

Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

U.S. Department of Homeland Security  
20 Massachusetts Avenue, NW, Rm. 3000  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

H2

[REDACTED]

FILE:

[REDACTED]

Office: LOS ANGELES, CA

Date:

**JAN 06 2009**

IN RE:

[REDACTED]

APPLICATION:

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

ON BEHALF OF APPLICANT:

[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 Director, Los Angeles District Office. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed, and the application will be denied.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. The applicant seeks a waiver of his ground of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h).

The director determined that the applicant had failed to establish a qualifying family member would suffer extreme hardship if the applicant were denied admission to the United States. The applicant's Form I-601, Application for Waiver of Ground of Excludability (now referred to as Inadmissibility), was denied accordingly.

On appeal, counsel for the applicant submits a brief, dated December 2, 2008. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(2)(A) of the Act provides 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.

Crimes involving moral turpitude are generally defined as an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man. *See Jordan v. De George*, 341 U.S. 223, 71 S.Ct. 703 (1951); *Matter of Serna* 20 I&N Dec. 579, 581 (BIA 1992). It is the “inherent nature of the crime as defined by statute and interpreted by the courts and as limited and described by the record of conviction” and not the facts and circumstances of the particular person’s case that determines whether the offense involves moral turpitude. *See, e.g., Matter of Short*, 20 I&N Dec. 136, 137 (BIA 1989); *Omagah v. Ashcroft*, 288 F.3d 254, 260 (5<sup>th</sup> Cir. 2002); *Goldshtein v. INS*, 8 F.3d 645 (9<sup>th</sup> Cir. 1993). Neither the seriousness of the 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). Although evil intent signifies a crime involving moral turpitude, willfulness in the commission of the crime does not, by itself, suggest that it involves moral turpitude. *Goldshtein v. INS, supra*. Under the statute, evil intent must be explicit or implicit given the nature of the crime. *Gonzalez-Alvarado, v. INS*, 39 F.3d 245, 246 (9<sup>th</sup> Cir. 1994).

The record reflects that on January 20, 1999, the applicant was convicted of the offense *Battery on Spouse, Cohabitant or Former Spouse or Non-Cohabitant* in violation of section 243(e) of the California Penal Code and sentenced to a period of formal probation for three years (Superior Court of

California County of Monterey Case No. [REDACTED]. On May 30, 2000, the applicant was convicted of the offense *Infliction of Corporal Injury on Spouse* in violation of section 273.5(a) of the California Penal Code and sentenced to a period of summary probation for three years (Municipal Court of Long Beach Judicial District Case No. [REDACTED]). The sentence of probation is a restraint on the applicant's liberty and, therefore, constitutes a conviction pursuant to section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A).

Section 243(e) of the California Penal Code provides, in pertinent part:

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, fiance, 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 . . . .

On appeal, counsel asserts that the Ninth Circuit Court of Appeals issued a precedent controlling decision in *Galeana-Mendoza v. Gonzalez*, 465 F.3d 1054 (2006), and held that a violation of California Penal Code section 243(e) is not a crime involving moral turpitude. Counsel contends that the applicant is, therefore, not inadmissible on this basis.

In *Galeana-Mendoza v. Gonzalez*, the Ninth Circuit Court of Appeals held that because California Penal Code section 243(e) lacks an injury requirement and includes no other inherent element evidencing 'grave acts of baseness or depravity,' it does not qualify as a crime categorically involving moral turpitude. 465 F.3d 1054, 1061. The court further held that the government failed to carry its burden under the modified categorical approach.<sup>1</sup> *Id.* at 1062.

Since the full range of conduct proscribed by the statute at hand does not constitute a crime involving moral turpitude, we apply the modified categorical approach 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." *Galeana-Mendoza v. Gonzalez*, 465 F.3d 1057-1058 (citations omitted). The applicant furnished a court certified copy of the *record of case events* related to his conviction under section 243(e) of the California Penal Code. The court record does not specify the type of battery the applicant engaged in against his girlfriend (now his spouse). Given that the court record fails to show that the

---

<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. See Section 291 of the Act, 8 U.S.C. § 1361.

applicant engaged in the type of battery that would constitute a crime involving moral turpitude, the AAO finds that his conviction under section 243(e) of the California Penal Code does not render him inadmissible to the United States.

As stated, the applicant was also convicted on May 30, 2000 of the offense *Infliction of Corporal Injury on Spouse* in violation of section 273.5(a) of the California Penal Code. Section 273.5(a) of the California Penal Code provides:

Any person who willfully inflicts upon a person who is his or her spouse, former spouse, cohabitant, former cohabitant, or the mother or father of his or her child, corporal injury resulting in a traumatic condition, is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not more than one year, or by a fine of up to six thousand dollars (\$6,000) or by both that fine and imprisonment.

