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

U.S. Citizenship and Immigration Services

H2

[redacted]

DATE: NOV 08 2011 Office: NEWARK FIELD OFFICE 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 Rhew

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Form I-601, Application for Waiver of Grounds of Inadmissibility, was denied by the Field Office Director, Newark, New Jersey. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Peru who was admitted into the United States as a B1 visitor visa holder on August 30, 2001. His admission was valid for 90 days, through November 28, 2001. The applicant did not depart the United States. He married a U.S. citizen on August 19, 2005. He is the beneficiary of an approved Form I-130, Petition for Alien Relative (Form I-130), and he filed a Form I-485, Application to Register Permanent Residence or Adjust Status on April 3, 2007. The applicant was found to be inadmissible to the United States 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 a crime 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 live in the United States with his U.S. citizen spouse and stepdaughter.

In a decision dated June 30, 2008, the director concluded the applicant had failed to establish that his U.S. citizen wife would experience extreme hardship if he were denied admission into the United States. The Form I-601 waiver application was denied accordingly. The applicant filed a Motion to Reopen and Reconsider (MTR) the director's decision on July 30, 2008. Through counsel, the applicant asserted on motion that, although not claimed in the initial Form I-601, the applicant has a stepdaughter that lives with the family who would suffer extreme hardship if the applicant's waiver application were denied. Counsel also expanded on the hardship that the applicant's wife would experience if the applicant were denied admission into the United States. The director reopened the Form I-601, however, the waiver application was subsequently denied on October 29, 2009, based on the applicant's failure to establish that his U.S. citizen wife or stepdaughter would suffer extreme hardship if the applicant were denied admission into the United States.

Through counsel, the applicant has appealed the denial of his waiver application. Counsel does not contest the director's inadmissibility findings, but asserts on appeal that the applicant's U.S. citizen wife and stepdaughter will experience extreme emotional and financial hardship if the applicant is denied admission into the United States. Counsel asserts further that the applicant's wife and stepdaughter could suffer physical hardship if they moved to Peru with the applicant, due to safety concerns. In addition, counsel asserts that the applicant's stepdaughter will experience educational hardship if she moves to Peru to be with the applicant. In support of the assertions made on appeal, the record contains birth certificate and custody information for the applicant's stepdaughter. The record also contains letters written by the applicant's wife, stepdaughter and in-laws, medical information for the applicant's father-in-law, and general articles on family separation, social readjustment, and country conditions in Peru. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a) of the Act states in pertinent part:

(2) Criminal and related grounds.-

(A) Conviction of certain crimes.-

(i) In general.-Except as provided in clause (ii), any 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 released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of 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 . . . 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).

Section 212(h) of the INA provides for the granting of a waiver of inadmissibility based on certain criminal grounds, and provides, in pertinent part, that:

The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) . . . if -

. . . .

(1) (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . . .

The applicant must also show that a waiver should be granted as a matter of discretion, with favorable factors outweighing the unfavorable factors in his case.

In the present matter, the record reflects that on October 22, 2002, the applicant was convicted of the offense of Aggravated Assault, 3rd Degree, in violation of New Jersey Statutes (N.J. Stat.) § 2C:12-1B(7). The applicant was sentenced to 364 days credit for time served, and to 4 years probation. Evidence that the applicant successfully completed probation on June 13, 2007, is contained in the record. The October 2002, Aggravated Assault offense is the only ground of inadmissibility referred to in the director's June 30, 2008 denials of the applicant's Form I-485 and Form I-601.

The record reflects, however, that on October 29, 2008, the applicant was convicted of a second criminal offense. Discovery of this offense was mentioned in the director's October 29, 2009, denial of the applicant's waiver application subsequent to a Motion to Reopen and Reconsider. Information about this offense was also provided on appeal to the AAO. Specifically, the record reflects that the applicant was convicted on October 29, 2008, of the offense of Endangering the Welfare of a Child, 3rd degree, in violation of N.J. Stat. § 2C:24-4(a).

In addition to the above offenses, the AAO has also received information indicating that since filing this appeal, the applicant was charged on August 31, 2011 with aggravated sexual assault upon a minor. The record contains no evidence concerning the resolution of these charges, and they appear to be pending against the applicant at present.

The BIA has held that "moral 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." *Matter of Perez-Contreras,* 20 I&N Dec. 615, 617-18 (BIA 1992).

