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



U.S. Citizenship
and Immigration
Services

H2

[REDACTED]

FILE:

[REDACTED]

Office: MIAMI, FLORIDA

Date: APR 06 2009

IN RE:

Applicant:

[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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Nicaragua who was found to be inadmissible to the United States under 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 record indicates that the applicant is the child of a lawful permanent resident of the United States. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his lawful permanent resident mother.

The Acting District Director found that the applicant failed to establish that extreme hardship would be imposed on his qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the Acting District Director*, dated June 22, 2006.

On appeal, the applicant, through counsel, asserts that the applicant's mother would suffer extreme hardship if the applicant is removed. *Attachment to Form I-290B*, filed July 14, 2006.

The record includes, but is not limited to, attachment to Form I-290B; affidavits from the applicant's mother and sisters; a letter from [REDACTED], regarding the applicant's mother's depression diagnosis; letters of recommendation from the applicant's friends and co-workers; and the criminal court disposition from the Broward County Circuit Court. The entire record was reviewed and considered in arriving at a decision on the appeal.

In the present application, the record indicates that the applicant entered the United States without inspection on March 14, 1985. On May 7, 1985, the applicant filed a Request for Asylum in the United States (Form I-589). On July 24, 1986, the District Director, Miami, Florida, denied the applicant's Form I-589, and an Order to Show Cause (OSC)¹ was issued against the applicant on March 15, 1997. On October 16, 1997, the applicant was convicted of aggravated battery on a law enforcement officer, aggravated assault on a law enforcement officer, leaving the scene of an accident, and operating a vehicle against license restrictions, and was sentenced to five (5) years probation and court costs and fines. On November 19, 1997, the applicant filed an Application for Suspension of Deportation (Form EOIR-40). On August 24, 1998, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) under NACARA. On April 27, 1999, the applicant filed a Form I-601. On November 9, 1999, an immigration judge administratively closed the applicant's deportation case. On June 22, 2006, the Acting District Director denied the applicant's Form I-485 and Form I-601, finding the applicant failed to demonstrate extreme hardship to his qualifying relative.

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

¹ The AAO notes that the OSC and Forms I-485 state the applicant entered the United States without inspection in November 1985; however, there is no evidence in the record that the applicant departed the United States since his initial entry without inspection on March 14, 1985.

(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...or an attempt or conspiracy to commit such a crime...is inadmissible.

The Board of Immigration Appeals (BIA) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), 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....

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.

(Citations omitted.)

In the recently decided *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. First, in evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a “realistic probability, not a theoretical possibility,” that the statute would be applied to reach conduct that does not involve moral turpitude. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability exists where, at the time of the proceeding, an “actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien’s own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude.” *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

However, if a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, “the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude.” *Silva-Trevino*, 24 I&N Dec. at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage inquiry in which the adjudicator reviews the “record of conviction” to determine if the conviction was based on conduct involving moral turpitude. *Id.* at 698-699, 703-704, 708. The record of conviction consists of documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.* at 698, 704, 708.

If review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. *Id.* at 699-704, 708-709. However, this “does not mean that the parties would be free to present any and all evidence bearing on an alien’s conduct leading to the conviction. (citation omitted). The sole purpose of the inquiry is to ascertain the nature of the prior conviction; it is not an invitation to relitigate the conviction itself.” *Id.* at 703. Finally, in all such inquiries, the burden is on the alien to establish “clearly and beyond doubt” that he is “not inadmissible.” *Id.* at 709 (citing *Kirong v. Mukasey*, 529 F.3d 800 (8th Cir. 2008)).

The record shows that on October 16, 1997, the applicant was convicted of aggravated battery on a law enforcement officer in violation of Florida Statutes § 784.07, aggravated assault on a law enforcement officer in violation of Florida Statutes § 784.07, leaving the scene of an accident, and operating a vehicle against license restrictions, and was sentenced to five (5) years probation and court costs and fines.

Florida Statutes § 784.07 was violated by “knowingly committing an assault or battery upon a law enforcement officer.” Section 784.021 of the Florida Statutes provided, in pertinent part:

(1) An “aggravated assault” is an assault:

- (a) With a deadly weapon without intent to kill; or
- (b) With an intent to commit a felony.

Section 784.045 of the Florida Statutes provided, in pertinent part:

(1)(a) A person commits aggravated battery who, in committing battery:

- 1. Intentionally or knowingly causes great bodily harm permanent disability, or permanent disfigurement; or
- 2. Uses a deadly weapon.

Assault on a law enforcement officer has been found to be a crime involving moral turpitude where the perpetrator knows the victim to be a law enforcement officer performing his official duty and the assault results in bodily injury to the officer. *See Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988) (distinguishing cases in which knowledge of the police officer’s status was not an element of the crime and where bodily injury or other aggravating factors were not present to elevate offense beyond “simple” assault); *see also Matter of O-*, 4 I&N Dec. 301 (BIA 1951) (German law involving an assault on a police officer was not a crime involving moral turpitude because knowledge that the person assaulted was a police officer engaged in the performance of his duties was not an element of the crime); *Matter of B-*, 5 I&N Dec. 538 (BIA 1953) (as modified by *Matter of Danesh*, *supra*) (assault on prison guard not a crime involving moral turpitude because offense charged appeared to be only “simple” assault and no bodily injury was alleged); *Ciambelli ex rel. Maranci v. Johnson*, 12 F.2d 465 (D. Mass 1926) (assault on an officer was not a crime involving moral turpitude in spite of fact that defendant was armed with a razor because the razor was not used in the assault).

