



U.S. Citizenship  
and Immigration  
Services

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FILE:

Office: SANTA ANA

Date:

DEC 03 2009

IN RE:

Applicant:

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:

INSTRUCTIONS:

This is a **NOTICE OF INTENT TO DISMISS** the appeal. You are afforded sixty (60) days to respond to this notice to the address shown above. If you choose not to respond, the Administrative Appeals Office will dismiss your case for the reasons stated herein.

*Michael Shumway*

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Field Office Director, Santa Ana, California, and is now before the Administrative Appeals Office (AAO) on appeal.

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 committed crimes involving moral turpitude. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with his U.S. citizen spouse and U.S. citizen children.

The director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on his qualifying relatives, his U.S. citizen wife and children, and denied the Application for Waiver of Ground of Excludability (Form I-601) accordingly.

On appeal, counsel asserts that the applicant's conviction for domestic battery in violation of Cal. Penal Code §§ 242 and 243(e) is not a crime involving moral turpitude. Counsel states that the applicant's conviction for theft of property does not, alone, support the need for a waiver. Counsel requests that the director grant the applicant adjustment of status.

In support of the application, the record contains, but is not limited to, an attestation from the applicant's spouse, financial documentation, photographs, court dispositions, the applicant's marriage certificate, the applicant's children's birth certificates, and the applicant's wife's naturalization certificate. The entire record was reviewed and considered in arriving at a decision on the appeal.

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

(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.

(ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime,

the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

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.)

The record reflects that the applicant was convicted in the Municipal Court of Los Angeles, California on May 1, 2000 of "Violence Used Against Former Spouse" in violation of Cal. Penal Code §§ 242 and 243(e). The applicant was placed on summary probation for a period of 36 months on the condition that he pay various fines, participate in specified community service, and enroll in a batterer's counseling program [REDACTED]

Cal. Penal Code § 242 (West 2000) defines battery as, "any willful and unlawful use of force or violence upon the person of another."

Cal. Penal Code § 243(e) (West 2000) provides:

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. If probation is granted, or the execution or imposition of the sentence is suspended, it shall be a condition thereof that the defendant participate in, for no less than one year, and successfully complete, a batterer's treatment program, as defined in Section 1203.097, or if none is available, another appropriate counseling program designated by the court. However, this provision shall not be construed as requiring a city, a county, or a city and county to provide a new program or higher level of service as contemplated by Section 6 of Article XIII B of the California Constitution.

On appeal, counsel asserts that the applicant's conviction for domestic battery in violation of Cal. Penal Code §§ 242 and 243(e) is not a crime involving moral turpitude. Counsel states that the applicant was convicted of an act similar to the respondent in *In re Sanudo*, 23 I&N Dec. 968 (BIA

2006). Counsel states that the minimal conduct necessary to complete an offense under Cal. Penal Code §§ 242 and 243(e) is simply an intentional touching of another without consent. Counsel notes that one may be convicted of battery in California without using violence and without injuring or even intending to injure the victim. Counsel states that such an offense is in the nature of a simple battery, as traditionally defined, and on its face it does not implicate any aggravating dimension that would lead to the conclusion that it is a crime involving moral turpitude.

In the precedent decision, *In re Sanudo*, 23 I&N Dec. 968 (BIA 2006), the BIA analyzed whether domestic battery in violation of Cal. Penal Code §§ 242 and 243(e) continues a crime involving moral turpitude. First, the BIA assessed the manner in which California courts have applied the “use of force or violence” clause of Cal. Penal Code § 242. The BIA noted that courts have held that “the force used need not be violent or severe and need not cause pain or bodily harm.” *Id.* at 969 (citing *Gunnell v. Metrocolor Labs., Inc.*, 112 Cal. Rptr. 2d 195, 206 (Cal. Ct. App. 2001)). Second, the BIA assessed the situations in which assault and battery offenses may be classified as crimes involving moral turpitude. The BIA noted that those offenses include assault and battery coupled with aggravating factors such as the use of deadly weapon, the intentional infliction of serious bodily injury, and bodily harm upon individuals deserving of special protection such as a child, domestic partner, or a peace officer. 23 I&N Dec. at 971-72. The BIA also held that “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,” and, therefore, a conviction for domestic battery does not qualify categorically as a crime involving moral turpitude. *Id.* at 972-73. The BIA further held that under the modified categorical analysis, the admissible portion of the respondent’s conviction record failed to reflect that “his battery was injurious to the victim or that it involved anything more than the minimal nonviolent ‘touching’ necessary to constitute the offense.” *Id.*

