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U.S. Department of Homeland Security
U.S. Immigration and Citizenship Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
and Immigration
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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: JUL 15 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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case 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 \$585. 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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of Cuba who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. The director indicated that 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 the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On appeal, counsel contends that the applicant's wife and children will experience extreme hardship if separated from the applicant. Counsel avers that [REDACTED] the applicant's son, has a cognitive deficit that impairs his learning and a Chiari malformation type I that requires skilled medical care. Counsel maintains that the applicant's family is emotionally and financially dependent upon the applicant, and that the applicant's wife stopped working in order to take care of [REDACTED] who is frequently dizzy and has headaches and nausea. Counsel states that [REDACTED] is a candidate for surgery due to his recurrent symptoms that are caused by decreased cerebral spinal fluid around the cerebellar tonsils. Counsel states that the applicant's wife needs to remain in the United States for [REDACTED] to receive proper medical treatment, and he indicates that two of the applicant's children have asthma and Cuba's climate will not be suitable for them.

The AAO will first address the finding of inadmissibility. Section 212(a)(2) of the Act states that:

(A)(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.

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.” *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 [REDACTED]. 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 on September 12, 2005, the applicant plead guilty to and was convicted of battery/aggravated/great bodily harm in violation of Florida Statutes § 784.045(1)(a)1, a second degree felony. Adjudication of guilt was withheld, and the applicant was placed on probation for two years.

Section 784.045(1)(a)1 of the Florida Statutes provides, in pertinent part that “[a] person commits aggravated battery who, in committing battery . . . [i]ntentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement . . . [w]hoever commits aggravated battery shall be guilty of a felony of the second degree . . .”

The AAO notes that the Eleventh Circuit Court of Appeals has held that aggravated battery, which includes the use of a deadly weapon or when the battery results in serious bodily injury, is a crime

involving moral turpitude. See *Sosa-Martinez v. U.S. Atty. Gen.*, 420 F.3d 1338, 1342 (11th Cir. 2005). For a felony of the second degree, the maximum term of imprisonment is 15 years. See, Fla. Stat. § 775.802. In view of the holding in *Sosa-Martinez* that aggravated battery involves moral turpitude, the AAO finds the applicant inadmissible under section 212(a)(2) of the Act.

The waiver for inadmissibility under section 212(a)(2)(A)(i)(I) 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 relatives here are the applicant's spouse, son and daughter, who are lawful permanent residents of the United States, and his U.S. citizen daughter. 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).

Because the applicant's offense of aggravated battery is a violent crime, the applicant must prove "exceptional and extremely unusual hardship" to a qualifying relative, so the AAO will evaluate whether the evidence meets this standard. 8 C.F.R. § 212.7(d). In order to show "exceptional and extremely unusual hardship," the applicant must show more than "extreme hardship." See *Matter of Monreal-Aguinaga*, 23 I&N Dec. 56, 62 (BIA 2001) (holding in cancellation of removal case that the "standard requires a showing of hardship beyond that which has historically been required in suspension of deportation cases involving the 'extreme hardship' standard"). The hardship "must be substantially beyond the ordinary hardship that would be expected when a close family member leaves this country," and is "limited to truly exceptional situations." *Id.* (internal quotation marks omitted). However, the applicant need not show that hardship would be unconscionable. *Id.* at 60.

Family separation must be considered in determining hardship. In *Salcido-Salcido v. INS*, 138 F.3d 1292 (9th Cir. 1998) the Ninth Circuit discussed the effect of emotional hardship on the alien and her husband and children as a result of family separation. The Ninth Circuit stated that "the most important single hardship factor may be the separation of the alien from family living in the United States" and that there must be a careful appraisal of "the impact that deportation would have on children and families." *Id.* at 1293. Furthermore, the Ninth Circuit indicated that "considerable, if not predominant, weight," must be attributed to the hardship that will result from family separation. *Id.* In *Yong v. INS*, 459 F.2d 1004 (9th Cir. 1972), the Ninth Circuit reversed a BIA decision

denying an application for suspension of deportation. The Ninth Circuit noted that “[s]eparation from one's spouse entails substantially more than economic hardship.” *Id.* at 1005.

The record contains letters, affidavits, medical records, income tax documents, birth certificates, school records, a blog about medical care in Cuba, prior AAO decisions, and other documentation.¹ In rendering this decision, the AAO will consider all of the evidence in the record.

With regard to remaining in the United States without the applicant, the applicant's wife conveys in her affidavits, dated November 29, 2007 and March 11, 2008, that she and the applicant have three children (born on March 18, 2000, September 10, 2002, and in 2008) and that she will not be able to take care of their children without the applicant. She conveys that [REDACTED], her oldest son, has a cranial malformation, which weakens him and may be aggravated by a simple fall, and will require surgery. The applicant's wife maintains that whenever [REDACTED] feels ill at school she and her husband pick him up, and she asserts that she stopped working to take care of [REDACTED]. The applicant's wife declares that [REDACTED] has a learning disability that requires spending at least three hours a day helping with his homework. Medical records reflect that [REDACTED] has chronic headaches, asthma, and Chiari malformation type I. The submitted information about Chiari malformation type I states that severe headaches are a symptom of the condition, and we note that the applicant submitted a blog about healthcare in Cuba. The psychological services report indicates that Rafael has cognitive processing deficits which impair his learning. The report conveys that [REDACTED] has extremely poor “working memory abilities,” which signifies that he will “do extremely poorly in tasks that require the ability to retain information temporarily in memory, perform some operation or manipulation with it, and produce a result.” Income tax records reflect that the applicant is the sole financial support of his family.

