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U.S. Citizenship
and Immigration
Services

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FILE:



Office: LOS ANGELES, CA Date:

SEP 11 2008

IN RE:



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:



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 that reads "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Los Angeles, California and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of El Salvador 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 been convicted of a crime involving moral turpitude. The applicant is married to a U.S. citizen and has three U.S. citizen children. He applicant seeks a waiver of inadmissibility in order to reside with his family in the United States.

The record reflects that, on June 26, 1991, the applicant pled *nolo contendere* in the Superior Court of California, County of Los Angeles, to one count of assault under section 245(a)(1) of the California Penal Code (CPC). He was sentenced to 365 days in jail and three years probation. On December 20, 2000, the applicant pled *nolo contendere* in the Municipal Court of East Los Angeles Judicial District, County of Los Angeles, to one count of petty theft under section 490.1(a) of the CPC. He was convicted for an infraction of the law and fined.

Based on these convictions, the district director found the applicant to be inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of crimes of moral turpitude. She further determined, based on the evidence in the record, that the applicant had failed to establish extreme hardship to a qualifying relative and denied the application accordingly. *See District Director's Decision*, dated June 29, 2006.

On appeal, counsel for the applicant asserts that Citizenship and Immigration Services (CIS) erred as a matter of law and abused its discretion in denying the Form I-601, Application for Waiver of Grounds of Excludability. He contends that if the applicant is removed from the United States, his family will suffer serious financial and psychological problems and that CIS has failed to consider the hardships faced by the applicant's family in the aggregate. *Form I-290B, Notice of Appeal to the Administrative Appeals Office*, dated July 20, 2006; *Counsel's Brief*, dated July 20, 2006.

The AAO first turns to a consideration of the applicant's 1991 and 2000 convictions.

The record establishes that the applicant was convicted of assault under section 245(a)(1) of the CPC, which states:

Any person who commits 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 shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousands dollars

Historically, a case-by-case approach has been employed to decide whether battery (or assault and battery) offenses involve moral turpitude. It has long been recognized 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. *Matter of B-*, 1 I&N Dec. 52, 58 (BIA, A.G. 1941); *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992); *Matter of*

Fualaau, 21 I&N Dec. 475, 476 (BIA 1996). This general rule does not apply, however, where an assault or battery necessarily involves some aggravating dimension, such as the use of a deadly weapon or the infliction of serious injury on persons whom society views as deserving of special protection, such as children, domestic partners or peace officers. *See, e.g., Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988). The Board of Immigration Appeals (BIA) has long held that an individual convicted of assault involving a deadly or dangerous weapon has committed a crime involving moral turpitude. The BIA has reasoned that an assault aggravated by the use of a dangerous or deadly weapon is inherently base because it is contrary to accepted standards of morality in a civilized society. *See Matter of O*, 3 I&N Dec. 193 (BIA 1948). In that the applicant was convicted of assault with a deadly weapon, he is inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act for having committed a crime involving moral turpitude.

In 2000, the applicant was convicted of petty theft under section 490.1(a) of the CPC:

Petty theft, where the value of the money, labor, real or personal property taken is of a value which does not exceed fifty dollars (\$50), may be charged as a misdemeanor or an infraction, at the discretion of the prosecutor, provided that the person charged with the offense has no other theft or theft-related conviction.

Counsel dismisses the applicant's 2000 conviction as it represents only an infraction of California law. The AAO notes, however, that neither the seriousness of a criminal offense nor the severity of the sentence imposed is determinative of whether a crime involves moral turpitude. *Matter of Serna*, 20 I&N Dec. 579, 581 (BIA 1992). It finds the record to establish that the applicant has been convicted of petty theft, a crime that may involve moral turpitude if the theft involves an intent to permanently deprive the owner of property. *Matter of D*, 1 I&N Dec. 143 (BIA 1941). In the present case, the statute under which the applicant was convicted does not address intent. Further, its broad wording offers no indication of the type of theft committed by the applicant in 2000, other than that the value of the property stolen was no more than \$50.

