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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

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H<sub>2</sub>

FILE:

Office: LOS ANGELES, CALIFORNIA Date:

**MAY 19 2010**

IN RE:

Applicant:

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 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".

Perry Rhew  
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Mexico. The director stated that the applicant was inadmissible 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 committing crimes involving moral turpitude. The director conveyed that the applicant sought a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i). 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 submitted waiver relates to the applicant's inadmissibility pursuant to section 212(a)(2)(A)(i)(I) of the Act for having been convicted of committing crimes involving moral turpitude, and is not for misrepresentation under section 212(a)(6)(C)(i) of the Act. Counsel maintains that the director misapplied the standard for determining extreme hardship, mischaracterized the hardship factors, and failed to consider the hardship factors in the aggregate.

As a preliminary matter, the director states that the record reflects that the applicant applied for a waiver under section 212(i) of the Act in order to waive the effects of the applicant's convictions, which include a felony perjury conviction that the director indicates qualifies as a fraudulent act. The director erred, however, in finding the felony perjury conviction rendered the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act for misrepresentation in that the applicant's misrepresentation was not made to an officer of the U.S. government to obtain a benefit under the Act, which is a requirement of establishing inadmissibility under section 212(a)(2)(A)(i)(I) of the Act.

Inadmissibility for having been convicted of committing a crime involving moral turpitude is under section 212(a)(2) of the Act. That section 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.)

To determine if a crime involves moral turpitude, the Ninth Circuit Court of Appeals first applies the categorical approach. *Ocequeda-Nunez v. Holder*, 594 F.3d 1124, 1129 (9<sup>th</sup> Cir. 2010) (citing *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 999 (9<sup>th</sup> Cir.2008)). This approach requires analyzing the elements of the crime to determine whether all of the proscribed conduct involves moral turpitude. *Nicanor-Romero*, *supra* at 999. In *Nicanor-Romero*, the Ninth Circuit states that in making this determination there must be "a realistic probability, not a theoretical possibility, that the statute would be applied to reach conduct that did not involve moral turpitude. *Id.* at 1004 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability can be established by showing that, in at least one other case, which includes the alien's own case, the state courts applied the statute to conduct that did not involve moral turpitude. *Id.* at 1004-05. *See also Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008) (whether an offense categorically involves moral turpitude requires reviewing the criminal statute to determine if there is a "realistic probability, not a theoretical possibility," that the statute would be applied to conduct that is not morally turpitudinous).

If the crime does not categorically involve moral turpitude, then the modified categorical approach is applied. *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1161 (9<sup>th</sup> Cir. 2009). This approach requires looking to the "limited, specified set of documents" that comprise what has become known as the record of conviction—the charging document, a signed plea agreement, jury instructions, guilty pleas, transcripts of a plea proceeding and the judgment—to determine if the conviction entailed admission to, or proof of, the necessary elements of a crime involving moral turpitude. *Id.* at 1161 (citing *Fernando-Ruiz v. Gonzalez*, 466 F.3d 1121, 1132-33 (9<sup>th</sup> Cir. 2006)).

The record shows that on May 5, 2004, the applicant was convicted of count 1, "perjury" in violation of California Penal Code § 118(a); and count 2, "false statement to the Department of Motor Vehicles or California Highway Patrol" in violation of Cal. Vehicle Code § 20. For both counts, the applicant's sentence was suspended by the court and he was placed on formal probation for three years, and ordered to serve one day in jail and pay a fine.

Cal. Penal Code § 118(a) provides that:

Every person who, having taken an oath that he or she will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which the oath may by law of the State of California be administered, willfully and contrary to the oath, states as true any material matter which he or she knows to be false, and every person who testifies, declares, deposes, or certifies under penalty of perjury in any of the cases in which the testimony, declarations, depositions, or

certification is permitted by law of the State of California under penalty of perjury and willfully states as true any material matter which he or she knows to be false, is guilty of perjury.

This subdivision is applicable whether the statement, or the testimony, declaration, deposition, or certification is made or subscribed within or without the State of California.

Section 20 of the Cal. Vehicle Code provides:

It is unlawful to use a false or fictitious name, or to knowingly make any false statement or knowingly conceal any material fact in any document filed with the Department of Motor Vehicles or the Department of the California Highway Patrol.

