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U. S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship and Immigration Services



H₂

FILE: [Redacted]

Office: MANILA, PHILIPPINES

Date FEB 02 2011

IN RE: [Redacted]

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:

SELF-REPRESENTED

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 \$630. 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,

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application for waiver of inadmissibility was denied by the Field Office Director, Manila, Philippines, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of the Philippines 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 a crime involving moral turpitude. The applicant is applying for a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his U.S. citizen wife and parents.

The director determined that the applicant is statutorily barred from applying for a waiver because he did not lawfully reside continuously in the United States for a period of not less than seven years immediately preceding the date of initiation of removal proceedings. *Form I-601 Decision*, dated April 4, 2008. The AAO notes that the applicant also filed an Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212). The director denied the Form I-212 based on the denial of the Form I-601. *Form I-212 Decision*, dated April 4, 2008. The director issued separate decisions for the Form I-212 and the Form I-601. The applicant submitted one appeal for both decisions.

In situations where an applicant must file a Form I-212 and a Form I-601, the adjudicator's field manual clearly states that the Form I-601 is to be adjudicated first. Chapter 43.2(d) of the Adjudicator's Field Manual states, "If the alien has filed both applications (Forms I-212 and I-601), adjudicate the waiver application first. If the Form I-601 waiver is approved, then consider the Form I-212 on its merits; if the Form I-601 is denied (and the decision is final), deny the Form I-212 since its approval would serve no purpose." Thus, based on this rule, in a situation like the applicant's, where there is one appeal that has been filed and either the Form I-212 or the Form I-601 could be considered on appeal, generally, the AAO will review the Form I-601.

On appeal, the applicant asserts that his spouse and daughter are suffering extreme hardship as a result of his removal. *Notice of Appeal or Motion (Form I-290B)*, dated April 30, 2008.

In support of the waiver application, the record includes, but is not limited to, a letter from the applicant, letters from the applicant's parents, letters from the applicant's siblings, a letter from the applicant's brother-in-law, a letter from the applicant's spouse, letters of support from the applicant's friends, and documentation related to the applicant's spouse's employment. The entire record was reviewed and considered in rendering a decision on the appeal.

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.)

The record reflects that the applicant was admitted to the United States as a lawful permanent resident on December 16, 1992. On November 24, 1998, the applicant was convicted in the State of Hawaii Circuit Court of the Third Circuit of sexual assault in the third degree, in violation of section 707-732 of the Hawaii Revised Statutes, a Class C felony. The maximum term of imprisonment for a Class C felony in Hawaii is five years. Haw. Rev. Stat. § 706-660. The applicant was sentenced to one year imprisonment and five years probation. On May 4, 2004, the applicant applied for admission to the United States at Honolulu International Airport as a returning lawful permanent resident. The applicant was found inadmissible under section 212(a)(2)(A) of the Act, and placed in

removal proceedings. On June 18, 2004, an Immigration Judge ordered the applicant removed to the Philippines. The BIA affirmed the Immigration Judge's decision, and dismissed the applicant's appeal. *Decision of the Board of Immigration Appeals*, dated October 12, 2004.

At the time of the applicant's conviction, Hawaii Revised Statutes § 707-732 provided, in pertinent part:

- (1) A person commits the offense of sexual assault in the third degree if:
 - (a) The person recklessly subjects another person to an act of sexual penetration by compulsion;
 - (b) The person knowingly subjects to sexual contact another person who is less than fourteen years old or causes such a person to have sexual contact with the person;
 - (c) The person knowingly subjects to sexual contact another person who is mentally defective, mentally incapacitated, or physically helpless, or causes such a person to have sexual contact with the actor;
 - (d) The person, while employed in a state correctional facility, knowingly subjects to sexual contact an imprisoned person or causes such person to have sexual contact with the actor; or
 - (e) The person knowingly, by strong compulsion, has sexual contact with another person or causes another person to have sexual contact with the actor; provided that paragraphs (b), (c), and (d) shall not be construed to prohibit practitioners licensed under chapter 453, 455, or 460, from performing any act within their respective practices.

The applicant has not contested his inadmissibility for having been convicted of a crime involving moral turpitude on appeal with the AAO. The applicant's inadmissibility was previously contested on appeal before the BIA. The applicant asserted that a violation of the Hawaii Revised Statutes § 707-732 "does not inherently involve a CIMT and is therefore a divisible statute." *Brief to the Board of Immigration Appeals*, dated May 27, 2004. In an unpublished decision, the BIA determined that all of the subsections of § 707-732 involve moral turpitude because they involve non-consensual sexual contact. The BIA noted that subsections (b)-(f) involve knowingly engaging in sexual contact with a person who does not have the mental or physical ability to resist the contact. The BIA further noted that although subsection (a) includes the *mens rea* of recklessness, that subsection also includes the element of "by compulsion." *Decision of the Board of Immigration Appeals*, dated October 12, 2004.

