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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

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FILE:



Office: MIAMI

Date:

MAR 08 2011

IN RE:

Applicant:



APPLICATION:

Application for Waiver of Grounds of Inadmissibility under Section 212(h) of the
Immigration and Nationality Act, 8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

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 waiver application was denied by the District Director, Miami, Florida, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that 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 been convicted of crimes involving moral turpitude. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his lawful permanent resident spouse and child, and U.S. citizen mother.

The director determined that the applicant failed to establish that extreme hardship would be imposed on his qualifying relatives if he is denied admission as a permanent resident. Specifically, the director noted that the applicant's failure to demonstrate extreme hardship was hampered by "the fact that there are no deportations to Cuba." The director further determined that the applicant's waiver should be denied as a matter of discretion because his convictions were serious, and has failed to show rehabilitation. The director denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated September 6, 2007.

On appeal, counsel asserts that the director's decision "is factually erroneous and legally incorrect." Counsel notes that the AAO has "held that whether or not the applicant will in fact be deported is not a consideration in these proceedings." Counsel states that the applicant is "deserving of a favorable exercise of discretion and his qualifying family members will in fact suffer extreme hardship in the event of his removal." *Notice of Appeal (Form I-290B)*, dated October 5, 2007.

The record includes, but is not limited to, counsel's brief, conviction records, the applicant's marriage and birth certificates, the applicant's son's birth certificate, medical documentation on behalf of the applicant's son, and an employment verification letter issued for the applicant. The entire record was reviewed and considered in arriving at a decision on the appeal.

As a preliminary matter, we will address the director's statement that the applicant failed to demonstrate extreme hardship to his qualifying relatives, "especially, in light of the fact that there are no deportations to Cuba." *Decision of the District Director* at 5. As stated by counsel, whether or not the applicant will, in fact, be removed from the United States has no bearing on the adjudication of a waiver under section 212(h) of the Act. The AAO interprets 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 two possible scenarios: either the qualifying relative will join the applicant to reside abroad or the qualifying relative will remain in the United States. Accordingly, we withdraw this part of the director's decision.

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.

The record shows that on May 3, 1994, the applicant was convicted in the Circuit Court of the Sixteenth Judicial Circuit of Monroe County, Florida, of attempted robbery in violation of Florida Statutes §§ 777.04 and 812.13. He was placed on probation for a period of three years, and ordered to complete public service and pay fines. On June 16, 1997, the applicant was found to have violated his probation, and the probation was revoked. The applicant was placed in a community control program for a period of two years followed by two years of probation, and ordered to pay additional fines and complete public service [REDACTED]

The record further shows that on March 10, 1997, the applicant was convicted in the Circuit Court of the Eleventh Judicial Circuit, Dade County, Florida, of resisting an officer with violence in violation of Florida Statutes § 843.01 and obtaining food, lodging or other accommodations with intent to defraud in violation of Florida Statutes § 509.151. The applicant was placed on probation for a period 18 months, and ordered to pay restitution to the victim and fines. On November 2, 1998, the applicant’s probation was revoked, and he was sentenced to a term of 60 days imprisonment. [REDACTED]

B). The applicant was again convicted on May 8, 1997 in the Circuit Court of the Eleventh Judicial Circuit, Miami-Dade County, Florida, for battery in violation of Florida Statutes § 784.03. He was placed on probation and ordered to complete community service [REDACTED]

Finally, the record shows that on October 24, 1997, the applicant was convicted in the Traffic Division of the County Court for Dade County, Florida, of driving while license suspended in violation of Florida Statutes § 322.34, driving under the influence in violation of Florida Statutes § 316.193, and unlawful use of a license in violation of Florida Statutes § 322.32. The applicant was placed on six

months probation. He was also ordered to pay a fine, complete community service, attended a D.U.I. program, and his driver's license was suspended [REDACTED]

On appeal, counsel asserts that the applicant's convictions for battery and resisting an officer with violence are not crimes involving moral turpitude because the statutes are divisible, and it is not clear from the record of conviction under which prong the applicant was found guilty.

