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

**U.S. Citizenship
and Immigration
Services**

H2

FILE:

Office:

MIAMI, FL

Date:

MAY 04 2009

IN RE:

APPLICATION:

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

ON BEHALF OF APPLICANT:

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, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

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

The applicant, a native and citizen of Canada, 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 crimes involving moral turpitude. The record indicates that the applicant's mother and father are lawful permanent residents. The applicant seeks a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside with his family in the United States.

The district director based her finding of inadmissibility on the applicant's convictions on March 9, 2006 in Broward County, Florida for Battery on a Law Enforcement Officer and Resisting/Obstructing an Officer with Violence. *District Director's Decision*, dated November 13, 2006. The district director found that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Id.*

On appeal, counsel asserts that the former attorney for the applicant did not submit evidence of the applicant's arrest in 2006 for Driving Under the Influence because the case was still ongoing and no final disposition had been issued. *Notice of Appeal (Form I-290B)*, dated December 12, 2006. Counsel states that United States Citizenship and Immigration Services (USCIS) places too much negative emphasis on this arrest, as there has been no evidence of guilt yet established. Counsel states further that USCIS argues that the applicant failed to establish extreme hardship to his parents as a result of his removal even though evidence was submitted to establish extreme hardship. Finally, counsel states that he is renewing his arguments before the AAO and will submit his legal arguments with his brief in thirty days. *Id.*

The AAO notes that it has been more than thirty days since the submission of the applicant's appeal and no brief and/or additional documentation has been submitted. Thus, the current record is considered complete.

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.)

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." 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. 24 I&N Dec. 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 indicates that on March 9, 2006 the applicant was convicted in the Seventeenth Judicial Circuit Court, Broward County, Florida, of Battery on a Law Enforcement Officer in violation of section 784.07 and Resisting an Officer with Violence in violation of section 843.01/Resisting an Officer without Violence in violation of section 843.02 of the Florida Statutes.¹ For these convictions the applicant was sentenced to two years probation.

The record also indicates that on August 15, 2006 the applicant was arrested for driving while intoxicated, careless driving, operating a vehicle with a headset on, not having insurance and failing to display vehicle registration. At the time of filing these charges had not been resolved.

At the time of the applicant's conviction, Florida Statutes § 843.01 provided, in pertinent part, that "[w]hoever knowingly and willfully resists, obstructs, or opposes any officer . . . by offering or doing violence to the person of such officer . . . is guilty of a felony of the third degree"

¹ The AAO notes that the record is not consistent as to whether the applicant was convicted under section 843.01, Resisting with Violence, or 843.02, Resisting without Violence of the Florida Statutes. The Complaint, dated July 25, 2007 states, as Count II, that the applicant's actions were contrary to section 843.02 of the Florida Statutes, Resisting without Violence. The Court Disposition, dated March 9, 2006 states that the applicant was convicted under Count II for Resisting Officer with Violence, but does not cite a statute number.

Florida Statutes § 843.02 provided, in pertinent part, that, “[w]hoever shall resist, obstruct, or oppose any officer ... without offering or doing violence to the person of the officer, shall be guilty of a misdemeanor of the first degree....”

Finally, Florida Statutes § 784.07 is violated by “knowingly committing . . . battery upon a law enforcement officer.” Section 784.03 of the Florida Statutes provided, in pertinent part:

(1)(a) The offense of battery occurs when a person:

1. Actually and intentionally touches or strikes another person against the will of the other; or
2. Intentionally causes bodily harm to another person.

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 the phrase “knowingly and willfully resists, obstructs, or opposes any officer” in Florida Statutes § 843.01 imposes a requirement that a defendant have knowledge of the officer’s status as a law enforcement officer. *See Polite v. State of Florida*, 973 So.2d 1107, 1112 (Fla. 2007). The Florida Supreme Court has also 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).

