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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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Date: MAY 12 2011 Office: TEGUCIGALPA, HONDURAS FILE [redacted]

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v) and Section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT:

[redacted]

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 $630. 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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting Field Office Director, Tegucigalpa, Honduras, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Honduras 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, and pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present for more than one year and seeking readmission within 10 years of his last departure. The applicant's spouse and two children are U.S. citizens. He seeks a waiver of inadmissibility in order to reside in the United States.

The acting field office director found that the applicant had failed to establish extreme hardship to a qualifying relative and the Application for Waiver of Grounds of Inadmissibility (Form I-601) was denied accordingly. *Acting Field Office Director's Decision*, dated September 25, 2008.

On appeal, counsel asserts that the acting field office director made an erroneous conclusion of fact and law, and that the applicant is not inadmissible for a prostitution conviction. *Form I-290*, received October 28, 2008.

The record includes, but is not limited to, counsel's brief, the applicant's spouse's statement and motion letter, the applicant's spouse's sister's statement, medical and educational records for the applicant's children and country conditions information on Honduras. The entire record was reviewed and considered in arriving at a decision on the appeal.

The record reflects that the applicant entered the United States without inspection on or about March 15, 1999, was granted voluntary departure on May 10, 2007 and departed the United States on May 17, 2007. The applicant accrued unlawful presence from on or about March 15, 1999, the date he entered the United States without inspection, until May 10, 2007, the date of his voluntary departure grant. The applicant is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of more than one year and seeking readmission within ten years of his May 17, 2007 departure from the United States.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

> (B) Aliens Unlawfully Present.-
>
> > (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-
> >
> > . . . .
> >
> > (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such

> alien's departure or removal from the United States, is inadmissible.
>
> . . . .
>
> (v) Waiver. – The Attorney General [now the Secretary of Homeland Security (Secretary)] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

The record reflects that the applicant was convicted on October 24, 2006 under Florida Statutes § 784.021(1)(a) of aggravated assault with a deadly weapon.

At the time of the applicant's conviction, Florida Statutes § 784.021 provided, in pertinent part:

(1) An "aggravated assault" is an assault:

(a) with a deadly weapon without intent to kill;

An "assault" is an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent. Fl. Stat. Ann. § 784.011. In *Matter of Fualaau*, the BIA noted, "The crime of assault includes a broad spectrum of misconduct, ranging from relatively minor offenses, *e.g.*, simple assault, to serious offenses, *e.g.*, assault with a deadly weapon." 21 I&N Dec. 475, 447 (BIA 1996). The BIA noted further, "Assault with a deadly weapon has been held to be a crime involving moral turpitude." *Id. (*citing *Matter of Medina,* 15 I&N Dec. 611 (BIA 1976)(stating that assault with a deadly weapon under the Illinois Revised Statutes is a crime involving moral turpitude even if the perpetrator only engages in reckless misconduct.); *see also Matter of Sanudo*, 23 I&N Dec. 968, 971 (BIA 2006)("assault and battery with a deadly weapon has long been deemed a crime involving moral turpitude by both this Board and the Federal courts, because the knowing use or attempted use of deadly force is deemed to be an act of moral depravity that takes the offense outside the 'simple assault and battery' category.") Therefore, the AAO finds that the applicant committed a crime involving moral turpitude and he is inadmissible under section 212(a)(2)(A)(i)(I) of the Act. [1]

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[1] The record reflects that the applicant was arrested on or around May 24, 2003 for petit theft under Florida Statutes § 902.20. The record is not clear as to the court disposition, if any, from this arrest.

The record reflects that the applicant was convicted of soliciting another to commit prostitution on July 11, 1999 under Florida Statutes § 796.07. Counsel asserts that the applicant is not inadmissible based on his prostitution conviction under the reasoning in *Matter of Oscar Gonzalez-Zoquiapan*, 24 I&N Dec. 549 (BIA 2008). *Brief in Support of Appeal*, dated October 23, 2008. The record is not clear as to the nature of the applicant's offense. In that the AAO is not finding

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, that:

> The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana . . . .
>
> (1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that –
>
> (i) the alien is inadmissible only under subparagraph (D)(i) or (D)(ii) of such subsection or 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 . . .; and
>
> (2) the Attorney General [Secretary], in his discretion, and pursuant to such

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that the applicant is eligible for a section 212(h)(1)(B) waiver for his crime involving moral turpitude, it will not address whether he is inadmissible under section 212(a)(2)(D)(ii) of the Act and whether he is eligible for a section 212(h)(1)(A) waiver.

> terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

The AAO finds that the applicant has committed a violent or dangerous crime (aggravated assault with a deadly weapon) and is subject to the heightened discretionary standard set forth in the regulation at 8 C.F.R. § 212.7(d), which provides:

> The Attorney General [Secretary, Department of Homeland Security], 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.

Therefore, to establish eligibility for a waiver of inadmissibility in the present case, the applicant must show that "extraordinary circumstances" warrant its approval. 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. The AAO will first address whether the applicant is eligible for a section 212(a)(9)(B)(v) waiver. As discussed below, the AAO finds the applicant not eligible for a section 212(a)(9)(B)(v) waiver. Therefore, there is no need to address the higher standard of the section 212(h) waiver.

A waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant or children can be considered only insofar as it results in hardship to a qualifying relative. The applicant's spouse is the only qualifying relative in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296, 301 (BIA 1996).

As a qualifying relative is not required to depart the United States as a consequence of an applicant's inadmissibility, two distinct factual scenarios exist should a waiver application be denied: either the qualifying relative will join the applicant to reside abroad or the qualifying relative will remain in the United States. Ascertaining the actual course of action that will be taken is complicated by the fact that an applicant may easily assert a plan for the qualifying relative to relocate abroad or to remain in

the United States depending on which scenario presents the greatest prospective hardship, even though no intention exists to carry out the alleged plan in reality. *Cf. Matter of Ige,* 20 I&N Dec. 880, 885 (BIA 1994) (addressing separation of minor child from both parents applying for suspension of deportation). Thus, we interpret the statutory language of the various waiver provisions in section 212 of the Act to require an applicant to establish extreme hardship to his or her qualifying relative(s) under both possible scenarios. To endure the hardship of separation when extreme hardship could be avoided by joining the applicant abroad, or to endure the hardship of relocation when extreme hardship could be avoided by remaining in the United States, is a matter of choice and not the result of removal or inadmissibility. As the Board of Immigration Appeals stated in *Matter of Ige*:

> [W]e consider the critical issue . . . to be whether a child would suffer extreme hardship if he accompanied his parent abroad. If, as in this case, no hardship would ensue, then the fact that the child might face hardship if left in the United States would be the result of parental choice, not the parent's deportation.

Id. See also Matter of Pilch, 21 I&N Dec. 627, 632-33 (BIA 1996).

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez,* the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). 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. *Id.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of deportation, removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. *See generally Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator "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." *Id.*

We observe that the actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. *See, e.g., In re Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate).

Family separation, for instance, has been found to be a common result of inadmissibility or removal in some cases. *See Matter of Shaughnessy*, 12 I&N Dec. at 813. Nevertheless, family ties are to be considered in analyzing hardship. *See Matter of Cervantes-Gonzalez,* 22 I&N Dec. at 565-66. The question of whether family separation is the ordinary result of inadmissibility or removal may depend on the nature of family relationship considered. For example, in *Matter of Shaughnessy*, the Board considered the scenario of parents being separated from their soon-to-be adult son, finding that this separation would not result in extreme hardship to the parents. *Id.* at 811-12; *see also U.S. v. Arrieta*, 224 F.3d 1076, 1082 (9th Cir. 2000) ("Mr. Arrieta was not a spouse, but a son and brother. It was evident from the record that the effect of the deportation order would be separation rather than relocation."). In *Matter of Cervantes-Gonzalez*, the Board considered the scenario of the respondent's spouse accompanying him to Mexico, finding that she would not experience extreme hardship from losing "physical proximity to her family" in the United States. 22 I&N Dec. at 566-67.

The decision in *Cervantes-Gonzalez* reflects the norm that spouses reside with one another and establish a life together such that separating from one another is likely to result in substantial hardship. It is common for both spouses to relocate abroad if one of them is not allowed to stay in the United States, which typically results in separation from other family members living in the United States. Other decisions reflect the expectation that minor children will remain with their parents, upon whom they usually depend for financial and emotional support. *See, e.g., Matter of Ige*, 20 I&N Dec. at 886 ("[I]t is generally preferable for children to be brought up by their parents."). Therefore, the most important single hardship factor may be separation, particularly where spouses and minor children are concerned. *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS,* 712 F.2d 401, 403 (9th Cir. 1983)); *Cerrillo-Perez*, 809 F.2d at 1422.

