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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: OCT 0 1 2013 Office: HIALEAH FILE: [redacted]

IN RE: [redacted]

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

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Hialeah, Florida, denied the waiver application. 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 Cuba who was found to be inadmissible under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having committed a crime 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 U.S. lawful permanent resident spouse, U.S. citizen children, and U.S. citizen mother. The AAO notes that the record indicates that the applicant was ordered removed from the United States on September 4, 2012 and therefore he would also be inadmissible under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii). In regards to that ground of inadmissibility, the applicant has not filed an Application for Permission to Reapply for Admission (From I-212).

On August 20, 2012, the Field Office Director denied the application for a waiver (Form I-601), finding that the applicant failed to establish extreme hardship to a qualifying relative.

On appeal, counsel for the applicant states that the applicant has established extreme hardship to a qualifying relative and that he also merits a waiver of inadmissibility in the exercise of discretion.

In support of the waiver application, the record includes, but is not limited to: a brief from counsel for the applicant; a sworn statement from the applicant; a sworn statement from the applicant's spouse; biographical information for the applicant, his spouse and their children; biographical and medical records for the applicant's mother; letters of support from family and friends of the applicant; school records for the applicant's children; a psychological evaluation of the applicant's spouse; financial records for the applicant and his spouse; documentation of the applicant and his spouse's property ownership; country conditions information for Cuba; and documentation in connection with the applicant's criminal and immigration history.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 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.

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.)

The applicant's case arises within the jurisdiction of the Eleventh Circuit Court of Appeals, which has reaffirmed the traditional categorical and modified categorical approach for determining whether a crime involves moral turpitude, declining to follow the framework set forth by the Attorney General in *Matter of Silva-Trevino,* 24 I&N Dec. 24 I&N Dec. 687 (A.G. 2008). *See Fajardo v. Attorney General*, 659 F.3d 1301, 1310 (11th Cir. 2011). The Eleventh Circuit defines the categorical approach as "looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." 659 F.3d at 1305 (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990)). However, where the statutory definition of a crime includes "conduct that would categorically be grounds for removal as well as conduct that would not, then the record of conviction – i.e., the charging document, plea, verdict, and sentence – may also be considered." 659 F.3d at 1305 (citing *Jaggernauth v. U.S. Att'y Gen.*, 432 F.3d 1346, 1354-55 (11th Cir. 2005)).

The record shows that on July 15, 1999 before the Circuit/County Court of the Eleventh Judicial Circuit of Florida, in and for Miami-Dade County, Florida, the applicant pled guilty to: Burglary with Assault/Battery, in violation of Florida Statutes § 810.02(2)(A), a first degree felony; Tampering with Witness, Victim or Informant, in violation of Florida Statutes § 914.22(1), a third degree felony; and Aggravated Battery, in violation of Florida Statutes § 784.045, a second degree felony. He was concurrently sentenced to five years of probation, ordered to pay costs, and to comply with other conditions, including completion of an anger control program.

Only one of the applicant's convictions need qualify as a crime involving moral turpitude for the applicant to be found inadmissible. As such, the AAO will first look to the applicant's conviction for aggravated battery in violation of Florida Statutes § 784.045, which at the time of the applicant's conviction stated that:

> 784.045. Aggravated battery
>
> (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.

(b) A person commits aggravated battery if the person who was the victim of the battery was pregnant at the time of the offense and the offender knew or should have known that the victim was pregnant.

(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 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. US Atty. Gen.*, 420 F.3d 1338, 1342 (11th Cir. 2005). In this case, the record of conviction indicates that the applicant "did thereby knowingly or intentional cause permanent disfigurement…in violation of section 784.045(1) of Florida Statutes." Moreover, as the applicant does not contest his inadmissibility on appeal and the record does not show the determination that the applicant is inadmissible under section 212(a)(2)(A)(i) to be in error, the AAO will not disturb that finding.

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 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 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.
>
> ...

