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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: OCT 24 2008

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director of the California Service Center denied the waiver application. The matter is now on appeal before the Administrative Appeals Office (AAO) in Washington, DC. The appeal will be dismissed.

The applicant, [REDACTED], is a native and citizen of Cuba who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i), for having committed a crime involving moral turpitude. The Form I-485, Application to Register Permanent Resident or Adjust Status, indicates that the applicant is applying for adjustment to permanent resident status under Section 1 of the Cuban Adjustment Act (CAA). The applicant sought a waiver of inadmissibility under section 212(h) of the Act, which the director denied, finding that the applicant failed to establish extreme hardship to a qualifying relative. *Decision of the Director*, dated May 11, 2006.

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.

“[M]oral turpitude refers generally to conduct which 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.” *Padilla v. Gonzales*, 397 F.3d 1016, 1019-21 (7th Cir. 2005), (quoting *In re Ajami*, 22 I. & N. Dec. 949, 950 (BIA 1999)).

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 charged with violating Cal. Penal Code § 245(a)(1) and Cal. Penal Code § 12022.7(a), assault great bodily injury and with a deadly weapon, on or about September 3, 1995; and on March 5, 1996, he was sentenced by the Municipal Court of California, County of San Diego, to three years of formal probation, to the sheriff’s commitment for 365 days and the Department of Corrections for

three years, and ordered to pay a fine and restitution for violation of Cal. Penal Code § 245(a)(1). He was sentenced to three years consecutive sentence for violation of Cal. Penal Code § 12022.7(a), and the record indicates that imposition/execution of the sentence was suspended.

In the Municipal Court of California, County of San Diego, the applicant was charged with violating Cal. Penal Code § 422 (making a terrorist threat) and Cal. Penal Code § 243(e) (battery of a former significant other) on or about April 14, 1996. On June 27, 1996, he pled guilty to both counts and the court found there was a factual basis for the plea. He was granted probation of three years for both counts and imposition of sentence was suspended for three years. For making the terrorist threat, he was sentenced to serve 150 days in the custody of the sheriff; and for the battery conviction, he was to serve 84 days in the custody of the sheriff, and to have no contact with the victim.

The applicant violated Cal. Penal Code § 245(a)(1) (prohibiting “[a]ny person [from] commit[ting] an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury”). The BIA has held that a conviction for assault with a deadly weapon involves moral turpitude. *See e.g., Matter of R-*, 1 I & N Dec. 209 (BIA 1942) (assault with a deadly weapon with intent to do bodily harm in violation of section 103-7-6 of the Revised Statutes of Utah is a crime involving moral turpitude); and *Matter of Danesh*, 19 I & N Dec. 669 (BIA 1988) (numerous cases indicate that assault, or assault and battery, with a deadly weapon is a crime involving moral turpitude).

With regard to the terrorist threat conviction, the court in *Chanmouny v. Ashcroft*, 376 F.3d 810 (8th Cir. 2004), found a terroristic threat to be a crime involving moral turpitude because it involved the mental state of acting with “the purpose to terrorize.” The Minnesota statute under which Chanmouny was convicted provides, in part, that “[w]hoever threatens, directly or indirectly, to commit any crime of violence with purpose to terrorize another ... or in a reckless disregard of the risk of causing such terror ... may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than \$10,000, or both.” Minn.Stat. § 609.713, subd. 1.

The applicant was convicted of violating Cal. Penal Code § 422 (making a terrorist threat). Section 422 of the Cal. Penal Code states:

Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison.

Cal. Penal Code § 422 requires the mental state of willfully threatening to commit a crime with the specific intent that the threatening statement be taken as a threat. Because the AAO finds that the mental state in

section 422 is similar to that of acting with “the purpose to terrorize,” the applicant’s conviction under Cal. Penal Code § 422 would involve moral turpitude.

With regard to the battery conviction, battery is defined by Cal. Penal Code § 242 as “any willful and unlawful use of force or violence upon the person of another.” The BIA in *In re Sanudo*, 23 I&N Dec. 968 (BIA 2006), states 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 969.

The applicant was convicted of battery of a former significant other under Cal. Penal Code § 243(e)(1), which provides that:

When a battery is committed against a spouse, a person with whom the defendant is cohabiting, a person who is the parent of the defendant's child, former spouse, fiancé, or fiancée, or a person with whom the defendant currently has, or has previously had, a dating or engagement relationship, the battery is punishable by a fine not exceeding two thousand dollars (\$2,000), or by imprisonment in a county jail for a period of not more than one year, or by both that fine and imprisonment.

In *In re Sanudo* the BIA found that neither the convicting statute nor the admissible portion of Sanudo's conviction record reflects that his battery was injurious to the victim or that it involved anything more than the minimal nonviolent “touching” necessary to constitute the offense. The BIA states that in the absence of admissible evidence reflecting that Sanudo's offense occasioned actual or intended physical harm to the victim, the existence of a current or former “domestic” relationship between the perpetrator and the victim is insufficient to establish the morally turpitudinous nature of the crime. *Id.* at 972-973.

