have an eight-year old daughter and a four-year old son who are both U.S. citizens by birth. The record reflects further that the applicant and Ms. are in their 30's, and Ms. [redacted] and the applicant's children do not have any health concerns.

Ms. sserts that she and her children would suffer emotional and financial hardship if they were to remain in e United States without the applicant. In her affidavit, Ms. [redacted] states that she would be unable to support the family without the applicant's income and that the applicant supports her graduate studies by taking care of the children while she needs to attend classes. Ms. [redacted] also states that the applicant provides her and the children with emotional support. She states that the children are very attached to the applicant and could not live without him.

Financial records indicate that, in 2000, Ms. [redacted] contributed 56% or approximately $42,261 to the household income. The record shows that, even without assistance from the applicant, Ms. [redacted] has, in the past, earned sufficient income to exceed the poverty guidelines for her family. *Federal Poverty Guidelines,* http://aspe.hhs.gov/poverty/figures-fed-reg.shtml. Ms [redacted] describes in her affidavit the costs of living in regard to her mortgage, childcare, education and automobile insurance. Even when these costs of living are deducted from Ms. [redacted] yearly income, she has approximately $16,000 per year with which to cover any additional costs, which, in and of itself almost meets poverty guidelines for the family. While it is unfortunate that Ms. [redacted] would essentially become a single parent, the applicant's children would essentially be raised by a single parent and professional childcare may be expensive and not equate to the care of a parent, this is not a hardship that is beyond those commonly suffered by aliens and families upon deportation. Moreover, the record reflects that Ms. [redacted] works away

from the home, indicating that the children may already have alternative care during the periods in which the applicant and Ms. [redacted] absent from the home due to work commitments.

There is no evidence in the record to suggest that Ms. [redacted] and the applicant's children suffer from a physical or mental illness that would cause them to suffer physical or emotional hardship beyond that commonly suffered by aliens and families upon deportation. Additionally, even though Ms. [redacted] states that her parent's are elderly, they may be able to provide emotional support in the absence of the applicant.

Ms. [redacted] contends that she and her children would suffer hardship if they were to accompany the applicant to Mexico. Ms. [redacted], in her affidavit, states it would be very difficult for them to relocate to Mexico because they have established themselves as a family in the United States. As discussed above, there is no evidence that Ms. [redacted] or the applicant's children suffer from a physical or mental illness that would cause them to suffer hardship beyond that commonly suffered by aliens and families upon deportation. There is no evidence in the record that the applicant and Ms. [redacted] would be unable to obtain *any* employment in Mexico. Moreover, the applicant's parents reside in Mexico and may be able to provide financial and emotional assistance. While the hardships faced by Ms. [redacted] and her children with regard to relocating to Mexico are unfortunate; they are what would normally be expected with any spouse or child accompanying a deported alien to a foreign country. The AAO notes that, as U.S. citizens, the applicant's spouse and children are not required to reside outside of the United States as a result of denial of the applicant's waiver request and, as discussed above, none of them would experience extreme hardship if they remained in the United States without the applicant.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that the applicant's spouse and children would face extreme hardship if the applicant were refused admission. Rather, the record demonstrates that Ms. [redacted] and the applicant's children will face no greater hardship than the unfortunate, but expected disruptions, inconveniences, and difficulties arising whenever a spouse or parent is removed from the United States. In nearly every qualifying relationship, whether between husband and wife or parent and child, there is a deep level of affection and a certain amount of emotional and social interdependence. While, in common parlance, the prospect of separation or involuntary relocation nearly always results in considerable hardship to individuals and families, in specifically limiting the availability of a waiver of inadmissibility to cases of "*extreme* hardship," Congress did not intend that a waiver be granted in every case where a qualifying relationship, and thus the familial and emotional bonds, exist. The point made in this and prior decisions on this matter is that the current state of the law, viewed from a legislative, administrative, or judicial point of view, requires that the hardship be above and beyond the normal, expected hardship involved in such cases. U.S. court decisions have repeatedly held that the common results of removal are insufficient to prove extreme hardship. *See Hassan v. INS,* 927 F.2d 465, 468 (9th Cir. 1991), *Perez v. INS,* 96 F.3d 390 (9th Cir. 1996); *Matter of Pilch,* 21 I&N Dec. 627 (BIA 1996) (holding that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute 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). "[O]nly in cases of great actual or prospective injury . . . will the bar be removed." *Matter of Ngai,* 19 I&N Dec. 245, 246 (BIA 1984). Further, 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).

The AAO therefore finds that the applicant failed to establish extreme hardship to his U.S. citizen spouse or children as required under section 212(h) of the Act, 8 U.S.C. § 1186(h). 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 an application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility rests with the applicant. INA **§ 291, 8 U.S.C. § 1361. Here, the applicant has** not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.