At the time of the applicant's conviction, Florida Statutes § 843.01 provided, in pertinent part, that "[w]hoever knowingly and willfully resists, obstructs, or opposes any officer . . . by offering or doing violence to the person of such officer . . . is guilty of a felony of the third degree"

Assault on a law enforcement officer has been found to be a crime involving moral turpitude where the perpetrator knows the victim to be a law enforcement officer performing his official duty and the assault results in bodily injury to the officer. *See Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988) (distinguishing cases in which knowledge of the police officer's status was not an element of the crime and where bodily injury or other aggravating factors were not present to elevate offense beyond "simple" assault).

The Florida Supreme Court has ruled that the phrase "knowingly and willfully resists, obstructs, or opposes any officer" in Florida Statutes § 843.01 imposes a requirement that a defendant have knowledge of the officer's status as a law enforcement officer. *See Polite v. State of Florida*, 973 So.2d 1107, 1112 (Fla. 2007). However, the AAO notes that Florida Statutes § 843.01 is violated by either "offering" to do violence, or by "doing" violence, and there is no requirement that the victim suffer bodily injury. Thus, based solely on the statutory language, it appears that Florida Statutes § 843.01 encompasses conduct that involves moral turpitude and conduct that does not.

However, in accordance with *Silva-Trevino*, the AAO must determine if an actual case exists in which these criminal statutes were applied to conduct that did not involve moral turpitude. The AAO is aware of a prior case in which Florida Statutes § 843.01 has been applied to conduct not involving moral turpitude. In *Wright v. State*, 681 So.2d 852, 853-54 (Fla. 5th Dist. App. 1996), the court found that the state was not required to prove that the appellant, who had denied under oath that he had hit, kicked or otherwise resisted the officers apprehending him, had actually struck either of the officers because evidence that he "struggled, kicked, and flailed his arms and legs was sufficient to show that he offered to do violence to the officers within the meaning of section 843.01."

Consequently, the AAO cannot find that the offense described in Florida Statutes §§ 843.01 is categorically a crime involving moral turpitude. The AAO must therefore review the entire record, including the record of conviction and, if necessary, other relevant evidence, to determine if the applicant's conviction under these statutes was for morally turpitudinous conduct. The AAO notes that the documents comprising the record of conviction are inconclusive as to whether the applicant caused bodily injury to the officer who arrested him. The narrative section of the police report describing the applicant's arrest indicates that the applicant was fleeing from arrest. While the narrative states that the victim of his crime "suffered injury to face," there is nothing in the police report that indicates the applicant physically harmed or injured the arresting officer. *Complaint/Arrest Affidavit*, dated

December 27, 1996. Therefore, the AAO does not find that his conviction under Florida Statutes § 843.01 constitutes a crime involving moral turpitude.

At the time of the applicant's conviction, Florida Statutes § 784.03, entitled "Battery" provided:

The offense of battery occurs when a person:

1. Actually and intentionally touches or strikes another person against the will of the other; or
2. Intentionally causes bodily harm to another person.

Simple assault and battery offenses generally do not involve moral turpitude; however, that determination can be altered if there is an aggravating factor such as the infliction of bodily harm upon persons whom society views as deserving of special protection, such as children or domestic partners or intentional serious bodily injury to the victim. *In re Sanudo*, 23 I. & N. Dec. 968, 972 (BIA 2006). Fl. Stat. § 784.03 is violated by "an actual and intentional touching or striking of another person against the will of the other person; or intentionally causing bodily harm to an individual." *Sosa-Martinez v. U.S. Atty. Gen.*, 420 F.3d 1338, 1341 (11th Cir. 2005)(citation omitted). Thus, based solely on the statutory language, it appears that Florida Statutes § 784.03 encompasses conduct that involves moral turpitude and conduct that does not.

