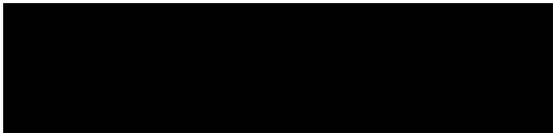


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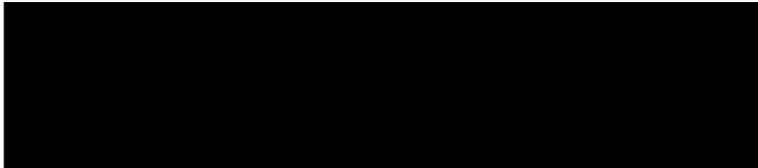
Applicant:



APPLICATION:

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

ON BEHALF OF APPLICANT:



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.

A handwritten signature in black ink, appearing to read "John F. Grissom".

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Chicago, Illinois, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant, [REDACTED] is a native and citizen of Mexico who was found to be 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 having committed a crime involving moral turpitude. The applicant sought a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(i), which the district director denied, finding the applicant failed to establish that extreme hardship would be imposed on a qualifying relative, *Decision of the District Director*, dated December 5, 2005.

The AAO will first address the finding of inadmissibility.

The record reflects that from 1994-2005, the applicant was charged with, and found guilty of the following:

- Domestic battery, conditional discharge one year, fines, costs, and fees of \$267
- Domestic Battery, conditional discharge one year, fines, costs, and fees of \$416; credit time served of 6 days
- Battery, supervision 6 months; fines, costs, and fees of \$257
- Assault, costs of \$145

Section 212(a)(2) of the Act states in pertinent part, 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 applicant's domestic battery, battery, and assault convictions are within the meaning of section 101(a)(48)(A) of the Act, constituting convictions for immigration purposes because of the imposition of a fine, cost, or fee, which is a punishment and penalty. *See Matter of Cabrera*, 24 I&N Dec. 459 (BIA 2008).

In determining whether the applicant's convictions involve moral turpitude, the Board of Immigration Appeals (BIA) in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), held 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. Assault may or may not involve moral turpitude. Simple assault is generally not considered to be a crime involving moral turpitude.

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 applicant was convicted of assault, battery, and domestic battery. The assault statute, 720 ILCS 5/12-1, provides that "[a] person commits an assault when, without lawful authority, he engages in conduct which places another in reasonable apprehension of receiving a battery." A battery is committed if a person "intentionally or knowingly without legal justification and by any means, (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual." *See* 720 ILCS 5/12-3. Domestic battery is found under 720 ILCS 5/12-3.2; it provides that a 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; or (2) makes physical contact of an insulting or provoking nature with any family or household member. The statute under 725 ILCS 5/112A-3 states that "domestic violence" means physical abuse, harassment, intimidation of a dependent, interference with personal liberty or willful deprivation but does not include reasonable direction of a minor child by a parent or person in loco parentis. An assault is a Class C misdemeanor and battery and domestic battery are Class A misdemeanors.

As a general rule, a simple assault and battery offense does not involve moral turpitude; however, that determination can be altered if there is an aggravating factor such as the infliction of bodily harm upon persons whom society views as deserving of special protection, such as children or domestic partners or intentional serious bodily injury to the victim. *In re Sanudo*, 23 I. & N. Dec. 968 (BIA 2006). In *Garcia-Meza v. Mukasey*, 516 F.3d 535 (7th Cir. 2008), the court states that *In re Sanudo*:

The Board considered whether domestic battery in California is a crime of moral turpitude. In noting that assault and battery can be morally turpitudinous but usually aren't, the court cited a string of decisions including *Danesh* that involved "the infliction of bodily harm upon a person whom society views as deserving of special protection, such as a child, a domestic partner, or a peace officer." But then the Board distinguished those cases, stating that the crimes there "were defined by statute to require proof of the actual infliction of some tangible harm on a victim." The domestic battery statute did not require bodily harm, and the court concluded that the victim's protected status alone did not implicate moral turpitude .

