

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

[REDACTED]

H2

FILE:

[REDACTED]

Office: CALIFORNIA SERVICE CENTER

Date **OCT 27 2010**

IN RE:

[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:

[REDACTED]

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. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion 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 applicant is a native and citizen of Cuba who was found to be 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 crimes involving moral turpitude. The applicant is the spouse and parent of U.S. citizens. He seeks a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States.

The Director concluded that the applicant had failed to establish that the bar to his admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on December 11, 2007.

On appeal, counsel for the applicant asserts that the Director failed to consider certain facts, failed to consider evidence of emotional hardship and failed to correctly weigh the balancing factors set out by relevant precedent.

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.

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).

The record shows that on April 6, 1998, the applicant was convicted of False Imprisonment, Florida Statutes Annotated (Fla. Stat. Ann.) § 787.02(2), a general intent crime in which the intention to commit the crime must be proven (or conceded) for a conviction. *State v. Graham*, 468 So.2d 270 (Fla. Dist. Ct. App. 1985).

Section 787.02 states, in relevant part:

(1)(a) The term “false imprisonment” means forcibly, by threat, or secretly confining, abducting, imprisoning, or restraining another person without lawful authority and against her or his will.

....

(2) A person who commits the offense of false imprisonment is guilty of a felony of the third degree,

The Ninth Circuit, in *People v. Cornelio*, 207 Cal.App.3d 1580, 255 Cal.Rptr. 775 (1989), in reviewing the elements of a false imprisonment conviction concluded that violence and the threat of harm, including violation of a person’s right to be free from the threat of harm or restraint of liberty was sufficient to establish moral turpitude. *Cf. Chen v. INS*, 87 F.3d 5 (1st Cir. 1996)(acknowledging that an applicant’s conviction for second degree robbery and false imprisonment under California law were considered to involve moral turpitude by the Board of Immigration Appeals (BIA)).

As false imprisonment is closely related to kidnapping, the AAO also finds *Matter of Nokoi*, 14 I&N Dec. 208 (BIA 1972) instructive because it categorizes kidnapping as a crime involving moral turpitude, and cites to *Matter of P - -*, 5 I&N Dec. 444 (BIA 1953). In *Matter of P - -* the BIA found that the statute in question was a CIMT 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.” Finally, the AAO would note that in *Sharpe v. Wiley*, 271 F.Supp. 2d 631 (E.D. Pa. 2003), the court found an unlawful restraint conviction under Pennsylvania law to constitute a crime involving moral turpitude. In Pennsylvania a conviction under the unlawful restraint statute requires that a person either: 1) restrains another unlawfully in circumstances exposing him to risk of serious bodily injury; or (2) holds another in a condition of involuntary servitude. *Id.*

A plain reading of the statute in question indicates that it contains the elements of unlawful restraint imposed with force against a person’s will, and as such falls within the scope of conduct that has been deemed morally reprehensible. *Cf. Matter of Nokoi, supra; Sharpe v. Wiley, supra.* As such, the applicant’s conviction for false imprisonment is one that categorically involves moral turpitude.

The record also indicates that, on August 16, 2000, the applicant was convicted of Aggravated Stalking, Fla. Stat. Ann. § 784.048(3), which states in relevant part:

(3) Any person who willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another person, and makes a credible threat with the intent to place that person in reasonable fear of death or bodily injury of the person, or the person's child, sibling, spouse, parent, or dependent, commits the offense of aggravated stalking, a felony of the third degree . . .

The BIA has held that aggravated stalking constitutes a CIMT in *Matter of Ajami*, 22 I&N Dec. 949 (BIA 1999). In that case, the BIA reviewed a Michigan stalking statute that involved the elements of

acting willfully, embarking on a course of conduct, as opposed to a single act, and causing another to feel great fear (credible threat). *See also Zavaleta-Gallegos v. INS*, 261 F.3d 951 (9th Cir. 2001)(holding that a conviction for stalking in California involved moral turpitude).

An examination of the plain language of this statute indicates that the elements of intent, course of conduct and credible threat are present, and that, as such, a conviction under the statute involves moral turpitude. Accordingly, the AAO finds the applicant to have been convicted of two CIMTs and to be inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Act.¹

The AAO also notes that the applicant's convictions are for crimes that may be considered violent or dangerous. The AAO interprets the phrase "violent or dangerous crimes" in accordance with the plain or common meaning of its terms, consistent with any published precedent decisions addressing discretionary denials under 8 C.F.R. § 212.7(d) or the standard originally set forth in *Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002).

A conviction for false imprisonment involves the use of force, either by threat, or secretly confining, abducting, imprisoning, or restraining, another individual against his or her will. As such, the statute, by its nature, involves a substantial risk that physical force against the person or property of another may be used. 18 U.S.C. §16. The AAO also finds the applicant's conviction for aggravated stalking to involve the threatened use of physical force. It can therefore be concluded that the applicant has been convicted of two violent or dangerous crimes, and that he is subject to the heightened discretionary standard under 8 C.F.R. § 212.7(d).