In determining whether a crime involves moral turpitude, the U.S. Court of Appeals for the Third Circuit, the jurisdiction where this matter arises, conducts a categorical inquiry, which consists of looking "to the elements of the statutory offense . . . to ascertain the least culpable conduct hypothetically necessary to sustain a conviction under the statute." *Jean-Louis v. Holder,* 582 F.3d 462, 465-66 (3rd Cir. 2009). The inquiry concludes when the adjudicator determines whether the least culpable conduct sufficient to sustain conviction under the statue fits within the requirements of a crime involving moral turpitude. *Id.* at 470. If the "statute of conviction contains disjunctive elements," some of which are sufficient for conviction of a crime involving moral turpitude, and others of which are not, it becomes necessary to examine the formal record of conviction "for the narrow purpose of determining the specific subpart under which the defendant was convicted." *Id.* at 466.

With regard to the applicant's first offense, the N.J. Stat. § 2C:12-1B states in pertinent part:

> Aggravated Assault. A person is guilty of aggravated assault if he . . . (7) [a]ttempts to cause significant bodily injury to another *or* causes significant bodily injury purposely or knowingly *or*, under circumstances manifesting

> extreme indifference to the value of human life recklessly causes such significant bodily injury. (Emphasis added).

New Jersey law defines "recklessly" as:

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation. "Recklessness," "with recklessness" or equivalent terms have the same meaning.

N.J. Stat. § 2C:2-2(b)(3), (2010).

Assault and battery offenses that necessarily involve the intentional infliction of serious bodily injury to another have been held to involve moral turpitude because such intentionally injurious conduct reflects a level of immorality that is greater than that associated with a simple offensive touching." *See Matter of Solon*, 24 I&N Dec. 239 (BIA 2007) (holding that a third-degree assault is a crime involving moral turpitude under New York law because the offense requires the intentional infliction of injury that is "of a kind meaningfully greater than mere offensive touching.") The second prong of N.J. Stat. § 2C:12-1B(7) involves purposely or knowingly causing significant injury to another. The second prong of the statute thus involves moral turpitude.

The first prong of the statute also encompasses behavior involving moral turpitude. The BIA has stated:

> [I]t is well established that for immigration purposes, with respect to moral turpitude there is no distinction between the commission of the substantive crime and the attempt to commit it. (citations omitted). An attempt involves the specific intent to commit the substantive crime, and if commission of the substantive crime involves moral turpitude, then so does the attempt, because moral turpitude inheres in the intent. (citations omitted).

Matter of Khanh Hoang V, 25 I&N Dec. 426 (BIA 2011).

The Third Circuit Court of Appeals held in *Knapik v. Ashcroft,* 384 F. 3d 84, 89-90 (3rd Cir. 2004), that moral turpitude can lie in criminally reckless behavior even where the statute does not contain an intent requirement, if aggravating factors exist, such as depraved indifference to human life or consciously creating a grave risk of death or serious harm to a person. The Court indicated further that "[w]ith regard to reckless acts, moral turpitude inheres in the conscious disregard of a substantial and unjustifiable risk of severe harm or death."

Id. at n.5.

The third prong of the statutory definition of aggravated assault in in New Jersey Criminal Code 2C:12-1B(7) requires reckless disregard to human life. The definition of reckless behavior in New Jersey encompasses conscious disregard of a substantial and unjustifiable risk or a gross deviation from the standard of conduct that a reasonable person would observe. The conscious disregard element meets the requirement for a crime involving moral turpitude, as discussed above. Furthermore, N.J. Stat. § 2C:12-1B(7) encompasses the additional aggravating factors of extreme indifference to the value of human life and significant bodily injury. These aggravating factors raise the conduct required by the third prong of the statute to criminally reckless behavior involving moral turpitude.

Because all three prongs of aggravated assault under N.J. Stat. § 2C:12-1B(7) encompass conduct involving moral turpitude, it is categorically a crime involves moral turpitude. The applicant's conviction under N.J. Stat. § 2C:12-1B(7) therefore constitutes a conviction for a crime involving moral turpitude. Accordingly, the applicant is inadmissible under section 212(a)(2)(A)(I) of the Act.

