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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**

[Redacted]

H2

FILE: [Redacted] Office: MIAMI, FLORIDA Date: **FEB 16 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:

[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, 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,

Michael Shumway

f/ Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting Field Office Director, Miami, Florida, 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 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 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 avers that the applicant was not represented by counsel and pled guilty to aggravated assault with a deadly weapon, false imprisonment, and misdemeanor battery in Florida (case number [REDACTED]). Counsel contends that the applicant was charged with using his car (the deadly weapon) to force [REDACTED] to jump. He asserts that the applicant did not have any intent to do any bodily harm, and was not charged with such. Counsel declares that aggravated assault in Florida is not a crime involving moral turpitude, and that what is shown on the arrest affidavit/police report is irrelevant in determining whether the applicant's crime is morally turpitudinous. Counsel avers that there is nothing in the record of conviction proving that the applicant and the alleged victim cohabitated as a spouse or family member.

Counsel states that the analysis of moral turpitude is limited to the statute (categorical approach) or the "record of conviction" as stated in *Shepard v. U.S.*, 544 U.S. 13 (2005) (modified categorical approach) if the statute is divisible. Counsel cites *Matter of Z*, 1 I&N Dec. 446 (BIA 1943) and *Matter of P-*, 3 I&N Dec. 5 (BIA 1947), and maintains that the Board of Immigration Appeals (Board) has generally held that aggravated assault is not a crime involving moral turpitude unless intent to do bodily harm is a necessary ingredient of the crime. He states that because the subsection of the aggravated assault statute under which the applicant was convicted requires neither recklessness nor actual bodily injury of any kind it does not qualify as a crime involving moral turpitude. Counsel cites *Matter of Garcia-Hernandez*, 23 I&N Dec. 590 (BIA 2003) and *Matter of E-*, 1 I&N Dec. 505 (BIA 1943), and states that the applicant's simple battery conviction is not morally turpitudinous since the Board has held that simple assault and battery does not involve moral turpitude. He maintains that the applicant's charging document does not reveal whether the conviction was for touching or striking the victim, so the applicant cannot be found to be inadmissible for a crime involving moral turpitude.

Lastly, counsel avers that the false imprisonment conviction is a divisible statute containing offenses that are and are not morally turpitudinous, and that the applicant's charging document does not clarify whether his conviction was for simple restraint or forcible threat against the victim. Thus, he contends that the applicant cannot be found to have committed a crime involving moral turpitude. Counsel states that the applicant has a lawful permanent resident wife and two U.S. citizen children,

and a lawful permanent resident mother. He asserts that the submitted evidence establishes that the applicant is entitled to a waiver as a matter of law and in the exercise of discretion.

We will first address the finding of inadmissibility. 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.

The Board held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

[M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general....

In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

In *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. First, in evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a “realistic probability, not a theoretical possibility,” that the statute would be applied to reach conduct that does not involve moral turpitude. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability exists where, at the time of the proceeding, an “actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien’s own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude.” *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

However, if a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, "the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude." 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 January 3, 2001, the applicant entered a plea of guilty to aggravated assault with a deadly weapon (Florida Statutes § 784.021(1)(a)); false imprisonment (Florida Statutes § 787.02(2)); and battery (Florida Statutes § 784.03) – case number [REDACTED]. He received a mitigated sentence on January 8, 2001, which was to serve 364 days in jail, complete two years of probation and one year of community control, complete the domestic intervention program, and stay away from the victim. We note that the applicant's arrests on September 18, 2000 and January 8, 2001 are for the criminal charges of which he pled guilty on January 3, 2001. We note that on October 19, 2002, the applicant was arrested for reckless driving (Florida Statutes § 316.192), and on November 15, 2002, he pled nolo-contendere to that charge and was ordered to pay a fine/cost and attend traffic school.