The Ninth Circuit Court of Appeals has held that a conviction under section 273.5(a) of the California Penal Code constitutes a conviction for a crime involving moral turpitude. In *Grageda v. INS*, the court held, “because spousal abuse is an act of baseness or depravity contrary to accepted moral standards, and willfulness is one of its elements . . . spousal abuse under section 273.5(a) is a crime of moral turpitude.” 12 F.3d 919, 922 (9th Cir. 1993); *See Guerrero de Nodahl v. INS*, 407 F.2d 1405, 1406-07 (9th Cir. 1969) (stating, “we rule that inflicting ‘cruel or inhuman corporal punishment or injury’ upon a child is so offensive to American ethics that the fact that it was done purposely or willingly (the California definition of ‘willful’) ends debate on whether moral turpitude was involved. When the crime is this heinous, willful conduct and moral turpitude are synonymous terms.”).

On appeal, counsel affirms that the applicant’s conviction under section 273.5(a) of the California Penal Code is for a crime involving moral turpitude, but contends that this conviction falls within the “petty offense” exception. Counsel notes that a conviction is considered a petty offense where the maximum penalty possible for the crime of which the alien was convicted did not exceed imprisonment for one year and the alien was not sentenced to a term of imprisonment in excess of six months. Counsel states that since the maximum penalty for a misdemeanor conviction of California Penal Code section 273.5(a) was imprisonment in county jail for not more than one year and the applicant was sentenced to seven days in jail, the conviction clearly falls within the “petty offense” exception.

The “petty offense” exception counsel has referred to is under section 212(a)(2)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(2)(A)(ii), which provides, in pertinent part:

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

(II) the maximum penalty possible for the crime of which the alien was convicted . . . did not exceed imprisonment for one year and . . . 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.)

According to section 273.5(a) of the California Penal Code, a person convicted under the statute is “guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not more than one year, or by a fine of up to six thousand dollars (\$6,000) or by both that fine and imprisonment.” Because the offense can result in a range of punishments, it is referred to as a “wobbler” statute, providing for either a misdemeanor or a felony conviction. *Garcia-Lopez v. Ashcroft*, 334 F.3d 840, 844 (9th Cir. 2003). Whether a “wobbler” is determined to be a misdemeanor or a felony is controlled by California Penal Code § 17(b), which sets out the range of judgments by which an offense is categorized “for all purposes” subsequent to judgment. *Id.*

Section 17(b) of the California Penal Code provides, in pertinent part:

When a crime is punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances:

(3) When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor.

The court certified record in the present case reflects that on April 20, 2000, the applicant was charged with a misdemeanor offense under section 273.5(a) of the California Penal Code. The court found the applicant guilty of this offense and granted the applicant summary probation without the imposition of a sentence.<sup>2</sup> Pursuant to section 17(b)(3) of the California Penal Code, this conviction constitutes a misdemeanor. *See People v. Vessell*, 36 Cal. App. 4<sup>th</sup> 285 (1995) (Holding that the respondent was not convicted of a felony under section 273.5(a) of the California Penal Code when the trial court reduced the charge to a misdemeanor.) Because the penalty for the offense did not exceed imprisonment for one year, and because the applicant received an actual sentence of less than six months, he qualifies for the petty offense exception to inadmissibility. Therefore, the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act on this basis.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO’s de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). Beyond the decision of the director, the AAO finds under its de novo review that the

---

<sup>2</sup> A grant of informal or summary probation is a “conditional sentence” pursuant to section 1203(a) of the California Penal Code, which is authorized only in misdemeanor cases. *See People v. Glee*, 82 Cal. App. 4<sup>th</sup> 99, 104 (2000).

applicant is inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for willfully misrepresenting a material fact to procure a benefit under the Act.

Section 212(a)(6)(C) of the Act provides, in pertinent part:

- (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

On March 5, 2002, the applicant filed a Form I-485, Application to Adjust Status (adjustment application), concurrently with his U.S. citizen spouse's Form I-130, Petition for Alien Relative. The applicant signed his adjustment application under penalty of perjury, certifying that the application and the evidence submitted with it are true and correct. On the adjustment application, the applicant listed his country of birth as Mexico. The applicant filed with his adjustment application, a signed Form G-325, Biographic Information, where he listed his country of birth and nationality as Mexico. As proof of his identity and nationality, the applicant furnished his birth certificate showing that his place of birth as Ahuatlan, Jalisco, Mexico. Furthermore, the applicant indicated on his waiver application that his country of birth is Mexico. The applicant, therefore, has presented himself for purposes of adjustment of status as a citizen and national of Mexico.