However, in accordance with *Silva-Trevino*, the AAO must determine if an actual case exists in which these criminal statutes were applied to conduct that did not involve moral turpitude. The AAO is aware of a prior case in which Fl. Stat. § 784.03 has been applied to conduct not involving moral turpitude. In *Clark v. State*, the court noted, "under the battery statute the degree of injury caused by an intentional touching is not relevant and 'any intentional touching of another person against such person's will is technically a criminal battery.'" 746 So.2d 1237, 1239 (Fla. 1st Dist. App. 1999)(citation omitted). The court further noted, "under section 784.03(1)(a) 'there need not be an actual touching of the victim's person in order for a battery to occur, but only a touching of something intimately connected with the victim's body.'" 746 So.2d 1237, 1239-40.

Therefore, the AAO cannot find that all of the offenses described in Fl. Stat. § 784.03 are categorically crimes involving moral turpitude. The AAO must therefore review the entire record, including the record of conviction and, if necessary, other relevant evidence, to determine if the applicant's conviction under these statutes was for morally turpitudinous conduct. The AAO notes that the applicant has failed to submit the record of conviction related to his conviction for battery. The record contains a police report related to the applicant's arrest for this offense. The police report reflects that the applicant was arrested on September 22, 1996 for aggravated battery and battery. Although the narrative section of the police report is not entirely legible, it does contain evidence that the applicant used physical force against the victims. The narrative states that the applicant "used a golf cart to ram victim 1&2's vehicle" and he "was observed grabbing the victim from behind." *Complaint/Arrest Affidavit*, dated September 21, 1996. Although the police report reveals that the applicant used physical force against the victims, it does not state that the applicant's actions resulted in bodily harm. Therefore, the AAO does not find that his conviction under Florida Statutes § 784.03 constitutes a crime involving moral turpitude.

Counsel further asserts, “The count for attempting to obtain food or lodging with intent to defraud does not require a waiver as it is not a criminal statute but rather falls under the regulation of trade, commerce, investments, and solicitations.”

At the time of the applicant’s conviction, Florida Statutes § 509.151, entitled “Obtaining food or lodging with intent to defraud” provided:

Any person who obtains food, lodging, or other accommodations having a value of less than \$300 at any public food service establishment, or at any transient establishment, with intent to defraud the operator thereof, is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083; if such food, lodging, or other accommodations have a value of \$300 or more, such person is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

The AAO finds counsel’s assertion that Florida Statutes § 509.151 is a regulatory law unpersuasive. The statutory language contained in this provision includes the *intent to defraud*. Fraud has, as a general rule, been held to involve moral turpitude. The U.S. Supreme Court in *Jordan v. De George* concluded that “Whatever else the phrase ‘crime involving moral turpitude’ may mean in peripheral cases, the decided cases make it plain that crimes in which fraud was an ingredient have always been regarded as involving moral turpitude. . . . Fraud is the touchstone by which this case should be judged. The phrase ‘crime involving moral turpitude’ has without exception been construed to embrace fraudulent conduct.” 341 U.S. 223, 232 (1951). Since a conviction under Florida Statutes § 509.151 requires an “intent to defraud” the victim, in this case a private establishment, we find that it is categorically a crime involving moral turpitude.

Finally, counsel asserts that, “[t]he attempted robbery conviction is also not a crime involving moral turpitude as it is also a divisible statute (permanent as opposed to temporary taking) and it cannot be ascertained from the record of conviction which prong Application was convicted under.”

At the time of the applicant’s conviction, Florida Statutes § 812.13, entitled “Robbery” provided:

“Robbery” means the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear.

Robbery has long been found to be a crime involving moral turpitude. In *Matter of Martin*, the Board noted that “It is clear . . . that robbery is universally recognized as a crime involving moral turpitude.” 18 I&N Dec. 226, 227 (BIA 1982). The applicant’s conviction under Florida Statutes § 812.13 constitutes a crime involving moral turpitude.

In sum, we find the applicant inadmissible under 212(a)(2)(A)(i)(I) of the Act for having been convicted of robbery and obtaining food or lodging with intent to defraud, two crimes involving moral turpitude.