However, the AAO notes that Florida Statutes § 843.01 is violated by either “offering” to do violence, or by “doing” violence, and there is no requirement that the victim suffer bodily injury. Similarly, Florida Statutes § 784.07 is violated by either intentionally touching or striking an officer against his will or by intentionally causing bodily harm to an officer. In contrast, Florida Statutes § 843.02 is violated without offering or doing violence to the person of the officer. Thus, based solely on the statutory language, it is clear that Florida Statutes §843.02 does not encompass conduct that involves moral turpitude, but it appears that sections 843.01 and 784.07

(hypothetically) encompass conduct that involves moral turpitude and conduct that does not involve moral turpitude.

However, in accordance with *Silva-Trevino*, the AAO must determine if an actual case exists in which sections 843.01 and 784.07 of the Florida Statutes were applied to conduct that did not involve moral turpitude. The AAO is aware of a prior case in which Florida Statutes § 843.01 has been applied to conduct not involving moral turpitude. In *Wright v. State*, 681 So.2d 852, 853-54 (Fla. 5th Dist. App. 1996), the court found that the state was not required to prove that the appellant, who had denied under oath that he had hit, kicked or otherwise resisted the officers apprehending him, had actually struck either of the officers because evidence that he “struggled, kicked, and flailed his arms and legs was sufficient to show that he offered to do violence to the officers within the meaning of section 843.01.” Similarly, in *Hendricks v. State*, 444 So.2d 542, 542-43 (Fla. 1st Dist. App. 1999), the court noted that the appellant had been charged and convicted of battery in the form of touching or striking a law enforcement officer, but not for intentionally causing bodily harm to an officer.

Therefore, the AAO cannot find that the offenses described in Florida Statutes § 843.01 and § 784.07 are categorically crimes involving moral turpitude. The AAO must therefore review the entire record, including the record of conviction and, if necessary, other relevant evidence, to determine if the applicant’s conviction under these statutes involve crimes of moral turpitude. The AAO notes that the documents comprising the record of conviction are inconclusive as to whether the applicant caused bodily injury to the officer who arrested him. However, in the arrest report, dated July 4, 2005, [REDACTED], states that:

This officer ([REDACTED]), in full police uniform, identified myself as a Fort Lauderdale Police Officer and grabbed the subject (the applicant) to leave the bar, where he (the applicant) had been involved in a physical altercation.

The subject then turned toward a security guard at the bar and swung his right hand with a closed fist and struck the security guard in the left jaw area. This officer then grabbed the subject and pulled him towards me, ordering him to stop fighting.

The subject then swung his left hand with a closed fist, striking this officer in the mouth area, causing a swollen upper lip and a small laceration on the inside of the mouth.

The subject then began swinging wildly striking this officer in the side of the head, upper chest, and arms. This officer countered with several right hand closed fist punches to the subjects face. The subject continued the fight, punching this officer and this officer punched the subject several more times in the face area until he went unconscious...

The subject was immediately carried outside where emergency medical services were summoned. The subject was transported to Broward General Hospital where he was treated for his injuries.

The arrest report indicates that the applicant did cause bodily injury to [REDACTED]. Based on this evidence, and the lack of any contradictory evidence in the record, the AAO determines that the applicant's conviction for battery on a law enforcement officer in violation of Florida Statutes § 784.07 was based on conduct that caused bodily injury to a law enforcement officer and is a crime involving moral turpitude that renders the applicant inadmissible under 212(a)(2)(A)(i)(I) of the Act. In addition, if the applicant was convicted under Florida Statutes § 843.01 for resisting a law enforcement officer with violence, this conviction would also be based on conduct that caused bodily injury to a law enforcement officer and would be considered a crime involving moral turpitude that renders the applicant inadmissible under 212(a)(2)(A)(i)(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. In this case, the relatives that qualify are the applicant's mother and father. Hardship to the applicant 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 (9th 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). Although the present case did not arise in the Ninth Circuit, separation of family will be given appropriate weight in the assessment of hardship factors.

