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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: DEC 0 5 2014 Office: NEBRASKA SERVICE CENTER 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:

[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 waiver application was denied by the Director of the Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Argentina who 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 was also found to be inadmissible pursuant to section 212(a)(9)(B)(i)(II) of Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking readmission within 10 years of his last departure from the United States. The applicant is the spouse of a United States citizen and is the beneficiary of an approved Petition for Alien Relative. He seeks a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h), and under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to return to the United States.

The Service Center Director concluded that the applicant's conviction was for a violent or dangerous crime, and consequently, that the applicant had to demonstrate that a qualifying relative would experience exceptional and extremely unusual hardship given his inadmissibility. *See decision of the service center director,* November 4, 2013. The Service Center Director further found that the applicant did not demonstrate that a qualifying relative would experience exceptional and extremely unusual hardship, and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Id.*

On appeal, counsel submits a brief in support. Therein, counsel contends that the applicant was not convicted of a violent or dangerous crime. Counsel moreover asserts that the applicant has shown that his spouse and children would experience extreme hardship if they continue being separated from him and if they relocate to Argentina.

The record includes, but is not limited to: statements from the applicant's spouse and children; letters from family, friends, and community members; financial and educational records; documentation from a psychologist; records of criminal and removal proceedings; articles on country conditions; evidence of birth, marriage, residence, and citizenship; other petitions and applications; and photographs. The entire record was reviewed and considered in rendering a decision on the appeal.

The AAO will first address the finding of inadmissibility. Section 212(a)(2) of the Act provides, in pertinent part, that:

> (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.

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

> (h) The Attorney General [now Secretary, Homeland Security, "Secretary"] 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 if -
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> . . .
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> (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 [now the Secretary of Homeland Security (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 . . . .

In assessing whether a conviction is a crime involving moral turpitude, the adjudicator must first "determine what law, or portion of law, was violated." *Matter of Esfandiary*, 16 I&N Dec. 659, 660 (BIA 1979). The adjudicator engages in a categorical inquiry, considering the "inherent nature of the crime as defined by statute and interpreted by the courts," not the underlying facts of the criminal offense. *Matter of Short,* 20 I&N Dec. 136, 137 (BIA 1989); *see also Matter of Louissaint*, 24 I&N Dec. 754, 757 (BIA 2009) (citing *Taylor v. United States,* 495 U.S. 575, 599-600 (1990)). If the statute "defines a crime in which turpitude necessarily inheres, then the conviction is for a crime involving moral turpitude." *Matter of Short*, *supra*, at 137.

Where the statute includes some offenses involving moral turpitude and some which do not – where there is a *realistic probability* that the statute would be applied to conduct not involving moral turpitude – the adjudicator looks to the record of conviction to determine the offense for which the applicant was convicted. *See Matter of Guevara Alfaro*, 25 I&N Dec. 417, 421 (citing *Matter of Silva-Trevino*, 24 I&N Dec. 687, 689-90, 696-99 (A.G. 2008)); *see also Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability, as opposed to a theoretical possibility, exists where there is an actual prior case, possibly the applicant's own case, in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. *Matter of Silva-Trevino*, *supra*, at 708. The record of conviction is a narrow, specific set of documents which includes the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Matter of Louissant*, *supra,* at 757; *see also Shepard v. U.S.,* 544 U.S. 13, 16 (2005) (finding that the record of conviction is limited to the "charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.")

If review of the record of conviction is inconclusive, an adjudicator may consider "probative evidence beyond the record of conviction" to resolve whether the offense constitutes a crime involving moral turpitude. *Matter of Guevara Alfaro, supra*, at 422 (citing *Matter of Silva-Trevino, supra*, at 690, 699-704, 709). However, the "sole purpose of the inquiry is to ascertain the nature of the prior conviction; it is not an invitation to relitigate the conviction itself." *Matter of Silva-Trevino, supra,* at 703; *see also Matter of Ahortalejo-Guzman*, 25 I&N Dec. 465, 468 (BIA 2011) (An adjudicator may not "undermine plea agreements by going behind a conviction to use sources outside the record of conviction to determine that an alien was convicted of a more serious turpitudinous offense.").

The record reflects that on August 11, 2005, the applicant was arrested and charged with disseminating indecent material to minors in violation of New York Penal Code ("N.Y.P.C.") §235.22, and with endangering the welfare of a child in violation of N.Y.P.C. § 260.10. On February 8, 2006, the applicant was convicted of one count of attempting to disseminate indecent material to minors in violation of N.Y.P.C. §§110.00 and 235.22. The applicant was sentenced to five years of probation.

With regard to this offense, section 110.00 of the N.Y.P.C. provided, at the time of conviction:

> A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime.