This information is materially inconsistent with additional documentation in the applicant's record. The record reflects that on January 29, 1996, the applicant submitted a Form I-589, Request for Asylum (asylum application), to the former Immigration and Naturalization Service. The applicant signed this application under penalty of perjury, declaring that the information contained in the application and the accompanying documents are true and correct to this best of his knowledge and belief. On the application, the applicant presented a claim for asylum based on his purported nationality as a citizen of El Salvador who entered the United States in March 1989. The applicant filed with his asylum application a signed Form G-325A, Biographic Information, where he listed his purported country of birth and nationality as El Salvador.

The applicant noted on his asylum application that he was an "I-589 Applicant Asylum (A.B.C.)." The term "ABC" refers to Guatemalan and Salvadoran class members of the ABC settlement agreement reached in *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991).

The *American Baptist Churches v. Thornburgh* (ABC) Settlement Agreement notice posted on the U.S. Citizenship and Immigration Services (USCIS) website in pertinent part provides:

The ABC settlement agreement provides that an eligible class member who registers for benefits and applies for asylum by the agreed-upon dates is entitled to an initial or de novo asylum interview and adjudication under the asylum regulations published July 27, 1990, which became effective October 1, 1990, and special provisions of the settlement agreement. The settlement agreement also contains special provisions regarding employment authorization and detention of eligible class members.

No eligible class member may be deported (or removed) until he or she has had an opportunity to obtain the benefits of the Settlement Agreement.

The ABC settlement Agreement restricts USCIS's detention authority over eligible class members.

Class members who are eligible for ABC benefits and who apply for asylum and employment authorization are entitled to employment authorization without regard to the "non-frivolous" standard that was required under the 1990 regulations.

Class members are defined solely by nationality and entry date. ABC class members are defined as: All Salvadorans physically present in the United States on or before September 19, 1990, and All Guatemalans physically present in the United States on or before October 1, 1990.

To be eligible for ABC benefits, a class member must have applied for asylum within a specified period of time. . . . Salvadorans: The class member must have applied for asylum on or before January 31, 1996 . . . [The INS (now USCIS) then extended a grace period to February 16, 1996 for processing purposes] . . . .

USCIS records show that the applicant filed a Form I-765, Application for Employment Authorization, pursuant to 8 C.F.R. § 274a.12(c)(8), as an alien who has filed a complete application for asylum. The applicant was granted employment authorization based on his status as an asylum applicant, and renewed his request for employment authorization on at least three occasions.

The applicant's willful misrepresentations on his asylum application, in order to procure employment authorization and the aforementioned special protections from the ABC settlement agreement, renders him inadmissible under section 212(a)(6)(C)(i) of the Act.

Section 212(i) of the Act provides:

- (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

Section 212(i) 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, the alien's U.S. citizen or lawful permanent resident spouse or parent. Hardship the alien himself experiences

upon refusal of admission is irrelevant to section 212(i) of the Act waiver proceedings. 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 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 United States 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.

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 Ninth Circuit Court of Appeals has stated, “the most important single hardship factor may be the separation of the alien from family living in the United States,” and also, “[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.” *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted); *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to BIA) (“We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.”) (citations omitted). Separation of family will therefore be given appropriate weight in the assessment of hardship factors in the present case.

The record reflects that the applicant married [REDACTED], a U.S. Citizen, on June 6, 2001. The applicant’s wife is a qualifying family member for section 212(i) of the Act extreme hardship purposes.

Extreme hardship to the applicant’s wife must be established in the event that she accompanies the applicant to Mexico or in the event that 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. In the present case, the applicant has not provided any documentation to establish that his wife would suffer extreme hardship in either of these situations.

The only supporting documentation in this case is a statement from the applicant, which provides:

I am presently married to a United States citizen. I can honestly say that she loves me. It is true I was once arrested for domestic violence. I have great deal of remorse and I apologize profusely. I would like to point out that was my only trouble with the law in fourteen years of living in the United States.

My wife has two children from a previous marriage. I love them greatly. I help support them. They are very young. I hope when they grow older I [sic] love me.

I repeat I am very sorry again for having committed domestic violence. I absolutely promise never to do such a thing again. I successfully completed my probation. My wife has forgiven me. If this waiver is not approved, she and her children would have to suffer more.

I now love this country greatly. My dream is to become an [sic] United States citizen one day. I beseech you to allow me to stay in this great country.

The applicant's statement fails to provide any information on the hardship his wife would suffer if he were denied admission to the United States. Additionally, the applicant failed to provide any other documentary evidence with his waiver application. 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 AAO therefore finds that the applicant failed to establish extreme hardship to his United States citizen spouse as required under section 212(i) 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(i) 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. The application is denied.