Where a statute is divisible (broad or multi-sectional), *see, e.g., Matter of P-*, 6 I&N Dec. 193 (BIA 1954); *Neely v. U.S.*, 300 F.2d 67 (9th Cir. 1962), 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; *Zaffarano v. Corsi*, 63 F.2d 67 757 (2d Cir. 1933); *U.S. v. Kiang*, 175 F.Supp.2d 942, 950 E.D. Mich. 2001). 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). It is also important to note that the record of conviction does not include the arrest report. *See In re Teixeira*, 21 I&N Dec. 316, 319-20 (BIA 1996).

In the present case, there is no record of conviction on which the AAO may rely for an understanding of the nature of theft committed by the applicant. The file before the AAO contains only a copy of the court docket, and the reports filed by the law enforcement officers who arrested the applicant. Therefore, it cannot be determined whether the applicant committed theft with an intent to permanently deprive the owner of property.

However, in 212(h) waiver proceedings, the burden of proving eligibility rests entirely with the applicant. As the statute of conviction does not address intent and the record does not contain a record of conviction that establishes that the applicant's offense did not involve an intent to permanently deprive the owner of property he stole, the

AAO finds that the applicant has not established that his 2000 conviction for petty theft is not a conviction for a crime involving moral turpitude.

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

(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) states in pertinent part that:

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

(1)(A) [I]t is established to the satisfaction of the Attorney General that-

(i) [T]he activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(iii) the alien has been rehabilitated; or

(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.

As less than 15 years have passed since the events that resulted in the applicant's 2000 conviction for theft, he is statutorily ineligible for a waiver of admissibility under section 212(h)(1)(A) of the Act. He is, however, eligible to apply for a waiver pursuant to section 212(h)(B) of the Act based on his U.S. citizen spouse and children.

A waiver of the bar to admission resulting from section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar would impose an extreme hardship on a qualifying family member. In the present case, the applicant's qualifying relatives are his U.S. citizen spouse and children. Hardship experienced by the applicant or other family members as a result of removal is not considered in section 212(h)(B) waiver proceedings unless it would cause hardship to the applicant's spouse and children. Should extreme hardship be established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. See *Matter of Mendez*, 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 set forth a list of non-exclusive factors relevant to determining whether an alien 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. The age of the qualifying relative may be an additional relevant factor. See *Matter of Pilch*, 21 I&N Dec. 627, 630 (BIA 1996). In examining whether extreme hardship has been established, the BIA has held:

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).

U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. See *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). For example, *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. 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. *Hassan v. INS*, *supra*, held further that the uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported.

The AAO notes that extreme hardship to the applicant’s spouse and children must be established in the event that they reside in El Salvador or in the event that they reside in the United States, as they are not required to reside outside the United States based on the denial of the applicant’s waiver request. The AAO now turns to a consideration of the relevant factors in this case.

The record offers the following evidence in support of the waiver application: counsel’s brief; two declarations made by the applicant’s spouse; letters documenting the employment of the applicant and his spouse; school records and certificates for the applicant’s children; and tax records and earnings statements for the applicant and his spouse, as well as other financial records.

The first part of the analysis requires the applicant to establish extreme hardship to his spouse, [REDACTED], or children in the event that they reside in El Salvador. On appeal, counsel contends that the applicant’s children barely speak any Spanish and cannot read or write in the Spanish language. He further notes that [REDACTED] family members all live in the United States. In her

declarations, dated July 23, 2001 and June 3, 2004, states that she and her children will not accompany the applicant to El Salvador as the children neither read nor write Spanish and have never been to El Salvador.

The AAO notes that Board of Immigration Appeals (BIA) has previously found that a 15-year-old child who had lived her entire life in the United States, was completely integrated into the American lifestyle and was not fluent in Chinese would suffer extreme hardship if she relocated to Taiwan. *Matter of Kao and Lin*, 23 I&N Dec. 45 (BIA 2001). The BIA concluded that uprooting the child at her stage of education and social development and requiring her to survive in a Chinese-only environment would be such a significant disruption that it would constitute extreme hardship. The BIA, having found extreme hardship to be established for the 15-year-old, determined it unnecessary to consider whether relocation to Taiwan would also constitute extreme hardship for her younger siblings.