The AAO similarly finds that all of the subsections of the Hawaii Revised Statutes § 707-732 denote conduct that involves moral turpitude. Subsection (b) of the statute is violated if an individual "knowingly subjects to sexual contact another person who is less than fourteen years old or causes

such a person to have sexual contact with the person.” The BIA has held that this conduct categorically involves moral turpitude. See *Matter of Imber*, 16 I&N Dec. 256, 258 (BIA 1977)(“[s]tatutory rape has repeatedly been held to involve moral turpitude, despite the strict liability nature of the crime.”). Subsection (c) of the statute is violated if an individual “subjects to sexual contact another person who is mentally defective, mentally incapacitated, or physically helpless, or causes such a person to have sexual contact with the actor” and subsection (d) is violated if an individual “while employed in a state correctional facility, knowingly subjects to sexual contact an imprisoned person or causes such person to have sexual contact.” Sexual contact with an individual who is incapacitated has long been held by the BIA to constitute a crime involving moral turpitude. See *Matter of M*, 2 I&N Dec. 17 (BIA 1944)(holding that sexual intercourse with a mentally incapacitated woman is a crime involving moral turpitude.).

Finally, subsections (a) and (e) of the statute involve sexual contact “by compulsion.” Subsection (a) of the statute is violated when an individual “recklessly subjects another person to an act of sexual penetration by compulsion” while subsection (e) is violated when an individual “knowingly, by strong compulsion, has sexual contact with another person or causes another person to have sexual contact with the actor.” The compulsion element of these subsections is indicative of a vicious motive and makes the crime an act that is contrary to the accepted rules of morality and to the duties owed between persons. See *Matter of Danesh*, 19 I&N Dec. 669, 670 (BIA 1988). The recklessness component of subsection (a) of the statute does not lessen the morally turpitudinous nature of the crime. At the time of the applicant’s conviction, “recklessly” was defined as a conscious disregard of a substantial and unjustifiable risk. Haw. Rev. Stat. § 707-206(3). The BIA in *Matter of Fualaau*, 21 I&N Dec 475 (BIA 1996) addressed whether a conviction for assault in the third degree under the Hawaii Revised Statutes is a crime involving moral turpitude. The BIA held, “In order for an assault of the nature at issue in this case to be deemed a crime involving moral turpitude, the element of a reckless state of mind must be coupled with an offense involving the infliction of serious bodily injury.” 21 I&N Dec. 475, 478. The AAO considers the conduct proscribed in Section 707-732(1)(a), subjecting the victim to an act of sexual penetration by force, to rise to the level of “serious bodily injury.” Therefore, we find that the applicant’s violation of Hawaii Revised Statutes § 707-732 is categorically a crime involving moral turpitude.

Section 212(h) of the Act provides, in pertinent parts:

(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

No waiver shall be provided under this subsection in the case of an alien who has been convicted of (or who has admitted committing acts that constitute) murder or criminal acts involving torture, or an attempt or conspiracy to commit murder or a criminal act involving torture. No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.

The AAO finds that the field office director's decision finding the applicant statutorily barred from applying for a waiver because he did not lawfully reside continuously in the United States for a period of not less than seven years immediately preceding the date of initiation of removal proceedings is incorrect. As discussed, the applicant was admitted to the United States as a lawful permanent resident on December 16, 1992, and he was placed in removal proceedings on May 4, 2004. The director has not shown that the applicant's residence between 1992 and 2004 was not for a continuous period of at least seven years. Accordingly, this part of the director's decision will be withdrawn from the record.

The AAO notes that section 212(h)(2) of the Act provides, "No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if . . . since the date of such admission the alien has been convicted of an aggravated felony . . ." Section 101(a)(43) of the Act, 8 U.S.C. § 1101(a)(43) defines aggravated felony as the "murder, rape, or sexual abuse of a minor" and "a crime of violence as defined under 18 U.S.C. § 16 for which the term of imprisonment is at least one year." The AAO notes that the applicant's conviction could render him ineligible for a waiver as an aggravated felon under section 101(a)(43) of the Act. However, since it is not clear that the applicant was convicted of either sexual abuse of a minor or a crime of violence, we will adjudicate his 212(h) waiver application on its merits.