Specifically, 8 C.F.R. § 212.7(d) states:

The Attorney General, in general, will not favorably exercise discretion under section 212(h)(2) of the Act (8 U.S.C. 1182(h)(2)) to consent to an application or reapplication for a visa, or admission to the United States, or adjustment of status, with respect to immigrant aliens who are inadmissible under section 212(a)(2) of the Act in cases involving violent or dangerous crimes, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of the application for adjustment of status or an immigrant visa or admission as an immigrant would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the alien's underlying criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act.

Accordingly, the applicant must show that "extraordinary circumstances" warrant the approval of his waiver application. 8 C.F.R. § 212.7(d). The BIA has stated that in assessing exceptional and extremely unusual hardship, it would be useful to view the factors considered in determining extreme hardship. *Matter of Monreal-Aguinaga*, 23 I&N Dec. 56, 62 (BIA 2001). As such, the

¹ The AAO notes that the applicant has also been convicted of Battery under Fla. Stat. Ann. § 784.03 and Offer to Commit Prostitution under Fla. Stat. Ann. § 796.07. As the applicant has already been determined to have committed two CIMTs, the AAO does not find it necessary address these additional convictions.

AAO will first examine the applicant's waiver application to determine if he has established extreme hardship before moving to a determination that he meets the heightened standard under 8 C.F.R. § 212.7(d).

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), (B), . . . 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 waiver of inadmissibility under section 212(h) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse, parent, son or daughter of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. The applicant's spouse and daughter are the qualifying relatives in this case.² If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver and United States Citizenship and Immigration Services (USCIS) then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996).

As a qualifying relative is not required to depart the United States as a consequence of an applicant's inadmissibility, two distinct factual scenarios exist should a waiver application be denied: either the qualifying relative will join the applicant to reside abroad or the qualifying relative will remain in the United States. Ascertaining the actual course of action that will be taken is complicated by the fact that an applicant may easily assert a plan for the qualifying relative to relocate abroad or to remain in the United States depending on which scenario presents the greatest prospective hardship, even though no intention exists to carry out the alleged plan in reality. *Cf. Matter of Ige*, 20 I&N Dec. 880, 885 (BIA 1994) (addressing separation of minor child from both parents applying for suspension of deportation). Thus, we interpret the statutory language of the various waiver provisions in section 212 of the Act to require an applicant to establish extreme hardship to his or her qualifying relative(s) under both possible scenarios. To endure the hardship of separation when extreme hardship could be avoided by joining the applicant abroad, or to endure the hardship of relocation when extreme hardship could be avoided by remaining in the United States, is a matter of choice and not the result of removal or inadmissibility. As the BIA stated in *Matter of Ige*:

² The AAO notes that counsel indicates that the applicant has a stepdaughter who is dependent on him. However, the record does not include documentary evidence (e.g., a birth certificate) that establishes her as the child of the applicant's spouse. The record includes a tax return on which this child is claimed as a dependent and a statement from ██████████ Schools that identifies the applicant and his spouse as her parents. However, this documentation is insufficient proof that she is biologically or legally the child of the applicant's spouse. As the record does not establish the applicant's stepdaughter's relationship to the applicant's spouse, her hardship will not be considered in this proceeding.

[W]e consider the critical issue . . . to be whether a child would suffer extreme hardship if he accompanied his parent abroad. If, as in this case, no hardship would ensue, then the fact that the child might face hardship if left in the United States would be the result of parental choice, not the parent's deportation.

Id. See also *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996).

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in 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. *Id.* The BIA added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The BIA has also held that the common or typical results of deportation, removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. See generally *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the BIA has made it clear that "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator "must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation." *Id.*

We observe that the actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. See, e.g., *In re Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding

hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate).

Family separation, for instance, has been found to be a common result of inadmissibility or removal in some cases. See *Matter of Shaughnessy*, 12 I&N Dec. at 813. Nevertheless, family ties are to be considered in analyzing hardship. See *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 565-66. The question of whether family separation is the ordinary result of inadmissibility or removal may depend on the nature of family relationship considered. For example, in *Matter of Shaughnessy*, the BIA considered the scenario of parents being separated from their soon-to-be adult son, finding that this separation would not result in extreme hardship to the parents. *Id.* at 811-12; see also *U.S. v. Arrieta*, 224 F.3d 1076, 1082 (9th Cir. 2000) (“Mr. Arrieta was not a spouse, but a son and brother. It was evident from the record that the effect of the deportation order would be separation rather than relocation.”). In *Matter of Cervantes-Gonzalez*, the BIA considered the scenario of the respondent’s spouse accompanying him to Mexico, finding that she would not experience extreme hardship from losing “physical proximity to her family” in the United States. 22 I&N Dec. at 566-67.

