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U.S. Citizenship and Immigration Services
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: MIAMI, FL Date: JUN 11 2009

IN RE:

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, Miami, Florida 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 Cuba 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's two daughters are U.S. citizens. The applicant seeks a waiver of inadmissibility in order to reside in the United States.

The district director found that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *District Director's Decision*, at 5, dated August 23, 2006.

On appeal, counsel asserts that the applicant's family depends on him for emotional and financial support. *Form I-290B*, received, September 21, 2006.

The record includes, but is not limited to, statements from the applicant's daughters and letters of support for the applicant. The entire record was reviewed and considered in arriving at a decision on the appeal.

The record reflects that the applicant was convicted of larceny in Cuba in 1971 and was sentenced to ten years in prison. The applicant was convicted of improper exhibition of dangerous weapons or firearms under Florida Statutes § 790.10 on May 9, 1991, and assault or battery of law enforcement officers under Florida Statutes § 784.07 and resisting officer without violence to his or her person under Florida Statutes § 843.02 on May 24, 2001.

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).

Florida Criminal Statute § 790.10 states, in pertinent part:

> If any person having or carrying any dirk, sword, sword cane, firearm, electric weapon or device, or other weapon shall, in the presence of one or more persons,

> exhibit the same in a rude, careless, angry, or threatening manner, not in necessary self-defense...

The statute does not include any language of intent, willfulness, knowledge or even recklessness. In *Matter of Perez-Contreras*, the BIA found that moral turpitude does not inhere where the required mens rea may not be determined from the statute. *Matter of Perez-Contreras*, at 618. As this statute neither includes a mens rea requirement nor does it involve inherently base, vile, or depraved acts, the AAO finds that improper exhibition of dangerous weapons or firearms under Florida Criminal Statute § 790.10 is not a crime involving moral turpitude.

Florida Statute § 843.02 (resisting officer without violence to his or her person) states, in pertinent part:

> Whoever shall resist, obstruct, or oppose any officer...or other person legally authorized to execute process in the execution of legal process or in the lawful execution of any legal duty, **without offering or doing violence to the person** of the officer, shall be guilty of a misdemeanor of the first degree...

The crime of interfering with a law enforcement officer is analogous to assault and involves moral turpitude when it involves the use of deadly physical force. *Matter of Logan*, 17 I&N Dec. 367, 368 (BIA 1980). The AAO finds that as the statute under which the applicant was convicted specifically involves resisting an officer without violence, the crime does not involve moral turpitude.

In the recently decided *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. First, in evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a "realistic probability, not a theoretical possibility," that the statute would be applied to reach conduct that does not involve moral turpitude. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). A realistic probability exists where, at the time of the proceeding, an "actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien's own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude." *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

However, if a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, "the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude." 24 I&N Dec. at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage inquiry in which the adjudicator reviews the "record of conviction" to determine if the conviction was based on conduct involving moral turpitude. *Id.* at 698-699, 703-704, 708. The record of conviction consists

of documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.* at 698, 704, 708.

If review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. 24 I&N Dec. at 699-704, 708-709. However, this "does not mean that the parties would be free to present any and all evidence bearing on an alien's conduct leading to the conviction. (citation omitted). The sole purpose of the inquiry is to ascertain the nature of the prior conviction; it is not an invitation to relitigate the conviction itself." *Id.* at 703. Finally, in all such inquiries, the burden is on the alien to establish "clearly and beyond doubt" that he is "not inadmissible." *Id.* at 709 (citing *Kirong v. Mukasey*, 529 F.3d 800 (8th Cir. 2008))

Florida Statutes § 784.07 was violated by "knowingly committing...battery upon a law enforcement officer." Section 784.03 of the Florida Statutes provided, in pertinent part:

> (1)(a) The offense of battery occurs when a person:
>
> 1. Actually and intentionally touches or strikes another person against the will of the other; or
>
> 2. Intentionally causes bodily harm to another person.

Assault on a law enforcement officer has been found to be a crime involving moral turpitude where the perpetrator knows the victim to be a law enforcement officer performing his official duty and the assault results in bodily injury to the officer. *See Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988) (distinguishing cases in which knowledge of the police officer's status was not an element of the crime and where bodily injury or other aggravating factors were not present to elevate offense beyond "simple" assault); *see also Matter of O-*, 4 I&N Dec. 301 (BIA 1951) (German law involving an assault on a police officer was not a crime involving moral turpitude because knowledge that the person assaulted was a police officer engaged in the performance of his duties was not an element of the crime); *Matter of B-*, 5 I&N Dec. 538 (BIA 1953) (as *modified by Matter of Danesh, supra.*) (assault on prison guard not a crime involving moral turpitude because offense charged appeared to be only "simple" assault and no bodily injured was alleged); *Ciambelli ex rel. Maranci v. Johnson*, 12 F.2d 465 (D. Mass 1926) (assault on an officer was not a crime involving moral turpitude in spite of fact that defendant was armed with a razor because the razor was not used in the assault).

The Florida Supreme Court has also ruled that knowledge of the officer's status is an element of the crime of battery upon a law enforcement officer under Florida Statutes § 784.07. *See Street v. State*, 383 So.2d 900, 901 (Fla. 1980).