The applicant was convicted of aggravated assault with a deadly weapon in violation of Florida Statutes § 784.021(1)(a), which provides, in pertinent part:

(1) An "aggravated assault" is an assault:

(a) With a deadly weapon without intent to kill; or

(2) Whoever commits an aggravated assault shall be guilty of a felony of the third degree, punishable as provided in s. [REDACTED]

The definition of "assault" is under Florida Statutes § 784.011(1), which states, in pertinent part:

(1) An "assault" is an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act

which creates a well-founded fear in such other person that such violence is imminent.

Counsel cites *Matter of Z* to establish that the Board has generally held that aggravated assault is not a crime involving moral turpitude unless intent to do bodily harm is a necessary ingredient of the crime. 1 I&N Dec. 446 at 449. Counsel also cites *Matter of P-*, wherein the Board states that "an assault with a dangerous weapon may be committed in such a manner as to preclude an evil intent . . . In short, it is the purpose or intent which accompanied the perpetration of the crime, and the manner and nature by which it is committed, which determines moral turpitude." 3 I&N Dec. 5 at 8-9.

However, *Matter of Z* was overruled in part by the Board in *Matter of O--*, 3 I&N Dec. 193 (BIA 1948), wherein the Board found that assault with a deadly and dangerous weapon (which was unspecified in the complaint) in violation of section 6195 of the General Statutes of Connecticut would involve moral turpitude because "it is inherently base . . . because an assault aggravated by the use of a dangerous or deadly weapon is contrary to accepted standards of morality in a civilized society, and . . . always constituted conduct contrary to acceptable human behavior." *Id.* at 197. In addition, in *In re Sanudo*, 23 I&N Dec. 968, 971 (BIA 2006), the Board states that "assault and battery with a deadly weapon has long been deemed a crime involving moral turpitude . . . because the knowing use or attempted use of deadly force is deemed to be an act of moral depravity that takes the offense outside the "simple assault and battery" category." (citations omitted).

We take notice that aggravated assault in Florida requires proof of a specific intent to do violence. *See Lavin v. State*, 754 So.2d 784, 787 (Fla.App. 3 Dist., 2000). Further, we note that in *Dey v. State*, 182 So.2d 266, 268 (Fla.App., 1966), the Court states that aggravated assault is an assault with a deadly weapon that is "likely to produce death or great bodily harm." (citing *Goswick v. State*, 143 So.2d 817 (Fla.1962)). In view of the decisions in *In re Sanudo* and *Matter of O--*, wherein the knowing use or attempted use of deadly force is deemed to involve moral turpitude, we find that an assault with a deadly weapon, whether the assault is committed with the intent to do "bodily harm," or with intent to do "violence" to the person of another, is morally turpitudinous because such an assault is committed with the knowing or attempted use of deadly force. Thus, based on the aforementioned discussion, we find that the applicant's aggravated assault conviction involves moral turpitude.

Aggravated assault is a third degree felony under Florida Statutes § 784.021(1), and is punishable by a term of imprisonment not exceeding five years. *See Florida Statutes § 775.082* Since the applicant's aggravated assault with a deadly weapon conviction involves moral turpitude, which renders him inadmissible under section 212(a)(2)(A)(i)(I) of the Act, we need not determine whether any of the applicant's other convictions involve moral turpitude.

The applicant was convicted of aggravated assault with a dangerous weapon. The regulation at 8 C.F.R. § 212.7(d) provides:

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.

The AAO notes that the words "violent" and "dangerous" and the phrase "violent or dangerous crimes" are not further defined in the regulation, and the AAO is aware of no precedent decision or other authority containing a definition of these terms as used in 8 C.F.R. § 212.7(d). A similar phrase, "crime of violence," is found in section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F). Under that section, a crime of violence is an aggravated felony if the term of imprisonment is at least one year. As defined by 18 U.S.C. § 16, a crime of violence is an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. We note that the Attorney General declined to reference section 101(a)(43)(F) of the Act or 18 U.S.C. § 16, or the specific language thereof, in 8 C.F.R. § 212.7(d). Thus, we find that the statutory terms "violent or dangerous crimes" and "crime of violence" are not synonymous and the determination that a crime is a violent or dangerous crime under 8 C.F.R. § 212.7(d) is not dependant on it having been found to be a crime of violence under 18 U.S.C. § 16 or an aggravated felony under section 101(a)(43)(F) of the Act. *See* 67 Fed. Reg. 78675, 78677-78 (December 26, 2002).

