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

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: BALTIMORE, MD Date: MAY 25 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. § 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.

Michael Rhew

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Baltimore, Maryland, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of El Salvador 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 committed crimes involving moral turpitude. 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 with his U.S. citizen son and daughter.

The applicant's employer filed an Immigrant Petition for Alien Worker (Form I-140) on the applicant's behalf and the applicant concurrently filed an Application to Register Permanent Residence or Adjust Status (Form I-485) on April 27, 2001. The applicant also filed an Application for Waiver of Grounds of Inadmissibility (Form I-601) on February 3, 2006.

In his decision dated August 4, 2006, the district director found the applicant inadmissible for having been convicted of two counts of "4th degree sex offense." The director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the waiver application accordingly.

In an undated brief, counsel states that the applicant's children will suffer extreme hardship as a result of the applicant's removal. He submits additional evidence of hardship on appeal.

In support of the waiver application, the applicant has submitted a psychological evaluation for the applicant's children; a note from the applicant's daughter's doctor; a U.S. Department of State Consular Information Sheet for El Salvador; documents regarding the treatment of Eczema; affidavits from the applicant, the applicant's common-law wife, and the applicant's brother; birth certificates for the applicant's two children; documents regarding the purchase of a home; and country condition information for El Salvador. The entire record has been reviewed in rendering a decision on the appeal.

Section 212(a)(2)(A) of the Act states, in pertinent parts:

> (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –
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> > (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.
>
> (ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-
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> > (I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before

> the date of the application for a visa or other documentation and the date of application for admission to the United States, or
>
> (II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

The AAO notes that the applicant cannot qualify for the petty offense exception because he was convicted of more than one crime.

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....
>
> 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.)

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.

The record shows that on February 8, 2000 the applicant was charged with (1) second degree rape, (2) second degree rape, (3) fourth degree sex offense, and (4) fourth degree sex offense. The applicant, who was born on February 28, 1976, was 23 years old at the time he committed the crimes that resulted in his arrest.

The record shows that the applicant was convicted in the Circuit Court, Prince George's County, Maryland, on August 1, 2000 of two counts of fourth degree sexual offense in violation of § 464C of the Maryland Code. The applicant was imprisoned for six months and placed on probation for one year.

At the time of the applicant's conviction, Maryland Code § 464C provided, in pertinent parts:

> § 464C Fourth degree sexual offense.
>
> (a) Elements of the offense. -- A person is guilty of a sexual offense in the fourth degree if the person engages:
>
> (1) In sexual contact with another person against the will and without the consent of the other person; or
>
> (2) Except as provided in § 464B (a) (4) of this subheading, in a sexual act with another person who is 14 or 15 years of age and the person performing the sexual act is four or more years older than the other person; or
>
> (3) Except as provided in § 464B (a) (5) of this subheading, in vaginal intercourse with another person who is 14 or 15 years of age and the person performing the act is four or more years older than the other person.
>
> (b) Penalty. -- Any person violating the provisions of this section is guilty of a misdemeanor and upon conviction is subject to imprisonment for a period of not more than one year, or a fine of not more than $1,000, or both fine and imprisonment.

The application for statement of charges dated December 29, 1999, states that the applicant and the victim had consensual intercourse on two occasions when the victim, born on June 21, 1986, was 14 years old and the applicant was 23 years old. Thus, the AAO finds that the applicant was convicted under the provisions of § 464C(a)(3) of the Maryland Code. In his affidavit dated January 30, 2006, the applicant states that his conviction arose from an intimate relationship involving sexual activities with a 14-year-old girl whom he believed to be 16 years old at the time. The AAO notes that the age of consent in Maryland is 16 years old. The AAO also notes that in cases involving statutory rape, Maryland law makes no allowance for a mistake-of-age defense. *Garnett v. State*, 332 Md. 571, 632 A.2d 797 (1993). Courts have commonly held that statutory rape is a crime involving moral turpitude. *United States v. Grey*, 87 Fed. Appx. 254, 2004 WL 65248 (3rd Cir. 2004); *Gonzalez-Alvarado v. INS*, 39 F.3d 245 (9th Cir. 1994); *Castle v. INS*, 541 F.2d 1064 (4th Cir. 1976); *Marciano v. INS*, 450 F.2d 1022 (8th Cir. 1971); *Matter of M- C-*, 9 I. & N. Dec. 280 (BIA 1961).

In *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008) the Attorney General found that a crime involving acts of indecency with a child was a crime involving moral turpitude, when the perpetrator had knowledge that the person with whom he or she was engaging in sexual conduct with was a child. The AAO notes that although the applicant now claims that he believed the victim in his case to have been 16 years old at the time he committed the acts which led to his conviction, the applicant's statements alone are not sufficient to find that he has not been convicted of a crime involving moral turpitude. The record includes no corroborating evidence to support the statements made by the applicant. Thus, the AAO finds that the applicant has been convicted of two crimes involving moral turpitude, and is inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The applicant does not contest this finding of inadmissibility.

