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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 24 2011 OFFICE: PHOENIX FILE: [redacted]

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:

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,

Michael Shumway

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application for waiver of inadmissibility was denied by the District Director, Phoenix, Arizona, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who was found to be inadmissible under 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 is applying for a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his lawful permanent resident mother.

The director determined that the applicant failed to establish extreme hardship to a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated October 29, 2008.

On appeal, counsel asserts that the applicant's mother would suffer extreme hardship if the applicant were denied admission to the United States. *Appeal Brief,* dated November 24, 2008.

In support of the waiver application, the record includes, but is not limited to, the applicant's conviction records, financial documentation, the applicant's birth certificate, statements from the applicant and his mother, a letter of support, identity documentation for the applicant's family members, and an approved petition for alien relative (Form I-130). The entire record was reviewed and considered 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 –
>
> > (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-
>
> > (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 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 *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). This case arises in the Ninth Circuit, and the Ninth Circuit Court of Appeals has adopted the realistic probability standard. *See Nicanor-Romero v. Mukasey*, 523 F.3d 992, 1004-1007 (9th Cir. 2008).

The record reflects that on May 12, 2005, the applicant was convicted in the Superior Court of California, County of Orange, of second degree burglary in violation of 459-460(b) of the California Penal Code and receiving stolen property in violation of 496(a) of the California Penal Code (Case No. [redacted] The imposition of sentence was suspended and the applicant was placed on three years informal probation pursuant to certain terms and conditions, including payment of fines and restitution, and serving 120 days in Orange County Jail. On October 21, 2005, the applicant was convicted in the Superior Court of California, County of Orange, of two counts of vandalism in violation of section 594 of the California Penal Code (Case No. [redacted]. The imposition of

sentence was suspended and the applicant was placed on three years informal probation pursuant to certain terms and conditions, including the payment of fines and restitution, and serving 45 days in Orange County Jail.

At the time of the applicant's conviction, Cal. Penal Code § 594 provided, in pertinent part:

> (a) Every person who maliciously commits any of the following acts with respect to any real or personal property not his or her own, in cases other than those specified by state law, is guilty of vandalism:
>
> (1) Defaces with graffiti or other inscribed material.
>
> (2) Damages.
>
> (3) Destroys.

A conviction for vandalism under Cal. Penal Code § 594 requires the perpetrator to "maliciously" deface, damage or destroy another's property. In *People v. Campbell*, the California Court of Appeal determined that a defendant's prior conviction for felony vandalism evinced "moral turpitude" and, thus, was admissible to impeach the defendant. 23 Cal.App.4th 1488 (1994). In making this determination, the Court noted that:

> [S]ection 594, subdivision (a), which was enacted as section 594 in the original 1872 Criminal Code as a "preliminary catch-all provision" to what is now title 14 of the Criminal Code, dealing with malicious injury to property (2 Witkin & Epstein, Cal.Criminal Law (2d ed. 1988) Crimes Against Property, § 678, pp. 761–762), still follows the language of the original malicious-mischief statutes in specifying "malice" as the mens rea of the offense. "It is generally held that [the term 'malice' in such statutes] calls for more than mere intentional harm without justification or excuse; there must be a wanton and wilful (or 'reckless') disregard of the plain dangers of harm, without justification, excuse or mitigation." (*Id.* at p. 762.) Such a state of mind betokens that "general readiness to do evil" which constitutes moral turpitude. (See *Castro, supra,* 38 Cal.3d at p. 314, 211 Cal.Rptr. 719, 38 Cal.3d 301.)

23 Cal.App.4th 1488, 1493.

The BIA in *Matter of M* addressed whether an alien's conviction for malicious and wanton injury to property in violation of the Oregon Penal Code constituted morally turpitudinous conduct. 3 I&N Dec. 272 (BIA 1948). In finding that the crime constitutes moral turpitude, the BIA noted that:

> [T]he indictment avers the terms "maliciously" and "wantonly." An act which is done for sufficient cause has been held not to be done "wantonly." *State* v. *Klein*, 98 Oreg., 116, 193 P. 208 (1920). However, it has been held that the terms "wantonly" and "wilfully" are substantially the same. *McHargue* v. *Calchina*, 78 Oreg. 326 (1915).

> Thus we do not have a case where the act was merely accompanied by negligence or carelessness, but one which was perpetrated maliciously and wantonly. Although the statute does not contain a specific intent except where poison is exposed with the intent that same shall be taken by any animal, the statute obviously does require a motive which is manifested by the elements of malice and wantonness.

3 I&N Dec. at 273-74.

The AAO finds that the applicant's conviction for two counts of vandalism under Cal. Penal Code § 594, requiring the offender to "maliciously" deface, damage or destroy another's property, constitutes an "act of baseness, vileness, or depravity in the private and social duties owing to fellow men, and society in general, contrary to accepted and customary rules," and therefore is categorically a crime involving moral turpitude. *Id.* at 274. The applicant has been convicted of two crimes involving moral turpitude, and is therefore inadmissible under section 212(a)(2)(A)(i)(I) of the Act.[1] The applicant does not contest his inadmissibility on appeal.