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

(h) Waiver of subsection (a)(2)(A)(i)(I), (II), (B), (D), and (E).—The Attorney General [now the Secretary of Homeland Security, “Secretary”] may, in [her] discretion, waive the application of subparagraphs (A)(i)(I)...of subsection (a)(2) if—

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

(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 established to the satisfaction of the [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...

(2) the [Secretary], in [her] discretion, and pursuant to such terms, conditions and procedures as [she] may by regulations prescribe, has consented to the alien’s applying or reapplying for a visa, for admission to the United States, or adjustment of status.

The applicant is seeking a section 212(h) waiver of the bar to admission resulting from a violation of section 212(a)(2)(A)(i)(I) of the Act. A waiver under section 212(h) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent or child of the applicant. Hardship the alien himself experiences upon removal is irrelevant to section 212(h) waiver proceedings; the only relevant hardship in the present case is hardship suffered by the applicant’s lawful permanent resident spouse and child, and U.S. citizen mother.

Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996). In most discretionary matters, the alien bears the burden of proving eligibility simply by showing equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957). However, the AAO cannot find, based on the facts of this particular case, that the applicant merits a favorable exercise of discretion solely on the balancing of favorable and adverse factors. The applicant’s convictions indicate that he may be subject to the heightened discretion standard of 8 C.F.R. § 212.7(d).

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.

We conclude that the applicant's conviction for robbery under Florida Statutes § 812.13 is a violent or dangerous crime. *See United States v. Wilkerson*, 286 F.3d 1324, 1325 (11th Cir. 2002) (holding that robbery under Florida Statutes § 812.13 is a violent felony in the sentencing context); *Matter of Carballe*, 19 I&N Dec. 357 (BIA 1986)(noting that robbery under Florida Statutes § 812.13 "is a grave, serious,

aggravated, infamous, and heinous crime.”).

Accordingly, the applicant must show that “extraordinary circumstances” warrant approval of the waiver. 8 C.F.R. § 212.7(d). Extraordinary circumstances may exist in cases involving national security or foreign policy considerations, or if the denial of the applicant’s admission would result in exceptional and extremely unusual hardship. *Id.* Finding no evidence of foreign policy, national security, or other extraordinary equities, the AAO will consider whether the applicant has “clearly demonstrate[d] that the denial of . . . admission as an immigrant would result in exceptional and extremely unusual hardship” to a qualifying relative. *Id.*

The exceptional and extremely unusual hardship standard is more restrictive than the extreme hardship standard. *Cortes-Castillo v. INS*, 997 F.2d 1199, 1204 (7th Cir. 1993). Since the applicant is subject to 8 C.F.R. § 212.7(d), merely showing extreme hardship to his qualifying relatives under section 212(h) of the Act is not sufficient. He must meet the higher standard of exceptional and extremely unusual hardship. Therefore, the AAO will at the outset determine whether the applicant meets this standard.

In *Matter of Monreal-Aguinaga*, 23 I& N Dec. 56, 62 (BIA 2001), the BIA 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 BIA 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 BIA 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 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 an exclusive list. *Id.*

In *Monreal*, the BIA 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 BIA 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 BIA 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 BIA 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 BIA 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 BIA 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 BIA 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 reflects that the applicant's mother, [REDACTED], is a native of Cuba and a U.S. citizen. The applicant wed his spouse, [REDACTED] a citizen of Cuba and U.S. lawful permanent resident, on January 29, 1993. The applicant and his spouse have a 17-year-old U.S. lawful permanent resident son, [REDACTED] who is also a citizen of Cuba. The applicant's mother, spouse and child are qualifying relatives for purpose of these proceedings.

As previously discussed, a determination of exceptional and extremely unusual hardship should include a consideration of the impacts of relocation on the applicant's qualifying relatives. In the brief filed with the waiver application, counsel asserts that Cuba is "a country with horrific social, economic, and political conditions." Counsel states that "Cuba is one of the most repressive systems of government in the world, a totalitarian regime where the freedom of the individual is restricted and individual human rights are constantly violated." Counsel notes that the applicant's son has been diagnosed with Attention Deficit Hyperactive Disorder (ADHD) and receives psychiatric, therapeutic, and case manager services for his condition. *Form I-601 Brief*, undated.

