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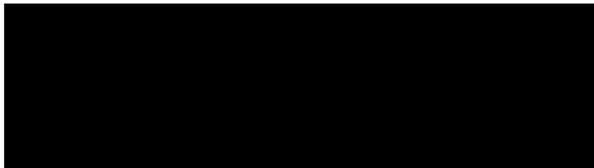
Date: **OCT 19 2011** Office: LOS ANGELES, CA

FILE: 

IN RE: 

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. The fee for a Form I-290B is currently \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Mexico 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 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 remain in the United States with his lawful permanent resident spouse and U.S. citizen son.

In a decision, dated November 8, 2008, the field office director found that the record failed to establish that the applicant's spouse and/or child would experience any extreme hardship as a result of the applicant's removal from the United States.

In a Notice of Appeal to the AAO (Form I-290B), dated December 9, 2008, counsel states that the field office director erroneously denied the applicant's waiver application because he failed to consider all of the evidence of extreme hardship to the applicants qualifying relatives. She states that the applicant clearly submitted sufficient evidence to establish extreme hardship.

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 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.)

In the recently decided *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude 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). This case arises in the Ninth Circuit, and the Ninth Circuit Court of Appeals has adopted the realistic probability standard. See *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 1004-1007 (9th Cir. 2008).

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 reflects that on June 1, 1992, in Los Angeles County, California, the applicant was convicted of misdemeanor battery, under Cal. Penal Code § 242, and sentenced to ten days in jail and two years probation. On August 12, 2004, in Los Angeles County, California, the applicant was convicted of receiving/concealing stolen property, under Cal. Penal Code § 296(A), and sentenced to one year in jail and two years probation.

Cal. Penal Code § 242 defines battery as any willful and unlawful use of force or violence upon the person of another. The AAO notes that the Ninth Circuit Court of Appeals has held that battery is “not categorically [a] crime involving moral turpitude.” *Nicanor-Romero v. Mukasey*,

523 F.3d 992, 998 (9th Cir. 2008), citing *Galeana-Mendoza v. Gonzales*, 465 F.3d 1054, 1055 (9th Cir. 2006). Additionally, the AAO notes that the Eleventh Circuit Court of Appeals has held that aggravated battery, which includes the use of a deadly weapon or when the battery results in serious bodily injury, to be a crime involving moral turpitude; however, simple battery is not a crime involving moral turpitude. See *Sosa-Martinez v. U.S. Atty. Gen.*, 420 F.3d 1338, 1342 (11th Cir. 2005). The AAO notes that such aggravated forms of battery are punished by Cal. Penal Code § 245.

Similarly, the AAO notes that harm to members of a specially protected class, like a spouse or child, can be morally turpitudinous. Specifically, in *Grageda v. INS*, 12 F.3d 919 (9th Cir. 1993), the Ninth Circuit Court of Appeals held that spousal abuse under section Cal. Penal Code 273.5(a) is a crime of moral turpitude because spousal abuse is an act of baseness or depravity contrary to accepted moral standards, and willfulness is one of its elements. However, as the applicant was convicted under a statute the language of which encompasses only simple battery, the AAO finds that the applicant's conviction for battery is not a crime involving moral turpitude.

In regards to the applicant's conviction for receiving/concealing stolen property under Cal. Penal Code § 296(A), Cal. Penal Code § 496(a) provides:

Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, is punishable by imprisonment in a state prison, or in a county jail for not more than one year. However, if the district attorney or the grand jury determines that this action would be in the interests of justice, the district attorney or the grand jury, as the case may be, may, if the value of the property does not exceed four hundred dollars (\$400), specify in the accusatory pleading that the offense shall be a misdemeanor, punishable only by imprisonment in a county jail not exceeding one year.

U.S. Courts have held that the crime of theft or larceny, whether grand or petty, involves moral turpitude. See *Matter of Scarpulla*, 15 I&N Dec. 139, 140 (BIA 1974)(stating, "It is well settled that theft or larceny, whether grand or petty, has always been held to involve moral turpitude . . ."); *Morasch v. INS*, 363 F.2d 30, 31 (9th Cir. 1966)(stating, "Obviously, either petty or grand larceny, i.e., stealing another's property, qualifies [as a crime involving moral turpitude].") However, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended. *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973).