The AAO is unaware of any published federal cases addressing whether the crimes of perjury and “false statement to the Department of Motor Vehicles or California Highway Patrol” under California law involve moral turpitude. However, in *Matter of H-*, 1 I&N Dec. 669 (BIA 1943), the BIA stated that the crime of “perjury” as defined by common law, and by statutes following common law, involves moral turpitude. 1 I&N Dec. at 670. Common law defines perjury as “the willful assertion as to a matter of fact, opinion, belief or knowledge made by a witness in a judicial proceeding upon oath, such assertion being known to the witness to be false and being intended by him to mislead the court, jury, or person holding the proceeding.” 1 I&N Dec. at 670. (citations omitted). According to the BIA, “[t]he assignment of perjury must be in a matter that is material to the issue.” 1 I&N Dec. at 670. (citations omitted). The BIA held that because materiality was a required element of the crime of perjury in Michigan, the offense of perjury under Michigan law necessarily involves moral turpitude. 1 I&N Dec. at 670. We note that in *Matter of L-*, 1 I&N Dec. 324 (BIA 1942), the BIA held that the offense of perjury under Canadian law did not involve moral turpitude because materiality was not a required element of the crime. 1 I&N Dec. 324-327.

Viewed against the holdings in *Matter of H-* and *Matter of L-*, wherein materiality must be a required element of perjury in order to find moral turpitude, the AAO finds that perjury under Cal. Penal Code § 118(a) and “false statement to the Department of Motor Vehicles or California Highway Patrol” under Cal. Vehicle Code § 20 are crimes involving moral turpitude because materiality is a required element of both of those offenses. The applicant is therefore 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 charged with having committed “inflict corporal injury on spouse” in violation of Cal. Penal Code § 273.5(a) and “battery” in violation of Cal. Penal Code § 242 on November 15, 1995. The applicant pled nolo contendere to and was found guilty of count 1, “inflict corporal injury on spouse.” He was placed on formal probation for three years and ordered to serve 180 days in jail and attend domestic violence counseling.

Cal. Penal Code § 273.5 provides, in relevant part:

(a) Any person who willfully inflicts upon a person who is his or her spouse, former spouse, cohabitant, former cohabitant, or the mother or father of his or her child,

corporal injury resulting in a traumatic condition, is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not more than one year, or by a fine of up to six thousand dollars (\$6,000) or by both that fine and imprisonment.

. . .

(c) As used in this section, “traumatic condition” means a condition of the body, such as a wound or external or internal injury, whether of a minor or serious nature, caused by physical force.

. . .

The applicant was convicted of “inflict corporal injury on spouse,” in violation of California Penal Code § 273.5(a). In *Grageda v. INS*, 12 F.3d 919 (9th Cir. 1993), the Ninth Circuit Court of Appeals held that spousal abuse under section 273.5(a) is a crime of moral turpitude because spousal abuse is an act of baseness or depravity contrary to accepted moral standards, and willfulness is one of its elements. In that the applicant’s crime involves moral turpitude, he is inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The applicant was charged with having committed on November 5, 1995, “inflict corporal injury on spouse” in violation of Cal. Penal Code § 273.5(a), and “battery” in violation of Cal. Penal Code § 242. The applicant pled nolo contendere to and was found guilty of battery. He was placed on summary probation for three years. Because we have determined that the applicant was convicted of three crimes involving moral turpitude, rendering him inadmissible under section 212(a)(2)(A)(i)(I) of the Act, we need not consider whether his battery conviction under Cal. Penal Code § 242 involves moral turpitude.

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 -

(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, in pertinent part:

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 naturalized citizen spouse, his U.S. citizen children, and his naturalized citizen mother. 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 crime "inflicting corporal injury on a spouse" qualifies as 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.