In the present matter, the birth certificates in the record establish that the applicant has a 17-year-old daughter and 12-year-old twins who, like the children in *Matter of Kao and Lin*, have lived their entire lives in the United States. [REDACTED] reports that the children have never visited El Salvador, speak little Spanish and have no ability to read or write in Spanish. Relying on the BIA's reasoning in *Matter of Kao and Lin*, the AAO concludes that relocation to El Salvador would create a similar disruption in the life of the applicant's 17-year-old daughter and, therefore, constitute an extreme hardship for her. In that El Salvador also continues to be a country whose nationals are designated for Temporary Protected Status based on current country conditions, the AAO finds the applicant to have established that a qualifying relative would suffer extreme hardship if his family were to relocate to El Salvador following his removal.

The second part of the analysis requires the applicant to establish extreme hardship in the event that his spouse and children remain in the United States, which [REDACTED] states is her intention. On appeal, counsel asserts that the removal of the applicant will deprive [REDACTED] of a husband's love, support and companionship; financial stability; parenting assistance and a paternal influence on her children. He further contends that the applicant's children would become emotionally disturbed by their father's absence, their mother's frustration and the radical changes they would experience in their lives as a result of the applicant's removal. Counsel states that, without the applicant, [REDACTED] would be unable to pay the rent and that she would likely have to work two jobs to provide for the children, thereby also depriving them of their mother's time and attention.

[REDACTED] states that the removal of her husband from the United States would destroy her family financially and break the hearts of her children. Without the applicant, she contends that she would suffer financial hardship and be unable to purchase the home they want for their children. She also indicates that the applicant is a good father who has a close relationship with his children and that they depend on his emotional and psychological support every day of their lives. [REDACTED] reports that her own parents were divorced when she was a child and that their breakup has negatively affected her ever since. She states that she does not want her daughter to suffer like she has.

The AAO notes that the record does not support the claims made by counsel and [REDACTED] regarding the emotional and financial impacts of the applicant's removal. It finds no documentary evidence in the record, e.g., an evaluation prepared by a mental health professional or a school counselor, that addresses the impact

the applicant's removal would have on his children's emotional well-being. In the absence of such documentation, counsel's contention that they would become emotionally disturbed is insufficient proof that this would be the case. Without supporting documentation, the assertions of counsel are not sufficient to meet the burden of proof in these proceedings. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel's and [REDACTED]'s claims that the applicant's removal would result in financial hardship for her are also unsupported by the record. The AAO notes that the applicant has submitted a 2006 letter from Ms. [REDACTED]'s employer indicating that she is employed 40 hours a week at \$14.75 per hour; a Form I-864, Affidavit of Support under Section 213A of the Act and a 2005 income tax return reporting [REDACTED] annual income as \$31,158; a rental agreement that establishes the rent on [REDACTED] home at \$550 per month in 2001; and monthly car payment notices from 2005 and 2006. This financial information is, however, too limited to allow a determination of the actual financial burden that would be placed on [REDACTED] in the applicant's absence. Therefore, the record does not establish, as counsel contends, that [REDACTED] would be unable to pay her rent and would have to obtain a second job if the applicant were removed from the United States or that, as [REDACTED] asserts, she would be unable to purchase a home for herself and her children. Moreover, the AAO also observes that the applicant does not claim that he, following his removal, would be unable to obtain employment and contribute to his family's finances from outside the United States.

When reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors cited above, the record does not support a finding that [REDACTED] or her children would face extreme hardship if they were to remain in the United States following the applicant's removal. The AAO finds that the applicant has submitted no evidence sufficient to demonstrate that the distress or difficulties experienced by his wife or children would exceed those normally associated with the removal of a spouse and father. In nearly every qualifying relationship, whether between husband and wife or parent and child, there is a deep level of affection and emotional and social interdependence. While the prospect of separation or relocation nearly always results in considerable hardship to the individuals and families involved, the Congress, in specifically limiting the availability of a waiver of inadmissibility to cases of "extreme hardship," did not intend that a waiver be granted in every case where a qualifying relationship and, thus, familial and emotional bonds exist. The point made in this and prior AAO decisions on this matter is that the current state of the law, viewed from a legislative, administrative, or judicial point of view, requires that the hardship, which meets the standard in section 212(h) of the Act, be above and beyond the normal, expected hardship involved in such cases. Therefore, the applicant is not eligible for a waiver under section 212(h) of the Act.

In that the applicant is statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion. Accordingly, the AAO will not assess the relative weights of the positive and negative factors in the present 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. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.