New York Penal Code § 235.22 indicated:

> A person is guilty of disseminating indecent material to minors in the first degree when:
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> 1. knowing the character and content of the communication which, in whole or in part, depicts actual or simulated nudity, sexual conduct or sado-masochistic abuse, and which is harmful to minors, he intentionally uses any computer communication system allowing the input, output, examination or transfer, of computer data or computer programs from one computer to another, to initiate or engage in such communication with a person who is a minor; and
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> 2. by means of such communication he importunes, invites, or induces a minor to engage in sexual intercourse, oral sexual conduct or anal sexual conduct with him, or to engage in a sexual performance, obscene sexual performance, or sexual conduct for his benefit.

In determining whether a crime is a crime involving moral turpitude, "there is no distinction between the commission of the substantive crime and the attempt to commit it. . . . 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." *Matter of*

Vo, 25 I&N Dec. 426, 428 (BIA 2011) (citing *Matter of Katsanis*, 14 I&N Dec. 266, 269 (BIA 1973)); *see also Matter of Awaijane*, 14 I&N Dec. 117, 118-19 (BIA 1972); *Matter of Davis*, 20 I&N Dec. 536, 545 (BIA 1992), *modified on other grounds*, *Matter of Yanez*, 23 I&N Dec. 390, 396 (BIA 2002).

Furthermore, for conviction under N.Y.P.C. § 235.22, an individual must intentionally use a computer system to initiate or engage in the transmission of actual or simulated depictions of sexual activity for the purpose of communicating with a minor, knowing the character and content of such communication. The communication must be "harmful to minors" as defined by Penal Law § 35.20(6). Second, the statute requires that an individual must "[b]y means of such communication" importune, invite or induce the minor to engage in sexual activity for his or her benefit. *People v. Foley*, 731 N.E.2d 123, 127-28, (N.Y. 2000). The New York Court of Appeals further held that for conviction, the statute requires an individual to know that he or she is communicating with a minor. *Id.* at 129.

In this case, we find that statute defines a crime in which moral turpitude necessarily inheres. The Board has emphasized that "any intentional sexual conduct by an adult with a child involves moral turpitude, as long as the perpetrator knew or should have known that the victim was a minor." *Matter of Guevara Alfaro*, 25 I&N Dec. 417, 420-21 (BIA 2011) (citing *Matter of Silva-Trevino*, 24 I&N Dec. 687, 705-07 (A.G. 2008). In addition, the Attorney General also noted that because some form of scienter is required for a finding of moral turpitude, "whether the perpetrator knew or should have known the victim's age is a critical factor . . . ." *Id.* at 706. Therefore, "convictions obtained under statutes that limit convictions to defendants who knew, or reasonably should have known, that their intentional sexual acts were directed at children categorically should be treated as convictions for crimes involving moral turpitude." *Id.* at 707. As discussed above, New York Penal Code § 235.22 penalizes intentional sexual conduct where an individual knew he or she was communicating with a minor.

Therefore, we affirm that the applicant's February 8, 2006, conviction for one count of attempting to disseminate indecent material to minors in violation of N.Y.P.C. §§110.00 and 235.22 is a conviction for a crime involving moral turpitude, and consequently, that he is inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The applicant's qualifying relatives for a waiver of this inadmissibility under section 212(h) of the Act are his U.S. citizen spouse and child.[1]

The applicant is also inadmissible under section 212(a)(9)(B)(i)(I) of the Act. Section 212(a)(9) of the Act provides, in pertinent part:

> (B) ALIENS UNLAWFULLY PRESENT.-
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> (i) In general.- Any alien (other than an alien lawfully admitted for permanent residence) who-

[1] The applicant claims his two daughters would experience extreme hardship given his inadmissibility; however, only one child and his spouse are listed on the Form I-601 application.

. . . .

> (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.
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> (ii) Construction of unlawful presence.- For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.
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> . . . .
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> (v) Waiver.-The Attorney General has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

The record reflects that the applicant attempted to procure admission into the United States on May 5, 1985. The applicant was taken into custody of immigration officials and placed in exclusion proceedings that day. In the applicant's December 15, 1987, exclusion order, wherein an immigration judge found that the applicant was an intending immigrant without an immigrant visa, the judge noted that he had escaped from custody following initiation of his exclusion proceedings. The applicant's subsequent appeal was dismissed by the Board of Immigration Appeals on June 9, 1992. After the applicant's 2006 conviction, he was removed from the United States on November 13, 2006.

The applicant therefore accrued unlawful presence from April 1, 1997, the effective date of the unlawful presence provisions, until his November 13, 2006, departure. As such, the applicant is also presently inadmissible under section 212(a)(9)(B)(i)(II) of the Act. The applicant's qualifying relative for a waiver of this inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act is his U.S. citizen spouse.

The record reflects that the applicant requires waivers under both section 212(h) of the Act and section 212(a)(9)(B)(v) of the Act. Whereas a waiver under section 212(h) of the Act includes consideration of hardship to an alien's U.S. citizen or lawful permanent resident child, parent, and spouse, hardship to an applicant's child cannot be considered in a waiver under section 212(a)(9)(B)(v) of the Act. As such, the applicant's spouse is the only qualifying relative for waivers under both sections 212(a)(9)(B)(v) and 212(h) of the Act. Therefore, hardship to the applicant's child will not be separately considered, except as it may affect the applicant's spouse.