The record contains letters, declarations, income tax documents, birth certificates, an enrollment agreement, photographs, medical records, school records, and other documentation. 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 declaration dated March 12, 2007, that she has a close relationship with her husband, who is a good father to their two children. She indicates that the applicant financially supports their family and her income from Kaiser Permanente is not enough to support them. The applicant's wife expresses concern about having a babysitter raise her children while she is at work. The applicant's

wife avers she currently attends school and hopes to graduate in a few years as a licensed nurse. She maintains that she and her husband are active members of their church, and that she has a close relationship with her family members, who are U.S. citizens and live nearby. She asserts that all of the applicant's family members are U.S. citizens. The applicant acknowledges in his declaration dated March 12, 2007, that in October 1995 he made a mistake in going to the Department of Motor Vehicles. He expresses concern about what will happen to his family if he is no longer in the United States and states that his wife will need two jobs to support their children. He contends that he will not find employment in Mexico and has no family members there. He states that he is presently employed as a real estate agent. The wage statements show the applicant's wife's annual income for 2006 as \$24,236. The college enrollment agreement shows her as enrolled in the surgical technology program five days a week from 5:30 P.M. until 10:00 P.M., and the tuition for the program as \$23,950. The applicant's mother asserts in her declaration dated March 15, 2007, that she will be affected if her son leaves the United States because they are a close family. She contends that her blood pressure is elevated due to her son's immigration problem. She states that her grandson is eleven years old and her granddaughter is three months old and that she worries about their separation from their father. The submitted medical record reflects that the applicant's mother receives treatment for hypertension. The record contains declarations by the applicant's family members and friends commending the applicant's character.

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. Similarly, the Third Circuit in *Bastidas v. INS*, 609 F.2d 101 (3rd Cir.1979) explicitly stressed the importance to be given the factor of separation of parent and child.

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. While the AAO acknowledges that the applicant's wife and children will experience financial hardship if they remain in the United States without the applicant, in view of the fact that the applicant submitted no documentation of his family's household expenses on appeal, we cannot ascertain the level of financial hardship that his family will experience without his income, especially because they reside with other family members. The AAO recognizes the significant emotional impact that separation from the applicant will have on his wife, children, and mother. Even though we recognize the applicant's wife's concern about raising her children without the applicant, we find that the applicant has not fully demonstrated that his mother, siblings, and in-laws will be unwilling or unable to assist his wife in the care of their children, especially because his wife and children live with his mother-in-law. We have taken into consideration the applicant's mother's hypertension and her allegation that it has worsened due to her concern about separation from the applicant. When all of the alleged hardship factors are considered in the aggregate, we find that the hardship endured by the applicant's

wife, children, and mother as a result of separation from the applicant is extreme, but does not meet the “exceptional and extremely unusual hardship” standard set forth in 8 C.F.R. § 212.7(d).

*With regard to the hardship of joining the applicant to live in Mexico, counsel indicates that the applicant’s spouse has lived in the United States since she was three years old, is not familiar with Mexico’s customs or culture, and dreams of becoming a nurse. In view of the evidence in the record and the assertions made on appeal, other than stating that the applicant’s wife’s wish is to become a nurse, we find that the applicant has not fully demonstrated how his wife will be impacted if she did not attend college in the United States to become a nurse. Counsel, citing the U.S. Department of State Country Reports on Human Rights Practices – 2006 for Mexico, states that Mexico has a high rate of poverty, crime, corruption, and discrimination. Counsel contends that because the applicant and his spouse have no family ties to Mexico, they most likely will live in poverty and be unable to pay for their children’s education. The AAO notes that the U.S. Department of State conveys in its report on Mexico that more than 2,000 people were killed in crime-related violence throughout Mexico. U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, *Country Reports on Human Rights Practices – 2006: Mexico*, 2 (March 6, 2007). However, even though the report on Mexico briefly discusses general economic conditions in Mexico, the report is not sufficiently detailed to support counsel’s claim that the applicant and his spouse will be unable to obtain employment that will pay a sufficient income to support their family and pay for their children’s education.*

Even when considering the alleged hardship factors cumulatively, the difficulty in obtaining employment, the crime, living in a foreign country, not completing a nursing degree, and separation from family members in the United States, the AAO finds that the applicant has not met his burden of proving that his wife and children would suffer exceptional and extremely unusual hardship if they were to join him to live in Mexico. He has not provided a detailed account of how his wife will be affected if she does not complete a nursing education. He also has not provided sufficient evidence to show that he and his wife will be unable to obtain employment that will provide an adequate income to keep them out of poverty and provide funds to educate his children. The AAO recognizes that Mexico has problems with crime and that the applicant’s wife and children will be separated from their extended family members in the United States. Nevertheless, the applicant has not 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 wife and children that arise from relocation do not meet the heightened hardship standard set forth in 8 C.F.R. § 212.7(d). We note that the applicant makes no claim of hardship to his mother if she joined him to live in Mexico.

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.