As 15 years have not passed since the occurrence of the activities that led to the applicant's inadmissibility, a waiver under 212(h) of the Act is dependent on a showing that the bar to the applicant's admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawful permanent 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 U.S. lawful permanent resident spouse, two U.S. citizen children, and his U.S. citizen mother are qualifying relatives 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). Moreover, 8 C.F.R. § 212.7(d) states:

> 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.

If the applicant's convictions for burglary and aggravated battery are determined to be violent or dangerous crimes under 8 C.F.R. § 212.7(d), the applicant would, at a minimum, need to also show that "extraordinary circumstances" warrant approval of the waiver. 8 C.F.R. § 212.7(d). Extraordinary circumstances may exist in cases involving national security or foreign policy considerations, or if the denial of the applicant's admission would result in exceptional and extremely unusual hardship. In the absence of any other extraordinary circumstances, counsel's claim that the applicant does not have to establish exceptional and extremely unusual hardship is incorrect. We do not need to make a determination on this matter at this time, as the applicant must first establish eligibility for a waiver of inadmissibility by showing that a qualifying relative would suffer from extreme hardship as a result of his inadmissibility.

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. 627, 632-33 (BIA 1996)*; *Matter of Ige, 20 I&N Dec. 880, 885 (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 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.*

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 1292, 1293 (9th Cir. 1998)

(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.

The first qualifying relative is the applicant's U.S. lawful permanent resident spouse. Counsel states that the applicant's spouse suffers from Major Depressive Disorder, is currently unemployed and fully depends on the applicant. The applicant's spouse in her sworn statement dated March 6, 2012, states that the applicant is the breadwinner supporting her and her two children. She also states that she cannot see her life without the applicant and that her husband's immigration inadmissibility has also affected her and her daughter's emotional well-being. A neuropsychological evaluation dated September 11, 2012 conducted by Psy.D., P.A., a clinical psychologist, concluded that the applicant's spouse has Major Depressive Disorder, Cognitive Disorder Not Otherwise Specified, and Borderline Intellectual Functioning. Dr. stated that the applicant's spouse's "current psychiatric and cognitive difficulties are likely to exacerbate even further if her husband is deported back to Cuba." He further recommended that the applicant's spouse receive psychiatric treatment or mental health counseling, but stated that "it is obvious that the patient is currently unable financially [to] afford the provision of mental health services." The record does not indicate what knowledge Dr. had of the applicant's spouse's financial situation or whether there was an availability of low-cost or no-cost mental health services for the applicant's spouse. Additionally, the record does not establish how the applicant's spouse's day to day functioning has been affected by her condition or how the exacerbation of her condition as predicated by Dr. would affect her ability to obtain employment or provide for herself and her family.

The record shows that the applicant and his spouse's home was put into foreclosure proceedings in 2009; however, no recent information was provided to show the status of those proceedings. Additionally, no documentation was submitted to show any additional financial distress being suffered by the applicant's spouse or to establish why the applicant's spouse is unable to obtain employment. The AAO notes that although the applicant's spouse's assertions 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. *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)). Similarly, without supporting evidence, the assertions of counsel will not satisfy the applicant's burden of proof. The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Based on the limited information provided it is not possible to determine the degree of financial hardship the applicant's spouse would suffer in the applicant's absence. The AAO recognizes that the applicant's spouse would experience hardship as result of separation from the applicant, but the evidence in the record, when considered in the aggregate, does not indicate that the hardship in this case, is extreme. *Matter of O-J-O-*, 21 I&N Dec. at 383.

