U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

[redacted]

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FILE: [redacted] Office: HIALEAH, FL Date: APR 2 3 2010

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. section 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, as required by 8 C.F.R. 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Hialeah, Florida. 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 Cuba. He was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I) for having been convicted of Crimes Involving Moral Turpitude (CIMT). The applicant is the father of a lawful permanent resident (LPR) of the United States. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h) in order to remain in the United States.

The Field Office Director concluded that the applicant had failed to establish that the bar to his admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on November 17, 2008.

On appeal, counsel for the applicant asserts that the applicant is not inadmissible, as his crimes are not CIMTs, and, alternatively, that the applicant has established that a qualifying relative will experience extreme hardship if he is excluded.

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 (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:

> (h) The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) . . . 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 record reflects that the applicant was convicted of Aggravated Battery-Pregnant Victim, Florida Statutes § 784.045(1)(b), on January 16, 1997. The record also indicates that the applicant was convicted of petit larceny, Florida Statutes § 812.014(3)(a), on October 15, 2007. Counsel, however, asserts that these convictions do not render the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act. He contends that the applicant's conviction for aggravated battery may not be found to be a conviction for a CIMT as the statute under which the applicant was convicted is divisible, i.e., containing subsections covering multiple offenses, some of which involve moral

turpitude and others that do not. Counsel states that the applicant's record of conviction does not conclusively establish that he was convicted of a CIMT and that this ambiguity must be resolved in favor of the applicant. Counsel further states that the applicant's conviction for petit larceny is amenable to the petty offense exception in section 212(a)(2)(A)(ii)(II) of the Act as the maximum sentence of imprisonment for the crime is less than one year and the applicant was sentenced to less than six months in jail.

The applicant was convicted of aggravated battery under Florida Statutes § 784.045(1)(b), which states:

> A person commits aggravated battery if the person who was the victim of the battery was pregnant at the time of the offense and the offender knew or should have known that the victim was pregnant.

Florida Statues § 784.03(1)(a) defines battery as follows:

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.

Battery offenses that necessarily involve the intentional infliction of serious bodily injury on another person have been held to involve moral turpitude. *Sosa-Martinez v. U.S. Att'y General*, 420 F.3d 1338 (11th Cir. 2005); *Nguyen v. Reno*, 211 F.3d 692 (1st Cir. 2000); Matter of P-, 7 I&N Dec. 376 (BIA 1956). However, not all crimes involving the injurious touching of another reflect moral depravity on the part of the offender, even though they may carry the label of assault, aggravated assault, or battery. *See Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996)(holding that a Hawaiian statute that involved recklessly causing bodily injury to another person was not a CIMT); *Matter of Perez-Contreras*, 20 I&N Dec. 615 (BIA 1992)(holding that a statute that involved negligently causing bodily harm is not a CIMT). In this case, the applicant was convicted of Aggravated Battery, which necessarily encompasses battery as it is defined by Florida Statues § 784.03(1)(a), due to the fact that the victim was pregnant. In *Matter of Sanudo,* 23 I. & N. Dec. 968, 973 (BIA 2006), the Board of Immigration Appeals (BIA) noted that "it has often been found that moral turpitude necessarily inheres in assault and battery offenses that are defined by reference to the infliction of bodily harm upon a person whom society views as deserving of special protection." As an individual may be convicted of battery under Florida Statutes § 784.03(1)(a) for having engaged in offensive touching or for having intentionally caused bodily injury to another, the AAO agrees that Florida Statutes § 784.05(1)(b), relying on Florida Statues § 784.03(1)(a), appears to encompass conduct that does and 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 for a crime involving moral turpitude where the language of the criminal statute in question encompasses conduct the involves moral turpitude and conduct that does not. In evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute to determine that the elements of a CIMT – a scienter of knowledge and morally reprehensible conduct – are present. *Id.* Florida's definition of battery involves a scienter of knowledge, but offensive touching, conduct covered in

subsection (1) of the statute, is not conduct that has been categorically deemed morally reprehensible. As Florida's definition of battery is not categorically a CIMT, the crime of Aggravated Battery of a Pregnant Victim, which incorporates Florida's definition of battery, is also not categorically a CIMT.

Pursuant to *Silva-Trevino*, when an offense is not categorically a CIMT, it is necessary to review the record of conviction, documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript, to determine if the conviction was based on conduct involving moral turpitude. *Id.* at 698-699, 703-704, 708. If a review of the record of conviction is inconclusive, an adjudicator may consider any additional evidence deemed necessary or appropriate to resolve the moral turpitude question. *Silva-Trevino*, at 699-704, 708-709.

The AAO notes that the documents comprising the record of conviction in this matter – the Information, the Finding of Guilt and Order Withholding Adjudication and Special Conditions, Charges and Costs, Order of Probation, and Special Conditions of Probation – fail to establish the nature of the conduct that led to the applicant's battery conviction. It, therefore, turns to the December 26, 1996 arrest record that describes the activity for which the applicant was convicted and finds it to indicate that the applicant, on the date of his arrest, slammed his pregnant girlfriend's head into the trunk of his car and, subsequently, held her down while another individual punched her in the face and abdomen.

