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

U.S. Citizenship and Immigration Services

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[redacted]

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FILE: [redacted] Office: KINGSTON, JAMAICA Date: SEP 21 2010

IN RE: Applicant: [redacted]

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

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Michael Rhew

Perry Rhew
Chief, Administrative Appeals Office

ACTION COMPLETED
APPROVED FOR FILING
Initials: JT Date: 6/22/11
FCO/Unit COW

DISCUSSION: The waiver application was denied by the Officer-in-Charge (OIC), Kingston, Jamaica, 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 Jamaica 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 a crime involving moral turpitude, the attacking and cutting of his girlfriend (who is now his wife). The director indicated that the applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h). The director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On appeal, the applicant contends that he has matured over the past 19 years and has resolved the differences that he had with his wife. He conveys that they had a second child together and have remained friends even though they have been separated.

The AAO will first address the finding of inadmissibility. 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 –
>
> > (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

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....
>
> 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." *Silva-Trevino*, 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. *Id.* 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 that the applicant was convicted of "felonious wounding" in Jamaica in 1987, and his sentence of 12 months hard labor was suspended for two years. In 1989, he was convicted of "malicious destruction of property" for setting fire to his girl friend's clothing. He was ordered to either pay a fine or spend 30 days in jail.

Section 12 of The Offenses Against the Person Act provides:

> Whosoever shall unlawfully and maliciously, by any means whatsoever, wound, or cause any grievous bodily harm to any person, or shoot at any person, or, by drawing a trigger, or in any other manner attempt to discharge any kind of loaded arms at any person, with intent in any of the cases aforesaid, to maim, disfigure or disable any person, or to do some other grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person, shall be guilty of felony, and, being convicted thereof, shall be guilty of felony, and, being convicted thereof, shall be liable, to be imprisoned for life with or without hard labour.

With regard to the "felonious wounding" offense, the record reflects that the applicant attacked and cut his girlfriend (his first child's mother). The Board determined that assault and battery offenses involve moral turpitude where there is an aggravating factor such as the use of deadly weapon, the

intentional infliction of serious bodily injury, and bodily harm upon individuals deserving of special protection such as a child, domestic partner, or a peace officer. *See In re Sanudo*, 23 I&N Dec. 968 (BIA 2006). We find that the conduct of which the applicant was convicted — attacking and cutting his girlfriend — is morally turpitudinous as it involves the malicious intent to "maim, disfigure or disable any person, or to do some other grievous bodily harm" to a domestic partner, an individual deserving of special protection. The finding of inadmissibility under section 212(a)(2)(A)(i)(I)of the Act was therefore correct.

The applicant was also convicted of "malicious destruction of property," the setting on fire his girlfriend's clothing. In *Matter of N-*, 8 I&N Dec. 466 (BIA 1959), the Board found that violation of Delaware's malicious mischief statute (section 692 of the Delaware Penal Code), which consisted of causing damage to the furnishing of the Wilmington Girls Club, does not involve moral turpitude as the act was not "inherently base or depraved." Moreover, the Board found that the malicious mischief of breaking the glass in a door of a building and damaging a mailbox were not crimes involving moral turpitude in *In Re C-*, 2 I&N Dec. 716 (BIA 1947) and in *In Re B-*, 2 I&N Dec. 867 (BIA 1947). In view of these decisions by the Board, we find that the applicant's offense of setting on fire his girlfriend's clothing does not involve moral turpitude as the act in itself is not "inherently base or depraved." Thus, the applicant's conviction for "malicious destruction of property" does not involve moral turpitude.

The record establishes that the applicant has been convicted of a crime involving moral turpitude, which renders him inadmissible under section 212(a)(2)(B) of the Act. The waiver for inadmissibility under section 212(a)(2)(B) of the Act is found under section 212(h) of the Act. That section 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 . . .

Section 212(h)(1)(A) of the Act provides that the Attorney General may, in his discretion, waive the application of subparagraph (A)(i)(I) of subsection (a)(2) if 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. Since the conviction rendering the applicant inadmissible occurred in 1987, which is more than 15 years ago, it is waivable under section 212(h)(1)(A)(i) of the Act.

