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

U.S. Citizenship and Immigration Services

[redacted]

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FILE: AAO 08 120 50022 Offic[redacted] Date: AUG 2 7 2010
CDJ 2005 526 089

IN RE: JUAN ANTONIO MELECIO SILVA

PETITION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B)(v) of the Immigration and Nationality Act (the Act), 8 U.S.C. section 1182(a)(9)(B)(v), section 212(h) of the Act, 8 U.S.C. section 1182(h), and section 212(g) of the Act, 8 U.S.C. section 1182(g).

ON BEHALF OF PETITIONER:

[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 $585. 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,

[redacted]

Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Mexico City, Mexico. 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 Mexico. He was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for one year or more and seeking admission within ten years of his last departure. The applicant was also found to be inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of Crimes Involving Moral Turpitude (CIMTs). He was further found to be inadmissible under section 212(a)(1)(A)(iii)(I) of the Act, 8 U.S.C. § 1182(a)(1)(A)(iii)(I), as an alien classified as having a physical or mental disorder with associated behavior that may pose, or has posed, a threat to the property, safety or welfare of the alien or others. He is married to a United States citizen, and he seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v).

The District Director concluded that the applicant had failed to establish that the bar to his admission would impose extreme hardship on a qualifying relative, his U.S. citizen spouse, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on December 28, 2007.

On appeal, counsel for the applicant asserts that the applicant's spouse is unable to support herself or their children, that the applicant does not pose a threat to property, safety or welfare of others, and that his criminal conviction for theft does not constitue a CIMT. He further states that, due economic and emotional impacts, the applicant's spouse is experiencing extreme hardship due to the applicant's inadmissibility.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

> (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-
>
> . . . .
>
> > (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.
> >
> > . . . .
>
> (v) Waiver. – The Attorney General [now the Secretary of Homeland Security (Secretary)] 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 [Secretary] 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.

The record establishes that the applicant entered the United States without inspection in August 1997 and remained until he departed voluntarily in August 2006. As the applicant has resided unlawfully in the United States for over a year and is now seeking admission within ten years of his last departure from the United States, he is inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

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

> (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.

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

> (h) 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 record reflects that the applicant was convicted of Theft, greater than $500, but less than $1,500, a class A misdemeanor, on March 12, 2003, in Dallas County Criminal Court, Texas. The record also indicates that the applicant has been charged with Assault with Bodily Injury to Spouse, Texas Penal Code § 21.02. The District Director concluded that the applicant had been convicted of a Crime Involving Moral Turpitude (CIMT), and was inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I). Theft has long been held to constitute a CIMT. *Matter of Garcia*, 11 I. & N. Dec. 521 (BIA 1966). The Board of Immigration Appeals (BIA) has held that, in order to constitute a CIMT, a conviction for theft must involve a permanent taking. *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973). Counsel has asserted on appeal that the applicant's conviction does not constitute a CIMT.

To qualify as a crime involving moral turpitude for purposes of the Immigration and Nationality Act, a crime must involve both reprehensible conduct and some degree of scienter, whether specific

intent, deliberateness, willfulness, or recklessness. *Matter of Cristoval Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008). Adjudicators must first look to the statute under which an applicant has been convicted to determine that it contains the elements which constitute a categorical CIMT. If a conviction under the statute in question has not been deemed to categorically constitute a CIMT, and contains additional or distinct elements necessary for a conviction, then the statute must be evaluated for the realistic probability that it could be applied to reach conduct that does not constitute moral turpitude. *Id.* at 698, (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). If the statute has not been applied in such a manner it is reasonable to conclude that all convictions under the statute may be categorized as crimes involving moral turpitude. *Id* at 697. In the event the statute is divisible, covering conduct that may or may not constitute moral turpitude, an adjudicator may examine the record of conviction to determine if the applicant's conduct involved a crime of moral turpitude. *Id.* at 698. If the record of conviction does not clearly establish conduct involving moral turpitude, USCIS may then examine any additional evidence deemed necessary to determine the nature of the conduct involved. *Id.* at 698.

Texas Penal Code section 31.03 states, in pertinent part:

> (a) A person commits an offense if he unlawfully appropriates property with intent to deprive the owner of property.

