

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy  
**PUBLIC COPY**

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



U.S. Citizenship  
and Immigration  
Services

H<sub>2</sub>



FILE: [REDACTED]

Office: VERMONT SERVICE CENTER Date: **DEC 20 2010**

IN RE: Applicant: [REDACTED]

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

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 by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Service Center Director, Vermont, 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 been convicted of a crime involving moral turpitude; and pursuant to section 212(a)(2)(B) as an alien who was convicted of an aggravated felony. The applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h). The director concluded that even though the applicant had demonstrated extreme hardship to a qualifying relative, his aggravated felony conviction permanently barred him from admission to the United States. The director, consequently, denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) as a matter of discretion.

On appeal, counsel states that on June 12, 2002, the applicant was convicted of battery and false imprisonment in Georgia, and was sentenced to two years in state prison. Counsel avers that the offenses had arisen out of the same scheme of criminal conduct. He indicates that on June 12, 2005, the applicant was removed from the United States as an alien convicted of an aggravated felony in accordance with section 237(a)(2)(A)(iii) of the Act. Counsel states that the director erred as a matter of law in concluding that the applicant is permanently barred from entering the United States as a result of an aggravated felony conviction. Counsel contends that the director ignored the favorable hardship factors in support of the waiver application such as the applicant's family ties. Counsel maintains that the director abused his discretion in denying the Form I-601.

The record reflects that on June 12, 2002, the applicant was convicted of count 4, false imprisonment, for which the court ordered that the applicant serve two years in prison and eight years on probation for his ten-year sentence to confinement. He was also convicted of count 5, battery, and count 2, simple battery, and the court ordered that his sentence of 12-months confinement was to be concurrent with count 4. Furthermore, in Canada, the applicant was convicted of fraud and was sentenced to two years probation on December 7, 1973; on July 9, 1975, he was convicted of public mischief and was sentenced to serve 45 days in jail; on March 7, 1979, he was convicted of theft over \$200 and was ordered to serve 1 day in jail and pay a fine; on June 25, 1979, he was convicted of driving while disqualified and was fined; and on September 4, 1980, he was convicted of driving while disqualified and obstructing a peace officer and was fined for both offenses.

The AAO will first address the director's determination that the applicant is permanently barred from the United States on the basis of having been convicted of battery, an aggravated felony.

Counsel states that *In re Michel*, 21 I&N Dec. 1101 (BIA 1998), establishes that the aggravated felony bar applies to aliens who have previously been admitted to the United States for lawful permanent residence and have been convicted of an aggravated felony. Counsel indicates that because the applicant was never admitted to the United States as a lawful permanent resident, he is not subject to the aggravated felony bar. We agree.

In *Michel*, the Board of Immigration Appeals (Board) found that the amendment to section 212(h) of the Act provides that "the aggravated felony bar to eligibility for relief applies only to an alien who

has previously been admitted to the United States for lawful permanent residence.” Consequently, based on the foregoing discussion of *Michel*, we find that the applicant, who has not been previously admitted to the United States for lawful permanent residence, is not precluded from applying for a waiver pursuant to section 212(h) of the Act.

We will now address whether the applicant is inadmissible for having been convicted of crimes involving moral turpitude.

Section 212(a)(2) 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 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. In evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a “realistic probability, not a theoretical possibility,” that the statute would be applied to reach conduct that does not involve moral turpitude. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability exists where, at the time of the proceeding, an “actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien’s own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude.” *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

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

If review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. *Id.* at 699-704, 708-709. However, this “does not mean that the parties would be free to present any and all evidence bearing on an alien’s conduct leading to the conviction. (citation omitted). The sole purpose of the inquiry is to ascertain the nature of the prior conviction; it is not an invitation to relitigate the conviction itself.” *Id.* at 703.

The applicant was convicted of battery in violation of Ga. Code Ann. § 16-5-23.1. That section provides:

- (a) A person commits the offense of battery when he or she intentionally causes substantial physical harm or visible bodily harm to another.
- (b) As used in this Code section, the term 'visible bodily harm' means bodily harm capable of being perceived by a person other than the victim and may include, but is not limited to, substantially blackened eyes, substantially swollen lips or other facial or body parts, or substantial bruises to body parts.
- (c) Except as provided in subsections (d) through (l) of this Code section, a person who commits the offense of battery is guilty of a misdemeanor.

Georgia has three distinct categories of battery: simple battery, Ga. Code Ann. § 16-5-23 (offensive touching or physical harm); battery, Ga. Code Ann. § 16-5-23.1 (substantial physical harm or visible bodily injury); and aggravated battery, Ga. Code Ann. § 16-5-24 (loss of body member or serious disfigurement).