Assault and battery offenses may appropriately be classified as crimes of moral turpitude if they necessarily involve aggravating factors that significantly increase their culpability, and involve something more than the "minimal nonviolent touching" of the protected victim. *Matter of Sanudo, supra*. In the present matter, that aggravating factor is the pregnancy of the applicant's victim who was also his girlfriend at the time of the battery. The applicant's arrest record establishes that the battery committed by the applicant involved intentionally injurious conduct against a woman who was pregnant and, therefore, was at a heightened risk of great bodily injury to herself or her fetus. In that the applicant's conduct, forcefully restraining the victim while his associate punched her in the face and stomach, involved more than a minimal nonviolent touching against an individual deserving of his protection, the AAO finds that the applicant's conviction for aggravated battery under Florida Statutes § 784.045(1)(b) is a conviction for a crime involving moral turpitude and that he must seek a waiver of inadmissibility under section 212(h) of the Act.

Section 212(h) of the Act provides that a waiver of the bar to admission resulting from section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar would impose an extreme hardship on a qualifying family member. In the present case, the applicant's only qualifying relative is his U.S. lawful permanent resident son. The AAO will not consider hardship to the applicant's wife as the record does not establish her as a qualifying relative. It notes that at the time of his initial parole into the United States in 1995, the applicant indicated that he was married to [redacted], the mother of his LPR son. The record includes a Form G-325A, Biographic Information, for the applicant, dated February 12, 2005, which states that he is unmarried and that his marriage to [redacted] ended in Cuba. A second Form G-325A, dated February 28, 2007, states that the applicant married [redacted], a U.S. lawful permanent resident, on November 27, 2006 and indicates no previous marriages. The record also includes a marriage certificate for the applicant that establishes he and [redacted] were married in Florida on November 25, 2006. While the AAO

notes the evidence that indicates that the applicant is divorced from [redacted] or was never married to her, it finds it to be insufficient proof that he was legally free to marry [redacted] on November 25, 2006. Absent documentation that the applicant's marriage to [redacted] was terminated in Cuba or after he was paroled into the United States, the AAO does not find the record to establish [redacted] as the applicant's lawful wife and, therefore, a qualifying relative for the purposes of this proceeding.

Hardship experienced by the applicant or other family members as a result of the applicant's inadmissibility will not be considered in this proceeding unless it would cause hardship to the applicant's LPR son. 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 any evaluation of extreme hardship to a qualifying relative must assess the impacts on that qualifying relative whether he or she relocates with the applicant or remains in the United States, as a qualifying relative is not required to reside outside the United States based on the denial of the applicant's waiver request.

The record contains documentation filed in support of the applicant's Form I-485, Application to Register Permanent Resident or Adjust Status. In relation to the applicant's Form I-601, the record includes, but is not limited to, briefs from counsel; a statement from the applicant's son and former wife attesting to the applicant's character; certificates for the applicant's son; employment verification for the applicant; tax returns and W-2 forms for the applicant; and court records pertaining to the applicant's criminal history. The entire record was reviewed and all relevant evidence considered in rendering this decision.

On appeal, counsel asserts that the applicant, his wife and son would suffer extreme hardship in Cuba due to conditions there. He states that there is widespread scarcity of even the most basic necessities, particularly in light of recent hurricanes, and that repression is the norm. Counsel further asserts that the applicant's son suffered from epilepsy when he was younger and must be periodically monitored and evaluated. Counsel also states that the applicant will be subject to repression, persecution and possible incarceration if he is returned to Cuba. The record, however, fails to contain any documentary evidence, e.g., published country conditions reports, to support counsel's claims regarding conditions in Cuba. It also lacks medical documentation that demonstrates that the applicant's son is monitored in relation to prior episodes of epilepsy or that this same type of monitoring would be unavailable in Cuba. Without supporting documentation, the assertions of counsel are not sufficient to meet the burden of proof in these proceedings. The 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). There is no other discussion of hardship upon relocation in the record. Accordingly, the AAO does not find the applicant to have established that his lawful permanent resident son would experience extreme hardship if he relocated to Cuba.

The applicant has also failed to establish extreme hardship to his son if his son remains in the United States. Counsel states that the applicant's return to Cuba would result in extreme hardship to his wife and son. He states that the applicant's wife works 35 hours a week as a nurse's assistant and earns $9/hour. He contends that it takes the applicant's and his wife's combined salaries to support their household. He further asserts that the applicant's son has begun college and that he is entirely dependent on the applicant for his tuition, books and expenses.

While the record establishes the applicant's employment and income, it does not similarly document his wife's employment and her rate of pay. Neither does it demonstrate what financial obligations would face the applicant's wife in his absence. Accordingly, the record fails to establish how the applicant's removal would affect his wife's financial circumstances. Moreover, as previously noted, the applicant's wife has not been established as a qualifying relative for the purposes of this proceeding and the record does not indicate how any financial hardship she might experience in the applicant's absence would affect the applicant's son, the only qualifying relative. The record also fails to demonstrate that the applicant's son is attending college or that he is dependent on the applicant for his school expenses. Although the record contains a certificate acknowledging the application submitted by the applicant's son to American Intercontinental University, it does not include documentation of his acceptance at that institution or proof that the applicant is paying for his tuition and expenses. The assertions of counsel do not constitute evidence. *Id.* Therefore, the record does not establish that the applicant's son would experience extreme hardship if the applicant's waiver request were to be denied and he remained in the United States.

U.S. court decisions have repeatedly held that the common results of removal or inadmissibility are insufficient to prove extreme hardship. *See Hassan v. INS,* 927 F.2d 465, 468 (9th Cir. 1991). 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. In that the record does not distinguish the hardship that would be suffered by the applicant's son from the hardship normally experienced by others whose family members have been excluded from the United States, the

applicant has failed to establish extreme hardship to his son under section 212(h) of the Act. 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 rests with the applicant. Here, the applicant has/has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.