The Ninth Circuit Court of Appeals addressed whether Cal. Penal Code §§ 242 and 243(e) constitutes a crime involving moral turpitude in the case *Galeana-Mendoza v. Gonzalez*, 465 F.3d 1054 (9th Cir. 2006). The Ninth Circuit noted agreement with the BIA’s decision in *In re Sanudo*. 465 F.3d at 1062. The court followed the “categorical” and “modified categorical” approach, as then defined, to determine whether the conviction was a crime involving moral turpitude. The Ninth Circuit theorized that, “throwing a cup of cola on the lap of someone to whom one is or had been engaged, slighting shoving a cohabitant, or poking the parent of one’s children rudely with the end of a pencil are all ‘offensive touching[s]’ of qualifying individuals and can constitute domestic battery under section 243(e).” *Id.* at 1061. The Ninth Circuit determined that since the full range of conduct proscribed by the statute at hand did not categorically involve moral turpitude, the court would conduct a modified categorical analysis and look “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 the applicant was convicted of a crime involving moral turpitude.” *Id.* at 1057-1058 (citations omitted).

Since its opinion in *Galeana-Mendoza*, the Ninth Circuit has adopted the “realistic probability” approach, as articulated by the U.S. Supreme Court in *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183 (2007), to determine whether or not the elements of a statute categorically render the offense a crime involving moral turpitude. See *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 1004-1007 (9th Cir. 2008). In defining this approach, the U.S. Supreme Court explained:

[T]o find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime. To show that realistic possibility, an offender, of course, may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.

*Duenas-Alvarez*, 549 U.S. at 193.

*Duenas-Alvarez* did not involve the determination of whether the alien was convicted of a crime involving moral turpitude, but rather, whether he was convicted of an aggravated felony under section 101(a)(43)(G) of the Act, 8 U.S.C. § 1101(a)(43)(G). As stated above, the Ninth Circuit has applied the “realistic probability” test as part of the categorical analysis for determining if a conviction is a crime of moral turpitude. See *Nicanor-Romero*, 523 F.3d at 1004-1007. Likewise, the Attorney General in *Matter of Silva-Trevino* found that the question presented in *Duenas-Alvarez* is similar to the question of whether a crime constitutes moral turpitude, and adopted the “realistic probability” standard articulated in *Duenas-Alvarez* as an approach for determining inadmissibility under section 212(a)(2)(A)(i)(I) of the Act. See 24 I&N Dec. 687, 698 (A.G. 2008).

The methodology adopted by the Attorney General consists of a three-pronged approach. 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. 24 I&N Dec. at 698 (citing *Duenas-Alvarez*, 549 U.S. at 193). 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.” 24 I&N Dec. at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage or “modified categorical” inquiry in which the adjudicator reviews the “record of conviction” to determine if the conviction was based on conduct involving moral turpitude. 24 I&N Dec. 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. Finally, 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. 24 I&N Dec. at 699-704, 708-709.

The Ninth Circuit Court of Appeals had previously reserved judgment as to whether it would follow the ruling of the Attorney General in *Silva-Trevino* that adjudicators may look beyond the record of conviction as part of the modified categorical inquiry. See *Marmolejo-Campos v. Holder*, 558 F.3d 903, 915 (9th Cir. 2009). However, this question was implicitly addressed in the recent case *Castillo-Cruz v. Holder*, 581 F.3d 1154 (9th Cir. 2009). In *Castillo-Cruz*, the Ninth Circuit addressed whether receipt of stolen property under Cal. Penal Code § 496(a) constitutes a categorical crime involving moral turpitude by applying the “realistic probability” test. 581 F.3d at 1161. The Ninth Circuit concluded that California courts have upheld convictions under Cal. Penal Code § 496(a) in cases where there was no intent to permanently deprive owners of their property, and as such, a conviction under the statute is not categorically a crime of moral turpitude. *Id.* The Court