With regard to the applicant's second offense, N.J. Stat. § 2C:24-4(a) states:

> Any person having a legal duty for the care of a child or who has assumed responsibility for the care of a child who engages in sexual conduct which would impair or debauch the morals of the child, or who causes the child harm that would make the child an abused or neglected child as defined in R.S. 9:6-1, F.S.9:6-3 and P.L. 1974, c. 119, s.1 (C.9:6-8.21) is guilty of a crime of the second degree. Any other person who engages in conduct or who causes harm as described in this subsection to a child under the age of 16 is guilty of a crime of the third degree.

It is noted that the statute at issue here is disjunctive, in that it encompasses behavior with intent to harm, but also behavior for engaging, without an intent requirement, in conduct that causes harm to a child. There is no formal court records to shed light on the circumstances of the applicant's conviction under this statute. It is thus unclear whether the applicant was convicted of a crime involving moral turpitude under N.J. Stat. 2C:24-4(a), and thus inadmissible based on this conviction.

As noted above, it has come to the attention of the AAO that the applicant was charged on August 31, 2011 with aggravated sexual assault on a minor. Because the charges apparently are still pending against the applicant, the applicant's potential inadmissibility for the alleged conduct is as yet unresolved.

Nevertheless, the applicant is inadmissible as a consequence of his aggravated assault conviction. The exceptions contained in section 212(a)(2)(A)(ii) of the Act do not apply in the applicant's case, as the crime was committed after the applicant turned 18. Additionally, the maximum penalty possible for the aggravated assault conviction was 5 years imprisonment, and the applicant served a term of imprisonment of 364 days, in excess of 6 months or less imprisonment period

allowed for in section 212(a)(2)(A)(ii)(II) of the Act. The applicant must therefore establish that he qualifies for a waiver of inadmissibility by demonstrating that the denial of his admission into the United States would result in extreme hardship to a qualifying relative, and by demonstrating that a waiver should be granted as a matter of discretion, as set forth in section 212(h) of the Act. Because the applicant's conviction is for a violent or dangerous crime, a favorable exercise of discretion would only be warranted where the applicant can demonstrate "extraordinary circumstances" as articulated in 8 C.F.R. § 212.7(d).

The record reflects that the applicant married a U.S. citizen on August 19, 2005. The applicant's spouse is a qualifying relative for section 212(h) of the Act, waiver of inadmissibility purposes. Birth certificate evidence shows that the applicant's spouse has a daughter, born February 2, 1993, and evidence in the record demonstrates that the applicant's spouse obtained sole legal and primary residential custody over her daughter on February 22, 2007, when her daughter was 14 years old. Because the qualifying relationship occurred before the applicant's stepdaughter turned 18, the applicant's stepdaughter is a qualifying relative for section 212(h) of the Act, waiver of inadmissibility purposes.

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,* 22 I&N Dec. 560, 565 (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. *Id.* 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 exclusive. *Id.* at 566.

The BIA has also held that the common or typical results of 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. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *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 BIA 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.*

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., Matter of 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). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. *See Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *but see Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

In the present matter, the record contains sworn statements written by the applicant's wife, stepdaughter and in-laws. The applicant's wife states that she was born and raised in the U.S., that her family is in the U.S., and that she works as a relocation consultant for [redacted] and owns a construction company that she operates with her husband in the U.S. She states that she needs to be near her ailing parents in the U.S., that her daughter wants to continue her high school education in the U.S., and that the applicant is like a father to her daughter. The applicant's wife indicates further that she and her daughter do not speak Spanish and that they are accustomed to their life-style in the U.S. She fears they will be victims of crime or violence if they move to Peru with the applicant. She also fears that she will lose her business and be unable to find work in Peru, and she states that her daughter would need to go to an expensive private school in order to continue her high school education in Peru. The applicant's stepdaughter's affidavit reflects that she spent the first ten years of her life living with her aunt and uncle, and that between the ages of 11 and 14, she lived with her biological father. The applicant's stepdaughter visited her mother and the applicant on weekends between the ages of 11 and 14, and she often spoke to the applicant on the phone during that time. She moved in with her mother and the applicant sometime in 2007, at the age of 14, and she continues to reside with them. The applicant's stepdaughter indicates that the applicant is like a father to her and she states that she likes being part of a family, and likes her home and her school. She does not want to move to Peru because she does not speak Spanish, she wants to go to college in the U.S., she feels there are fewer

opportunities for her in Peru, and she believes she would feel uncomfortable in Peru. Affidavits from the applicant's in-laws state that they are disabled and live in senior center housing. They state that they are a close family, that it would be difficult for them not to have their daughter and granddaughter near them, that the success of their daughter's business depends on the applicant's direct involvement, and that they fear for their family's safety in Peru.