Regardless of the type of family relationship involved, the hardship resulting from family separation is determined based on the actual impact of separation on a qualifying relative, and all hardships must be considered in determining whether the combination of hardships takes the case beyond the

consequences ordinarily associated with removal or inadmissibility. *Matter of O-J-O-*, 21 I&N Dec. at 383. Nevertheless, though we require an applicant to show that a qualifying relative would experience extreme hardship both in the event of relocation and in the event of separation, in analyzing the latter scenario, we give considerable, if not predominant, weight to the hardship of separation itself, particularly in cases involving the separation of spouses from one another and/or minor children from a parent. *Salcido-Salcido*, 138 F.3d at 1293.

The first part of the analysis requires the applicant to establish extreme hardship to a qualifying relative in the event of relocation to Honduras. The AAO notes counsel's point that the acting field office director incorrectly mentioned Costa Rica as the relevant country in his decision. *Brief in Support of Appeal.* The applicant's spouse states that life is very unsafe in Honduras, and there are drugs and gangs there. *Applicant's Spouse's Motion Letter*, dated December 5, 2007. Counsel states that Honduras has experienced considerable natural disasters; the U.S. government has granted Honduran nationals temporary protected status; requiring two small children to move there would in itself be extreme hardship, both children have medical problems, including chronic asthma which requires nebulizer treatments; the applicant could not find the necessary medical facilities to assist his children; the older daughter is having educational issues; the older daughter would have to leave her classmates and school; the applicant's spouse would have to find a job in a country plagued by natural disasters. *Brief in Support of Appeal.* The record reflects that the applicant's older daughter has some educational issues. The applicant's children's medical records reflect that they have taken albuterol and have had reactive airway disease. The record is not clear as to the severity of their medical issues. The record does not include supporting documentary evidence of the lack of medical facilities in Honduras. The record does not include supporting documentary evidence of the gang and drug situation in Honduras. Going on record without supporting documentation will not meet the applicant's burden of proof in this proceeding. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). However, the AAO notes that Honduras is currently listed as a country whose nationals are eligible for Temporary Protected Status (TPS) due to the damage done to the country from Hurricane Mitch and the subsequent inability of Honduras to handle the return of its nationals. 75 Fed. Reg. 24734-24736 (May 5, 2010). Under the TPS program, citizens of Honduras are allowed to remain in the United States temporarily due to the inability of Honduras to handle the return of its nationals due to the disruption of living conditions. *Id.* As such, requiring the applicant's U.S. citizen spouse to relocate to Honduras in its current state would constitute extreme hardship to her. The AAO notes that she would be relocating to Honduras with two young children with some medical issues, and one with educational issues.

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. The applicant's spouse states that since the applicant returned to Honduras, the children have been experiencing a lot of hardship; it is gut-wrenching to tell her children that the applicant will be home very soon and he never comes; it is hard for her to take care of two children, pay for child care, pay the rent, pay for medical bills, pay for housing and send money to the applicant; both of her children suffer from asthma; she is financially unable to take the children to visit the applicant in Honduras; she is financially unable to support her older daughter's extracurricular activities; and her older child thinks the applicant has

abandoned her. *Applicant's Spouse's Statement*, dated October 1, 2008. The applicant's spouse also states that she is close to bankruptcy and losing her and the applicant's home, which is worth $300,000; her monthly mortgage is $1,982, home taxes are $5,700 and insurance is $2,400; and her other expenses include asthma medicine, doctor appointments, clothes and school items. *Applicant's Spouse's Motion Letter.* The record includes copies of a home loan statement, insurance statement and credit card statement. The applicant's spouse's sister states that the applicant's spouse is financially devastated; she cannot afford child care; she has to work based on her sister's schedule, resulting in a 3:30 A.M. to 10 A.M. work day; her work is not enough to provide necessities for her children; and their schedule results in their girls being home alone for 30 minutes a day. *Applicant's Spouse's Sister's Statement*, dated October 1, 2008. The record is not clear as to the applicant's spouse's salary and her expenses. Therefore, it has not been established that the applicant's spouse cannot meet her expenses. The record is not clear as to the severity of her children's medical issues. In addition, the record indicates that the applicant's children are receiving regular medical care. As such, the record is not clear as to the degree of hardship to the applicant's spouse based on the children's medical issues. The AAO finds that the record does not include sufficient evidence of financial, medical, emotional or other types of hardship, which in their totality, establish that a qualifying relative would experience extreme hardship upon remaining in the United States.

A review of the documentation in the record fails to establish the existence of extreme hardship to a qualifying relative caused by the applicant's inadmissibility to the United States, as the second prong of the analysis has not been met. 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(a)(9)(B)(v) 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. As such, the AAO will not address whether the applicant meets the higher standard of exceptional and extremely unusual hardship in order to receive a section 212(h) waiver. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.