then held that the respondent's conviction was not a crime involving moral turpitude under the modified categorical analysis because the government conceded that there was no evidence in the record establishing that his offense involved an intent to deprive the owner of possession permanently. *Id.* The court cited to its prior precedent that only the record of conviction may be reviewed as part of the modified categorical inquiry, and apparently reviewed only the record of conviction in making this determination. *Id.* (citing *Fernando-Ruiz v. Gonzalez*, 466 F.3d 1121, 1132-33 (9th Cir. 2006)). The AAO interprets the holding in *Castillo-Cruz* as a refusal by the Ninth Circuit to accept the more expansive review allowed by the Attorney General, and will thus restrict its review in this case to only the record of conviction.

Having established the methodology followed by the Ninth Circuit Court of Appeals in determining whether a conviction is a crime involving moral turpitude, the AAO will now apply the "realistic probability" standard to the instant case. The record reflects that the applicant was convicted on May 1, 2000 of "Violence Used Against Former Spouse" in violation of Cal. Penal Code §§ 242 and 243(e). Although not explicitly applying the "realistic probability" test, the Ninth Circuit in *Galeana-Mendoza* engaged not only in assessing the theoretical possibility but also the realistic probability that Cal. Penal Code § 242 is a categorical crime involving moral turpitude. 465 F.3d 1054. The Ninth Circuit stated that in looking at California court decisions involving Cal. Penal Code § 242, "the phrase 'use of force or violence' . . . is a term of art, requiring neither a force capable of hurting or causing injury nor violence in the usual sense of the term." *Id.* at 1059 (citing *Ortega-Mendez v. Gonzalez*, 450 F.3d 1010, 1016 (9th Cir. 2006)). The Ninth Circuit noted that the domestic relationship factor delineated in Cal. Penal Code § 243(e) is not, alone, sufficient to render every offense under this statute as one that is categorically grave, base, or depraved, and as such, the full range of conduct proscribed by section 243(e) does not involve moral turpitude. 465 F.3d at 1059-60. The Ninth Circuit held that since Cal. Penal Code § 243(e) "lacks an injury requirement and includes no other inherent element evidencing 'grave acts of baseness or depravity,'" it is not categorically a crime involving moral turpitude. *Id.* at 1061. The Ninth Circuit further held that the government failed to carry its burden under the modified categorical approach.<sup>1</sup> *Id.* at 1062.

Since a conviction for domestic violence under Cal. Penal Code §§ 242 and 243(e) is not categorically a crime involving moral turpitude, we apply the modified categorical approach and "consider whether any of a limited, specified set of documents-including the state charging document, a signed plea agreement, jury instructions, guilty pleas, transcripts of a plea proceeding and the judgment (sometimes termed 'documents of conviction')" reflect that the applicant's conviction involved an admission to, or proof of, morally turpitudinous conduct. *Fernando-Ruiz*, 466 F.3d at 1132 (citation omitted). As previously discussed, the BIA in *In re Sanudo* determined that bodily harm upon

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<sup>1</sup> The AAO notes that, unlike a removal hearing in which the government bears the burden of establishing a respondent's removability, the burden of proof in the present proceedings is on the applicant to establish his admissibility for admission to the United States "to the satisfaction of the Attorney General [Secretary of Homeland Security]." See Section 291 of the Act, 8 U.S.C. § 1361. The AAO notes that the burden of proof was also on the alien in *Castillo-Cruz*, as the issue under consideration by the court was his application for cancellation of removal, a form of relief from removal requiring an applicant to demonstrate that he or she is not inadmissible under section 212(a)(2) of the Act and therefore not ineligible for cancellation of removal under sections 240A(b)(1)(C), (d)(1), of the Act, 8 U.S.C. §§ 1229b(b)(1)(C), (d)(1). See 581 F.3d at 1157; see also sections 240(c)(2)(A), (c)(4)(A), of the Act, 8 U.S.C. §§ 1229a(c)(2)(A), (c)(4)(A).

individuals deserving of special protection such as a child, domestic partner, or a peace officer, constitutes morally turpitudinous conduct. 23 I&N Dec. 968, 971-72 (BIA 2006).