The record contains an employment letter and income tax information reflecting that the applicant's wife is a full time employee with [redacted] and that she and the applicant also receive income from a family-run construction company. The record contains a Pulmonary Function Report for the applicant's father-in-law, as well as evidence reflecting that his father-in-law receives personal care assistance from the Visiting Nurse Association of Central New Jersey. In addition, the record contains general articles about social readjustment, the value of family unity, the UNHCR Convention on the Rights of the Child, and a 2008 Department of State country conditions report on Peru.

Upon review, the AAO finds that the evidence in the record fails to show that the hardships faced by the applicant's wife and stepdaughter, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship.

Although the depth of concern and anxiety over the applicant's immigration status is neither doubted nor minimized, the fact remains that Congress provided for a waiver of inadmissibility only under limited circumstances. In nearly every qualifying relationship, whether between husband and wife or parent and child, there is a deep level of affection and a certain amount of emotional and social interdependence. While, in common parlance, the prospect of separation or relocation nearly always results in considerable hardship to individuals and families, in specifically limiting the availability of a waiver of inadmissibility to cases of "extreme hardship" Congress did not intend that a waiver be granted in every case where a qualifying relationship, and thus the familial and emotional bonds, exist. The point made in this and prior decisions on this matter is that the current state of the law, viewed from a legislative, administrative, or judicial point of view, requires that the hardship, which meets the standard in section 212(h) of the Act, be above and beyond the normal, expected hardship involved in such cases.

In the present case, the affidavit evidence contained in the record fails to demonstrate that the applicant's wife and stepdaughter would experience extreme hardship if they remained in the U.S. or if they relocated to Peru. Although the assertions made by the applicant's wife and family are relevant and have been taken into consideration, little weight can be afforded them in the absence of supporting evidence. *See Matter of Kwan*, 14 I&N Dec. 175 (BIA 1972) ("Information in an affidavit should not be disregarded simply because it appears to be hearsay; in administrative proceedings, that fact merely affects the weight to be afforded it."). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)). Here, the record contains no evidence to corroborate the statements made about emotional hardship. Furthermore, the affidavit statements made by the applicant's wife, his stepdaughter and by his in-laws reflect only that the

applicant's qualifying relatives would experience the type of emotional hardship commonly associated with removal or inadmissibility.

The financial evidence contained in the record also fails to demonstrate that the applicant's wife and stepdaughter would experience extreme financial hardship if they remained in the U.S. Although the evidence demonstrates that the applicant's wife is the owner of a family-run construction business which is primarily operated by the applicant, the record also reflects that the applicant's wife is a full-time employee for a moving and relocation company, and that she is not dependent on the construction business as her primary source of income. The statements that the applicant's wife and stepdaughter would experience extreme financial, physical, and in his stepdaughter's case, educational hardship if they moved to Peru are also uncorroborated by the evidence in the record. The medical and home-care evidence relating to the applicant's father-in-law is general and does not contain an explanation of the nature and severity of the health conditions. The evidence also fails to demonstrate that the applicant's in-laws are dependent on the applicant's wife for care, or that his in-law's health would be affected if the applicant's wife and stepdaughter moved to Peru. It is additionally noted that concerns about the applicant's stepdaughter being unable to continue her high school education in Peru no longer apply, as she is now 18 and an adult. The articles about social readjustment, the value of family unity, children's rights, and country conditions in Peru are general in nature, and also fail to establish that the applicant's wife and stepdaughter would experience emotional, financial, or physical hardship beyond that normally associated with removal or inadmissibility if they moved to Peru.

Upon review of the totality of the evidence, the AAO finds that the applicant failed to establish extreme hardship to his U.S. citizen spouse and stepdaughter as required under section 212(h) of the Act. As the applicant has not established extreme hardship to a qualifying family member, no purpose would be served in determining whether the applicant merits a waiver as a matter of discretion, though, as noted above, the applicant would have to demonstrate "extraordinary circumstances" to warrant a favorable exercise of discretion, and the current record does not manifest the existence of such circumstances.

In proceedings for an 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 Form I-601 appeal will be dismissed.

ORDER: The appeal is dismissed.