A plain reading of the statute indicates that a permanent taking is not an element necessary to receive a conviction, and as such it is divisible, covering conduct which may or may not involve moral turpitude. However, an examination of the charging statement, included in the record as part of the record of conviction, reveals that the basis of the applicant's charge was the theft of a cement mixer. It is reasonable from these facts to presume that the applicant intended to permanently deprive the owner of the property and that his conviction is for a crime that involves moral turpitude. Although counsel asserts the applicant has not been convicted of a CIMT he has not articulated a basis for this position, nor offered any authority or provided evidence to support his assertion. This crime is punishable by a term of imprisonment not to exceed one year. The applicant was not imprisoned and was given two years probation. However, we cannot determine whether the conviction would qualify for the petty offense exception listed at Section 212(a)(2)(A)(ii) because the applicant has been charged with an additional crime which is a CIMT.

By the applicant's own admission, and as can be determined from evidence in the record, he has been charged with assault with bodily injury to a spouse. The BIA has held that a misdemeanor conviction for assault with bodily injury to a spouse is a CIMT. *Matter of Deanda-Romo*, 23 I. & N. Dec. 597 (BIA 2003). The record does not contain a copy of the final disposition, or any documentation indicating that the charge was dropped, dismissed or un-prosecuted. Any future proceedings will need to contain documentation that establishes this charge has been dismissed.

The director also found the applicant inadmissible under section 212(a)(1)(A) of the Act.

INA § 212(a), 8 U.S.C. § 1182(a), states, in pertinent part:

> (a) Classes of Aliens Ineligible for Visas or Admission.—Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:
>
> (1) Health-related grounds.—
>
> (A) In general.-Any alien-
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> . . .
>
> (iii) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services in consultation with the Attorney General [now Secretary of Homeland Security])—
>
> (I) to have a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others, or
>
> (II) to have had a physical or mental disorder and a history of behavior associated with the disorder, which behavior has posed a threat to the property, safety, or welfare of the alien or others and which behavior is likely to recur or to lead to other harmful behavior . . . is inadmissible.
>
> (B) Waiver authorized.—For provision authorizing waiver of certain clauses of subparagraph (A), see subsection (g).

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

> (g) The Attorney General may waive the application of—
>
> (3) subsection (a)(1)(A)(iii) in the case of any alien, in accordance with such terms, conditions, and controls, if any, including the giving of bond, as the [Secretary], in the discretion of the [Secretary] after consultation with the Secretary of Health and Human Services, may by regulation prescribe.

The record reflects that the panel physician who conducted the applicant's medical examination classified the applicant as having a Class A medical condition, Alcohol Abuse, with associated

Harmful Behavior, based on the applicant's prior arrest for domestic violence while under the influence of alcohol. The District Director found the applicant inadmissible under section 212(a)(1)(A)(iii) of the Act on this basis.

Regulations at 8 C.F.R. § 212.7(b) govern aliens with certain mental conditions, who are eligible for immigrant visas but require the approval of waivers of grounds of inadmissibility. The regulations require that the applicant submit the waiver application and a statement to the appropriate USCIS office indicating that arrangements have been made to provide the alien's complete medical history, including details of any hospitalization or institutional care or treatment for any physical or mental condition; the alien's current physical and mental condition, including prognosis and life expectancy; and a psychiatric examination. 8 C.F.R. § 212.7(b)(4). "For an alien with a past history of mental illness, the medical report shall also contain available information on which the U.S. Public Health Service can base a finding as to whether the alien has been free of such mental illness for a period of time sufficient in the light of such history to demonstrate recovery." *Id.* The medical report must then be forwarded to the U.S. Public Health Service for review. *Id.* These regulations further provide:

> (ii) *Submission of statement.* Upon being notified that the medical report has been reviewed by the U.S. Public Health Service and determined to be acceptable, the alien or the alien's sponsoring family member shall submit a statement to the consular or [USCIS] office. The statement must be from a clinic, hospital, institution, specialized facility, or specialist in the United States approved by the U.S. Public Health Service. The alien or alien's sponsor may be referred to the mental retardation or mental health agency of the state of proposed residence for guidance in selecting a post-arrival medical examining authority who will complete the evaluation and provide an evaluation report to the Centers for Disease Control. The statement must specify the name and address of the specialized facility, or specialist, and must affirm that:
>
> (A) The specified facility or specialist agrees to evaluate the alien's mental status and prepare a complete report of the findings of such evaluation.
>
> (B) The alien, the alien's sponsoring family member, or another responsible person has made complete financial arrangements for payment of any charges that may be incurred after arrival for studies, care, training and service;
>
> (C) The Director, Division of Quarantine, Center for Prevention Services, Centers for Disease Control, Atlanta, GA. 30333 shall be furnished:
>
> (*1*) The report evaluating the alien's mental status within 30 days after the alien's arrival; and
>
> (*2*) Prompt notification of the alien's failure to report to the facility or specialist within 30 days after being notified by the U.S. Public Health Service that the alien has arrived in the United States.

(D) The alien shall be in an outpatient, inpatient, study, or other specified status as determined by the responsible local physician or specialist during the initial evaluation.

The record reflects that the applicant meets the requirements for a waiver of inadmissibility under section 212(g) of the Act. The record contains a Centers for Disease Control (CDC) form 4,422-1, Statements in Support of Application for Waiver of Inadmissibility. Part I of CDC form 4,422-1 reflects that the Department of Health and Human Services Public Health Service (PHS) received the required medical documentation regarding the applicant's present condition. The PHS reviewing official, Martin S. Cetron, M.D., Director, Division of Global Migration and Quarantine, National Center for Infectious Diseases, classified the applicant as having a Class A medical condition, Alcohol Abuse, which renders him inadmissible under section 212(a)(1)(A)(iii)(I). Part II of CDC form 4,422-1 shows that, pursuant to 8 C.F.R. § 212.7(b)(4)(ii), the applicant obtained the required statement from Eddie Osuagwu, M.S., SAP, ADC III, CDVC III, at a PHS-approved facility, Remedy Addictions Counselors-RAC, Inc. The applicant's wife completed Part III of Form CDC 4,422-1, attesting that necessary arrangements for further examination of the applicant will be made upon his entry to the United States. On January 4, 2007, Dr. Martin S. Cetron endorsed the applicant's Form CDC 4,422-1, thus certifying PHS's opinion that appropriate follow-up care will be provided upon the applicant's entry to the United States, and that PHS has no objection to his entry. Therefore, the AAO finds that the applicant has established eligibility for a 212(g) waiver of the ground of inadmissibility pertaining to aliens who have been classified as having a Class A medical condition.

A waiver of inadmissibility under section 212(a)(9)(B)(v) is dependent upon a showing that the bar to admission imposes an extreme hardship on a qualifying relative, *i.e.,* the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant is not directly relevant to the determination of extreme hardship under the statute and will be considered only insofar as it results in hardship to a qualifying relative in the application. The applicant's U.S. citizen spouse is the only qualifying relative in this proceeding. If extreme hardship to a qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted.

The concept of extreme hardship to a qualifying relative "is not . . . fixed and inflexible," and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560, 565 (BIA 1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals set forth a list of non-exclusive factors relevant to determining whether an applicant has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. These factors include, with respect to the qualifying relative, the presence of family ties to U.S. citizens or lawful permanent residents in the United States, family ties outside the United States, country conditions where the qualifying relative would relocate and family ties in that country, the financial impact of departure, and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 566.

> Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact 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.

Matter of O-J-O-, 21 I&N Dec. 381, 383 (BIA 1996) (citations omitted).

The AAO notes that extreme hardship to a qualifying relative must be established whether he or she accompanies the applicant or remains in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

The record includes, but is not limited to, a statement from counsel: statements from the applicant's spouse; copies of birth certificates for the applicant's children; receipts for medical visits; copy of a rental agreement for a residential apartment; a copy of one telephone bill; a copy of a Texas Dep. Of Transportation application; a copy of a letter accepting one of the applicant's children into an early childhood developmental program, as well as copies of attendance forms for the program; pictures of the applicant, her husband and their children; documents relating to the applicant's attendance in an Alcoholics Anonymous program;[1] court records and police reports concerning the applicant's criminal charges; and a letter from the applicant's spouse's employer.

