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**U.S. Citizenship
and Immigration
Services**

[REDACTED]

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Date: **FEB 17 2012** Office: LOS ANGELES, CA

FILE: [REDACTED]

IN RE: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under 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,


for Perry Rhew

Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Mexico. The field office director found the applicant to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of 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) in order to reside in the United States with his U.S. citizen spouse and daughter.

In a decision, dated March 11, 2000, the field office director concluded that the applicant had failed to establish that his inadmissibility would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Ground of Excludability (Form I-601) accordingly.

In a Notice of Appeal to the AAO (Form I-290B), dated April 8, 2009, counsel asserts that the field office director failed to adequately evaluate the hardship to the applicant's U.S. citizen child, relied on case law that has been long overruled, and failed to consider hardship in the aggregate.

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 (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.)

On or about May 17, 2000, the applicant was charged with misdemeanor theft under California Penal Code (CPC) § 484(A) and burglary under CPC § 459. On May 19, 2000 the burglary charge was dismissed and the applicant pled guilty to the theft charge. The applicant was sentenced to three years probation and served three days in jail.

At the time of the applicant's conviction, Cal. Penal Code § 484(a) provided, in pertinent part:

Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft. . . .

The Ninth Circuit Court of Appeals in *Castillo-Cruz v. Holder* determined that petty theft under Cal. Penal Code § 484(a) requires the specific intent to deprive the victim of his or her property permanently, and is therefore a crime categorically involving moral turpitude. 581 F.3d 1154, 1160 (9th Cir. 2009).

In view of the holding in *Castillo-Cruz*, we find that the applicant's conviction for theft constitute crimes involving moral turpitude, rendering him inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

In addition, on or about April 17, 2006 the applicant was charged with Infliction of Corporal Injury on a Spouse under CPC § 273.5(A) and with Battery Against a Former Spouse/Fiancée under CPC § 243(E)(1) for events that occurred on or about March 1, 2006. On September 5, 2006, the charge under § 273.5(A) was dismissed and the applicant was convicted under CPC § 243(E)(1). The applicant was sentenced to one day in jail and three years probation.

At the time of the applicant's conviction, battery was defined under CPC § 242 as the, "willful and unlawful use of force or violence upon the person of another."

At the time of the applicant's conviction, CPC § 243(E)(1) stated:

When a battery is committed against a spouse, a person with whom the defendant is cohabiting, a person who is the parent of the defendant's child, former spouse, fiancé or fiancée, or a person with whom the defendant currently has, or has previously had, a dating or engagement relationship, the battery is punishable by a fine not exceeding two thousand dollars (\$2,000), or by imprisonment in a county jail for a period of not more than one year, or by both that fine and imprisonment. If probation is granted, or the execution or imposition of the sentence is suspended, it shall be a condition thereof that the defendant participate in, for no less than one year, and successfully

complete, a batterer's treatment program, as defined in Section 1203.097, or if none is available, another appropriate counseling program designated by the court. However, this provision shall not be construed as requiring a city, a county, or a city and county to provide a new program or higher level of service as contemplated by Section 6 of Article XIII B of the California Constitution.

In *In re Sanudo*, 23 I&N Dec. 968 (BIA 2006), the BIA analyzed whether domestic battery in violation of Cal. Penal Code §§ 242 and 243(e) constitutes a crime involving moral turpitude. 23 I&N Dec. at 969. First, the BIA assessed the manner in which California courts have applied the “use of force or violence” clause of Cal. Penal Code § 242. *Id.* The BIA noted that courts have held that “the force used need not be violent or severe and need not cause pain or bodily harm.” *Id.* at 969 (citing *Gunnell v. Metrocolor Labs., Inc.*, 112 Cal. Rptr. 2d 195, 206 (Cal. Ct. App. 2001)). Second, the BIA assessed the situations in which assault and battery offenses may be classified as crimes involving moral turpitude. The BIA noted that those offenses include assault and battery coupled with aggravating factors such as the use of deadly weapon, the intentional infliction of serious bodily injury, and bodily harm upon individuals deserving of special protection such as a child, domestic partner, or a peace officer. 23 I&N Dec. at 971-72. The BIA also held that “the existence of a current or former ‘domestic’ relationship between the perpetrator and the victim is insufficient to establish the morally turpitudinous nature of the crime,” and, therefore, a conviction for domestic battery does not qualify categorically as a crime involving moral turpitude. *Id.* at 972-73.

