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U.S. Citizenship
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Services

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[REDACTED]

FILE:

[REDACTED]

Office: CHICAGO, ILLINOIS

Date:

DEC 18 2007

IN RE:

[REDACTED]

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under section 212(h) of the
Immigration and Nationality Act, 8 U.S.C. § 1182(h).

ON BEHALF OF APPLICANT:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The District Director for Chicago, Illinois, denied the waiver application. The matter is now on appeal before the Administrative Appeals Office (AAO) in Washington, DC. The appeal will be sustained.

The applicant [REDACTED] is a native and citizen of Mexico who was found inadmissible to the United States pursuant to 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 committing a crime of moral turpitude. The applicant sought a waiver of inadmissibility under section 212(h) of the Act, which the District Director denied, finding that the applicant failed to establish extreme hardship would be imposed on a qualifying relative. *Decision of the District Director*, dated October 5, 2004. The applicant submitted a timely appeal.

The AAO will first address the finding of inadmissibility.

Section 212(a)(2) of the Act states that:

(A)(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 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines "conviction" for immigration purposes as:

A formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where -

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

The record reflects that the applicant was convicted of the following charges:

- October 30, 1997 - Domestic Battery, 720 ILCS 5/12-3.2 - sentenced to 1 year of conditional discharge
- February 2, 1988 - Residential Burglary, 720 ILCS 5/19-3 - sentenced to 6 years (served 30 months probation, restitution, and given credit for time served in the county jail)
- February 21, 2001 - Attempt Obstruction of Justice, 720 ILCS 5/31-4 - sentenced to 24 months of conditional discharge

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* may not be determined from the statute, moral turpitude does not inhere.

The AAO finds that there is no clear-cut definition of "moral turpitude." In *Grageda*, the Ninth Circuit Court stated that in "[d]escribing moral turpitude in general terms, courts have said that it is an "act of baseness or depravity contrary to accepted moral standards." *Grageda v. INS*, 12 F.3d 919, 921 (9th Cir.1993)(quoting *Guerrero de Nodahl v. INS*, 407 F.2d 1405, 1406 (9th Cir. 1969)) . See also *McNaughton v. INS*, 612 F.2d 457, 459 (9th Cir.1980)("Whether a particular crime involves moral turpitude "is determined by the statutory definition or by the nature of the crime not by the specific conduct that resulted in the conviction.") With regard to the crime of assault, courts generally have held that a conviction for simple assault does not involve moral turpitude. See, e.g., *Reyes-Morales v. Gonzales*, 435 F.3d 937, 945 n. 6 (8th Cir.2006) (observing that simple assault does not involve moral turpitude).

The applicant was convicted under 720 ILCS 5/12-3.2 for domestic battery. The domestic battery statute reads as follows:

Sec. 12-3.2 Domestic Battery.

Any person commits domestic battery if he intentionally or knowingly without legal justification by any means:

- (1) Causes bodily harm to any family or household member as defined in subsection (3) of Section 112A-3 of the Code of Criminal Procedure of 1963, as amended;
- (2) Makes physical contact of an insulting or provoking nature with any family or household member as defined in subsection (3) of Section 112A-3 of the Code of Criminal Procedure of 1963, as amended.

U.S. courts and the BIA have held that not all crimes involving assault or battery are considered crimes involving moral turpitude. For example, the BIA in *In re Sanudo*, 23 I&N Dec. 968, 970-971 (BIA 2006), stated that "not all crimes involving the injurious touching of another reflect moral depravity on the part of the offender, even though they may carry the label of assault, aggravated assault, or battery under the law of the relevant jurisdiction." (citing *Matter of B-*, 1 I&N Dec. 52, 58 (BIA, A.G. 1941) (finding that second-degree assault under Minnesota law does not qualify categorically as a crime involving moral turpitude (following *United States ex rel. Zaffarano v. Corsi*, 63 F.2d 757, 758 (2d Cir. 1933))). In *Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996), the BIA held that third-degree assault under the law of Hawaii, an offense of recklessly causing bodily injury to another person, is not a crime of moral turpitude. And in *Matter of Perez-Contreras*, 20 I&N Dec. 615 (BIA 1992), it concluded that third-degree assault under the law of Washington, an offense

of negligently causing bodily harm accompanied by substantial pain which caused considerable suffering, is not a crime of moral turpitude.