In the instant case, counsel has asserted that the conviction record does not reflect that the applicant was convicted under Cal. Penal Code §§ 242 and 243(e) for causing bodily harm to his former spouse. The AAO notes, however, that the applicant has failed to submit the documents comprising the record of conviction. In response to a request by the director for the dispositions of the applicant's convictions, the applicant submitted copies of the court dockets, which contain a procedural record of the criminal proceedings for his two convictions. The docket for the conviction under Cal. Penal Code §§ 242 and 243(e) does not include any record of factual findings made by the court, but it does indicate that a complaint was filed in the court, a copy of the complaint and arrest report were provided to applicant's defense counsel, the applicant pled nolo contendere, and the court found a factual basis for the plea and accepted it. The AAO acknowledges that the director did not specifically request that the applicant submit a copy of the complaint, or any other document that is part of the record of conviction, and that the docket is sufficient evidence of the conviction itself. *See* section 240(c)(3)(B) of the Act, 8 U.S.C. § 1229a(c)(3)(B). Nevertheless, counsel's assertions on appeal demonstrate awareness that the applicant has the burden to demonstrate that he is not inadmissible, and that this is accomplished by showing that the record of conviction fails to reflect that the conviction was based on the applicant inflicting bodily harm on his former spouse.

Although the AAO finds that the Ninth Circuit has restricted review under the modified categorical inquiry to the record of conviction, this restriction does not excuse the applicant from meeting his burden of proof in these proceedings, as that burden is defined in section 291 of the Act. To meet his burden, the applicant must, at a minimum, submit the available documents that comprise the record of conviction and show that these fail to establish that his conviction was based on conduct involving moral turpitude. To the extent such documents are unavailable, this fact must be established pursuant to the requirements in 8 C.F.R. § 103.2(b)(2).

The record shows that a copy of the complaint pursuant to which the applicant was convicted under Cal. Penal Code §§ 242 and 243(e) was provided to the applicant's defense counsel. The applicant has failed to submit a copy of the complaint or explain the reason for this failure. The applicant has not submitted documentation pursuant to 8 C.F.R. § 103.2(b)(2) to explain his failure to submit a copy of the complaint or other existing documents that comprise the record of conviction. The applicant has not even offered an explanation of the facts underlying his conviction to support the assertion that his conviction should not be classified a crime involving moral turpitude. Given the applicant's failure to meet his burden of proof by submitting the documents that comprise the record of conviction, the AAO cannot find that the applicant's conviction under Cal. Penal Code §§ 242 and 243(e) is not a crime involving moral turpitude.

The record further reflects that on December 9, 1997, the applicant was convicted in the Municipal Court of Downey Judicial District, County of Los Angeles, California, of misdemeanor theft of property (petty theft) in violation of section 484(a) of the California Penal Code. The applicant was placed on summary probation for a period of 36 months on the condition that he serves one day in jail and pay a \$540.00 fine (Case No. 7DW10021).

Cal. Penal Code § 484(a) (West 1997) provides:

- (a) Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft. In determining the value of the property obtained, for the purposes of this section, the reasonable and fair market value shall be the test, and in determining the value of services received the contract price shall be the test. If there be no contract price, the reasonable and going wage for the service rendered shall govern. For the purposes of this section, any false or fraudulent representation or pretense made shall be treated as continuing, so as to cover any money, property or service received as a result thereof, and the complaint, information or indictment may charge that the crime was committed on any date during the particular period in question. The hiring of any additional employee or employees without advising each of them of every labor claim due and unpaid and every judgment that the employer has been unable to meet shall be prima facie evidence of intent to defraud.

U.S. Courts have held that the crime of theft or larceny, whether grand or petty, involves moral turpitude. See *Matter of Scarpulla*, 15 I&N Dec. 139, 140 (BIA 1974)(stating, “It is well settled that theft or larceny, whether grand or petty, has always been held to involve moral turpitude . . .”); *Morasch v. INS*, 363 F.2d 30, 31 (9th Cir. 1966)(stating, “Obviously, either petty or grand larceny, i.e., stealing another's property, qualifies [as a crime involving moral turpitude].”) However, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended. *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973).