(Citations omitted).

In re Sanudo, 23 I&N Dec. 968, 970-971 (BIA 2006), the BIA found that a conviction under California Penal Code sections 242 and 243(e), battery against spouse, is not categorically a crime involving moral turpitude. In looking to California court decisions construing the elements of the battery offense, the BIA found that they have construed the minimal conduct necessary to complete a battery in California as simply an intentional "touching" of another without consent. *Id.* at 972. In light of this, the BIA reasoned that one may be convicted of battery in California without using violence and without injuring or even intending to injure the victim; and it held that such an offense, lacking any aggravating dimension, is simple battery and does not involve moral turpitude.

The BIA reached a similar determination in *In re. Sejas*, 24 I&N Dec. 236 (BIA 2007), where it held that an assault and battery offense in violation of section 18.2-57.2 of the Virginia Code was held to not categorically involve moral turpitude. In reaching this conclusion, the BIA looked at how Virginia courts interpret the crime of assault and battery; it found that a conviction for assault and battery in Virginia does not require "the actual infliction of physical injury and may include any touching, however slight," the intent or imputed intent to cause injury "may be to the feelings or mind, as well as to the corporeal person," and that intent to do "bodily harm" includes offensive touching, even the slightest touching. *Id.* at 238.

However, in following the Ninth Circuit's holding in *Grageda v. INS*, 12 F.3d 919 (9th Cir.1993), in *In Matter of Tran*, 21 I&N Dec. 291, 294 (BIA 1996), the BIA held that violation of section 273.5(a) of the California Penal Code, which criminalizes a person for willfully inflicting upon a person who is his or her spouse, former spouse, cohabitant, former cohabitant, or the mother or father of his or her child, a corporal injury resulting in a traumatic condition, constitutes a crime involving moral turpitude.

Whether a particular crime involves moral turpitude is determined by the "categorical approach" and the "modified categorical approach." The "categorical approach requires looking to the elements of the criminal statute and the nature of the offense, rather than to the particular facts relating to the crime, to determine whether an offense involves moral turpitude. *Leocal v. Ashcroft*, 543 U.S. 1, 7, 125 S. Ct. 377, 160 L.Ed.2d 271 (2004). A court considers only the fact of conviction and the statutory definition of the criminal offense. *Matter of Tobar-Lobo*, 24 I&N Dec. 143 (BIA 2007). If necessary, one may look to authoritative court decisions in the convicting jurisdiction that elucidate

the meaning of equivocal statutory language. *See Matter of Olquin*, 23 I&N Dec. 896, 897 (BIA 2006). Although evil intent signifies a crime involving moral turpitude, willfulness in the commission of the crime does not, by itself, suggest that it involves moral turpitude. *Goldeshtein v. INS*, 8 F.3d 645 (9th Cir. 1993). Under the statute, evil intent must be explicit or implicit given the nature of the crime. *Gonzalez-Alvarado, v. INS*, 39 F.3d 245, 246 (9th Cir. 1994). Neither the seriousness of the criminal offense nor the severity of the sentence imposed determines whether a crime involves moral turpitude. *Matter of Serna*, 20 I&N Dec. 579, 581 (BIA 1992). “If the statute defines a crime in which moral turpitude necessarily inheres, then the conviction is for a crime involving moral turpitude for immigration purposes, and our analysis ends.” *Matter of Ajami*, 22 I&N Dec. 949 (BIA 1999).

When a statute contains offenses that do and do not involve moral turpitude, the modified categorical approach is applied. *See, e.g., Neely v. U.S.*, 300 F.2d 67 (9th Cir. 1962). With this approach a narrow, specific set of documents comprises the record: “[the] charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.” *Shepard v. U.S.*, 125 S.Ct. 1254, 1257 (2005). The court looks to the “record of conviction” to determine if the crime involves moral turpitude. *Matter of Ajami*, 22 I&N Dec. 949, 950 (BIA 1999) (look to indictment, plea, verdict, and sentence). The charging document, or information, is not reliable where the plea was to an offense other than the one charged. *Martinez-Perez v. Gonzales*, 417 F.3rd 1022, 1028-29 (9th Cir. 2005). The record of conviction does not include the arrest report. *See In re Teixeira*, 21 I&N Dec. 316, 319-20 (BIA 1996).