Normally, if a crime is “inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general” it involves moral turpitude. *In re Sanudo* at 976. (citations omitted). Whether a crime is morally turpitudinous is determined by reference to the statutory definition of the offense and to court decisions in the convicting jurisdiction. However, the actual conduct underlying the conviction cannot be considered. *Id.* at 970-971. (citations omitted).

In determining whether a crime involves moral turpitude, the Seventh Circuit applies the “categorical” approach, as stated in *Padilla v. Gonzales*, 397 F.3d 1016, 1019 (7th Cir. 2005), an obstruction of justice case. With this approach, the court examines the elements of the statute under which the alien was convicted and the record of conviction; it does not analyze the “circumstances surrounding the particular transgression” in determining whether a given crime involves moral turpitude. *Id.* The court states that “a statute that encompasses both acts that do and do not involve moral turpitude cannot be the basis of a removability determination under the categorical approach.” (citation omitted). However, it stated that if the statute can be divided into “discrete subsections of acts that are and those that are not” crimes involving moral turpitude, then a conviction under a subsection that includes only crimes involving moral turpitude may be a ground for removal. *Id.* (citation omitted)

The statute here convicts for causing bodily harm or making physical contact of an insulting or provoking nature to any family or household member. In the case *In re Sanudo*, 23 I&N Dec. 968 (BIA 2006), the BIA specifically addressed section 242 of the California Penal Code, stating that:

The California courts have construed section 242 to require an unprivileged “touching of the victim” by means of force or violence. *People v. Jackson*, 91 Cal. Rptr. 2d 805, 809 (Cal. Ct. App. 2000) (quoting *People v. Marshall*, 931 P.2d 262, 282 (Cal. 1997)). However, they have also significantly qualified the statutory language, emphasizing that “[t]he word ‘violence’ has no real significance.” *People v. Mansfield*, 245 Cal. Rptr. 800, 802 (Cal. Ct. App. 1988). Thus, the courts have held that “the force used need not be violent or severe and need not cause pain or bodily harm.” *Gunnell v. Metrocolor Labs., Inc.*, 112 Cal. Rptr. 2d 195, 206 (Cal. Ct. App. 2001) (citing *People v. Rocha*, 479 P.2d 372, 377 n.12 (Cal. 1971) (quoting 1 Bernard E. Witkin, California Crimes 243-44 (1963))). Furthermore, although battery is a “specific intent” crime in California, the requisite intent pertains only to the commission of the “touching” that completes the offense, and not to the infliction of harm on the victim. *People v. Mansfield*, supra, at 803 (“A person need not have an intent to injure to commit a battery. He only needs to intend to commit the act.”).

Id. at 970-971.

In *In re Sanudo* the BIA found that the minimal conduct required to complete a battery under section 242 “is simply an intentional “touching” of another without consent.” It stated that a person may be convicted of battery under the statute “without using violence and without injuring or even intending to injure the victim.”

The BIA found such an offense is a simple battery “and on its face it does not implicate any aggravating dimension that would lead us to conclude that it is a crime involving moral turpitude.” *Id.* at 972.

Because the BIA in *In re Samudo* determined that section 242 of California Penal Code relates to a simple battery that does not involve any aggravating dimension that would bring it into the ambit of a crime of moral turpitude, and because the Illinois statute convicts for causing bodily harm or for making physical contact of an insulting or provoking nature, neither of which require an aggravating dimension such as a serious injury, the AAO finds that the applicant’s domestic battery conviction does not, for this reason alone, categorically qualify as a crime of moral turpitude.