The Florida Supreme Court has ruled that knowledge of the officer's status is an element of the crime of battery upon a law enforcement officer under Florida Statutes § 784.07. *See Street v. State*, 383 So.2d 900, 901 (Fla. 1980). Since the applicant was convicted of aggravated battery against a law enforcement officer, which requires intentionally or knowingly causing great bodily harm, the applicant was convicted of a crime involving moral turpitude. Additionally, the AAO notes that the applicant caused bodily injury to the uniformed officer who attempted to stop him. Therefore, the applicant is inadmissible to the United States under 212(a)(2)(A)(i)(I) of the Act.

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

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

(1) (A) in the case of any immigrant it is established to the satisfaction of the [Secretary] that -

- (i) ...the 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 [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...

The applicant is seeking a section 212(h) waiver of the bar to admission resulting from a violation of section 212(a)(2)(A)(i)(I) of the Act. A waiver under section 212(h) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent or child of the applicant. Hardship the alien himself experiences upon removal is irrelevant to section 212(h) waiver proceedings; the only relevant hardship in the present case is hardship suffered by the applicant's lawful permanent resident mother. Once extreme hardship is 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 AAO notes that the record contains several references to the hardship that the applicant's lawful permanent resident sister would suffer if the applicant were denied admission into the United States. Section 212(a)(2)(A) of the Act provides that a waiver, under section 212(h) of the Act, is applicable solely where the applicant establishes extreme hardship to his citizen or lawfully resident spouse, parent, or child. In the present case, the applicant's mother is the only qualifying relative, and hardship to the applicant's sister will not be considered, except as it may cause hardship to the applicant's mother.

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999), the BIA provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 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.

Counsel states that:

[t]he basis for the [Acting District Director's] denial was the conviction by the applicant for aggravated assault toward a law enforcement officer. That event was more akin to an accident than to a crime. The applicant was arrested for an accident in which a police officer was hit when the [applicant] failed to stop his motorcycle in time. That collision was really an accident and not intentional.

Attachment to Form I-290B, supra.

Counsel's assertions are unpersuasive. "[C]ollateral attacks upon an [applicant's] conviction do not operate to negate the finality of his conviction unless and until the conviction is overturned." *Matter of Madrigal-Calvo*, 21 I&N Dec. 323, 327 (BIA 1996) (citations omitted). In *Matter of Khalik*, 17 I&N Dec. 518, 519 (BIA 1980), the BIA held that the Service cannot go behind the judicial record to determine the guilt or innocence of an alien for a criminal offense. A record of conviction constitutes a conviction for immigration purposes. The applicant can only appeal such a conviction within the court system. On October 16, 1997, a judge in the Broward County Circuit Court found the applicant guilty of aggravated battery on a law enforcement officer, aggravated assault on a law enforcement officer, leaving the scene of an accident, and operating a vehicle against license restrictions, and the applicant was sentenced to five (5) years probation and court costs and fines. Therefore, the applicant is clearly inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

Counsel asserts that the applicant's mother would face extreme hardship if the applicant is removed from the United States. *Attachment to Form I-290B, supra.* The applicant's mother states she has "required medical treatment and psychological attention as a result of the stress, depression and anxiety that [she] now [has] on [a] daily basis as a result of [the applicant's] situation. [She has] been clinically diagnosed with mayor [sic] depression as a result of the present problems [the applicant] is undergoing." *Affidavit from* [REDACTED] dated February 21, 2000. A psychiatrist at the [REDACTED] diagnosed

the applicant's mother with Major Depression. *See letter from [REDACTED]*, dated February 4, 2000. The AAO notes that other than the letter from [REDACTED] and various receipts for prescriptions, there is nothing for the AAO to review to determine if the depression suffered by the applicant's mother is beyond that experienced by others in the same situation. The applicant's mother states that she is dependent on the applicant for financial support. *See affidavit from [REDACTED]* dated October 29, 2003. The AAO notes that the applicant's mother made no claim that she could not join the applicant in Nicaragua, and it has not been established that she has no transferable skills that would aid her in obtaining a job in Nicaragua. Additionally, the AAO notes that the applicant's mother is a native of Nicaragua, she speaks Spanish, and it has not been established that she has no family ties in Nicaragua. The AAO finds that the applicant failed to establish that his mother would suffer extreme hardship if she accompanies him to Nicaragua.

In addition, the applicant does not establish extreme hardship to his mother if she remains in the United States. As a lawful permanent resident of the United States, the applicant's mother is not required to reside outside of the United States as a result of denial of the applicant's waiver request. The applicant's mother states that she is completely financially dependent on the applicant for food expenses and medications. *See affidavit from [REDACTED]* dated October 29, 2003. Counsel states that "the applicant's mother is incapable of supporting herself has [sic] a result of her severe clinical depression and must rely on the applicant, her son for not only economic support but emotional support daily care, coordination of medical appointments and treatment and daily assistance." *Attachment to Form I-290B, supra*. The AAO notes that both of the applicant's sisters reside in Miami, and it has not been established that the applicant's mother will be unable to receive any physical or financial help or that this particular hardship is atypical of individuals separated as a consequence of removal or inadmissibility. Additionally, the AAO notes that the record fails to demonstrate that the applicant will be unable to contribute to his mother's financial wellbeing from a location outside of the United States. Moreover, the United States Supreme Court has held that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship. *INS v. Jong Ha Wang*, 450 U.S. 139 (1981).

United States 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, in *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), the Board 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. In *Hassan, supra*, the Ninth Circuit Court of Appeals 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 recognizes that the applicant's lawful permanent resident mother will endure hardship as a result of separation from the applicant. However, her situation if she remains in the United States is typical to individuals separated as a result of removal and does not rise to the level of extreme hardship.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's mother caused by the applicant's inadmissibility to the United States. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(2)(A) 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.