The Ninth Circuit Court of Appeals addressed the issue of whether Cal. Penal Code § 484(a) constitutes a crime involving moral turpitude in *Castillo-Cruz*. See 581 F.3d at 1157. The Ninth Circuit reviewed lower court case law on convictions under Cal. Penal Code § 484(a), and determined that a conviction for theft (grand or petty) under the California Penal Code requires the specific intent to deprive the victim of his or her property permanently. *Id.* at 1160 (citations omitted). The Ninth Circuit cited to the Second District Court of Appeal’s opinion in *People v. Albert*, which held that the act of robbery, defined by the court as “larceny aggravated by use of force or fear,” requires an intended permanent taking. *Id.* (citing 47 Cal.App.4th 1004, 1007 (1996)). The Second District Court of Appeal emphasized that absent this specific intent, the taking of the property of another is not theft. 47 Cal.App.4th at 1008.

In the instant case, the copy of the court docket submitted by the applicant does not reflect whether the applicant was convicted under Cal. Penal Code § 484(a) for intending to deprive the owner of his or her property permanently or temporarily. Pursuant to the “realistic probability” test, the applicant

has not demonstrated that a case exists in which Cal. Penal Code § 484(a) has been applied to conduct that did not involve moral turpitude (i.e. a temporary taking). The AAO can therefore conclude that a conviction under Cal. Penal Code § 484(a) is categorically a crime involving moral turpitude.

Although the “petty offense” exception found in section 212(a)(2)(A)(ii)(II) of the Act would apply to the applicant’s theft conviction if it were his only conviction for a crime involving moral turpitude, the applicant has failed to demonstrate that he has only one conviction for a crime involving moral turpitude. Consequently, the AAO finds that the applicant has failed to show that he is not inadmissible under section 212(a)(2)(A)(i) of the Act.

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), (B), . . . 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 . . . .

The AAO notes that section 212(h) of the Act provides that a waiver of inadmissibility is dependent first upon a showing that the bar to admission imposes an extreme hardship on a qualifying family member. Hardship to the applicant himself is not relevant under the statute and will be considered only insofar as it results in hardship to a qualifying relative. If extreme hardship is established, the Secretary then assesses whether an exercise of discretion is warranted.

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. The BIA added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not an exclusive list. *See id.*

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).

The AAO notes that in *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9<sup>th</sup> Cir. 1998), the Ninth Circuit Court of Appeals held that, “the most important single hardship factor may be the separation of the alien from family living in the United States”, and that, “[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion.” (Citations omitted.)

The AAO notes, however, that 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, in *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), the BIA held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), the Court defined “extreme hardship” as hardship that was unusual or beyond that which would normally be expected upon deportation. The Court emphasized that the common results of deportation are insufficient to prove extreme hardship. Moreover, the U.S. Supreme Court held in *INS v. Jong Ha Wang*, 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

An analysis under *Cervantes-Gonzalez* is appropriate. The AAO notes that extreme hardship to a qualifying relative must be established in the event that he or she accompanies the applicant or in the event that he or she remains in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant’s waiver request.

The record reflects that the applicant wed [REDACTED] a native of El Salvador and naturalized U.S. citizen, on April 23, 2001. The applicant and his spouse have a ten-year-old U.S. citizen child, [REDACTED], and a seven-year-old U.S. citizen child, [REDACTED]. The applicant’s spouse and children are qualifying family members for section 212(h) of the Act extreme hardship purposes.

In support of the Form I-601 waiver application, counsel filed a brief detailing the hardship the applicant’s spouse and children would suffer if the waiver is denied. Counsel asserts that the applicant’s spouse’s entire family, including her parents, siblings and children, are U.S. citizens and reside in the United States. Counsel states that if the applicant’s spouse moves with her husband to El Salvador, she will be cut off from her parents and siblings. Counsel states that the applicant’s children will be cut off from their grandparents. Counsel asserts that the applicant’s spouse is a U.S. citizen who has lived most of her life in the United States and she does not have immediate family in El Salvador. Counsel states that the applicant’s children have never visited El Salvador. Counsel states that the applicant’s spouse is no longer familiar with the lifestyle of El Salvador. Counsel states that the applicant’s spouse and children would be isolated in El Salvador. Counsel states that the applicant’s spouse speaks halting Spanish and her children, who were born in the United States, only speak and understand English. Counsel states that the applicant’s children would face a severely substandard education system in El Salvador. Counsel states that the secondary effects from the 1980s civil war in El Salvador are clearly present in the country. Counsel notes that civil rights violations, violence against women and poverty are prevalent in El Salvador.