The Seventh Circuit next applies the “modified categorical” approach in determining whether the applicant’s crime involves moral turpitude. In *Sharashidze v. Gonzales*, 480 F.3d 566 (7th Cir. 2007), the Seventh Circuit states:

Where a statute is divisible, courts may look to the record of conviction to determine the factual basis of the offense. Under the INA, the record of conviction includes, among other things, the complaint, the judgment, and any document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction. 8 U.S.C. § 1229a(c)(3)(B).

(citation omitted).

Applying the modified categorical approach, the criminal complaint indicates that the applicant “struck his wife about the leg and abdomen with his hands and feet without legal cause.” The information states that:

[T]he said defendant knowingly and without legal justification caused bodily harm to [REDACTED] a family and household member of the defendant, in that said defendant kicked [REDACTED] in her legs and stomach, pushed her on her body and pulled her hair.

In the Ninth Circuit case, *Jose Roberto Fernandez-Ruiz v. Gonzales*, 468 F.3d 1159, 1163 (9th Cir. 2006), the court stated that it explained in *Galeana-Mendoza v. Gonzales*, 465 F.3d 1054 (9th Cir. 2006) that:

Grageda stands only for the proposition that “when a person beats his or her spouse *severely enough to cause ‘a traumatic condition,’* he or she has committed an act of baseness or depravity contrary to accepted moral standards.” *Id.* (quoting *Grageda*, 12 F.3d at 922 (discussing CAL. PENAL CODE § 273.5(a))) (emphasis added). It does *not* suggest that a spousal contact that causes minor injury or a spousal threat that results in no physical injury constitutes a crime of moral turpitude. Rather, the California spouse abuse and child abuse statutes that we held to involve moral turpitude in *Grageda* and *Guerrero de Nodahl* both required the willful infliction of bodily “injury *resulting in a traumatic condition.*” *Grageda*, 12 F.3d at 921 (quoting CAL. PENAL CODE § 273.5(a)) (emphasis added); *Guerrero de Nodahl*, 407 F.2d at 1406 n. 1 (quoting CAL. PENAL CODE § 273d) (emphasis added).

Jose Roberto Fernandez-Ruiz at 1167.

The court stated that “[a] simple assault statute which permits a conviction for acts of recklessness, or for mere threats, or for conduct that causes only the most minor or insignificant injury is not limited in scope to crimes of moral turpitude.” *Jose Roberto Fernandez-Ruiz* at 1167.

The AAO finds that although the applicant struck [REDACTED] the record does not establish any aggravating dimension such as a serious injury done to [REDACTED]. See, *Jose Roberto Fernandez-Ruiz and Galeana-Mendoza v. Gonzales, supra*. Accordingly, the AAO finds that the record fails to establish that the applicant’s crime involves moral turpitude.

The applicant was convicted of residential burglary, 720 ILCS 5/19-3, in 1988. The Information reflects that the applicant was charged with without authority entering the dwelling place of [REDACTED] “with the intent to commit therein a theft.” In *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982), the BIA found that burglary with intent to commit theft is a crime of moral turpitude.

The applicant was convicted under 720 ILCS 5/31-4 for attempted obstruction of justice. In *Padilla v. Gonzales*, 397 F.3d 1016, 1019-21 (7th Cir. 2005), the court found that obstruction of justice under 720 ILCS 5/31-4(a) for knowingly furnishing false information with intent to prevent the apprehension or obstruct the prosecution or defense of any person was a crime of moral turpitude.

The record therefore establishes that the applicant was convicted of two crimes involving moral turpitude and is inadmissible under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for committing a crime of moral turpitude.

The AAO will now address the finding that the grant of a waiver of inadmissibility is not warranted.

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

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . 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 . . .