In *Galeana-Mendoza v. Gonzales*, 465 F.3d 1054, 1061 (9<sup>th</sup> Cir. 2006), the Ninth Circuit states that its reasoning is entirely consistent with that of *In re Sanudo*. Thus, after observing how California court interpret the phrase ‘use of force or violence’ in section 242, and how the California jury instruction define “force and violence,” the Ninth Circuit in *Galeana-Mendoza* held that, because the battery statute lacks an injury

requirement and includes no other inherent element evidencing “grave acts of baseness or depravity,” California Penal Code section 243(e) does not qualify as a crime categorically involving moral turpitude. *Id.* at 1061.

Furthermore, applying the modified categorical approach, which allows for ‘look[ing] beyond the language of the statute to a narrow, specified set of documents that are part of the record of conviction, including the indictment, the judgment of conviction, jury instructions, a signed guilty plea, or the transcript from the plea proceedings,’ to determine whether an offense qualifies as a crime involving moral turpitude, *Galeana-Mendoza* at 1057-1058, the Ninth Circuit concluded that the criminal complaints, each of which specified that Galeana-Mendoza committed battery on the mother of his children using “force and violence,” failed to establish that the convictions qualify as crimes involving moral turpitude. *Id.* at 1062.

Here, the criminal complaint’s allegation, which is that “did willfully and unlawfully use force and violence” upon a person who he has or previously had a dating relationship with, is similar to the allegations stated in *Galeana-Mendoza*. Consequently, the criminal complaint before the AAO fails to establish conviction of battery involves moral turpitude.

The record, the AAO finds, establishes the applicant’s inadmissibility under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for committing crimes of moral turpitude, assault with a deadly weapon and making terrorist threats.

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. The record reveals that the applicant’s qualifying relative is his U.S. citizen spouse. 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 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 in the event that the qualifying relative joins the applicant, and alternatively, that the qualifying relative remains in the United States without the applicant. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant’s waiver request.

On appeal, counsel states that the psychological evaluation establishes that the applicant’s naturalized citizen spouse would experience extreme hardship if separated from her husband. Counsel asserts that the applicant’s spouse has been living in the United States for more than 20 years, and that her daughter lives in the United States. Counsel states that because the applicant’s spouse left Cuba for political reasons, the Cuban government would not want her to return. Counsel refers to *Contreras-Buenfil v. INS*, 712 F.2d 401 (9<sup>th</sup> Cir. 1983), *Mejia-Carrillo v. INS*, 656 F.2d 520 (6<sup>th</sup> Cir. 1981), and *Bastidas v. INS*, 609 F.2d 101 (3<sup>rd</sup> Cir. 1979) to show the importance of family in determining hardship.

The record contains two evaluations by \_\_\_\_\_ a licensed clinical psychologist. The evaluation dated June 1, 2006 conveyed that the applicant’s spouse was seen by \_\_\_\_\_ on four occasions with the purpose of obtaining psychotherapy to alleviate her symptoms. Ms. \_\_\_\_\_ stated that the applicant’s wife has a history of post-partum depression since 1995 when she had her daughter. She stated that the applicant explored in psychotherapy issues related to past sexual abuse, incest, and suicidal ideation. Ms. \_\_\_\_\_ stated that, at present, the applicant’s depressive symptoms have exacerbated because of her husband’s immigration problems. Ms. \_\_\_\_\_ conveyed that the applicant’s wife’s condition could further deteriorate if she is separated from her husband because she relies on her husband for financial and emotional support and is concerned about her daughter’s emotions. The applicant’s wife is diagnosed with Axis I: 296.33 Major Depressive Disorder, and Axis V: 50.

The April 11, 2006 evaluation is similar in content to the above-mentioned evaluation. In addition, the applicant's wife reported to [REDACTED] that she had been psychotherapy for two years in 1989 for related symptoms and that during her younger years she had a difficult relationship with her mother, with whom she perceived as emotionally detached and abusive. Ms. [REDACTED] provided a diagnostic impression of Axis I: R/O 296.34 Major Depressive Disorder with psychotic features, and Axis V: 50.

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

In *Hassan v. INS*, 927 F.2d 465, 468 (9<sup>th</sup> Cir. 1991), the Ninth Circuit upheld the finding that deporting the applicant and separating him from his wife and child was not conclusive of extreme hardship as it "was not of such a nature which is unusual or beyond that which would normally be expected from the respondent's bar to admission."

With regard to the two submitted evaluations of the applicant's wife, the AAO finds that they establish that the applicant's spouse has significant emotional problems and a history of such problems. Thus, the record before the AAO is sufficient to show that the emotional hardship, which she will experience, is unusual or beyond that which is normally to be expected upon removal. *See Hassan, supra*.

Counsel claims that the applicant's wife cannot join her husband in Cuba because she left Cuba for political reasons and the Cuban government would not let her return. There is no documentation in the record to establish that the applicant's wife left Cuba for political reasons and would not be allowed to return there for that reason. 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)).

The applicant established extreme hardship to his wife if she were to remain in the United States without him. However, having carefully considered each of the hardship factors raised, both individually and in the aggregate, it is concluded that the applicant has failed to establish extreme hardship to his spouse if she were to join him in Cuba. Consequently, the factors presented do not 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).

Furthermore, 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. In light of the violent nature of the applicant's crimes, the AAO notes that an exercise of discretion would not be warranted in this case.

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

**ORDER:** The appeal is dismissed.