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. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and 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 Board of Immigration Appeals stated in *Matter of Ige*:

[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 Board 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 Board 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 Board 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 Board 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 Board 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.

On appeal, the applicant asserts that his wife and 10-year-old daughter have suffered “tremendous hardship” as a result of his removal. *Form I-290B (Notice of Appeal)*, dated April 30, 2008. In a letter filed with the waiver application, the applicant contends that if his daughter relocates to the Philippines, she will suffer hardship adjusting to a new school system. He states that his daughter has established good relationships with her friends, teachers, and classmates in Hawaii. He notes that her daughter has numerous family ties in the United States, including her uncles, aunts, cousins and grandparents. He states that his daughter will suffer from pollution and a “not so good” health care system in the Philippines. The applicant further contends that he cannot support his daughter and spouse financially and emotionally if they remain separated from him. He states that his spouse has been the sole financial provider for his family since their separation. He notes that his spouse, who is a nurse’s aide, cannot afford to leave her position return to school to become a registered nurse. He states that when he was in the United States, he worked as a “houseman” at a hotel and paid his taxes. The applicant notes that he loves his family and wants to be available to guide his daughter. *Letter from* [REDACTED], undated.

The applicant’s spouse states that she works at [REDACTED] as a nurse’s aide and also cleans homes part-time to help support her family. She states that she received a hospital scholarship to further her nursing school, but cannot return to school because her husband’s immigrant visa was denied. She notes that her daughter cannot join after-school activities because of financial reasons and her work schedule. The applicant’s spouse states that when they visit the applicant in the Philippines, her daughter cannot concentrate on her school work because of the climate, and she feels sick and tired from the traveling. The applicant’s spouse notes that her daughter was very upset when she had to miss a school open house because she was called in to work. She asserts that the applicant is not available to support his daughter financially or emotionally. The applicant’s spouse further asserts that she and her daughter will “suffer more” in the Philippines. She states that she will not be able to find a position as a nurse’s aide with the same level of income she is currently receiving in Hawaii. She contends that she will not have an income to support her family in the Philippines. She states that she has concerns about her daughter’s education and ability to adjust to a “new place and the way of living” in the Philippines. She notes that she is also concerned about paying medical bills should one of them get sick. The applicant’s spouse asserts that she has family ties in the United States, including her parents, sisters, brothers, uncles, nephews and nieces. *Letter from* [REDACTED] dated September 26, 2007.

The applicant’s parents state that their granddaughter needs the applicant’s “love, guidance, care and attention with financial support.” They note that “It is hard to run and manage if you are [a] single parent.” They further state that they will be happy if the applicant returns to the United States because it will allow their “whole family [to] rebuild again.” *Letters from* [REDACTED] and [REDACTED] dated August 21, 2007 and November 23, 2008.

The AAO notes that the applicant listed his spouse, daughter and parents as qualifying relatives on his waiver application. DHS records confirm that the applicant's spouse, mother and father are naturalized U.S. citizens, and thus, qualifying relatives in this case. The applicant has indicated that he has a daughter, [REDACTED], who was born in the United States. However, the applicant has not furnished her birth certificate, passport, or any other records as evidence of her identity and U.S. citizenship. The burden of proof in these proceedings rests with the applicant. See section 291 of the Act. Since the applicant has failed to provide evidence to confirm [REDACTED] eligibility for status as a qualifying relative, we will only consider the applicant's spouse and parents as qualifying relatives for purposes of the applicant's 212(h) waiver.

The AAO acknowledges that the applicant's spouse and parents are experiencing emotional hardship as a result of the applicant's removal. This case arises in the Ninth Circuit. In *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998), the Ninth Circuit Court of Appeals, referring to the separation of an alien from qualifying relatives, held that "the most important single hardship factor may be the separation of the alien from family living in the United States," and that "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion." (Citations omitted).

Similarly, in *United States v. Arrieta*, the Ninth Circuit assessed the factors to be considered in a section 212(h) waiver and stated:

Of particular importance is the evidence Mr. Arrieta produced of the effect that separation from him would have on his immediate family members, as to whom he provided essential emotional and other non-economic familial support. We have previously explained that "preservation of family unity" may be a central factor in an extreme hardship determination. See *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1423 (9th Cir. 1987). We based this determination not only on the United States' international human rights commitments, but on "[t]he importance and centrality of the family in American life [which] is firmly established both in our traditions and in our jurisprudence." *Id.* Unlike in *Arce-Hernandez*, where we explained that it was not clear whether the alien's family would accompany him back to Mexico, (and did not consider the issue of family separation or emotional and other non-economic familial support,) in this case Mr. Arrieta has documented that his deportation would deprive his family of various forms of non-economic familial support and that it would disrupt family unity.