The AAO observes that counsel has failed to support any of the above assertions with documentation such as affidavits from the applicant’s spouse and family members, evidence of the applicant’s spouse’s family ties in the United States, and country condition reports. Without documentary

evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 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).

The AAO notes, however, that the Secretary of the Department of Homeland Security has extended Temporary Protected Status (TPS) for nationals of El Salvador until September 9, 2010. The Secretary, after consultation with appropriate government agencies, may designate a country for TPS under the following conditions:

There is an ongoing armed conflict within the state and, due to that conflict, return of nationals to that state would pose a serious threat to their personal safety;

The state has suffered an environmental disaster resulting in a substantial, temporary disruption of living conditions, the state is temporarily unable to handle adequately the return of its nationals, and the state has requested TPS designation; or

There exist other extraordinary and temporary conditions in the state that prevent nationals from returning in safety, unless the Secretary finds that permitting nationals of the state to remain temporarily is contrary to the national interest of the United States.

Section 244(b)(1) of the Act, 8 U.S.C. § 1254a(b)(1).

The U.S. Department of State's profile on El Salvador states that the country has suffered a number of catastrophic natural disasters. The profile provides in part:

In 1998, Hurricane Mitch killed 10,000 in the region . . . Major earthquakes in January and February of 2001 took another 1,000 lives and left thousands more homeless and jobless. El Salvador's largest volcano, Santa Ana (also known by its indigenous name Ilamatepec), erupted in October 2005, spewing sulfuric gas, ash, and rock on surrounding communities and coffee plantations, killing two people and permanently displacing 5,000. Also in October 2005, Hurricane Stan unleashed heavy rains that caused flooding throughout El Salvador. In all, the flooding caused 67 deaths and more than 50,000 people were evacuated at some point during the crisis.

U.S. Department of State, *Background Note: El Salvador*, September 2009.

Further, the U.S. Department of State's description of travel conditions in El Salvador warns that the country is considered a "critical crime-threat country" with one of the highest homicide rates in the world. The travel advisory provides in part:

Random and organized violent crime is endemic throughout El Salvador. . . Many Salvadorans are armed, and shootouts are not uncommon. . . Armed holdups of vehicles traveling on El Salvador's roads are increasing, and U.S. citizens have been victims in various incidents. In one robbery, an American family was stopped by gunmen while driving during the day on the Pan American highway in the Santa Ana Department. In another incident, an American citizen passenger was robbed after the van in which she was riding was carjacked by armed men. The van was stopped at a

traffic light on the busy road between Comalapa International Airport and San Salvador shortly after dark. . . .

[V]iolent crimes, as well as petty crimes are prevalent throughout El Salvador, and U.S. citizens have been among the victims. The Embassy is aware of at least five American citizens who were murdered in El Salvador during the last year, and also has confirmed reports of at least two attempted sexual assaults against American citizens. . . . Armed assaults and carjackings take place both in San Salvador and in the interior of the country, but are especially frequent on roads outside the capital where police patrols are scarce. Criminals have been known to follow travelers from the international airport to private residences or secluded stretches of road where they carry out assaults and robberies. Armed robbers are known to shoot if the vehicle does not come to a stop. Criminals often become violent quickly, especially when victims fail to cooperate immediately in surrendering valuables. Frequently, victims who argue with assailants or refuse to give up their valuables are shot.

U.S. Department of State, *Country Specific Information: El Salvador*, March 25, 2009.

The AAO finds that the designation of El Salvador as a “critical crime-threat country” indicates that if the applicant’s spouse and children moved to El Salvador, they would likely suffer hardship in the form of serious threats to their welfare and safety. This hardship is beyond the hardship typically experienced upon relocation to another country, and thus, rises to the level of extreme hardship. It has therefore been established that the applicant’s spouse and children would suffer extreme hardship if the applicant’s waiver is denied and they relocated with him to El Salvador.