The AAO notes that the current U.S. Department of State *Background Note* on Cuba provides information on the general political and economic conditions of the country. The report states, in pertinent parts:

Cuba is a totalitarian communist state headed by [REDACTED] and a cadre of party loyalists. [REDACTED] replaced his brother [REDACTED] as chief of state, president of Cuba, and commander-in-chief of the armed forces on February 24, 2008. [REDACTED] retains the position of [REDACTED]. A pending Communist Party Congress, the first to have been held since 1997, has been indefinitely postponed. The Cuban Government seeks to control most aspects of Cuban life through the Communist Party and its affiliated mass organizations, the government bureaucracy, and the state security apparatus. The Ministry of Interior is the principal organ of state security and control. . . .

Living conditions in 2009 remained well below the 1989 level. Moreover, the gap in the standard of living is widening between those with access to convertible pesos and those without. Jobs that can earn salaries in convertible pesos or tips from foreign businesses and tourists have become highly desirable. It is not uncommon to see doctors, engineers, scientists, and other professionals working in restaurants or as taxi drivers. An estimated \$1 billion in yearly remittances exacerbates the gap.

Prolonged austerity and the state-controlled economy's inefficiency in providing adequate goods and services have created conditions for a flourishing informal economy in Cuba. As the variety and amount of goods available in state-run peso stores has declined and prices at convertible peso stores remain unaffordable to most of the

population, Cubans have turned increasingly to the black market to obtain needed food, clothing, and household items. Pilferage of items from the work place to sell on the black market or illegally offering services on the sidelines of official employment is common. A report by an independent economist and opposition leader speculates that more than 40% of the Cuban economy operates in the informal sector. Petty theft and corruption has reached such critical proportions that (now former) [REDACTED] acknowledged it could bring the end of the revolution. In the last few years, the government has carried out an anti-corruption campaign, including the creation of a Comptroller General's Office in 2009, repeated street-level crackdowns, and ongoing ideological appeals. So far, these measures have yielded limited if any results.

U.S. Department of State, *Background Note: Cuba*, dated March 2010.

The AAO notes that the BIA and U.S. Courts 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, *Matter of Kao and Lin*, 23 I&N Dec. 45, 50 (BIA 2001), the BIA concluded that the language capabilities of the respondent's 15-year-old daughter were not sufficient for her to have an adequate transition to daily life in Taiwan. The girl had lived her entire life in the United States and was completely integrated into an American life style. The BIA found that uprooting her at this stage in her education and her social development to survive in a Chinese-only environment would constitute extreme hardship. In *Ramos v. INS*, 695 F.2d 181, 186 (5th Cir. 1983), the Fifth Circuit Court of Appeals stated that "imposing on grade school age citizen children, who have lived their entire lives in the United States, the alternatives of . . . separation from both parents or removal to a country of a vastly different culture where they do not speak the language," must be considered in determining whether "extreme hardship" has been shown. In *Prapavat v. INS*, 638 F.2d 87, 89 (9th Cir. 1980) the Ninth Circuit Court of Appeals 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.

It is unknown whether the applicant's child, who was granted lawful permanent resident status in the United States when he was 4 years old, is fluent in Spanish. However, the record demonstrates that he has significant ties to the United States. His mother is a lawful permanent resident and his grandmother is a U.S. citizen. He has resided in the United States since he was 4 years old and he is currently a 17-year-old teenager. The AAO finds that the applicant's child's relocation from the United States to a country such as Cuba with a vastly different political and economic culture would certainly cause them the extreme hardship demonstrated in *Matter of Kao and Lin, supra*. The question remains whether the applicant's child have shown hardship that is not only extreme, but also is "'substantially' beyond the ordinary hardship that would be expected when a close family member leaves this country." *Matter of Monreal-Aguinaga*, 23 I&N Dec. 56, 62 (BIA 2001).