The applicant was convicted of assault, which is committed when a person engages in conduct that places another in reasonable apprehension of receiving a battery. *See* 720 ILCS 5/12-1. A person commits a battery by intentionally or knowingly without legal justification and by any means causes bodily harm to an individual or makes physical contact of an insulting or provoking nature with an individual.” *See* 720 ILCS 5/12-3. Because assault in Illinois not require intentional or knowing conduct, but rather, requires merely without lawful authority, engaging in conduct that places another in reasonable apprehension of receiving a battery, i.e. bodily harm or contact of an insulting or provoking nature, the AAO finds that a violation of 720 ILCS 5/12-1 would not involve moral turpitude. *See Matter of Perez-Contreras, supra*.

The elements of the applicant’s battery and domestic battery crimes are similar: a person is convicted for intentionally or knowingly causing bodily harm or making physical contact of an insulting or provoking. The distinction with the two crimes is that domestic battery involves a family or household member. The AAO finds that in light of *In re. Sanudo*, *In re. Sejas*, *Grageda* and *Matter of Tran* intentionally causing bodily harm to another would involve moral turpitude while making physical contact of an insulting or provoking nature with an individual would not. Because Illinois’ battery and domestic battery statutes contain acts which both do and do not involve moral turpitude, the AAO must apply the “modified categorical” approach to determine the subsection of the applicant’s offense. Because the record before the AAO contains only the June 1, 2005 letter by the Clerk of the Circuit Court, which does not indicate whether the applicant was convicted of causing bodily harm or simply making physical contact of an insulting or provoking nature, the AAO is, therefore, unable to determine whether the full record of conviction would

demonstrate that the applicant was not convicted of intentionally or knowingly causing bodily harm to another. As the burden is on the applicant to establish his admissibility to the United States, the AAO finds that, with regard to his battery and domestic battery convictions, the applicant has failed to prove he is admissible pursuant to section 212(a)(2)(A)(i)(I) of the Act.

The AAO will now consider whether granting the applicant's section 212(h) waiver is 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, who in this case are the applicant's U.S. citizen wife and children. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Moralez*, 21 I&N Dec. 296 (BIA 1996).

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 (BIA) 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 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).

Applying the *Cervantes-Gonzalez* factors here, extreme hardship to the applicant’s qualifying relative must be established if she or he joins the applicant, and alternatively, if she or he remains in the United States without him. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant’s waiver request.

In addition to other documentation submitted in support of the waiver application, the record contains the following evidence:

- A letter dated June 27, 2005 by the food service director of ARAMARK Corrections, conveying that the applicant’s wife, who has been employed there since February 24, 2004, receives health, dental, and life insurance.
- In her December 1, 2005 letter the applicant’s wife states that her sons have a close relationship with their father. She states that her husband has severe asthma and since he became ill in 2003 has not been able to work. She states that because her husband maintains the house and cares for their children she has been able to work the number of hours that she does as the lead supervisor in the county jail’s kitchen. She states that she started training for the position of assistant food service director. She indicates that raising three boys as a single mother would be an extreme hardship to her and to her sons, who will be impacted emotionally and mentally. She states that her rights as a U.S. citizen will be violated if her husband is deported. She indicates that her husband has taken domestic violence classes and has been sober for one year.
- The Turning Point letter, dated February 14, 1996, conveys that the applicant completed its abuse program.
- In her August 3, 2005 letter, the applicant’s wife states that for the past two years her husband has been the primary care provider of their three children. She states that she lives 15 minutes from her job, is on-call 24 hours, and has as shift from 4:00 A.M. to 12:00 P.M. and would not know what to do with her children, who are now 15, 8, and 7 years old, at 3:30 A.M. in the morning if her husband were not there. She indicates that her husband is being treated by a physician for asthma.
An August 1, 2005 letter by [REDACTED], M.D., conveying the applicant is under his care for a history of asthma and hypertension.
- School records of the applicant’s children
- The letter dated December 5, 2005 by [REDACTED] which indicates that the applicant’s wife works at his restaurant earning \$3.60 per hour, working approximately 10 hours each week.
- Letters by the applicant’s children describing their close relationship with their father. The letter by [REDACTED] conveys that their mother works two jobs and is never home. He states that their father helps with their homework, cooks, wakes them up in the morning, and picks them up from school.

