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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



**U.S. Citizenship  
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Services**

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[Redacted]

FILE:

[Redacted]

Office: MIAMI, FL

Date:

**JAN 26 2010**

IN RE:

[Redacted]

PETITION: 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:

[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).

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Acting District Director, Miami, Florida and is now before the Administrative Appeals Office (AAO) on appeal.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States under 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 is the spouse of a United States citizen, and the father and stepfather of United States citizens. He now seeks a waiver of inadmissibility so that he may reside in the United States with his spouse and children.

The Acting District Director concluded that the applicant had failed to establish that extreme hardship would be imposed upon a qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the Acting District Director*, dated July 10, 2006.

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 *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 applicant has the following criminal history. On January 23, 1996, the applicant pled no contest in Florida to Battery on a Law Enforcement Officer under Florida Statutes § 784.07. *Information, Collier County Clerk of Courts, Public Information Systems*. Adjudication was ordered withheld on January 30, 1996. *Judgment, Twentieth Judicial Circuit, Collier County, Florida*. The applicant was placed on probation for a period of one year and received credit for time served. *Order of Probation, Circuit Court of Collier County, Florida; Court Calendar, Collier County, State of Florida*. Probation was terminated on August 5, 1996. *Order, Circuit Court of the Twentieth Judicial Circuit, Collier County, Florida*. On November 6, 1997 the applicant was arrested for Failing to Give Information and two counts of Leaving the Scene of an Accident with Property Damage. *Intake Disposition Notice, Office of the State Attorney, Twentieth Judicial Circuit of Florida*. The charges were dropped for Failing to Give Information and one of the counts of Leaving the Scene of an Accident with Property Damage. *Id.* On February 5, 1998 the applicant was adjudged guilty in Florida for Leaving the Scene of an Accident with Property Damage under section 316.061. *Judgment, Twentieth Judicial Circuit, Collier County, Florida; Information, Collier County Clerk of Courts, Public Information Systems*. The applicant was ordered to pay court fines and attend Driver Improvement School, which he successfully completed. *Id.; National Safety Council, Defensive Driving Course, Certificate of Completion*, dated March 14, 1998.

The record establishes that the applicant was convicted under Florida Statutes § 784.07 of “knowingly committing . . . battery upon a law enforcement officer.” Florida Statutes § 784.03(1)(a) stated that 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.<sup>1</sup>

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.*)

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<sup>1</sup> Under Florida Statutes § 784.03, an individual who committed battery was guilty of a misdemeanor in the first degree, punishable by a term of imprisonment not to exceed one year. *See Florida Statutes § 775.082(4)(a)*. However, when that battery was knowingly committed upon a law enforcement officer, Florida Statutes § 784.07(2)(b) reclassified it as a felony of the third degree, punishable by a term of imprisonment not to exceed five years. *See Florida Statutes § 775.082(3)(d)*. Accordingly, the applicant’s conviction is not subject to the petty offense exception in section 212(a)(2)(ii)(II) of the Act.

(assault on prison guard not a crime involving moral turpitude because offense charged appeared to be only “simple” assault and no bodily injured 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 knowledge of an 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).

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. Thus, based solely on the statutory language, it appears that Florida Statutes § 784.07 encompasses (hypothetically) conduct that involves moral turpitude and conduct that does not.

However, in accordance with *Silva-Trevino*, the AAO must determine if an actual case exists in which this criminal statute was applied to conduct that did not involve moral turpitude. The AAO is aware of such a case. 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 offense described in Florida Statutes § 784.07 is categorically a crime 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 this statute was for morally turpitudinous conduct. It finds, however, the limited number of documents comprising the record of conviction offer inconclusive evidence as to whether the applicant caused actual bodily harm to a law enforcement officer.

On July 8, 2009, the AAO requested that the applicant submit evidence relating to his arrest and conviction for battery that would address whether or not the conduct for which he was convicted involved moral turpitude. Pursuant to federal regulations at 8 C.F.R. § 103.2(b)(8), the applicant was allowed 12 weeks from the date of the July 8, 2009 notice to respond to the AAO and additional time may not be granted. As of this date, the AAO has not received a response from the applicant. It is the applicant’s burden to show that he is not inadmissible to the United States. In that the applicant has failed to provide additional evidence regarding his arrest and conviction for battery, the AAO finds the applicant to have been convicted of a crime involving turpitude and to be inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

Counsel asserts that the requirements introduced by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) should not apply in this case, as the applicant’s crime was committed prior to its enactment. Citing to *Matter of Soriano*, 21 I. & N. 516 (BIA, AG 1996) and *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999), states that a statute is not retroactive if:

[I]t does not impair rights a party possessed when he or she acted, increase a party's liability for past conduct, or impose new duties with respect to

transactions already completed. More specifically, an intervening statute that either alters jurisdiction or affects prospective injunctive relief generally does not raise retroactivity concerns, and, thus, presumptively is to be applied in pending cases. [citation omitted]. Likewise, the Attorney General concluded [in *Soriano*] that the new provisions in section 212(c) applied to pending cases because the new legislation acted to withdraw her authority to grant prospective relief; it did not speak to the rights of the affected party. [citation omitted]. The effect was therefore to alter both jurisdiction and the availability of prospective relief to the alien. [citation omitted]. *Cervantes-Gonzalez* at 564.

The Board of Immigration Appeals (BIA) held in *Cervantes-Gonzalez* that a request for a section 212(i) waiver of the Act is a request for prospective relief and as such its restrictions may be applied to conduct that predates passage of the current statute. The AAO will rely on *Cervantes-Gonzalez* in this proceeding.

A waiver of the bar to admission resulting from section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar would impose an extreme hardship to the citizen or lawfully resident spouse, parent or child of the applicant. The plain language of the statute indicates that hardship that the applicant would experience if the applicant's waiver request is denied is not directly relevant to the determination as to whether the applicant is eligible for a waiver under section 212(h). The only relevant hardship in the present case is the hardship suffered by the applicant's spouse or children if the applicant is removed. If 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).

*Matter of Cervantes-Gonzalez* provides a list of factors the BIA deems relevant in determining whether an alien has established extreme hardship pursuant to section 212(i) of the Act. These factors include the presence of a lawful permanent resident or United States citizen family ties to 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 AAO notes that extreme hardship to a qualifying relative must be established whether he or she resides in Mexico or the United States, as he or she is not required to reside outside the United States based on the denial of the applicant's waiver request. The AAO will consider the relevant factors in adjudication of this case.

If the applicant's spouse joins the applicant in Mexico, the applicant needs to establish that his spouse will suffer extreme hardship. The applicant's spouse was born in the United States. *Birth certificate*. She lives in the same small town where she was born and raised, and her immediate family lives within five miles of her home. *Statement from the applicant's spouse*, dated August 8,

2006. She notes that a relocation to Mexico would be devastating, and that Mexico is foreign in every way. *Id.* Neither she nor her children speak Spanish. *Id.* She states she would not be able to use her nursing license or practice as a nurse in Mexico. *Id.* The applicant's spouse also asserts that her son from a prior relationship has been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and that doctors and medication would not be as available in Mexico. *Id.* The record establishes that the applicant's spouse's child has been diagnosed with ADHD and requires daily medication. *Letter from [REDACTED]* dated August 30, 2006. A statement from the applicant's father in Mexico notes that he and his family depend upon the applicant for economic support and it is not possible for him to offer support to the applicant. *Statement from the applicant's father*, dated August 28, 2006. When the aforementioned factors are considered in the aggregate, particularly the applicant's spouse's lack of familial and cultural ties to Mexico, her inability to speak Spanish, and her need to obtain medical treatment for her older son in a Spanish-speaking environment, the AAO finds that the applicant has demonstrated extreme hardship to his spouse if she were to relocate to Mexico.

If the applicant's spouse resides in the United States, the applicant needs to establish that his spouse will suffer extreme hardship. As previously noted, the applicant's spouse was born in the United States and her immediate family lives within five miles of her home. *Birth certificate; Statement from the applicant's spouse*, dated August 8, 2006. Counsel asserts that it would be extremely difficult for this family to be separated. *Attorney's brief*. He notes that the applicant's spouse would be unable to support her children on a single income, they would lose their assets, and she would be forced into accepting welfare. *Id.* Because the family would have limited financial resources, they would not be able to travel to visit the applicant and communication would be difficult because of the limitations of the communications infrastructure in Guanajuato, Mexico. *Id.* Counsel also notes that travel to Guanajuato is not easy, there are no international airports, and use of the local bus system would require local knowledge and the ability to speak Spanish. *Id.* The record fails to provide documentation to support them. The record includes credit card bills; bank statements including debit charges; and utility bills documenting the expenses of the applicant's spouse and her family, there is nothing in the record to show that the applicant is unable to contribute to his family's well-being from a location other than the United States. The country condition reports included in the record, although they provide statistics on human development indicators such as life expectancy, literacy, school enrollment and poverty, do not address the economy and employment situation in Mexico as they would affect the applicant. Further, the record does not document the applicant's spouse's income. Without supporting documentation, the assertions of counsel are not sufficient to meet the burden of proof in these proceedings. The 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). The AAO also notes the record makes no mention as to whether the applicant's spouse suffers from a health problem, physical or mental, and how being separated from the applicant would affect her health. The record does not include a statement from a licensed healthcare professional documenting how the applicant's spouse would be affected emotionally or mentally as a result of being separated from the applicant.