The decision in *Cervantes-Gonzalez* reflects the norm that spouses reside with one another and establish a life together such that separating from one another is likely to result in substantial hardship. It is common for both spouses to relocate abroad if one of them is not allowed to stay in the United States, which typically results in separation from other family members living in the United States. Other decisions reflect the expectation that minor children will remain with their parents, upon whom they usually depend for financial and emotional support. See, e.g., *Matter of Ige*, 20 I&N Dec. at 886 (“[I]t is generally preferable for children to be brought up by their parents.”). Therefore, the most important single hardship factor may be separation, particularly where spouses and minor children are concerned. *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *Cerrillo-Perez*, 809 F.2d at 1422.

Regardless of the type of family relationship involved, the hardship resulting from family separation is determined based on the actual impact of separation on an applicant, and all hardships must be considered in determining whether the combination of hardships takes the case beyond the consequences ordinarily associated with removal or inadmissibility. *Matter of O-J-O*, 21 I&N Dec. at 383. Nevertheless, though we require an applicant to show that a qualifying relative would experience extreme hardship both in the event of relocation and in the event of separation, in analyzing the latter scenario, we give considerable, if not predominant, weight to the hardship of separation itself, particularly in cases involving the separation of spouses from one another and/or minor children from a parent. *Salcido-Salcido*, 138 F.3d at 1293.

The record includes, but is not limited to: a brief and statements from counsel; statements from the applicant, his spouse, and his stepdaughter; tax returns from the applicant for the years 2002 – 2006; W-2 forms and earnings statements for the applicant; a Social Security earnings statement for the applicant; employment letters for the applicant and his spouse; copies of monthly billing statements; and copies of educational records and school documents for the applicant’s stepdaughter.

All relevant evidence has been considered in this determination.

The record does not address the impacts of moving to Cuba on the applicant's spouse or daughter. Without such evidence, the AAO is unable to determine that they would experience extreme hardship in Cuba with the applicant. Further, although counsel states on appeal that he is submitting materials to establish the conditions that the applicant would face in Cuba, this documentation is not found in the record. Accordingly, the applicant has not established that a qualifying relative would suffer extreme hardship upon relocation.

With regard to the hardship created by the applicant's removal, counsel asserts on appeal that the applicant's spouse and daughter will experience financial and emotional hardship. The applicant's spouse asserts that the applicant participates in household chores and that she would experience economic and psychological hardship if he were removed.

The evidence in the record does not support counsel's assertion of extreme financial hardship. First, the AAO notes that the record contains information about the applicant's spouse's income only for the year 2006. Records for this year indicate that the applicant earned roughly \$13,780. When this amount is subtracted from their \$47,621 in joint income for 2006, it appears that the applicant's spouse earned roughly \$34,000 for that year. This exceeds the federal poverty guideline for a family of three. The record also fails to adequately document the financial obligations of the applicant's spouse. The billing statements in the record are not sufficient to establish her monthly financial obligations³ and there is no other documentation that demonstrates her financial situation. The AAO also notes that the record fails to indicate whether the applicant's stepdaughter receives any financial support from her biological father. Accordingly, the AAO finds the record to be unclear as to the financial impact of the applicant's removal on his spouse.

Counsel also contends that the applicant's spouse and child would experience extreme emotional hardship if he is removed and references two psychological evaluations of the applicant and his family. The AAO notes counsel's claims, but does not find the record to include either evaluation. As such, counsel's assertions regarding the emotional hardship that would be experienced by the applicant's family in his absence will be given minimal weight in this proceeding. 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).

Based on the record, the AAO does not find the applicant to have established extreme hardship to his spouse and/or daughter if he is removed and they remain in the United States.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors cited above, does not support a finding that the applicant's qualifying relatives would face extreme hardship if the applicant is refused admission. The AAO recognizes that the applicant's spouse and child will experience hardship as a result of the applicant's inadmissibility. The record, however, does not distinguish their hardship from that normally associated with removal or exclusion and it does not, therefore, rise to the level of "extreme" as informed by relevant precedent. U.S. court decisions have

³ The AAO would note that some of the monthly billing statements and invoices have the balances redacted, further complicating the AAO's ability to determine the financial impact of the applicant's removal.

repeatedly held that the common results of removal or inadmissibility are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). 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. The AAO therefore finds that the applicant has failed to establish extreme hardship to a qualifying relative as required under section 212(a)(9)(B)(v) of the Act.

In that the applicant has not established that a qualifying relative would suffer extreme hardship as a result of his inadmissibility, the AAO finds that he has also failed to establish that the denial of his waiver application would result in exceptional and extremely unusual hardship to a qualifying relative, the heightened standard under the regulation at 8 C.F.R. § 217.2(d). As such, the applicant does not warrant a favorable exercise 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. The applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.