A section 212(h) waiver of the bar to admission resulting from violation of section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant is not a consideration under the statute and will be considered only to the extent that it results in hardship to a qualifying relative. The waiver application indicates that the qualifying relatives are the applicant’s naturalized citizen wife and U.S. citizen daughters and his lawful permanent resident mother. If extreme hardship to the qualifying

relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996).

The record contains affidavits, letters, birth certificates, a marriage certificate, a home warranty deed, bills, photographs, income tax returns, documents about Mexico, invoices, and other documents. The AAO has carefully considered all of the documentation in the record in rendering this decision.

The affidavits in the record from family attest to the changed character of the applicant and his need to remain in the United States for his wife and daughters. The letter from his church indicates that the applicant attends mass with his family regularly. The letters from neighbors and friends attest to the applicant's good character.

The applicant's affidavit conveys that he has been living in the United States for over 26 years and his whole family resides here. He states that he has nothing in Mexico and his wife's and daughter's lives are in the United States. He states that his family recently bought a house and new furniture and that his wife does not earn enough to pay all the bills. He states that he has been a construction worker for 18 years and he and his wife are in the process of starting their own construction company. He states that his family is being punished for his mistakes, which he regrets. The applicant indicates that his daughters' primary language is English, that they have never attended bilingual programs and cannot read or write in Spanish, and that they would have a language barrier.

The affidavit from Ms. [REDACTED] states that her husband is a good parent. She states that they owe money for the new house and furniture and appliances. She conveys that her husband takes her daughters to school and the bus stop and attends their school activities and conferences. She states that he would take them to soccer practice and watch while they practiced. She conveys that she has borrowed money to pay bills while her husband was in jail and that she had difficulty taking the children to school during this period. She states that all of her husband's family members are in the United States.

The affidavits from the applicant's daughters convey they have a close relationship with their father.

The income tax records reflect the following: for 2003, income of \$23,937 (Ms. [REDACTED] and \$8,088 (the applicant's business income; gross receipts were \$23,934); for 2002, income of \$21,465 (Ms. [REDACTED] and \$24,873 (the applicant's business income; gross receipts were \$30,228); for 2001, income of \$20,215 (Ms. [REDACTED]

The Countrywide Home Loan shows a principal balance of \$192,511 and monthly payments of \$1,687.49. The record contains credit card invoices and invoices from Peoples Energy (\$30.81), Comcast (\$46.66), Cingular Wireless (\$52.34), and other businesses. The credit union loan is \$6,833.29.

The letter from the physician dated February 28, 2005 indicates that the applicant's mother was treated in Mexico for facial paralysis.

"Extreme hardship" is not a definable term of "fixed and inflexible meaning"; establishing extreme hardship is "dependent upon the facts and circumstances of each case." *Matter of Cervantes-Gonzalez*, 22 I&N

Dec. 560, 565 (BIA 1999). The Board of Immigration Appeals (BIA) in *Matter of Cervantes-Gonzalez* lists the factors it considers relevant in determining whether an applicant has established extreme hardship pursuant to section 212(i) of the Act. 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.* at 565-566. The BIA indicated that these factors relate to the applicant's "qualifying relative." *Id.* at 565-566.

In *Matter of O-J-O*, 21 I&N Dec. 381, 383 (BIA 1996), the BIA stated that the factors to consider in determining whether extreme hardship exists "provide a framework for analysis," and that the "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." It further stated that "the trier of fact must consider the entire range of factors concerning hardship in their totality" and then "determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation." (citing *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994).

Extreme hardship to the qualifying relative must be established in the event that the qualifying relative joins the applicant; and in the alternative, that the qualifying relative remains in the United States. 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 wife claims that she would experience financial hardship if she remained in the United States without her husband. The documentation in the record reflects that Ms. [REDACTED] earned income of \$23,937 in 2003, \$21,465 in 2002, and \$20,215 in 2001. The monthly mortgage payment is \$1,687.49. The family has outstanding credit card and credit union debt in addition to other household expenses. It is noted that the [REDACTED] daughters are 12 and 14 years old. The AAO finds that the documentation in the record indicates that the applicant's financial contribution is needed to meet monthly household expenses. Thus, the applicant has demonstrated that his wife would experience extreme financial hardship in his absence.