We are unaware of any published federal court decisions analyzing whether battery under Georgia laws involves moral turpitude. Nonetheless, in *Matter of Solon*, 24 I&N Dec. 239 (BIA 2007), the Board held the offense of third degree assault in violation of section 120.00(1) of the New York Penal Law, which requires both specific intent and physical injury, is a crime involving moral turpitude. Ga. Code Ann. § 16-5-23.1 expressly prohibits a person who “intentionally causes substantial physical harm or visible bodily harm to another.” In accordance with *Solon*, we find that violation of Ga. Code Ann. § 16-5-23.1 categorically involves moral turpitude because the statute has the requisite elements of scienter and physical injury. Thus, the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude

The applicant was also convicted of false imprisonment in violation of Ga. Code Ann. § 16-5-41. That statute reads:

- (a) A person commits the offense of false imprisonment when, in violation of the personal liberty of another, he arrests, confines, or detains such person without legal authority.
- (b) A person convicted of the offense of false imprisonment shall be punished by imprisonment for not less than one nor more than ten years.

In *Shue v. State*, 251 Ga.App. 50, 553 S.E.2d 348 (Ga. App. 2001), false imprisonment in violation of Ga. Code Ann. § 16-5-41 is categorized as a lesser included offense of kidnapping. The Court states that false imprisonment is committed by “an arrest, confinement or detention . . . without legal authority, which violates the person's personal liberty (i.e., against his or her will),” and that kidnapping is committed when a person “abducts or steals away any person without lawful authority or warrant and holds such person against his will.” According to the Court, “[t]he only difference between false imprisonment and kidnapping is that kidnapping requires asportation. *Id.* at 51. Similarly, in *Sallie v. State*, 216 Ga.App. 502, 455 S.E.2d 315 (Ga.App.,1995), the Court indicates that the only difference between kidnapping and false imprisonment is asportation. The Court further observes that in certain factual situations false imprisonment is not a lesser included offense of kidnapping. *Id.* at 316. (citing *Johnson v. State*, 195 Ga.App. 723(2), 394 S.E.2d 586 (1990) (“false imprisonment occurred after the kidnapping had already been accomplished”). *See also John v. State*, 282 Ga. 792, 653 S.E.2d 435 (Ga. 2007) (the offenses of kidnapping and false imprisonment did not merge under the stated facts because the crime of false imprisonment was complete before the victim was forced into the woods (kidnapped) and shot).

We observe that many of the Georgia false imprisonment cases involve violent behavior, including *Clark v. State*, 2008, 283 Ga. 234, 657 S.E.2d 872 (defendant detained victim at gunpoint despite victim's entreaties to be released); *Pierce v. State*, 301 Ga.App. 167, 687 S.E.2d 185, 190 (2009) (defendant “grabbed the victim by the hair and dragged her from room to room ... while beating

her”); and *Williams v. State*, 295 Ga.App. 9, 670 S.E.2d 828, 832-33 (2008) (victim was raped in her home then forced into a closet, and was threatened to be killed her if she did not stay in the closet).

The AAO is unaware of any published federal cases addressing whether the false imprisonment under Ga. Code Ann. § 16-5-41 involves moral turpitude. We note that kidnapping is categorized as a crime involving moral turpitude in *Matter of Nokoi*, 14 I&N Dec. 208 (BIA 1972), and that the Board in that case cites *Matter of P - -*, 5 I&N Dec. 444 (BIA 1953). In *Matter of P - -*, the Board found that the statute in question was a crime involving moral turpitude because it contained the two primary elements of kidnapping necessary to render such a crime morally reprehensible act, to wit: (1) “unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted or carried away by any means whatsoever [any person]” and (2) “held for ransom or reward or otherwise.”

In *U.S. v. Adams*, 83 F.3d 1371 (11<sup>th</sup> Cir. 1996), the Eleventh Circuit states that the Senate Judiciary Committee indicates that “the addition of the word ‘otherwise’ is to extend the jurisdiction of this act to persons who have been kidnapped and held, not only for reward, *but for any other reason.*” *Id.* at 1373. The Eleventh Circuit conveys that the Supreme Court has held that “the addition of ‘otherwise’ was intended to make clear that a nonpecuniary motive did not preclude prosecution under the statute.” *Id.* at 1373. (citing *United States v. Healy*, 376 U.S. 75 (1964)).

In consideration of *Matter of P - -*, wherein the Board found that the elements of “unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted or carried away by any means whatsoever [any person]” and “held for ransom or reward or otherwise” render kidnapping a morally reprehensible act, we find that based upon the language of Ga. Code Ann. § 16-5-41, and that the Georgia courts have interpreted the statute to be distinguishable from kidnapping based solely on the element of asportation, the prohibited conduct under Ga. Code Ann. § 16-5-41 involves moral turpitude. Consequently, the applicant’s false imprisonment conviction also renders him inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

Since the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for the battery and false imprisonment convictions, we need not determine whether his other convictions are morally turpitudinous.