The Ninth Circuit Court of Appeals addressed whether Cal. Penal Code §§ 242 and 243(e) constitutes a crime involving moral turpitude in the case *Galeana-Mendoza v. Gonzalez*, 465 F.3d 1054 (9th Cir. 2006). The Ninth Circuit noted agreement with the BIA’s decision in *Sanudo*. 465 F.3d at 1062. The court followed the “categorical” and “modified categorical” approach, as then defined, to determine whether the conviction was a crime involving moral turpitude. The Ninth Circuit theorized that, “throwing a cup of cola on the lap of someone to whom one is or had been engaged, slighting shoving a cohabitant, or poking the parent of one’s children rudely with the end of a pencil are all ‘offensive touching[s]’ of qualifying individuals and can constitute domestic battery under section 243(e).” *Id.* at 1061. The Ninth Circuit determined that since the full range of conduct proscribed by the statute at hand did not categorically involve moral turpitude, the court would conduct a modified categorical analysis and look “beyond the language of the statute to a narrow, specified set of documents that are part of the record of conviction, including the indictment, the judgment of conviction, jury instructions, a signed guilty plea, or the transcript from the plea proceedings to determine whether the applicant was convicted of a crime involving moral turpitude.” *Id.* at 1057-1058 (citations omitted).

To determine if a crime involves moral turpitude, the Ninth Circuit Court of Appeals first applies the categorical approach. *Nunez v. Holder*, 594 F.3d 1124, 1129 (9th Cir. 2010) (citing *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 999 (9th Cir.2008)). This approach requires analyzing the elements of the crime to determine whether all of the proscribed conduct involves moral turpitude. *Nicanor-Romero*, *supra* at 999. In *Nicanor-Romero*, the Ninth Circuit states that in making this determination there must be “a realistic probability, not a theoretical possibility, that the statute

would be applied to reach conduct that did not involve moral turpitude. *Id.* at 1004 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability can be established by showing that, in at least one other case, which includes the alien's own case, the state courts applied the statute to conduct that did not involve moral turpitude. *Id.* at 1004-05. *See also Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008) (whether an offense categorically involves moral turpitude requires reviewing the criminal statute to determine if there is a "realistic probability, not a theoretical possibility," that the statute would be applied to conduct that is not morally turpitudinous).

If the crime does not categorically involve moral turpitude, then the modified categorical approach is applied. *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1161 (9th Cir. 2009). This approach requires looking to the "limited, specified set of documents" that comprise what has become known as the record of conviction—the charging document, a signed plea agreement, jury instructions, guilty pleas, transcripts of a plea proceeding and the judgment—to determine if the conviction entailed admission to, or proof of, the necessary elements of a crime involving moral turpitude. *Id.* at 1161 (citing *Fernando-Ruiz v. Gonzalez*, 466 F.3d 1121, 1132-33 (9th Cir. 2006)).

Although not explicitly applying the "realistic probability" test, the Ninth Circuit in *Galeana-Mendoza* engaged not only in assessing the theoretical possibility but also the realistic probability that Cal. Penal Code § 242 is a categorical crime involving moral turpitude. 465 F.3d 1054. The Ninth Circuit stated that in looking at California court decisions involving Cal. Penal Code § 242, "the phrase 'use of force or violence' . . . is a term of art, requiring neither a force capable of hurting or causing injury nor violence in the usual sense of the term." *Id.* at 1059 (citing *Ortega-Mendez v. Gonzalez*, 450 F.3d 1010, 1016 (9th Cir. 2006)). The Ninth Circuit noted that the domestic relationship factor delineated in Cal. Penal Code § 243(e) is not, alone, sufficient to render every offense under this statute as one that is categorically grave, base, or depraved, and as such, the full range of conduct proscribed by section 243(e) does not involve moral turpitude. 465 F.3d at 1059-60. The Ninth Circuit held that since Cal. Penal Code § 243(e) "lacks an injury requirement and includes no other inherent element evidencing 'grave acts of baseness or depravity,'" it is not categorically a crime involving moral turpitude. *Id.* at 1061. The Ninth Circuit further held that the government failed to carry its burden under the modified categorical approach. *Id.* at 1062.

Since a conviction for domestic violence under Cal. Penal Code §§ 242 and 243(e) is not categorically a crime involving moral turpitude, we apply the modified categorical approach and "consider whether any of a limited, specified set of documents—including the state charging document, a signed plea agreement, jury instructions, guilty pleas, transcripts of a plea proceeding and the judgment (sometimes termed 'documents of conviction')" reflect that the applicant's conviction involved an admission to, or proof of, morally turpitudinous conduct. *Fernando-Ruiz*, 466 F.3d at 1132 (citation omitted). As previously discussed, the BIA in *Sanudo* determined that bodily harm upon individuals deserving of special protection such as a child, domestic partner, or a peace officer, constitutes morally turpitudinous conduct. 23 I&N Dec. 968, 971-72 (BIA 2006).

