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

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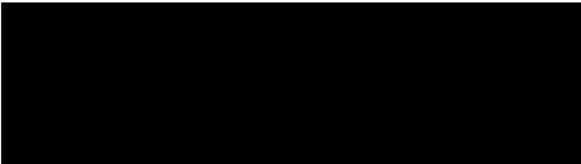
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IN RE: [REDACTED]

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

ON BEHALF OF APPLICANT:



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).

A handwritten signature in black ink that reads "Michael Shumway".

John F. Grissom  
Acting Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Canada 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 a crime 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 step-daughter.

In an undated decision, the district director found the applicant inadmissible for having been convicted of third degree aggravated assault. The district director then concluded that the applicant had failed to establish that his claims were elevated to “the realm of great actual or prospective injury” and denied the waiver application accordingly.

In a Notice of Appeal to the AAO, dated January 4, 2007, counsel states that the applicant’s spouse suffers from a chronic medical condition called Crohn’s disease and that in denying the applicant’s waiver request the district director failed to consider all the evidence in the record regarding the impact the applicant’s departure would have on his spouse’s mental and physical health.

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 shows that the applicant was arrested in Morris County, New Jersey on June 25, 2005. On July 26, 2005, he was convicted of third degree aggravated assault under New Jersey Statute 2C:12-1b(7). The applicant was sentenced to three days imprisonment, two years probation, and 500 hours of community service

At the time of the applicant's conviction, New Jersey Statute 2C:12-1b provided, in pertinent parts:

A person is guilty of aggravated assault if he:

(7) Attempts to cause significant bodily injury to another or causes significant bodily injury purposely or knowingly or, under circumstances manifesting extreme indifference to the value of human life recklessly causes such significant bodily injury;

Aggravated assault ... under subsections b. (2), b. (7), b. (9) and b. (10) is a crime of the third degree...

The BIA has held that a conviction for aggravated assault constitutes a crime involving moral turpitude. *Matter of Chavez-Calderon*, 20 I. & N. Dec. 744 (BIA 1993). The AAO notes that as a general rule, simple assault or battery is not deemed to involve moral turpitude for purposes of the immigration laws, even if the intentional infliction of physical injury is an element of the crime. *Matter of Fualaau*, 21 I&N Dec. 475, 477 (BIA 1996). However, this general rule does not apply where an assault or battery necessarily involved some aggravating dimension. *See, e.g., Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988).

The record also shows that the applicant was convicted on July 13, 2005 in Chatham County, Georgia for Failure to Exercise Due Care. He was made to pay a fine of \$650 and was sentenced to one-year probation.

The AAO finds that the applicant is inadmissible under section 212(a)(2)(A)(i)(I) as a consequence of his conviction for aggravated assault. The applicant has not disputed his inadmissibility on appeal.

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 relative that qualifies is the applicant's spouse. 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 she accompanies the applicant to Canada and 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 a statement dated December 19, 2006, the applicant's spouse states that removing the applicant from the United States would be devastating to her family. She states that she has dealt with chronic pain since she was 15 years old and diagnosed with endometriosis. She states that she has a difficult pregnancy with her daughter and lost one pregnancy after her daughter's birth. She states that at the age of twenty-five she had a hysterectomy and has since had several other surgeries to remove scar tissue caused by the endometriosis. The applicant's spouse states that in June 2004 she was diagnosed with Crohn's disease, a painful gastro-intestinal disease, which causes her severe cramping and diarrhea. She states that she often misses days of work because her symptoms are so bad. She states that the applicant is her source of health insurance and that to switch health insurance she would have to go for at least one year without her treatment for Crohn's disease (a pre-existing condition) before being covered by insurance. She also states that she researched COBRA plans and found that it would cost her \$950.00 per month for coverage. The applicant's spouse also states that the thoughts of moving to Canada and having to find other doctors causes her stress as she has been with the same doctor for over five years. She also states that she does not speak French and she can not imagine discussing her health with a language barrier.

The applicant's spouse states further that the applicant's inadmissibility has financial implications. She states that before she met the applicant she was struggling financially, working two jobs, and trying to support her daughter. She states that she had to give up custody of her daughter to her ex-husband because he was more financially stable. The applicant's spouse states that during this time her daughter suffered as her father struggled financially and she had to switch schools several times. The applicant's spouse states that the summer after she and the applicant married her daughter was able to move back home with her and has been doing much better in school and in her social life. She states that her daughter's father lives only twenty minutes away and her daughter visits him frequently. She states that her ex-husband has told her several times that she cannot take their daughter away from Savannah, Georgia. Finally, the applicant's spouse states that she was hoping, with the applicant's help, to return to school to get her degree and that the applicant has been working hard to better himself after the incident for which he was arrested occurred.

In an undated statement, the applicant states that he is the main source of income in his household earning over \$100,000 per year and with his removal his family would lose their income, insurance, and home. He states that as a single mother his spouse was not able to provide for her daughter and will face the same situation if he is removed. The applicant also states that it would be an extreme hardship for his stepdaughter to move in with her father who is now financially struggling with children of his own and for his spouse to move to Quebec where she does not speak the language.

The AAO notes that the record also includes a letter from the applicant's spouse's doctor and her employer. In a letter dated December 18, 2006, the applicant's spouse's doctor, [REDACTED] states that the applicant's spouse has been a longstanding patient and that she has several chronic medical problems that are followed closely. [REDACTED] also states that undue stress or tension is an exacerbating factor in the applicant's spouse's medical conditions, that if these problems flare up she will be forced to miss work, and that her husband is her only other source of income.

In a letter dated December 29, 2006, the applicant's spouse's employer states that if the applicant's spouse were forced to relocate it would be difficult to find a replacement with her skills and knowledge of the industry.

The AAO notes that the current record lacks the documentation to substantiate the claims of hardship made by the applicant and his spouse and thus does not support a finding of extreme hardship. For example, the applicant and his spouse claim that the applicant's spouse is covered under the applicant's health insurance and would be unable to access affordable health care outside the applicant's plan because of the applicant's spouse's pre-existing condition, but no documentation supporting these claims was submitted. In addition, the applicant and his spouse state that the applicant's inadmissibility would cause financial struggles, but provide no documentation regarding the financial situation of the applicant and/or his spouse. Similarly, the applicant and his spouse state that their daughter's biological father would not allow for her to be taken outside of Savannah, Georgia, but submit no documentation from the father to support these statements. Finally, the applicant's spouse states that she cannot relocate to Canada because she does not speak French and does not want to have to see doctors that do not speak English. The AAO notes that no country condition information was submitted to support these claims. Moreover, the AAO notes that Canada is a bilingual country where many people speak both English and French.

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).

Thus, the AAO 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.