The record shows that the applicant's child has academic special needs that require learning accommodations. The record contains a letter from [REDACTED] "By means of this letter we would like to inform you that [REDACTED] . . . has been receiving Psychiatric,

Therapeutic, and Case Manager Services since 08/13/01. [REDACTED] was diagnosed with ADHD Combined Type on September 10, 2001 and prescribed with Adderal 10 mg.” *Letter from* [REDACTED] dated July 29, 2003. A subsequent letter from [REDACTED] states, [REDACTED] is receiving Therapeutic, Case Manager Services and Psychiatrist treatment He is ADHD and he is taking Adderall XR 20 mg. [REDACTED] needs supervision from his family in order to improve his behavior and academic problems.” *Letter from* [REDACTED], dated January 27, 2006. The AAO finds that in light of his special needs, to uproot the applicant’s child during the formative stage of his adolescent years and to place him in a country such as Cuba, where the political and economic system are, in sharp contrast to the United States, under a totalitarian communist state, would cause him exceptional and extremely unusual hardship. *See U.S. Department of State, Background Note: Cuba*, dated March 2010.

Although the applicant has established that a qualifying relative will experience exceptional and extremely unusual hardship upon relocation, he must still establish that a qualifying relative will experience exceptional and extremely unusual hardship if he is denied admission and they remain in the United States. On appeal, counsel asserts that the denial of the waiver application would result in extreme hardship to the applicant’s mother, wife and son. Counsel states that the applicant’s son is “completely dependent on Applicant’s health insurance coverage for treatment of his ADHD.” *Appeal’s Brief* at 2-3, dated November 1, 2007. Counsel previously asserted that the applicant supports his spouse financially and emotionally. Counsel contended that the applicant “will most likely be incarcerated upon his return thereby causing great pain and suffering to his wife and son.” *Form I-601 Brief*.

The AAO has considered the documentation provided in the record, and finds that it does not reflect that the applicant’s son is dependent on him for health insurance coverage. The applicant has not submitted a copy of his son’s health insurance card, or any indication that he is paying for his medical expenses through his medical insurance. Nor does the record contain financial documentation as evidence of the applicant’s overall household expenses. The applicant has not stated whether his spouse is employed, and if so, provided copies of her earnings statements. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Similarly, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner’s burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 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). Accordingly, the AAO cannot determine that the applicant’s spouse, child or mother would suffer financial hardship upon separation from the applicant.

In addition, the AAO finds that the applicant has not provided any evidence to support that he has engaged in activities that would result in his incarceration upon his return to Cuba. The AAO notes that the applicant’s adjustment application (Form I-485) reflects that he has a son who resides in Cuba. Neither counsel nor the applicant have stated, or demonstrated, that the applicant’s spouse, mother, or child would be unable to visit the applicant in Cuba. The AAO observes that the record does not

contain statements from the applicant's qualifying family members providing a first-hand account of the hardship they would suffer upon separation from the applicant.

The AAO acknowledges that the applicant and his qualifying family members will experience emotional hardship if they are separated as a result of his inadmissibility. 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). The AAO finds that the applicant's separation from his spouse, child and mother constitutes emotional suffering for his qualifying family members, but the applicant has failed to demonstrate that this hardship, when combined with other hardship factors, rises to the level of exceptional and extremely unusual. While almost every case will present some hardship, the fact pattern here is not 'substantially' beyond ordinary hardship.

All elements of hardship to the applicant's qualifying relatives, should they remain in the United States, have been considered in aggregate. While the AAO acknowledges that they will suffer some emotional hardship upon separation from the applicant, the record does not show that such hardship rises to the level of exceptional and extremely unusual.

In conclusion, although the record reflects that the applicant's child would suffer exceptional and extremely unusual hardship upon relocation to Cuba, it does not demonstrate that any of the applicant's qualifying relatives would suffer exceptional and extremely unusual hardship upon separation from the applicant. The AAO therefore finds that the applicant has failed to establish eligibility for a waiver of inadmissibility under section 212(h) of the Act.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. See section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.