Nevertheless, we will use the definition of a crime of violence found in 18 U.S.C. § 16 as guidance in determining whether a crime is a violent crime under 8 C.F.R. § 212.7(d), considering also other common meanings of the terms "violent" and "dangerous". The term "dangerous" is not defined specifically by 18 U.S.C. § 16 or any other relevant statutory provision. Thus, in general, we interpret the terms "violent" and "dangerous" in accordance with their plain or common meanings, and consistent with any rulings found in published precedent decisions addressing discretionary denials under the standard described in 8 C.F.R. § 212.7(d). Decisions to deny waiver applications on the basis of discretion under 8 C.F.R. § 212.7(d) are made on a factual "case-by-case basis." 67 Fed. Reg. at 78677-78.

The AAO finds that aggravated assault with a dangerous weapon is a violent crime. In the instant case, as we find that there are not national security or foreign policy considerations that would warrant a favorable exercise of discretion, the applicant must, in addition to the statutory

requirement of proving extreme hardship, demonstrate that denial of admission would result in exceptional and extremely unusual hardship, to a qualifying relative, who in the instant case are the applicant's lawful permanent resident spouse and U.S. citizen sons, and his lawful permanent resident mother.

In *Matter of Monreal-Aguinaga*, 23 I&N Dec. 56, 62 (BIA 2001), the Board determined that exceptional and extremely unusual hardship in cancellation of removal cases under section 240A(b) of the Act is hardship that "must be 'substantially' beyond the ordinary hardship that would be expected when a close family member leaves this country." However, the applicant need not show that hardship would be unconscionable. *Id.* at 61. The AAO notes that the exceptional and extremely unusual hardship standard in cancellation of removal cases is identical to the standard put forth by the Attorney General in *Matter of Jean, supra*, and codified at 8 C.F.R. § 212.7(d).

The Board stated that in assessing exceptional and extremely unusual hardship, it would be useful to view the factors considered in determining extreme hardship. *Id.* at 63. In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999), the Board provided a list of factors it deemed relevant in determining whether an alien has established the lower standard of extreme hardship. 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. 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 an exclusive list. *Id.*

In *Monreal*, the Board provided additional examples of the hardship factors it deemed relevant for establishing exceptional and extremely unusual hardship:

[T]he ages, health, and circumstances of qualifying lawful permanent resident and United States citizen relatives. For example, an applicant who has elderly parents in this country who are solely dependent upon him for support might well have a strong case. Another strong applicant might have a qualifying child with very serious health issues, or compelling special needs in school. A lower standard of living or adverse country conditions in the country of return are factors to consider only insofar as they may affect a qualifying relative, but generally will be insufficient in themselves to support a finding of exceptional and extremely unusual hardship. As with extreme hardship, all hardship factors should be considered in the aggregate when assessing exceptional and extremely unusual hardship.

23 I&N Dec. at 63-4.

In the precedent decision issued the following year, *Matter of Andazola-Rivas*, the Board noted that, "the relative level of hardship a person might suffer cannot be considered entirely in a vacuum. It

must necessarily be assessed, at least in part, by comparing it to the hardship others might face.” 23 I&N Dec. 319, 323 (BIA 2002). The issue presented in *Andazola-Rivas* was whether the Immigration Judge correctly applied the exceptional and extremely unusual hardship standard in a cancellation of removal case when he concluded that such hardship to the respondent’s minor children was demonstrated by evidence that they “would suffer hardship of an emotional, academic and financial nature,” and would “face complete upheaval in their lives and hardship that could conceivably ruin their lives.” *Id.* at 321 (internal quotations omitted). The Board viewed the evidence of hardship in the respondent’s case and determined that the hardship presented by the respondent did not rise to the level of exceptional and extremely unusual. The Board noted:

While almost every case will present some particular hardship, the fact pattern presented here is, in fact, a common one, and the hardships the respondent has outlined are simply not substantially different from those that would normally be expected upon removal to a less developed country. Although the hardships presented here might have been adequate to meet the former “extreme hardship” standard for suspension of deportation, we find that they are not the types of hardship envisioned by Congress when it enacted the significantly higher “exceptional and extremely unusual hardship” standard.