In regards to the applicant's U.S. citizen children, counsel states that both of the applicant's children would suffer from extreme hardship if they are separated from the applicant. In regards to the applicant's 9-year-old son, counsel states that the child suffers from Attention Deficit Disorder, Depression, and Insomnia. Counsel states that the boy reports that he loves his father and cannot live without him. In regards to the applicant's 11-year-old daughter, counsel states that she suffers from Depression and Insomnia. School records from Public Schools indicate that the children attend elementary school and reside with their father and mother in Florida. An October 2, 2012 evaluation by South Florida Psychological Center, Inc. indicates that the applicant's son meets "diagnostic criteria for ADHD, Combined Type." The letter states that a full report would follow the evaluation; however, that full report is not in the record. Dr. PsyD, Licensed Psychologist, recommended that applicant's son "may benefit from medication to assist in improving his concentration." There is no indication in the record how the applicant's inadmissibility or presence in the United States would affect his son's condition. In regards to the applicant's daughter, an April 10, 2010 Psychological Evaluation from describes the applicant's daughter as "very friendly, motivated, and sociable child with a good support system." The report indicates that that the applicant's daughter was to receive a speech evaluation, but there is no documentation of that evaluation in the record. Apart from the applicant's son's diagnosis of ADHD, the record does not support counsel's assertions regarding issues with depression and insomnia. Again, 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. at 165. Although the AAO notes that the applicant's children would likely endure hardship as a result of separation from the applicant, the record does not establish that the hardships they would face, considered in the aggregate, rise to the level of "extreme."

In regards to the hardship that the applicant's U.S. citizen mother would experience if she were to be separated from the applicant, counsel states that the applicant's mother's medical condition is critical and that her "entire life would collapse" if she is separated from her son and he must return to Cuba. Counsel states that the applicant provides for his mother emotionally and financially and that he also takes her to her doctor's appointments and makes sure that she has all that she needs. Counsel also notes that the applicant's mother left Cuba "in search of justice[] and fairness" and that she would be emotional upset by his return there. Medical records for the applicant's mother indicate that she is 85-years-old and has a history of hypertension, diabetes mellitus, mild central and cortical brain atrophy and pneumonia. The record does not establish the role that the applicant plays in caring for his mother or that she would suffer from extreme hardship in his absence. The AAO notes that the record indicates that the applicant's 49-year-old sister also resides at the same address as the applicant in , Florida according to her driver's license. It is not clear from the record what role that the applicant's sister plays in caring for her mother. The AAO recognizes that the applicant's mother would endure hardship as the result of separation from the applicant, the record does not establish that the hardships she would face, considered in the aggregate, rises to the level of "extreme."

In regards to the hardship that any of the qualifying relatives would suffer if they were to return to Cuba with the applicant, the record does not contain sufficient documentation to establish that the

hardship, considered in the aggregate for each individual, would be extreme in nature. Counsel submitted evidence of country conditions in Cuba. The information reflects that there are serious human rights issues in Cuba as Cuba is a totalitarian police state. However, the security environment in Cuba is relatively stable and the majority of crime in Cuba is non-violent. Additionally, there is no documentation to support counsel's assertions that education for the applicant's children and medical care for the applicant's children and mother would unavailable in Cuba. The AAO notes that the general country conditions in Cuba may result in difficulty for the applicant's qualifying relatives. However, the record does not include sufficient evidence to establish that they would not be able to reside there and that they would experience extreme hardship upon relocation to Cuba. Based on the information provided, considered in the aggregate, the evidence does not illustrate that the hardship suffered in this case, should any of the applicant's qualifying relatives relocate to Cuba, would be beyond what is normally experienced by families dealing with removal or inadmissibility. *Matter of O-J-O-*, 21 I&N Dec. at 383.

Although the applicant's qualifying relatives' concerns over the applicant's immigration status are 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 involuntary 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 this case, the record does not contain sufficient evidence to show that the hardships faced by any of the qualifying relatives, each considered individually in the aggregate, rise 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 a qualifying relative 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 he merits a waiver as a matter of discretion. The AAO notes that if we were to conduct a discretionary analysis, the applicant would have to meet the requirements of 8 C.F.R. § 212.7(d) due to having convictions for violent or dangerous crimes. Because the applicant has not established extreme hardship, we do not need to make a determination on that matter at this time.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.