Although hardship to the applicant’s wife and children in the event that they accompany the applicant to El Salvador is material for establishing eligibility for a waiver under section 212(h) of the Act, it is not the only factor to be considered. Extreme hardship to the applicant’s wife and children must be established in the event that they accompany the applicant or in the event that they remain in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant’s waiver request.

Counsel asserts that the applicant and the applicant’s spouse use their combined income to pay for their home mortgage and medical and auto insurance policies. Counsel states that if the applicant is deported to El Salvador, the applicant’s wife and children would be plunged into poverty. The record contains a letter from the applicant’s spouse, dated July 13, 2005, which states that the applicant supports his children financially and emotionally. She states that they recently purchased a home to give their children a better life. She states that she would not be able to pay for their house, bills and medical insurance if she is separated from the applicant. She states that she would have no other choice but to go on welfare.

Financial hardship will be considered as a factor contributing to a finding of extreme hardship. However, such hardship must be demonstrated by the record. The AAO finds that counsel has failed to support the assertions of financial hardship in the instant case with documentary evidence. The record contains the applicant’s spouse’s 2004 Form W-2, Wage and Tax Statement, which reflects that she earned \$20,267.61 during that year. The U.S. Department of Health and Human Service’s 2004 federal poverty guidelines reflect that an annual income of less than \$15,670 for a family of

three constitutes poverty, thus allowing for financial eligibility for certain federal program purposes.<sup>2</sup> The applicant's spouse's sole income in 2004 was above the poverty level. The AAO acknowledges that this income may not fully cover the applicant's spouse's expenses. However, the record does not contain documentation of her monthly mortgage payments and other recurrent expenses. The only expense related documentation in the record consists of an auto insurance policy statement. This document does not, alone, demonstrate the financial hardship the applicant's spouse claims she would suffer if she were separated from the applicant. Moreover, the AAO notes that counsel failed to submit updated financial records with the appeal. 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)). While the applicant's spouse's unsupported assertions are relevant and have been considered, they are of little weight in the absence of supporting evidence.

Finally, the applicant's spouse asserts that she cannot put into words the pain and heartbreak that her family would suffer if the applicant was not with them. She states that it is very important for her children to have their father in their lives so that they may grow up to be great citizens. She states that it is extremely important for her to keep her family together.

The AAO acknowledges that the applicant's wife and children will experience emotional hardship if they remain in the United States without the applicant, but the applicant has failed to demonstrate that this hardship, when combined with other hardship factors, will be extreme. The AAO recognizes the significance of family separation as a hardship factor, but concludes that the hardship described by the applicant's spouse, and as demonstrated by the evidence in the record, is the common result of removal or inadmissibility and does not rise to the level of extreme hardship. U.S. court decisions have repeatedly held that the common results of removal or inadmissibility are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). 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 this case, the record does not contain sufficient evidence to show that the hardships faced by the applicant's spouse and children, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship. The AAO therefore finds that the applicant has failed to establish eligibility for a waiver of inadmissibility under section 212(h) of the Act. 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(h) of the Act, the burden of proving eligibility rests with the applicant. *See* section 291 of the Act. Here, the applicant has not met that burden. The applicant has failed to demonstrate that he is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act for his conviction under Cal. Penal Code §§ 242 and 243(e), or that denial of the waiver application will result in extreme hardship to the qualifying relatives.

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<sup>2</sup> <http://aspe.hhs.gov/POVERTY/04poverty.shtml>

Accordingly, the AAO hereby gives the applicant notice of its intent to dismiss the appeal for the reasons provided herein. The applicant is granted sixty (60) days from the date of this notice to respond with evidence showing that he is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act or, alternatively, that he meets the requirements for a waiver of inadmissibility under section 212(h) of the Act. If the applicant does not respond within the allotted time period, the AAO will dismiss the appeal. If the applicant chooses to respond, the response should be submitted to the address shown on the first page of this notice. The applicant's file number, [REDACTED], should be included in the response.