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 –
>
> . . . .
>
> (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 . . . .

A waiver of inadmissibility under section 212(h) 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, parent, son or daughter of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. The applicant's lawful permanent resident mother 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).

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,*

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[1] The AAO notes that because the applicant's conviction under Cal. Penal Code § 594 has been found to be a crime involving moral turpitude that renders the applicant inadmissible, we will not review whether his other convictions are also crimes involving moral turpitude.

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).

On appeal, counsel asserts that the applicant's mother has been residing in the United States for 26 years and is gainfully employed. Counsel states that the applicant's mother has family ties in the United States, including her lawful permanent resident parents, three lawful permanent resident siblings, three U.S. citizen children, and one lawful permanent resident child. Counsel states that the applicant's mother raised the applicant as a single parent. Counsel contends that the applicant's

mother feels "she will be a failure as a mother" and "will have sleepless nights" if the applicant is not admitted to the United States. Counsel states that the applicant's mother's "family and community roots are deeply embedded in the United States." Counsel notes that if the applicant's mother relocates to Mexico, "she will be affected by the trauma that her children will suffer upon having to be uprooted." Counsel contends that the applicant's mother will have to choose "between being with her four children that are in the United States legally and her oldest son." Counsel states that the applicant's mother will suffer "psychological trauma" if she is separated from the applicant or if she relocates to Mexico. *Appeal Brief*, dated November 24, 2008.

The applicant's mother states that she believes the applicant's crimes were a result of her raising the applicant as a single parent. She asserts that if the applicant's waiver is not approved, she would fault herself and feel that she has "failed as a mother." She states that she "will have sleepless nights thinking that he is in a strange country and that his future will be destroyed." She states that the applicant has become a responsible person, and he is employed and contributes to the household expenses. She states that the applicant came to the United States when he was four years old, and does not know the lifestyle and culture of Mexico. *Declaration of* [redacted] dated January 21, 2008.

The applicant asserts that when he was released from jail he realized that he needs to "grow up" and help his mother. He states that he wants to be a role model for his siblings "by going to college and pursuing a career." He states that he wants his siblings to learn from his mistakes, and he regrets "all the wrongs" he has committed. He contends that he has changed his life and requests forgiveness. *Statement from* [redacted] dated January 21, 2008.

The AAO acknowledges that the applicant has a close relationship with his mother and siblings. The separation of family members often results in significant psychological hardship. The statements from the applicant and his mother demonstrate their strong family bond and their interests in keeping their family unified. As noted, 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. However, this case involves the separation of a 25-year-old adult child from his mother. As stated, 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*, 12 I&N Dec. 810, 813 (BIA 1968), 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.

Counsel asserts that the applicant "has been helping with the economy of the household." *Appeal Brief* at 6. However, the applicant's mother has not asserted that the applicant's absence would cause her family financial hardship. The record reflects that three of the applicant's four siblings are over the age of 18 years, and he only has one sibling who is a minor child at 16 years old. The record reflects that the applicant's mother's boyfriend resides with the applicant and his mother, and contributes financially to the household. *See Affidavit of Support* (Form I-864). Moreover, the record does not show the applicant's mother's major household expenses that could not be met without the applicant's financial assistance. Notably, the applicant has not submitted earnings

statements, W-2 Forms, or any other documentation as evidence of his wages. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)). Therefore, the AAO cannot determine that the applicant's mother would suffer financial hardship if she were separated from the applicant.

All presented elements of hardship to the applicant's mother, should she remain in the United States separated from the applicant, have been considered in aggregate. While the AAO gives significant weight to the emotional hardship of separation, the applicant has not shown that this hardship is atypical and rises to the level of extreme hardship. Based on the foregoing, the applicant has not shown that his mother will suffer extreme hardship should she decide to remain in the United States.

Furthermore, the applicant has not established extreme hardship to his mother if she relocated to Mexico. The AAO acknowledges that the applicant's mother has numerous family ties in the United States. The record reflects that the applicant's mother has resided in the United States as a lawful permanent resident since December 1, 1990. The applicant's mother has three U.S. citizen children, ages 16, 18, 20 years old. She also has a 24-year-old lawful permanent resident son. The record shows that the applicant's mother's elderly parents are lawful permanent residents. Counsel notes that if the applicant's mother relocates to Mexico, "she will be affected by the trauma that her children will suffer upon having to be uprooted." *Appeal Brief* at 6. The AAO will consider hardship to the applicant's siblings insofar as it results in hardship to the applicant's mother. However, without documentary evidence to support the claim, the assertions of counsel will not satisfy the applicant's burden of proof. The unsupported 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). The applicant's mother has not discussed the impacts of relocation on herself, her minor child, or her adult children. The applicant's mother's statement is silent on the issue of relocation, and the hardships she may suffer in Mexico. It should be noted that since the applicant's mother is a citizen and native of Mexico, she should presumably have less difficulty with adjusting to the culture and customs of the country. While we will give weight to the family ties that the applicant's mother has in the United States, this factor alone does not rise to the level of extreme hardship.

Therefore, the applicant has not established that denial of the present waiver application "would result in extreme hardship" to his mother, as required for a waiver 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 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. The waiver application is denied.