The Ninth Circuit Court of Appeals addressed the issue of whether Cal. Penal Code § 496(a) constitutes a crime involving moral turpitude in the recent case, *Castillo-Cruz v. Holder*, No. 06-70896, slip op. (9th Cir. Sept. 17, 2009). The Court determined that Cal. Penal Code § 496(a) does not require a perpetrator to have the intent to permanently deprive the owner of his or her

property, but rather permits conviction for an intent to deprive the owner of his or her property temporarily. *Castillo-Cruz v. Holder*, No. 06-70896, slip op. at 13481. The Court applied the methodology articulated in *Gonzales v. Duenas-Alvarez*, *supra*, for a determination of whether there is a “realistic probability” that Cal. Penal Code § 496(a) would be applied to conduct that does not involve moral turpitude. *Id.* The Court concluded that lower courts have upheld convictions under Cal. Penal Code § 496(a) in cases where there was no permanent intent, and as such, a conviction under the statute is not categorically a crime of moral turpitude. *Castillo-Cruz*, No. 06-70896, slip op. at 13482. The Court then held that the alien’s conviction was not a crime involving moral turpitude under the modified categorical analysis because the government conceded that there was no evidence in the record establishing that his offense involved an intent to deprive the owner of possession permanently. *Id.*

However, in proceedings for an application for a waiver of grounds of inadmissibility, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has not asserted that his crime is not a crime involving moral turpitude, has not provided an explanation of the crime that, if accepted, shows the crime not to be a crime involving moral turpitude, and, finally, has not presented all available documentation to show that the record of conviction and other relevant documents are inconclusive as to whether his conviction involved the intent to deprive the owner of possession permanently. Therefore, the AAO cannot find that the applicant’s conviction under Cal. Penal Code § 496(a) did not involve the intent to permanently deprive the owner of possession and is, therefore, not a crime involving moral turpitude.

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

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), . . . of subsection (a)(2) . . . if –

....

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien

A waiver of inadmissibility under section 212(h) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse, parent, son or daughter of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. The applicant’s spouse and child are the only qualifying relatives in this case. 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-Morales*, 21 I&N Dec. 296, 301 (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 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. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *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.*

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., Matter of 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). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important

single hardship factor in considering hardship in the aggregate. *See Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *but see Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

In her brief, counsel states that the district director failed to consider the supporting documentation of hardship submitted by the applicant with his original waiver application. Counsel states repeatedly that although the district director lists the supporting documents submitted by the applicant, he then finds that the applicant failed to submit supporting documentation for his hardship claims. Counsel states further that the district director erred in not finding that the applicant's spouse would suffer extreme emotional and financial hardship as a result of the applicant's inadmissibility.

In her statement, the applicant states that she would face extreme hardship if she had to relocate to Mexico because she has extensive family ties to the United States and has lived in this country since 1982. She also states that she would not want to take her youngest son out of school in the United States because he is doing very well and plans to go to college, which she states he cannot do in Mexico because they will not be able to afford high school or college in Mexico and her son does not speak Spanish. She states that moving to Mexico would cause her extreme financial hardship because she would lose her medical benefits and retirement plan that comes with her current employment. She states that she only has a sixth-grade education, and the applicant only a third-grade education, so their lack of education combined with their age would prohibit them from finding employment in Mexico. Finally, the applicant's spouse also states that she will suffer extreme emotional and financial hardship if she and the applicant are separated. She states that as a result of separation, she fears she will fall into depression as she and the applicant have been together since she was thirteen years old.

The AAO notes that the applicant's statement supports the claims made by his spouse. However, going on record without supporting documentary evidence is not sufficient for the 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)). In addition, 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 Obaighena*, 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).

The AAO notes that in his decision, the district director listed the supporting documentation submitted by the applicant with his initial waiver application as follows: a letter from the applicant, a declaration for the applicant's spouse, several documents relating to the applicant's son's educational accomplishments, an employment verification letter, letters of

recommendation for the applicant, pictures of the applicant's family, a letter verifying life insurance coverage, and a letter from counsel. On appeal the only additional documentation submitted is counsel's brief.

The AAO finds that counsel has failed to submit documentation to support the hardship claims of the applicant's spouse. While there are documents that have been submitted to the record, as listed above, they do not meet the burden of proof to establish extreme hardship. The educational documentation submitted shows only that the applicant's son does very well in school, but does not show that he would suffer hardship or not continue to do well in school if he was separated from his father or if he relocated to Mexico. Similarly, an employment verification letter submitted establishes a place of employment and ties to the United States, but does not show that an applicant would not be able to find employment in the country of relocation. No financial documentation or family budget information was submitted to show in detail the financial situation the applicant's spouse would be left in if she were separated from the applicant and no documentation or statements from family or friends were submitted to indicate the emotional toll separation or relocation would take on the applicant's spouse, and how this emotional suffering would amount to extreme hardship. The AAO notes that letters from family and friends were submitted in regards to the applicant's moral character and although supportive of a favorable exercise of discretion should extreme hardship be established, they do not contain information that support a finding of extreme emotional hardship. Furthermore, counsel submitted no documentation of country conditions in Mexico or, more specifically, of conditions in the area of Mexico the family would be likely to relocate. The record lacked any documentation to support that the applicant's son would not be able to attend school or that the applicant and his spouse would not be able to find work in Mexico. Therefore, for the reasons stated above, the AAO finds that the applicant has failed to show that a qualifying relative would suffer extreme hardship as a result of his inadmissibility.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's spouse and/or child caused by the applicant's inadmissibility to the United States. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. The appeal will be dismissed. .

ORDER: The appeal is dismissed.