The entire record was reviewed and all relevant evidence considered in rendering this decision.

The applicant's spouse has submitted several statements and asserts that she and her children are suffering physical and emotional impacts due to the applicant's inadmissibility. She further states that she is unable to care for and provide for her children financially as a single parent, and that she needs the applicant to provide the family income so she can stay at home and care for the children. She specifically states that her part-time job is insufficient to cover her family's expenses, and that they were forced to vacate their two bedroom apartment for a one bedroom living space with her mother-in-law.

As discussed in *Matter of Cervantes Gonzalez, supra,* a determination of extreme hardship should include a consideration of the impacts of relocation with the applicant on the applicant's qualifying relative, although a qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request. The applicant's spouse has asserted her children are U.S. citizens and that they cannot relocate to Mexico because the weather, food and water in Mexico are different and they have no place to go. As noted above, children are not qualifying relatives under a section 212(a)(9)(B)(v) hardship waiver, and as such any hardship to them is not directly relevant to

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[1] These documents are in Spanish. While all documents submitted to USCIS in a foreign language must be accompanied by a certified, full English translation, 8 C.F.R. § 103.2(b)(3), the AAO will take judicial notice that these documents relate to his attendance of a alcohol rehabilitation program. In the event of any future proceedings, the documents should be accompanied by a certified translation.

a determination of extreme hardship to a qualifying relative. However, the AAO will consider hardship on the applicant's children insofar as it results in hardship to the applicant's spouse. The applicant's spouse further asserts that she has little family in Mexico, does not have employment contacts, and she and her daughters are accustomed to health care in the United States.

An examination of the record reveals that there is very little documentation in support of the applicant's spouse's brief statement on this issue. The record contains a statement from Susan Bart, Program Director, Dallas Center for Developmentally Disabled, indicating that the applicant's child is enrolled in the center's Early Childhood Intervention program. However, the copy of the center's evaluation is not completely legible, and fails to establish the basis of any determination of a disability, or to what degree, if any, this impacts the applicant's spouse's daily life. There is no evidence in the record that such a developmental program would not be available in Mexico if the applicant's spouse were to relocate with the applicant. Without further, probative evidence supporting the applicant's spouse's assertions the record fails to establish that the applicant's spouse would experience any hardship which rises above what would normally be experienced due to relocation, or that rises to the level of extreme hardship. *See Matter of Ige*, 20 I&N 880 (BIA 1994) (concluding that the fact that economic, educational, and medical facilities and opportunities may be better in the United States does not in itself establish extreme hardship).

With regard to financial hardship the applicant's spouse asserts she has to make a monthly car-payment to her father-in-law, co-signer on a car loan for her husband, has insurance payments, baby wipes and diapers, gas for her car, and food and other necessary items for her and her children. The applicant has not, however, detailed the cost of child care services, nor articulated why she is unable to work while her children are cared for by a professional child care provider. Although USCIS recognizes that the applicant's spouse has an increased financial burden to share due to her spouse's inadmissibility, the impacts she has asserted are common, and do not rise above those normally experienced by the relatives of inadmissible aliens. The documents in the record are insufficiently probative to support her assertions of financial hardship. There is no evidence of significant debt, pending bankruptcy, the loss of a home, inability to make payments on her obligations, or other documentation which objectively establishes that she is experiencing extreme financial hardship.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors cited above, does not support a finding that the applicant's spouse faces extreme hardship if the applicant is refused admission. The AAO recognizes that the applicant's spouse may experience emotional and financial difficulties due to the applicant's inadmissibility. These assertions, however, are common hardships associated with removal and separation, and do not rise to the level of "extreme" as informed by relevant precedent. U.S. court decisions have repeatedly held that the common results of removal or inadmissibility are insufficient to prove extreme hardship. *See Hassan v. INS,* 927 F.2d 465, 468 (9th Cir. 1991). In addition, *Perez v. INS,* 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined extreme hardship as hardship that was unusual or beyond that which would normally be expected upon deportation. The AAO therefore finds that the applicant has failed to establish extreme hardship to his U.S. citizen spouse as required under section 212(a)(9)(B)(v) of the Act. Having found the applicant statutorily ineligible

for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of proving eligibility rests with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.