Section 212(h)(1)(A)(ii) and (iii) of the Act requires that the applicant's admission to the United States not be contrary to the national welfare, safety, or security of the United States; and that the applicant establish his rehabilitation. Evidence in the record to establish the applicant's eligibility under section 212(h)(1)(A)(ii) and (iii) of the Act consists of letters by his family members and his present and former wife. The applicant's former spouse states in her undated letter that her sons miss their father. She conveys that the applicant's son died and that he provided emotional support to his present wife, who was the mother of the son who died. She asserts that her former husband has matured, and is rehabilitated and regrets his past actions. The applicant's wife asserts in her undated letter that she misses her husband and requires his financial assistance. She conveys that traveling, purchasing calling cards, and maintaining two households is draining them financially. The applicant's wife states that because she is financially burdened she is living with her 20-year-old son, which she feels is unfair to him. The record conveys that the applicant has been a self-employed shopkeeper in Jamaica since 1993, that he married his present wife (the girlfriend who he wounded) in Jamaica on June 11, 1961, and that they regularly communicate by telephone. The applicant has twin sons who were born on August 2, 1997 and now live in the United States, and a daughter who was born on May 24, 1986, and lives in Jamaica.

In view of the record, which shows that the applicant has not committed any crimes since 1987, has good character according to his former and present spouses, and has been self-employed for a substantial period of time, the AAO finds that the applicant has demonstrated that his admission to the United States is not contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated, as required by section 212(h)(1)(A)(ii) and (iii) of the Act.

Once eligibility for a waiver is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion in favor of the waiver. *See Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). A favorable exercise of discretion is limited in the case of an applicant who has been convicted of a violent or dangerous crime. Specifically, 8 C.F.R. § 212.7(d) states:

> The Attorney General, in general, will not favorably exercise discretion under section 212(h)(2) of the Act (8 U.S.C. 1182(h)(2)) to consent to an application or reapplication for a visa, or admission to the United States, or adjustment of status, with respect to immigrant aliens who are inadmissible under section 212(a)(2) of the Act in cases involving violent or dangerous crimes, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of the application for adjustment of status or an immigrant visa or admission as an immigrant would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the alien's underlying criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act.

The applicant's conviction for "felonious wounding" qualifies as a violent or dangerous crime under 8 C.F.R. § 212.7(d). Accordingly, the applicant must show that "extraordinary circumstances" warrant approval of the waiver. 8 C.F.R. § 212.7(d). Extraordinary circumstances may exist in cases involving national security or foreign policy considerations, or if the denial of the applicant's

admission would result in exceptional and extremely unusual hardship. Finding no evidence of foreign policy, national security, or other extraordinary equities, the AAO will consider whether the applicant has "clearly demonstrate[d] that the denial of . . . admission as an immigrant would result in exceptional and extremely unusual hardship" to a qualifying relative.

In the instant case, the applicant must demonstrate that denial of admission would result in exceptional and extremely unusual hardship to a qualifying relative, who is the applicant's U.S. citizen spouse.[1] The applicant's spouse conveys that she requires financial support from the applicant. She submitted invoices which show that she is in arrears with JP Morgan Chase, DDA in the amount of $376.94, and was in arrears in the amount of $1,450.59 in paying her rent. The record also contains a credit card invoice showing the total balance due of $3,329.14. Even though we recognize that the applicant's spouse states that she lives with her son because she is in financial straits, the applicant's spouse has submitted no documentation of her income and has only partially submitted invoices of her expenses. The applicant has not provided enough documentation to demonstrate that his wife's income is not sufficient to pay all of her household expenses. The AAO recognizes that applicant's wife will endure emotional hardship as a result of separation from the applicant. However, we find that the applicant has not demonstrated that the financial and emotional hardship to his qualifying relative meets the "exceptional and extremely unusual hardship," standard as required in 8 C.F.R. § 212.7(d).

With regard to joining the applicant to live in Jamaica, no hardship claim is made. The burden of proof in this proceeding lies with the applicant, and "while an analysis of a given application includes a review of all claims put forth in light of the facts and circumstances of a case, such analysis does not extend to discovery of undisclosed negative impacts." *Matter of Ngai*, 19 I&N Dec. 245, 247 (Comm'r 1984).

Accordingly, the applicant failed to demonstrate that he merits a favorable exercise of discretion under 8 C.F.R. § 212.7(d), and the appeal will be dismissed.

ORDER: The appeal is dismissed.

[1] The applicant has submitted no documentation of the legal status of his sons in the United States, which is required in order to establish them as "qualifying relatives."