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), (B), . . . of subsection (a)(2) . . . if –
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> . . . .
>
> (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 AAO notes that section 212(h) 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. In this case, the relatives that qualify are the applicant's two children. Hardship to the applicant is not considered under the statute and will be considered only insofar as it results in hardship to a qualifying relative. 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, 565-66 (BIA 1999), the BIA provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in 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. The BIA added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not an exclusive list. *See id.*

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 in *Salcido-Salcido v. INS,* 138 F.3d 1292, 1293 (9th Cir. 1998), the Ninth Circuit Court of Appeals held that, "the most important single hardship factor may be the separation of the alien from family living in the United States", and that, "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion." (Citations omitted). Although the present case did not arise in the Ninth Circuit, separation of family will be given appropriate weight in the assessment of hardship factors.

The AAO notes further, however, that 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, in *Matter of Pilch,* 21 I&N Dec. 627 (BIA 1996), the BIA held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In *Perez v. INS,* 96 F.3d 390 (9th Cir. 1996), the Court defined "extreme hardship" as hardship that was unusual or beyond that which would normally be expected upon deportation. The Court emphasized that the common results of deportation are insufficient to prove extreme hardship. Moreover, the U.S. Supreme Court 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.

An analysis under *Matter of Cervantes-Gonzalez* is appropriate. The AAO notes that extreme hardship to a qualifying relative must be established in the event that he or she accompanies the applicant or in the event that he or she remains in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

The AAO finds that the applicant's children will suffer extreme hardship as a result of relocating to El Salvador. The U.S. Citizenship and Immigration Services currently offers Temporary Protected Status to nationals of El Salvador residing in the United States. A Temporary Protected Status designation acknowledges that it is unsafe to return to a country because of ongoing armed conflict, an environmental disaster, or other extraordinary and temporary conditions. Temporary Protected Status for El Salvadorans has been designated through September 9, 2010. In his affidavit dated January 30, 2006, the applicant states that his children will suffer extreme hardship upon relocation to El Salvador because of the economic conditions, the lack of educational opportunities, and access to medical care. The AAO notes that the record includes various articles from the internet about poverty and violence in El Salvador, including the U.S. Department of State Consular Information Sheet for El Salvador. The Consular Information Sheet states that El Salvador is a critical crime-

threat country and has one of the highest homicide rates in the world. The report also states that there are very few private hospitals in El Salvador with an environment that would be acceptable to visiting Americans. Furthermore, the record includes a medical note from the applicant's daughter's doctor, [redacted], which states that the applicant's daughter is suffering from and being treated for chronic, persistent, eczema. [redacted] states that receiving the medical care she needs in El Salvador would be a problem. Thus, the AAO finds that based on the applicant's statements, the applicant's daughter's medical condition, the conditions in El Salvador, and the designation of Temporary Protected Status for nationals of El Salvador living in the United States, it would be an extreme hardship for the applicant's children to relocate to El Salvador.

The AAO also finds that he applicant's children will suffer extreme hardship from being separated from their father. The AAO notes that the applicant's children born on October 29, 2002 and November 21, 2004, are now seven and five years old. In his affidavit dated January 30, 2006, the applicant states that if he returns to El Salvador he will not be able to provide his children with financial, emotional, or paternal support. He states that his common-law wife will struggle to provide financially for their children. He also states that his children are very emotionally attached to him. In an affidavit dated January 27, 2006, the applicant's wife states that if their children are separated from the applicant they will suffer emotional and psychological trauma. She states that the children are very close to the applicant and that she would not be able to maintain their standard of living without the applicant's contribution to the household income.

The record also contains a psychological evaluation by [redacted] a Licensed Social Worker [redacted] states that the applicant works in construction and earns $18.00 per hour and that his wife is a social services assistant and earns $1,600 per month. He states that the family had recently purchased and moved into a new home, that the mortgage payment is $2,500 per month and the applicant's wife only earns $1,600 per month. He states that the applicant estimates he will earn about $5.00 a day in El Salvador and will not be able to meaningfully contribute to his family's finances. [redacted] also states that the children's mental well being is inextricably linked to the mental health of their parents, especially their mother. He states that the applicant's wife being stressed and depressed about the applicant's possible removal is also causing the children hardship and could have long term effects on their development. The AAO notes that the record contains documents supporting the assertions regarding the family's home ownership and purchase of a home for $250,000 in Hyattsville, Maryland.

The AAO finds that the applicant's children will suffer emotional hardship as a result of being separated from their father at such a young age. They will also suffer financial hardship as a result of the loss of income from the applicant. Thus, taking the hardships that will be experienced by the applicant's children in the aggregate, the AAO finds that the applicant has shown that his U.S. citizen children will suffer extreme hardship.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the applicant bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

> In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying

> circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

See Matter of Mendez-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country. " *Id.* at 300. (Citations omitted).

The adverse factors in the present case are the applicant's criminal convictions.

The favorable factors in the present case are the applicant's family ties to the United States; extreme hardship to his family if he were to be denied a waiver of inadmissibility; the applicant's consistent record of employment and financial support of his family; the applicant's lack of a criminal record or offense since 2000; and, as indicated by affidavits from his family, the applicant's good moral character and his attributes as a good father and husband.

The AAO finds that the crimes committed by the applicant are serious in nature and cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.