The waiver for inadmissibility under section 212(a)(2)(B) of the Act is found under section 212(h) of the Act. That section provides, in pertinent part:

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

A section 212(h) waiver of the bar to admission resulting from violation of section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant is not a consideration under the statute and will be considered only to the extent that it results in hardship to a qualifying relative. The qualifying relative here is the applicant's U.S. citizen spouse, daughter, and step-son. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. See *Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996).

The director concluded that the applicant had demonstrated extreme hardship to a qualifying relative. The applicant's convictions for battery and false imprisonment are as violent or dangerous crimes under 8 C.F.R. § 212.7(d). Accordingly, the applicant must show that "extraordinary circumstances" warrant approval of the waiver. 8 C.F.R. § 212.7(d). Extraordinary circumstances may exist in cases involving national security or foreign policy considerations, or if the denial of the applicant's admission would result in exceptional and extremely unusual hardship. Finding no evidence of foreign policy, national security, or other extraordinary equities, the AAO will consider whether the applicant has "clearly demonstrate[d] that the denial of . . . admission as an immigrant would result in exceptional and extremely unusual hardship" to a qualifying relative.

In the instant case, the applicant must demonstrate that denial of admission would result in exceptional and extremely unusual hardship to a qualifying relative, who in this case are the applicant's U.S. citizen spouse, daughter, and stepson.

In regard to remaining in the United States without the applicant, the applicant's spouse conveys in the January 15, 2007 letter that she has known the applicant since 1988, and married him in June 1996 in Florida when her son was almost two years old. She indicates that the applicant is the only father her son knows and that she and her son have a close relationship with the applicant. The applicant's wife asserts that separation from the applicant for the past five years has been more than an extreme emotional, psychological, and financial struggle. She states that the financial loss of the income from her husband's business has placed an extreme hardship on their family and that she has been forced to sell all of their assets, except for their home, and take on a second job. The applicant's wife indicates that she is a regional director with ██████████ Hotels Group, where she has worked for 11 years. She states that she travels extensively and it would be less of a financial and emotional burden if the applicant were home to share in household responsibilities. The applicant's daughter states in the letter dated October 7, 2007, that she has a close relationship with her father and feels empty because he is not close by. The applicant's step-son indicates in his letter dated October 29, 2007, that he has a close relationship with the applicant and that their family is not complete with him. He indicates that he is concerned that his mother will be alone after he graduates from college.

Although the director found that denial of the waiver applicant will result in "extreme hardship" to a qualifying relative, we find that the applicant has not demonstrated "exceptional and extremely unusual hardship" to his wife, daughter, or stepson, as required in 8 C.F.R. § 212.7(d). With regard to financial hardship, even though the applicant's spouse sold most of their assets, she indicates that she still owns the family home and no documentation has been presented to demonstrate that since their separation on June 12, 2005 she has been unable to meet household expenses without the

applicant's income. The record reflects the emotional hardship that the applicant's wife, daughter, and stepson will have as a result of separation. We recognize that based on the many years of their marriage and their close relationship the applicant's spouse will experience extreme hardship as a result of separation from her husband. However, we find that the applicant has not demonstrated that her emotional hardship or that of his daughter and stepson meets the "exceptional and extremely unusual hardship" standard as required in 8 C.F.R. § 212.7(d).

With regard to joining the applicant to live in Canada, the applicant's spouse will lose her ties to the United States, her adult son and stepdaughter, her life that she has established in the United States since 1995, her property ownership, and her employment as a regional director with ██████████ Hotels Group, where she has worked for 11 years. However, there is no indication that the applicant's spouse will be unable to obtain employment in Canada for which she is qualified, and the applicant's stepson indicates that after he graduates from college he will no longer live with his mother. The record does not suggest that the applicant's wife will have to sell her home at a loss. When all of the hardship factors are considered collectively, they fail to demonstrate that the applicant's wife will experience "exceptional and extremely unusual hardship" if she joined her husband to live in Canada. Moreover, the record does not demonstrate that the applicant's daughter or stepson will experience "exceptional and extremely unusual hardship" if they joined the applicant to live in Canada. The burden of proof in this proceeding lies with the applicant, and "while an analysis of a given application includes a review of all claims put forth in light of the facts and circumstances of a case, such analysis does not extend to discovery of undisclosed negative impacts." *Matter of Ngai*, 19 I&N Dec. 245, 247 (Comm'r 1984).

Accordingly, the applicant failed to demonstrate that he merits a favorable exercise of discretion under 8 C.F.R. § 212.7(d), and the appeal will be dismissed.

**ORDER:** The appeal is dismissed.