Florida Statutes § 784.07 is violated by either intentionally touching or striking an officer against his will or by intentionally causing bodily harm to an officer. Thus, based solely on the statutory language, it appears that Florida Statutes § 784.07 encompasses conduct that involves moral turpitude and conduct that does not.

However, in accordance with *Silva-Trevino*, the AAO must determine if an actual case exists in which these criminal statutes were applied to conduct that did not involve moral turpitude. The AAO is aware of a prior case in which Florida Statutes § 784.07 has been applied to conduct not involving moral turpitude. In *Hendricks v. State*, 444 So.2d 542, 542-43 (Fla. 1st Dist. App. 1999), the court noted that the appellant had been charged and convicted of battery in the form of touching or striking a law enforcement officer, but not for intentionally causing bodily harm to an officer.

Therefore, the AAO cannot find that the offense described in Florida Statutes § 784.07 is categorically a crime involving moral turpitude. The AAO must therefore review the entire record, including the record of conviction and, if necessary, other relevant evidence, to determine if the applicant's conviction under this statute was for morally turpitudinous conduct. The AAO notes that the documents comprising the record of conviction are inconclusive as to whether the applicant caused bodily injury to the officer who arrested him. The complaint/arrest affidavit states, "Defendant then started swinging his arms as attempting to strike these officers. He was then subdued but resisted being handcuffed and taken into custody. Defendant struggled for a short while and these officers finally managed to get the handcuffs on him." *Complaint/Arrest Affidavit*, at 2, dated April 28, 2001.

The arrest report reflects that the applicant did not cause any bodily injury to the arresting officers. Based on this evidence, and the lack of any contradictory evidence in the record, the AAO determines that the applicant's conviction for battery on a law enforcement officer in violation of Florida Statutes § 784.07 was not based on conduct that caused bodily injury to a law enforcement officer. Consequently, this conviction is not a crime involving moral turpitude that renders the applicant inadmissible under 212(a)(2)(A)(i)(I) of the Act.

The applicant has stated that he was convicted of larceny in Cuba for stealing clothing from a store. Retail theft is considered a crime involving moral turpitude. *In re Jurado Delgado*, 20 I&N Dec. 29, 33-34 (BIA 2006). As such, the applicant is inadmissible under section 212(a)(2)(A)(i)(I) as a consequence of his conviction for larceny in Cuba.

Section 212(a)(2)(A) of the Act states 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.

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 record reflects that the date on which the activity resulting in the applicant's conviction for larceny occurred more than 15 years ago. Therefore, section 212(h)(1)(A) of the Act applies to the applicant.

In order to be eligible for a section 212(h)(1)(A) waiver, the applicant must demonstrate that his admission to the United States would not be contrary to its national welfare, safety, or security and that he is rehabilitated. There is no indication that the applicant has ever relied on the government for financial assistance. There is no indication that the applicant is involved with terrorist-related activities or any other activities that would affect the nation's safety or security. The AAO also notes the letters of recommendation submitted by the principal and teachers at the elementary school where the applicant works as well as other individuals associated with the school, all of whom attest to the character and responsibility shown by the applicant. *Letters of Support*, dated September 18, 2006 and undated. His daughters' letters describe the applicant as a role model who makes everyone around him happy. *Applicant's Daughter's Letters*, dated September 18, 2006 and undated. However, the AAO notes that since committing larceny, the applicant has had three more convictions, as discussed previously, two of which are relatively recent. As such, the record does not establish that the applicant has been rehabilitated and he is not eligible for a section 212(h)(1)(A) waiver.

The record also reflects that the applicant has two U.S. citizen daughters and he is eligible to apply for a section 212(h)(1)(B) waiver. The AAO notes that section 212(h)(1)(B) 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 (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.

Therefore, an analysis under *Matter of Cervantes-Gonzalez* is appropriate in this case. The AAO notes that extreme hardship to a qualifying relative must be established whether the qualifying relative resides in Cuba or the United States, as the qualifying relative is not required to reside outside 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 a qualifying relative in the event that the qualifying relative resides in Cuba. This prong of the analysis is not addressed. The AAO therefore finds that the applicant has not established that a qualifying relative would suffer extreme hardship upon residing in Cuba permanently.

The second part of the analysis requires the applicant to establish extreme hardship in the event that a qualifying relative remains in the United States. On appeal, counsel asserts that the applicant's family depends on him for emotional and financial support and points to the letters written by the applicant's daughters as proof of his claims. *Form I-290B.* The applicant's daughters' letters describe the role that the applicant plays in their lives. *Applicant's Daughter's Letters.* Both letters describe the affection they feel for the applicant and their gratitude for his love and support. *Id.* However, beyond these statements, the record is silent as to the impact that the applicant's removal would have on his daughters. The record does not include any other evidence of emotional, financial, medical or other forms of hardship. Accordingly, the record does not include sufficient evidence that a qualifying relative would suffer extreme hardship upon remaining in the United States.

U.S. court decisions have additionally 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.

A review of the documentation in the record, when considered in its totality, reflects that the applicant has failed to show that a qualifying relative would suffer extreme hardship. Having found the applicant statutorily ineligible for relief, no purpose would be served in an additional discussion of 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.