The hardship factors asserted in the instant case are family separation and financial hardship. Substantial weight is given to family separation in the hardship analysis. We acknowledge that the applicant's wife and children will experience financial hardship if they remain in the United States without the applicant. Furthermore, we recognize the significant emotional impact that separation from the applicant will have on his wife and children, especially because his ten-year-old son has cognitive processing deficits that significantly impair his learning, and has a history of migraine headaches as a result of Chiari malformation type I. The AAO acknowledges the applicant's wife's concern about raising her children without the applicant. When all of the alleged hardship factors are considered in the aggregate, the AAO finds that the hardship endured by the applicant's wife and children as a result of separation from the applicant meets the “exceptional and extremely unusual hardship” standard set forth in 8 C.F.R. § 212.7(d).

With regard to joining the applicant to live in Cuba, the applicant's wife avers in her letters that she cannot return to Cuba because it has limited medical care; even though her son had headaches, they failed to diagnose her son's cranial malformation; and Rafael and her daughter have asthma that is aggravated by Cuba's climate. The record reflects that the applicant's son has a history of chronic migraine headaches due to Chiari malformation, which are treated with Excedrin. His medical records indicate that in the United States he saw neurologist, and had an electroencephalogram

¹ The AAO notes that the AAO decisions are not persuasive here because they address the extreme hardship standard, whereas the instant case requires a showing of exceptional and extremely unusual hardship.

(EEG) test performed, which results were normal; they also show that he had magnetic resonance imaging (MRI) of his brain and spine, and that his spine showed no abnormality. The information from the Mayo Clinic conveys that children born with a Chiari malformation “require frequent examinations and diagnostic testing to monitor the condition.” The U.S. Department of State Bureau of Consular Affairs Country Specific Information on Cuba (April 29, 2010) states that “[m]edical care in Cuba does not meet U.S. standards,” and that “many health facilities face shortages of medical supplies and bed space. Many medications are unavailable.” U.S. Department of State, Bureau of Consular Affairs, *Country Specific Information - Cuba* (April 29, 2010).

When considering the alleged hardship factors cumulatively, the present health problems of the applicant’s son, the possibility of his requiring future medical care for Chiari malformation, and the shortage of medical supplies and bed space at health facilities in Cuba, the AAO finds that the applicant has met his burden of proving that [REDACTED] would suffer exceptional and extremely unusual hardship if he joined the applicant to live in Cuba. Thus, the applicant has demonstrated that the evidence in the record in the aggregate shows that the hardships of relocation produce a “truly exceptional situation” that would meet the exceptional and extremely unusual hardship standard. *See Matter of Monreal-Aguinaga*, 23 I&N Dec. 56 at 62. Accordingly, the hardships to the applicant’s son that arise from relocation do meet the heightened hardship standard set forth in 8 C.F.R. § 212.7(d).

However, the AAO finds that the gravity of the applicant’s offense overrides the extraordinary circumstances in the applicant’s case. In determining the gravity of the applicant’s offense, the AAO must not only look at the criminal act itself, but also engage in a traditional discretionary analysis and “balance the adverse factors evidencing an alien’s undesirability as a permanent resident with the social and humane considerations presented on the alien’s behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country.” *Matter of Mendez-Morales*, 21 I&N Dec. 296, 300 (BIA 1996)(Citations omitted).

The favorable factors presented by the applicant are the exceptional and extremely unusual hardship to his U.S. citizen daughter and lawful permanent resident wife, son, and daughter; the applicant’s stable work history in the United States; the letters commending the applicant; and the lack of any other criminal convictions since the conviction in October 2005.

The unfavorable factor presented in the application is the applicant’s conviction for battery/aggravated/great bodily harm in October 2005. The applicant stated in his affidavit dated November 23, 2007, that he “acted in self defense” and deeply regrets his crime. The arrest report conveyed that the applicant had walked upstairs in his apartment building and started an argument that became violent when the applicant began to push party attendees. The applicant was taken back to his apartment by his wife and building manager and once inside his apartment armed himself with a steak knife and began to run back upstairs. The first person the applicant encountered was struck on the forehead and nose with the knife. The arrest report conveyed that the party attendees jumped on the applicant in order to stop the fight. The applicant and the victim live in the same apartment building. In view of the serious nature of the offense of which the applicant was convicted and the recency of his conviction, which occurred only four years ago, the AAO finds that the applicant has not demonstrated his rehabilitation.

Taken together, the favorable factors in the present case do not outweigh the adverse factors, such that a favorable exercise of discretion is not warranted. Accordingly, the appeal will be dismissed.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility rests with the applicant. *See* section 291 of the Act. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed and the waiver application will be denied.

ORDER: The appeal is dismissed.