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

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FILE:

Office: CALIFORNIA SERVICE CENTER

Date:

IN RE:

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).

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 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 committed a crime involving moral turpitude. The applicant's spouse is a lawful permanent resident. The applicant seeks 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 the bar to his admission would result in extreme hardship to a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Director*, at 3, dated July 12, 2007.

On appeal, the applicant's spouse details the hardship that she is experiencing due to the applicant's immigration problem. *Applicant's Spouse's I-290B Statement*, at 1, dated July 25, 2007.

The record includes, but is not limited to, counsel's brief, the applicant's spouse's statements, country conditions information on Cuba and financial documentation for the applicant and his spouse. The entire record was reviewed and considered in arriving at a decision on the appeal.

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. The United States Court of Appeals for the Eleventh Circuit has adopted this methodology. 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.

On May 15, 2002, the applicant was convicted of aggravated assault in violation of Florida Statutes Section 784.02, a third degree felony punishable by a maximum of five years imprisonment, and was sentenced to two years of probation, court costs and costs of supervision.

Florida Statutes § 784.021 states:

- (1) An “aggravated assault” is an assault:
 - (a) With a deadly weapon without intent to kill; or
 - (b) With an intent to commit a felony

The applicant has not presented and the AAO is unaware of any prior case in which a conviction has been obtained under Florida Statutes § 784.021 for conduct not involving moral turpitude. Nevertheless, in accordance with the language of *Silva-Trevino*, the AAO will review the record as part of its categorical inquiry to determine if the statute was applied to conduct not involving moral turpitude in the applicant’s own criminal case. The AAO notes that the documents comprising the record of conviction reflect that the applicant was found guilty of aggravated assault with a deadly weapon. *Finding of Guilt and Order of Withholding Adjudication/Special Conditions*, at 1, dated May 15, 2002.

Based on the evidence in the record, the AAO finds that the applicant’s crime was for aggravated assault with a deadly weapon under Florida Statutes § 784.021(1)(a). The BIA has found aggravated assault with a dangerous and deadly weapon to be a crime involving moral turpitude. *In re Matter of O-*, 3 I. & N. Dec. 193 (BIA Mar 29, 1948). The applicant was thus convicted of a crime involving moral turpitude, and is inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

Section 212(a)(2)(A) of the Act states in pertinent part, that:

- (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.

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) . . . of subsection (a)(2) . . . if -

(1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that -

- (i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,
- (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
- (iii) the alien has been rehabilitated; or

(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 . . .

Section 212(h) of the Act provides that 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 imposes an extreme hardship on a qualifying family member, in this case, the applicant's spouse. Hardship to the applicant is not a permissible consideration in a 212(h) waiver proceeding except to the extent that such hardship may affect the qualifying relative. Once 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, 22 I&N Dec. 560 (BIA 1999) provides a list of factors the Board of Immigration Appeals (BIA) deems relevant in determining whether an alien has established extreme hardship. These factors include the presence of lawful permanent resident or U.S. 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 the applicant's spouse must be established whether she resides in Cuba or in the United States, as she is not required to reside outside of the United States based on the denial of the applicant's waiver request.

The first part of the analysis requires the applicant to establish extreme hardship to a qualifying relative in the event of relocation to Cuba. Counsel states that the applicant's spouse would be forced to return to a country where she and the applicant would be deprived of basic human rights due to the human rights violations and living conditions in Cuba; and they would likely be discriminated against as a result of their conscious decision to live in freedom in the United States and abandoning communist ideals. *Brief in Support of Form I-601*, at 2-3, dated May 17, 2006. The applicant's spouse states that she is from Cuba, and that she and the applicant did not want to live under the oppression of communism in Cuba; she cannot travel with the applicant to Cuba where political and social conditions have deteriorated to the point where thousands of people risk their lives every week in search of freedom, and she will likely be discriminated against and perhaps be at risk for harm after residing under a capitalist system. *Applicant's Spouse's Statement*, dated May 11, 2006. The record includes country conditions information that details living conditions and human rights issues in Cuba. The record reflects that the Cuban government requires its citizens to obtain official permission to leave or return to Cuba, permission that is often denied; and unauthorized travel can result in criminal prosecution. *Cuba: Country Reports on Human Rights Practices, Released by the Bureau of Democracy, Human Rights and Labor*, at 2, released on February 28, 2005. However, the record does not include evidence that the applicant has been denied permission to return to Cuba, that she has had prior unauthorized travel or that she would likely be criminally prosecuted. The record also contains no documentary evidence that supports the applicant's spouse's claim that she would be discriminated against for having lived in the United States. The record lacks sufficient documentary evidence of emotional, financial, medical or other types of hardship that, in their totality, establish that the applicant's spouse would suffer extreme hardship if she relocated to Cuba.

The second part of the analysis requires the applicant to establish extreme hardship in the event that a qualifying relative remains in the United States. Counsel states that the applicant and his spouse made the choice to leave an oppressive system to search for freedom in a new country, the applicant's spouse has no other family or relatives in the United States, and she would be without the support and affection of the applicant. *Brief in Support of Form I-601*, at 2. The applicant's spouse states that she has been married to the applicant for seven years, he is the closest person in to her in her life, she has nobody else in the United States, separation from the applicant would be a huge loss and cause her pain, and her marriage would likely end as she could not visit him even periodically as travel to Cuba is restricted for political reasons. *Applicant's Spouse's Statement*.

The applicant's spouse states that she has become very sick, she had to sell a small clothing store she and the applicant had opened, she and the applicant are in debt because the applicant is not able to apply for employment authorization, they are living on credit cards because her income is not sufficient to cover their finances, they do not have money to buy food sometimes, she needs the applicant to help her financially, the stress that she is encountering due to financial issues is making her emotionally sick to the point that she cannot eat or sleep, she is falling into depression, and they

want the American dream of owning a home, having a good job and being free of terrorism and discrimination. *Applicant's Spouse's I-290B Statement*, at 1. The record documents the store opened by the applicant and his spouse, but not that it has closed. The record includes financial records for the applicant and his spouse reflecting credit card balances of \$1,468.49, \$3,881.96 and \$9,658.76. *Financial Statements*, various dates.¹ The record further includes a collection notice with regard to the card balance of \$1,468.49. *Balance Due Statement*, dated July 16, 2007. The AAO notes that the applicant's spouse's income is under \$10,000 (\$3,624.51(R&A), \$4,862.51 (Florida Components) and \$1,482 (unemployment compensation)) and that this is below the U.S. Department of Health and Human Services poverty guidelines for a family of one (\$10,830). Based on the hardship factors presented, the AAO finds that the applicant's spouse would suffer extreme hardship if she remains in the United States.

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.

A review of the documentation in the record fails to establish the existence of extreme hardship to a qualifying relative caused by the applicant's inadmissibility to the United States. Having found the applicant statutorily ineligible for relief, no purpose would be served in an additional discussion of whether he applicant 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 proving eligibility 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.

¹ The record includes other credit statements indicating large balances. However, these documents are in Spanish and will not be considered as they are not accompanied by certified English translations, as required by the regulation at 8 C.F.R. § 103.2(b)(3).