23 I&N Dec. at 324.

However, the Board in *Matter of Gonzalez Recinas*, a precedent decision issued the same year as *Andazola-Rivas*, clarified that “the hardship standard is not so restrictive that only a handful of applicants, such as those who have a qualifying relative with a serious medical condition, will qualify for relief.” 23 I&N Dec. 467, 470 (BIA 2002). The Board found that the hardship factors presented by the respondent cumulatively amounted to exceptional and extremely unusual hardship to her qualifying relatives. The BIA noted that these factors included her heavy financial and familial burden, lack of support from her children’s father, her U.S. citizen children’s unfamiliarity with the Spanish language, lawful residence of her immediate family, and the concomitant lack of family in Mexico. 23 I&N Dec. at 472. The Board stated, “We consider this case to be on the outer limit of the narrow spectrum of cases in which the exceptional and extremely unusual hardship standard will be met.” *Id.* at 470.

An analysis under *Monreal-Aguinaga* and *Andazola-Rivas* is appropriate. See *Gonzalez Recinas*, 23 I&N Dec. at 469 (“While any hardship case ultimately succeeds or fails on its own merits and on the particular facts presented, *Matter of Andazola* and *Matter of Monreal* are the starting points for any analysis of exceptional and extremely unusual hardship.”). The AAO notes that exceptional and extremely unusual hardship to a qualifying relative must be established in the event that he or she accompanies the applicant or in the event that he or she remains in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant’s waiver request.

The record contains income tax records, photographs, letters, a special warranty deed, a settlement statement, the U.S. Department of State Background Note: Cuba for August 2008, and other documentation.

The applicant's wife conveys in her hardship statement dated August 10, 2010 that she is 28 years old and has been married to the applicant for seven years. She indicates that they have two children, who are six and four years old, and are a close knit family. She states that she is an orphan and cannot imagine her children without their father. She avers that they recently bought a house and would "suffer greatly, for the basic necessities, injustices and violation of human rights" in Cuba, which is the reason they are in the United States.

The asserted hardship in the instant case is that of separation from the applicant if the applicant's wife and children and mother remain in the United States without him. Though the AAO recognizes that there is a close relationship between the applicant and his wife and their two children, who are six and four years old, and the applicant's mother, and that they will experience emotional hardship as a result of separation from him, we find that they have not fully demonstrated that their emotional hardship would be "exceptional and extremely unusual" if they remain in the United States without the applicant.

The conditions in the country to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries must be assessed in the exceptional and extremely unusual determination. The applicant's wife asserts that in Cuba they would "suffer greatly, for the basic necessities, injustices and violation of human rights," and submitted into the record is the U.S. Department of State Background Note: Cuba for August 2008 in support of her assertion. We take notice that this conveys that Cuba is a totalitarian communist state and the report describes religious restrictions, the denial of due process in cases involving political offenses, and the control of the human rights community. U.S. Department of State, Bureau of Western Hemispheres, *Background Note: Cuba*, 1-7 (August 2008). However, we take note that the applicant's wife does not specify the basic necessities, injustices, and human rights violations of which they would be impacted. Furthermore, we note that the applicant's asylum application reflects that the applicant has family members residing in Cuba, who are his father and two siblings. Thus, when the hardship factors are considered together, we find that the applicant fails to fully demonstrate that the hardship of his wife, children, and mother would be "exceptional and extremely unusual" in joining him to live in Cuba.

In conclusion, the applicant has not demonstrated that the hardship to a qualifying relative meets the "exceptional and extremely unusual hardship" standard as required in 8 C.F.R. § 212.7(d).

Because the applicant is statutorily ineligible for relief, no purpose is served in discussing whether he 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 establishing that the application merits approval 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. The waiver application is denied.