The record is sufficient to establish that the applicant's daughters would endure extreme hardship if they were to join the applicant in Mexico.

The applicant indicates that his daughters understand the Spanish language but do not read or write in Spanish. U.S. courts have held that the consequences of deportation imposed on citizen children of school age must be considered in determining extreme hardship. For example, *In Re. Kao-Lin*, 23 I. & N. Dec. 45, 50 (BIA 2001), the BIA concluded that the language capabilities of a 15-year-old girl were not sufficient for her to have an adequate transition to daily life in Taiwan; she had lived her entire life in the United States, was completely integrated into an American lifestyle, and uprooting her at this stage in her education and her social development to survive in a Chinese-only environment would constitute extreme hardship. In *Ramos v. INS*, 695 F.2d 181, 186 (5th Cir. 1983), the Circuit Court indicated that "imposing on grade school age citizen children, who have lived their entire lives in the United States, the alternatives of . . . separation from both parents or removal to a country of a vastly different culture where they do not speak the language," must be

considered in determining whether "extreme hardship" has been shown. In *Prapavat vs. I.N.S.*, 638 F. 2nd 87, 89 (9th Cir. 1980), the Ninth Circuit found the BIA abused its discretion in concluding that extreme hardship had not been shown in light of fact that the aliens' five-year-old citizen daughter, who was attending school, would be uprooted from the country where she lived her entire life and taken to land whose language and culture were foreign to her.

The record here conveys that the [REDACTED] 12- and 14-year-old daughters are not academically proficient in the Spanish language to transition to life in Mexico and that they are immersed in American culture, playing soccer, fishing, and going to the park; no documentation suggests that the girls have lived in Mexico and are familiar with its culture. Accordingly, the AAO finds that the Moreno's daughters would experience extreme hardship if they were to join their father in Mexico.

In considering the hardship factors raised here, the AAO examines each of the factors, both individually and cumulatively, to determine whether extreme hardship has been established. It considers whether the cumulative effect of claims of economic and emotional hardship would be extreme, even if, when considered separately, none of them would be. It considers the entire range of factors concerning hardship in their totality and then determines whether the combination of hardships takes the case beyond those hardships ordinarily associated with removal.

In the final analysis, the AAO finds that the requirement of significant hardships over and above the normal economic and social disruptions involved in removal has been met so as to warrant a finding of extreme hardship under section 212(h) of the Act. Having carefully considered each of the hardship factors raised, both individually and in the aggregate, it is concluded that these factors in this case constitute extreme hardship to a qualifying family member for purposes of relief under section 212(h) of the Act, 8 U.S.C. § 1182(h).

The grant or denial of the above waiver does depend only on the issue of the meaning of "extreme hardship." Once extreme hardship is established, the Secretary then determines whether an exercise of discretion is warranted.

The favorable factors in this matter are the extreme hardship to the applicant's spouse and children, letters of recommendation, payment of taxes, and the passage of six years since the applicant's most recent criminal conviction. The unfavorable factors are the applicant criminal convictions, and his initial unlawful entry and periods of unauthorized presence and employment. The AAO notes that the applicant does not appear to have any other criminal convictions besides those enumerated in this proceeding.

While the AAO cannot emphasize enough the seriousness with which it regards the applicant's criminal convictions, it finds that the hardship imposed on the applicant's spouse and children as a result of the applicant's inadmissibility outweighs the unfavorable factors in the application. Therefore, a favorable exercise of the Secretary's discretion is warranted in this matter.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h), the burden of establishing that the application merits approval remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. The applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained. The waiver application is approved.