The AAO acknowledges the difficulties faced by the applicant's spouse in being separated from the applicant. However, 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, *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. 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. *Hassan v. INS*, *supra*, held further that the uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported. The AAO recognizes that the applicant's spouse will endure hardship as a result of her separation from the applicant. However, the record does not distinguish her situation, if she remains in the United States, from that of other individuals separated as a result of removal. Accordingly, it does not establish that the hardship experienced by the applicant's spouse would rise to the level of extreme hardship. Even when the aforementioned hardship factors are considered in the aggregate, the AAO does not find that the applicant has demonstrated extreme hardship to his spouse if she were to reside in the United States.

In that the record does not demonstrate that the applicant's spouse would suffer extreme hardship upon relocation and in the United States, the applicant has not established eligibility for a waiver under section 212(h) of the Act based on his spouse.

If the applicant's children join the applicant in Mexico, the applicant needs to establish that one of them will suffer extreme hardship. The applicant's children were born in the United States. Counsel asserts that the applicant's children do not speak Spanish. *Attorney's brief*. Counsel further asserts that doctors and medication would not be as available to the applicant's older child who has been diagnosed with ADHD and that the applicant's younger child would suffer from a lack of education and opportunity in Mexico. *Attorney's brief*. While the AAO acknowledges counsel's assertions, it notes that the record fails to include published country conditions reports to support them. Without supporting documentation, the assertions of counsel are not sufficient to meet the burden of proof in these proceedings. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). However, the AAO observes that the BIA in *Matter of Kao and Lin*, 23 I&N Dec. 45 (BIA 2001), found a 15-year-old child who had lived her entire life in the United States, was completely integrated into the American lifestyle and was not fluent in Chinese would suffer extreme hardship if she relocated to Taiwan. Based on the reasoning of the court in *Kao and Lin*, the AAO finds that the applicant's 13-year-old stepson would suffer extreme hardship if he were to relocate to Mexico with the applicant.

If the applicant's children reside in the United States, the applicant needs to establish that one of them will suffer extreme hardship. As just noted, the applicant's children were born in the United States. Counsel asserts that it would be extremely difficult for this family to be separated. *Attorney's brief*. He notes that travel to Guanajuato is not easy, there are no international airports,

and that use of the local bus system would require local knowledge and the ability to speak Spanish. *Id.* Counsel also contends that the applicant's spouse could not support her children on her income, would lose the family's assets, and that the family would end up on welfare. *Id.* He further states that the applicant's spouse's immediate family would not be able to help her much as they have limited financial resources. *Id.*

The applicant's spouse states that she and the applicant have many monthly expenses, including medication costs for the treatment of her older child's ADHD. *Statement from the applicant's spouse*, dated August 8, 2006. She further asserts that she and the applicant both have to work to provide their children with what they need. *Id.* The record contains copies of the applicant's and his spouse's bills that establish the range of their expenses.

While the AAO acknowledges counsel's and the applicant's spouse's assertions, it notes that the record fails to provide documentation to support them. The record fails to include documentation, such as published country conditions reports regarding the costs and difficulties of traveling to or communicating with Guanajuato. The record, as previously discussed, also fails to establish that the applicant would be unable to obtain employment in Mexico and thus contribute to his family's financial well-being while outside the United States or the level of the applicant's spouse's income from her employment. Without supporting documentation, the assertions of counsel are not sufficient to meet the burden of proof in these proceedings. The 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). Going on record without supporting documentation is not sufficient to meet the applicant's burden of proof in this proceeding. *See 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 also notes the record does not establish the emotional impact that separation would have on the applicant's children. When looking at the aforementioned factors, the AAO does not find that the applicant has demonstrated extreme hardship to either of his children if they were to reside in the United States.

In that the record does not demonstrate that either of the applicant's children would experience extreme hardship both upon relocation and in the United States, the applicant has not established eligibility for a waiver under section 212(h) of the Act based on his children.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's qualifying relatives caused by the applicant's inadmissibility to the United States. 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 an application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval rests with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has not met his burden.

**ORDER:** The appeal is dismissed.