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 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 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 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.

The applicant's spouse claims she will experience continued emotional and financial hardship without the applicant present. She explains that she has suffered from depression since the 2006 separation, she feels like she has been left feeling empty and hopeless, and that her relationships with family members and friends have suffered. A form indicates that the spouse has attended assessment / treatment sessions with a technician or therapist in 2005 and 2006. A social worker states in a letter that in August 2012 the spouse was diagnosed with severe stress and tension, which caused somatic symptoms such as body aches, uneven equilibrium, and headaches. The spouse also states that her life has not been easy as a single mother with two teenage daughters. In terms of financial difficulties, the spouse asserts that she is unable to afford to regularly travel back and forth to visit the applicant in Argentina. The spouse also states that she has had to refinance the house twice since the applicant left, and she is now barely able to afford the mortgage, which now exceeds the fair market value. Documentation of a 2008 refinance, house expenses, and valuation are submitted in support. The spouse moreover claims that she has had to accumulate more debt to pay her bills and visit the applicant in Argentina.

With respect to relocation to Argentina, the spouse asserts that she is not from that country, and apart from the applicant, she has no family or connections there. The spouse also expresses concern that the culture in Argentina tolerates rape and domestic abuse, and that she would not want to subject her daughters to that culture. In addition, the spouse states there is rampant political and governmental corruption there. A 2009 Department of State Human Rights Report on Argentina is submitted in support. The spouse adds that she will most likely not have medical care available in Argentina, and she would have to give up her job as an assistant principal here, and sell the house. She further states that she would be unable to maintain her credit if she moved because she would be unable to meet her financial obligations in Argentina.[2]

The applicant has not submitted sufficient evidence to demonstrate that his spouse would experience extreme hardship upon relocation to Argentina. Although the spouse claims she would have difficulty finding a job and fulfilling her financial obligations if she relocated there, the applicant submits no documentation to establish that a person with her skills and experience would have not be able to find sufficient employment in that country. Although these 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

[2] We note that the applicant also claims his spouse would experience extreme hardship upon relocation to Mexico. However, the applicant submits no documentation demonstrating that he would be able to relocate to Mexico, and consequently, that his spouse would relocate to that country to reside with him. Therefore, only relocation to Argentina will be considered in this analysis of extreme hardship.

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). The spouse's assertions on medical care in Argentina are similarly unsupported by evidence of record. Furthermore, while the 2009 Human Rights Report indicates that rape and domestic violence are problems in Argentina, it is unclear whether the applicant's two children, now in college, would also relocate to Argentina and be subject to those problems.

Relocation to Argentina would entail separation from family members who live in the United States as well as other difficulties. However, we do not find evidence of record to show that the spouse's difficulties would rise above the hardship commonly created when families relocate as a result of inadmissibility or removal. In that the record lacks sufficient evidence to demonstrate the emotional, financial, medical, or other impacts of relocation on the applicant's spouse are in the aggregate above and beyond the hardships normally experienced, we cannot conclude that she would experience extreme hardship if the waiver application is denied and the applicant's spouse relocates to Argentina.

The applicant has also submitted insufficient evidence to demonstrate that his spouse would experience extreme hardship in the event of continued separation. Documentation on the finances surrounding the spouse's house and mortgage are submitted, which demonstrate that the spouse has had financial difficulties as a result of refinancing and natural disasters. However, it is unclear from the record what the spouse's current income is, whether the applicant can assist her financially from Argentina, and what her monthly expenses are. Without evidence on these matters, the degree of the spouse's financial hardship cannot be fully evaluated.

The record indicates that the applicant's spouse experiences emotional and psychological hardship without the applicant present. While we acknowledge that the applicant's spouse would face difficulties as a result of the applicant's inadmissibility, we do not find evidence of record to demonstrate that her hardship would rise above the distress normally created when families are separated as a result of inadmissibility or removal. In that the record fails to provide sufficient evidence to establish the financial, medical, emotional, or other impacts of separation on the applicant's spouse are cumulatively above and beyond the hardships commonly experienced, we cannot conclude that she would suffer extreme hardship if the waiver application is denied and the applicant remains in Argentina without his spouse.

In this case, the record does not contain sufficient evidence to show that the hardships faced by the qualifying relative, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship. We therefore finds that the applicant has failed to

establish extreme hardship to his U.S. Citizen spouse as required under sections 212(a)(9)(B)(v) and 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.

Without determining whether the applicant was convicted of a violent or dangerous crime, we note as he did not demonstrate that a qualifying relative would experience extreme hardship given his inadmissibility, the applicant would also not meet the heightened "exceptional and extremely unusual hardship" standard required for an exercise of discretion as stated in 8 C.F.R. § 212.7(d).

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.