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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, D.C. 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

DATE: AUG 0 8 2012

OFFICE: HIALEAH, FLORIDA

FILE: [redacted]

IN RE: Applicant: [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:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 application for waiver of inadmissibility was denied by the Field Office Director, Hialeah, Florida, 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 Cuba 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 does not contest the findings of inadmissibility. Rather, he seeks 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 father, fiancée, and son.[1]

The Field Office 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. *See Decision of the Field Office Director*, dated July 19, 2010. The AAO notes that the Field Office Director erroneously indicated that the applicant identified his qualifying relative as his U.S. citizen father rather than as a Lawful Permanent Resident as the applicant's waiver application clearly indicates that his father is a Lawful Permanent Resident. The AAO finds the reference to the qualifying relative's immigration status to be harmless error as the Field Office Director considered all of the evidence in the record concerning hardship to the applicant's father as the qualifying relative.

On appeal, the applicant asserts that the additional documentary evidence demonstrates how his father will suffer extreme medical, financial, and emotional hardship if his waiver application is denied. The applicant also requests that the U.S. Citizenship and Immigration Services (USCIS) reconsider the denial of his waiver application as he is needed to help his father and family as well as to raise his son. *See Notice of Appeal or Motion* (Form I-290B), dated August 4, 2010.

The record contains, but is not limited to: letters of support; and identity, medical, psychological, employment, financial, and criminal history documents. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(2)(A) of the Act provides, in pertinent part:

> (i) … any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –

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[1] The AAO notes that the record also reflects that subsequent to the filing of the appeal, the applicant's fiancée gave birth to his son. However, the applicant has not submitted any additional information or assertions concerning any hardship that the son, as another possible qualifying relative, may suffer because of the applicant's inadmissibility.

> (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-
>
> . . .
>
> (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):

> [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* [italics added] may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

The present case falls within the jurisdiction of the Eleventh Circuit Court of Appeals. In evaluating whether an offense constitutes a crime involving moral turpitude, the Eleventh Circuit employs the categorical and modified categorical approach. *Fajardo v. U.S. Atty. Gen.*, 659 F.3d 1303, 1305-06 (11th Cir. 2011). "To determine whether a conviction for a particular crime constitutes a conviction of a crime involving moral turpitude, both [the Eleventh Circuit] and the BIA have historically looked to 'the inherent nature of the offense, as defined in the relevant statute . . . .'" *Id.* at 1305. "If the statutory definition of a crime encompasses some conduct that categorically would be grounds for removal as well as other conduct that would not, then the record of conviction—i.e., the charging document, plea, verdict, and sentence—may also be considered." *Id.* (citing *Jaggernauth v. U.S. Att'y Gen.*, 432 F.3d 1346, 1354–55 (11th Cir.2005)).

The Eleventh Circuit has rejected the methodology adopted by the Attorney General in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008). *Fajardo v. U.S. Atty. Gen.*, 659 F.3d at 1308—11. While the Attorney General determined that assessing whether a crime involves moral turpitude may include looking beyond the record of conviction, the Eleventh Circuit has stated: "[w]hether a crime involves the depravity or fraud necessary to be one of moral turpitude depends upon the inherent nature of the offense, as defined in the relevant statute, rather than the circumstances surrounding a defendant's particular conduct." *Itani v. Ashcroft*, 298 F.3d 1213, 1215–16 (11th Cir. 2002). In *Fajardo v. U.S. Atty. Gen.*, the Eleventh Circuit affirmed its reasoning in *Vuksanovic v. U.S. Attorney General*, 439 F.3d 1308, 1311 (11th Cir.2006), stating, "the determination that a crime involves moral turpitude is made categorically based on the statutory definition or nature of the crime, not the specific conduct predicating a particular conviction." *Fajardo v. U.S. Atty. Gen.*, 659 F.3d at 1308—09.

The record shows that on May 22, 2003, the applicant was convicted of aggravated battery, a second degree felony. He was sentenced as a Youthful Offender and ordered to: complete two years of probation[2]; and pay fines totaling $428. For a felony of the second degree, we note that the maximum term of imprisonment is 15 years. *See* Fla. Stat. § 775.082.

At the time of the applicant's conviction, Fla. Stat. § 784.045 provided, in relevant part:

> (1)(a) A person commits aggravated battery who, in committing battery:
>
> 1. Intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement; or
>
> 2. Uses a deadly weapon.
>
> . . .
>
> (2) Whoever commits aggravated battery shall be guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

The AAO notes that the Eleventh Circuit Court of Appeals has held that aggravated battery, which results in serious bodily injury or involves use of a deadly weapon, is a crime involving moral turpitude. *See Sosa-Martinez v. U.S. Atty. Gen.*, 420 F.3d 1338, 1342 (11th Cir. 2005). In view of the holding in *Sosa-Martinez* that aggravated battery involves moral turpitude, the AAO finds the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

Section 212(h) of the Act provides, in pertinent part:

> The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of

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[2] The AAO notes that the court ordered a modification of the terms of the probation on September 23, 2004.