The current record, which does not include the full record of conviction, does not indicate whether serious injury to the victim occurred in the commission of the applicant's crime. However, unlike a

removal hearing in which the government bears the burden of establishing a respondent's removability, the burden of proof in the present proceedings is on the applicant to establish his admissibility for admission to the United States "to the satisfaction of the Attorney General [Secretary of Homeland Security]." See Section 291 of the Act, 8 U.S.C. § 1361. Therefore, as counsel does not contest the field office director's finding of inadmissibility on appeal, the AAO will not disturb that finding.¹

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

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

. . . .

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

A waiver of inadmissibility under section 212(h) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse, parent, son or daughter of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. The applicant's spouse and daughter are the 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-Moralez*, 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.

¹ The AAO notes that if the applicant's conviction under CPC § 243(E)(1) involved serious harm, it may be considered a violent crime and the applicant may be subject to the heightened discretionary standard under 8 C.F.R. § 212.7(d).

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.

The record of hardship includes: counsel's brief, a statement from the applicant's spouse, tax documents for the applicant and his spouse, family photographs, joint documents between the applicant and his spouse, evidence of familial ties to the United States, and medical records for the applicant's daughter.

Counsel claims that the applicant's spouse and child will suffer emotional, financial, and in the applicant's daughter's case, medical hardship as a result of the applicant's inadmissibility. Counsel claims that the applicant's spouse will suffer emotional and financial hardship as a result of having

to support two households and care for the couple's daughter in the event of separation. In the event of relocation, counsel states that the applicant's spouse will suffer hardship because of the country conditions in Mexico and that she is not likely to find employment in Mexico due to her education level. Counsel claims that the applicant's daughter will suffer emotionally in the event of separation because she will lose the support of her father during the formative years of her childhood and medically as a result of relocation because she suffers from asthma and will not be able to access adequate health care in Mexico. The AAO notes that the applicant's spouse's statement supports the hardship claims made by counsel.

However, the additional supporting documentation submitted as part of the record and the lack of certain documentation in the record indicates that these hardship claims are not fully supported by the record. Tax documentation and other financial documentation in the record indicates that the applicant and his spouse were living at or below the poverty guidelines in 2004 and 2005 as set by the Department of Health and Human Services. The record does not establish that the applicant and/or his spouse would not be able to find employment in Mexico at or above these income levels. Moreover, the record includes no documentation to support any claims made in regards to country conditions in Mexico including economic issues, safety issues, or problems with the standards of medical care in the country.

The AAO finds further that the medical documentation submitted as evidence of the applicant's daughter's asthma is from 2006, when the applicant's daughter was four years old and does not provide enough detail about the severity of the daughter's condition and the required follow-up care for the condition, for the AAO to make a determination as to whether the condition would cause extreme hardship. The applicant's appeal was filed in 2009, but no medical documentation was included in the record beyond 2006. The medical records, dated April 24, 2006, state that the applicant's daughter was diagnosed with reactive airway disease and was prescribed an inhaler and an aerochamber with child mask. The AAO recognizes the stress and concern that any illness can cause, especially in the case of a young child. However, the current documentation submitted as part of the record is not sufficient to support counsel's and the applicant's spouse's claims that the daughter's medical condition would cause her extreme hardship in the absence of her father or cause her mother extreme hardship in having to care for a child with this condition in the absence of her spouse. Similarly, the record is insufficient to establish that the condition's severity rises to a level where taking her away from her doctors in the United States would be detrimental to her health. To the contrary, the record does not even establish that the applicant's daughter must see a doctor for her condition on a frequent or regular basis. As stated above, the record also fails to establish that medical care in Mexico would be insufficient to treat the applicant's daughter's condition.

Given the applicant's and his spouse's combined income being at or above the poverty level and the existence of a minor child in the relationship, the AAO finds that it would be extreme financial and emotional hardship for the family to separate. However, given the current record and the lack of supporting documentation, the AAO cannot find that relocation to Mexico would be extreme hardship.

The AAO can find extreme hardship warranting a waiver of inadmissibility only where an applicant has demonstrated extreme hardship to a qualifying relative in the scenario of separation *and* the scenario of relocation. A claim that a qualifying relative will remain in the United States and thereby suffer extreme hardship as a consequence of separation can easily be made for purposes of the waiver even where there is no intention to separate in reality. *See Matter of Ige*, 20 I&N Dec. 880, 886 (BIA 1994). Furthermore, to separate and suffer extreme hardship, where relocating abroad with the applicant would not result in extreme hardship, is a matter of choice and not the result of inadmissibility. *Id.*, *see also Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996). As the applicant has not demonstrated extreme hardship from relocation, we cannot find that refusal of admission would result in extreme hardship to the qualifying relative(s) in this case.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's spouse or daughter 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 under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.