- The letter by [REDACTED] conveys that the applicant's wife has a job schedule that often changes and requires her to often work holidays and weekends. She states that with regard to childcare, the applicant's wife's parents live five hours away, her brother lives one hour away, and her brothers and sisters who live in the area either work or are unable to help due to caring for their own families.
- The letter by the applicant's brother-in-law conveys that the applicant's wife will have to find another job if the applicant is deported because she will not be able to afford a babysitter.
- The letter by the co-worker of the applicant's wife conveys that the applicant's wife works full-time, at least 40 hours each week, and would have difficulty holding her job without her husband caring for their children.
- The affidavit of support reflects the applicant's wife worked full time, earning \$11.00 per hour with ARAMARK in 2004, and was a part-time waitress earning \$450 each month. Her income in 2004 was \$17,189.

In rendering this decision, the AAO has carefully considered all of the evidence in the record.

With regard to hardship imposed on the applicant's children if they joined their father to live in Mexico, administrative and judicial decisions which have held that the consequences of deportation such as language capabilities and cultural differences imposed on children of school age must be assessed in determining extreme hardship. In *Matter of Kao & Lin*, 23 I&N Dec. 45, 50 (BIA 2001), the BIA held that the language capabilities of the respondent's 15-year-old daughter were not sufficient for her to transition to 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 would constitute extreme hardship. In *Ramos v. INS*, 695 F.2d 181, 186 (5th Cir. 1983), the 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. Lastly, in *Prapavat v. I.N.S.*, 638 F. 2nd 87, 89 (9th Cir. 1980) the court found the BIA abused its discretion in holding that extreme hardship had not been shown in light of the 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 a land whose language and culture were foreign to her.

In light of the aforementioned decisions, the AAO finds that the applicant's sons, who are 15, 8, and 7 years and have always lived in the United States, would experience extreme hardship if they were to join their father to live in Mexico, a country with a vastly different culture, and nothing in the record indicates that the applicant's sons would be academically proficient in the Spanish language.

The record demonstrates that the applicant's wife works full-time at ARAMARK and part-time at a restaurant and that her income, as shown in the affidavit of support, would not be enough to pay for the childcare services that will be required while she is at work. Thus, the AAO finds that the documentation in the record establishes that the applicant's wife and children would experience extreme hardship if they were to remain in the United States without the applicant because it is the applicant who takes care of the children while his wife is at work.

Taking all the factors presented in this situation into consideration, the AAO finds that, cumulatively, they constitute extreme hardship to a qualifying family member for purposes of relief under section 212(h) of the Act, 8 U.S.C. § 212(h).

The grant or denial of the above waiver does not 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, the applicant's history of employment and paying taxes, the letters commending his character, and his completion of an abuse program in 1996. The unfavorable factors in this matter are the applicant's criminal convictions, his initial entry without inspection, periods of unauthorized employment and presence, and his use of fraudulent documents in order to obtain employment.

While the AAO cannot emphasize enough the seriousness with which it regards the applicant's criminal convictions and immigration violations, the AAO finds that the hardship imposed on the applicant's spouse and children as a result of his 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) of the Act, 8 U.S.C. § 1182(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.