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 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 . . .; and
>
> (2) the Attorney General [Secretary], in his discretion, and pursuant to such 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.

. . .

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. For the aforementioned reasons, the applicant's father is the only demonstrated 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*, 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; *In re 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 *In re 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).

Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996). In most discretionary matters, the alien bears the burden of proving eligibility simply by showing equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

The applicant contends that his father will suffer extreme medical, financial, and psychological hardship in his absence as: his father suffers from medical conditions that do not allow him to work; the applicant is the only source of income and pays for his father's medications; his father needs a costly hip replacement, for which the applicant has been saving money; and his father has been suffering from depression because of the applicant's immigration matters. The applicant also contends that he would like to raise his son and does not want to experience being unavailable to assist his father as he was unavailable to his mother during her last days. In unsigned letters of support, the applicant's father discusses: the symptoms that he experienced upon receiving the denial of the applicant's wavier application; the reasons why he does not want to be separated from the applicant; how the applicant has set a good example for his siblings; and how the applicant has grown into a responsible man. He also discusses how the United States has "opened its doors" to him and his family. The applicant's fiancée indicates that she and the applicant have been trying to

form a family and a home as they are expecting a son. She also indicates that she does not want to see her son grow-up without a "father figure"; one who provides moral and economic support as well as support to her. In an unsigned letter of support, the applicant's sister discusses how the applicant has changed and deserves another opportunity, and his younger brother describes his feelings for the applicant as well as the activities that they do with one another.

The evidence on the record is sufficient to establish that the applicant's father has suffered from work-related hip and back injuries; resulting in various physical conditions and psychological manifestations, worker's compensation, and the need for prescriptive medications and the limitation that he only work in a sedentary position. The record is also sufficient to establish that the father was diagnosed with Major Depression, Single Episode, and because of his psychological and physical conditions, he may experience some emotional and medical hardship in the applicant's absence. However, the AAO finds that the record does not establish that the hardship goes beyond what is normally experienced by qualifying relatives of inadmissible individuals. The most recent medical and mental health documentation provided is dated almost five years prior to appeal submission. No documentation has been submitted on appeal establishing the father's current medical conditions, mental health situation, or treatment as well as the necessity of the applicant's participation with the treatment. The AAO is thus unable to conclude that the record establishes that the applicant's father's hardship would go beyond that which is commonly expected.

Additionally, the record indicates that the applicant has been employed by TCS Group, Inc., since June 9, 2008, but does not include any evidence to show his capacity or salary. Also, the record indicates that the applicant's father filed [redacted] a for-profit company, with the Secretary of State for Florida on March 19, 2010. The Articles of Incorporation indicate that the principal place of business is the father's and the applicant's home and lists the father as the registered agent. Accordingly, the AAO finds that the record is unclear concerning whether the applicant is the father's only source of income as asserted by the applicant. The AAO notes the concerns regarding the applicant's father's medical, psychological, and financial hardship that he may experience in the applicant's absence, but finds that even when this hardship is considered in the aggregate, the record fails to establish that the applicant's father will suffer extreme hardship as a result of separation from the applicant.

Further, the applicant does not address whether his father would experience extreme hardship if he were to relocate to Cuba to be with the applicant. The AAO notes that the record does not include any evidence of social, political, or economic conditions in Cuba and how they would impact the applicant's father. As extreme hardship upon relocation has not been addressed, the AAO concludes that the record fails to establish that the applicant's father will suffer extreme hardship as a result of relocation.

In this case, the record does not contain sufficient evidence to show that the hardship faced by the qualifying relative, considered in the aggregate, rises beyond the common results of removal or inadmissibility to the level of extreme hardship. The AAO therefore finds that the applicant has failed to establish extreme hardship to his Lawful Permanent Resident father 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.

The AAO notes that the record further shows that on May 31, 2001, the applicant was convicted under Fla. Stat. § 812.13 of robbery with a weapon, a first degree felony and a crime of violence. *See U.S. v. Oner*, 382 Fed. Appx. 893, 896 (11th Cir. 2010). Accordingly, the applicant must show that "extraordinary circumstances" warrant approval of the waiver request. 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. *Id.* Decisions to deny waiver applications on the basis of discretion under 8 C.F.R. § 212.7(d) are made on a factual "case-by-case basis." 67 Fed. Reg. at 78677-78. However, as the applicant has not established extreme hardship under the lesser discretionary standards found in Section 212(h) of the Act, the AAO will not reach a discussion on the merits of the applicant's appeal under the heightened discretionary standards found in the regulation at 8 C.F.R. § 212.7(d).

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. 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.