The AAO notes further, 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 *Matter of Cervantes-Gonzalez* is appropriate. The AAO notes that extreme hardship to a qualifying relative must be established in the event that he and/or she accompanies the applicant to Canada or in the event that he and/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 of hardship in the applicant’s case includes a letter from counsel, an affidavit from the applicant’s parents, letters from doctors, copies of medical prescriptions, and articles on hypertension and hyperlipidemia.

In his statement, counsel cites *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978), and states, “the case law on 212(h) waivers requires the decision maker to balance the adverse factors evidencing an alien’s undesirability as a permanent resident with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country.” *Counsel’s Statement*, dated October 31, 2006. The AAO notes that a balancing of the unfavorable factors in the applicant’s case with the favorable factors in determining if the applicant warrants a favorable exercise of discretion is part of deciding whether a waiver under section 212(h) of the Act is granted. However, as stated above, the first part of the

analysis in adjudicating a section 212(h) waiver requires the applicant to show that his inadmissibility to the United States would cause extreme hardship to his qualifying relative. If extreme hardship is established, only then will the Secretary weigh the favorable and unfavorable factors in the applicant's case, assessing whether an exercise of discretion is warranted.

Counsel states that the applicant has been residing in the United States since 1999, that in addition to his parents, his grandparents and two siblings are lawful permanent residents, and that he only has other family members in India, not in Canada. He states that the applicant's removal from the United States would result in extreme emotional and financial hardship to his parents, who both suffer from serious medical ailments. Counsel states that the applicant is completely financially dependant on his parents and does not have many job skills that he could use to obtain employment in a foreign country. *Id.*

The applicant's father states that the applicant's removal from the United States would cause him and his wife extreme hardship. *Father's Statement*, undated. He states that he currently suffers from hypertension and hyperlipidemia and that the applicant's immigration situation has greatly exacerbated his stress and worry. *Id.* The record includes a letter from a [REDACTED] which states that the applicant's father is under his care for hypertension and hyperlipidemia and is being treated with medication. *Letter from [REDACTED]* undated. The record also includes copies of prescriptions for the applicant's father and articles from the internet stating the definition and risk factors involved in people with hypertension (high blood pressure) and hyperlipidemia (an elevation of fats in the blood stream).

In his statement, the applicant's father also states that his wife suffers from diabetes and hypothyroidism. He states that his son's removal would worsen his wife's condition significantly. *Father's Statement*, undated. The record includes a letter from the applicant's mother's doctor, Dr. [REDACTED], which states that she is being treated for diabetes and hypothyroidism. *Letter from [REDACTED]* undated.

The applicant's father states further that his family is close knit, dine together every night and the removal of the applicant would cause great depression, anxiety and frustration. *Father's Statement*, undated. He states that he currently has nightmares about his son's situation, he cannot function at work, and he has been advised by his doctor to keep his stress level to a minimum because of the adverse effects it would have on his health. The applicant's father also states that he is experiencing hyperventilation, panic attacks and a fear for his own health and safety. He states that he believes these symptoms will only worsen if the applicant is removed from the United States. *Id.* The AAO notes that although the applicant's father submitted documentation regarding the medical ailments suffered by him and his wife, he did not provide evidence to support the mental health problems he is reportedly experiencing.

The applicant's father states that he would fear for his son's safety and well-being in Canada, living alone in a country where he has no family and little possibility of obtaining employment. *Father's Statement*, undated. The applicant's father explains that the only employment his son knows is as a

vendor of cell phones and accessories in the family business and that he is highly dependent on his family for financial support. The applicant's father states that with the applicant in Canada the family would suffer a financial burden that would cause more stress and frustration. *Id.* The AAO notes that no documentation was submitted to support the assertions made regarding conditions in Canada and the applicant's ability to find employment in Canada.

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)). Similarly, without documentary evidence to support a claim, the assertions of counsel will not satisfy an applicant's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Furthermore, counsel did not address the possibility of the applicant's parents relocating to Canada to be with the applicant and if this relocation would result in extreme hardship. Thus, the applicant has not shown that his inadmissibility would result in extreme hardship to his qualifying relative parents.

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.

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 establishing that the application merits approval 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.