224 F.3d 1076, 1082 (9th Cir. 2000).

However, for the applicant's qualifying family members to endure the hardship of separation when extreme hardship could be avoided by joining the applicant abroad is a matter of choice and not the result of removal or inadmissibility. The AAO finds that the applicant has not established that his qualifying family members would suffer extreme hardship should they relocate to their native country of the Philippines.

The primary hardship factors noted in the applicant and his spouse's statements relate to the hardship their daughter, [REDACTED] would suffer upon relocation. The statements focus on her integration into the U.S. school system and her family and community ties in Hawaii. The AAO acknowledges that court decisions have found extreme hardship in cases where the language capabilities of the children were not sufficient for them to have an adequate transition to daily life in the applicant's country of origin. For example, in *Prapavat v. INS*, 638 F. 2nd 87, 89 (9th Cir. 1980) the Ninth Circuit found the BIA abused its discretion in concluding that extreme hardship had not been shown to the aliens' five-year-old citizen daughter, who was attending school, and would be uprooted from the country where she lived her entire life and taken to a land whose language and culture were foreign to her. However, in the instant case, the applicant has failed to establish his daughter's identity, citizenship and residence in the United States with corroborating evidence. Therefore, the assertions of hardship to his daughter will not be considered in these proceedings.

The other hardship factors cited by the applicant's spouse include her inability to find employment in the Philippines that is commensurate with her current position and her family ties in the United States. In regard to the applicant's spouse's claim of having family ties in the United States, the applicant's spouse has not provided evidence of her family members' identity and lawful status in the United States. Nor has she indicated where they reside in the United States, and how frequently she has contact with them. For these reasons, the AAO is unable to assess the level of hardship the applicant's spouse would experience should she become separated from her family members.

In addition, the applicant has not demonstrated that his spouse has researched employment opportunities in the Philippines for an individual with her education, background and skills. It should be noted that as a former native of the Philippines, she would return to the country without any significant linguistic and cultural barriers. The AAO acknowledges that the applicant's spouse will have to leave her long-term employment at a hospital where she has received a scholarship award. This factor will be considered a hardship, but it does not alone rise to the level of extreme hardship. In *Shoostary v. INS*, the Ninth Circuit Court of Appeals noted that "the extreme hardship requirement . . . was not enacted to insure that the family members of excludable aliens fulfill their dreams or continue in the lives which they currently enjoy." 39 F.3d 1049, 1051 (9th Cir. 1994).

Finally, the applicant's mother and father have not discussed the possibility of moving to the Philippines. They have not asserted, or provided evidence to demonstrate, that they would suffer hardship should they relocate there to maintain family unity with the applicant. Accordingly, the AAO cannot determine that they would suffer extreme hardship in the Philippines should they decide to relocate.

In this case, the record does not contain sufficient evidence to show that the hardships faced by the applicant's qualifying family members, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship if they relocate to the Philippines. The AAO therefore finds that the applicant has failed to establish eligibility for a waiver of inadmissibility under section 212(h) of the Act.

The AAO notes that even if the applicant had satisfied the requirements of section 212(h)(1)(B) of the Act, he could be subject to the heightened discretionary standard for violent or dangerous crimes.

The regulation at 8 C.F.R. § 212.7(d) states in pertinent part:

The Attorney General [Secretary, Department of Homeland Security], 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.

It is noted that the terms "violent" and "dangerous" are not further defined in the regulation, and the AAO is aware of no other precedent or guidance defining those crimes considered "violent or dangerous" and those that are not. The AAO therefore looks to the plain meaning of the terms "violent" and "dangerous." Black's Law Dictionary, Seventh Edition (1999), defines violent as "of, relating to, or characterized by strong physical force" and dangerous as "likely to cause serious bodily harm." It is observed that certain subsections of Hawaii Revised Statutes § 707-732 are violated when physical force or coercion is used. Therefore, the applicant's conviction could be considered a "violent or dangerous" crime within the meaning of 8 C.F.R. § 212.7(d), and the heightened discretionary standards found in that regulation could be applicable in this case.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval 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.

ORDER: The appeal is dismissed.