

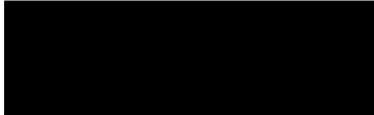
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



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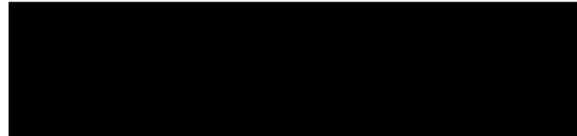
Date: **MAY 02 2012** Office: MIAMI

FILE:

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 Field Office Director, Miami, Florida, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Cuba who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude.<sup>1</sup> He seeks a waiver of inadmissibility in order to reside in the United States with his lawful permanent resident wife and U.S. citizen children.

The field office director denied the Form I-601 application for a waiver, finding that the applicant failed to establish extreme hardship to a qualifying relative. *Decision of the Field Office Director*, dated July 28, 2009.

On appeal, counsel for the applicant asserts that the applicant's wife and children will suffer extreme hardship should the present waiver application be denied. *Brief from Counsel*, dated July 6, 2009.

The record contains, but is not limited to: a brief from counsel; statements from the applicant and the applicant's wife and son; tax records for the applicant and his wife; records pertaining to the applicant's business and employment activities; documentation regarding the applicant's daughter's academic activities; a letter showing that the applicant was involved in a volunteer project; copies of documents regarding the applicant's wife's ownership of a home; and documentation in connection with the applicant's criminal history. The entire record was reviewed and considered in rendering this decision.

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 –

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<sup>1</sup> On May 1, 2008, the Director of the California Service Center denied the applicant's prior Form I-485 application to adjust his status to lawful permanent resident based on a finding that there is sufficient reasonable, substantial, and probative evidence to support that he has been involved in the illicit trafficking of a controlled substance. The director found that the applicant is inadmissible under section 212(a)(2)(C) of the Act, for which there is no waiver. In the present matter, the field office director did not raise this ground of inadmissibility, and the record does not show that the applicant has rebutted the prior finding of the director of the California Service Center. The AAO observes that the applicant was charged with conspiracy to traffic cocaine for his conduct in 1986, yet the charge against him was dismissed. The AAO declines to make a finding of whether the record supports inadmissibility under section 212(a)(2)(C) of the Act, as the appeal will be dismissed on other grounds.

- (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

(ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-

- (I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or

- (II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

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

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

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

(Citations omitted.)

The applicant's case arises within the jurisdiction of the Eleventh Circuit Court of Appeals, which has recently reaffirmed the traditional categorical approach for determining whether a crime involves moral turpitude. *See Fajardo v. Attorney General*, 659 F.3d 1303, 1310 (11<sup>th</sup> Cir. 2011) (finding that the Congress intended the traditional categorical or modified categorical approach to be used to determine whether convictions were convictions for crimes involving moral turpitude and declining to follow the "realistic probability approach" put forth by the Attorney General in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)). In its decision, the Eleventh Circuit defined the categorical approach as

“ ‘looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions.’ ” 659 F.3d at 1305 (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990)). The court indicated, however, that where the statutory definition of a crime includes “conduct that would categorically be grounds for removal as well as conduct that would not, then the record of conviction – i.e., the charging document, plea, verdict, and sentence – may also be considered.” 659 F.3d at 1305 (citing *Jaggernaut v. U.S. Att’y Gen.*, 432 F.3d 1346, 1354-55 (11<sup>th</sup> Cir. 2005)).

The record shows that the applicant has been convicted of multiple criminal offenses, including aggravated battery with great bodily harm under Florida Statutes § 784.045 for his conduct on or about March 16, 1999. He was also convicted in Florida of grand larceny for his conduct on or about December 11, 1985; dealing in stolen property for his conduct on or about March 18, 1986; resisting arrest for his conduct on July 10, 1989; possession of marijuana less than 20 grams for his conduct on or about December 8, 1989; and multiple instances of driving without a license or while his license was suspended or revoked. The applicant concedes that he has committed crimes involving moral turpitude that render him inadmissible under section 212(a)(2)(A)(i)(I) of the Act, and that he requires a waiver under section 212(h) of the Act.

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

The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana . . . .

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

- (i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien’s application for a visa, admission, or adjustment of status,
- (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
- (iii) the alien has been rehabilitated; or

(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 . . . ; and

(2) the Attorney General [Secretary], in his discretion, and pursuant to

such terms, conditions and procedures as he 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.

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 wife and children are the 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 deportation, removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. *See generally Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator "must consider the entire range of factors concerning hardship in their totality and determine whether the

combination of hardships takes the case beyond those hardships ordinarily associated with deportation.” *Id.*

We observe that the actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. *See, e.g., In re Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate).

In a brief dated July 6, 2009 counsel asserts that the applicant’s wife and children will suffer difficulty should they reside in Cuba due to poor conditions there. Counsel provides that the applicant’s wife works sporadically, but her income falls below the federal poverty guidelines for herself and their daughter. Counsel asserts that, should the applicant reside in Cuba, the applicant’s son will lose the applicant’s contribution to this college expenses, and the applicant’s daughter will be unable to continue attending private school. Counsel contends that the applicant’s wife and daughter will lose their home. Counsel notes that the applicant operates a successful business that provides the large majority of their household income.

In a statement dated February 24, 2009, the applicant’s wife indicated that she has resided with the applicant since 1988, they married in 2007, and they have a daughter who was born on September 10, 1999. She lauds the applicant’s character and support of their family, and she asserts that she and their daughter will suffer great emotional distress and financial hardship if the applicant returns to Cuba. It is noted that the record contains a second statement from the applicant’s wife, dated February 23, 2007, yet it contains nearly verbatim the same content of the statement dated February 24, 2009.

The record contains an undated statement from the applicant’s adult son in which he indicated that he resided with the applicant until approximately two years before the statement was issued. He expressed that the applicant has been a good father and has had a positive impact on him. He provided that he will endure emotional difficulty should the applicant return to Cuba.

Upon review, the applicant has not shown that a qualifying relative will suffer extreme hardship should the present waiver application be denied. The applicant has not established that his family members will endure extreme hardship should they remain in the United States without him. The AAO has carefully examined the brief statement from the applicant’s 25-year-old son, and acknowledges that he will face emotional hardship should he reside apart from the applicant. However, the applicant has not shown that his son will face psychological challenges that rise to an extreme level. The applicant has not presented documentation to support the assertions that his son will face economic difficulty in the applicant’s absence, or that his college activities will be interrupted. While counsel asserts that conditions are poor in Cuba, the applicant has not presented sufficient explanation or supporting documentation to show that his son would face extreme hardship should he attempt to reside in Cuba.

As noted above, the content of the applicant's wife's statement was presented to U.S. Citizenship and Immigration Services (USCIS) in or about February 2007, over five years ago. Though the appeal was filed in or about August 2009, the applicant does not update the record with recent statements from him or his wife that discuss their current circumstances. While we acknowledge that the applicant's wife and daughter will face emotional difficulty should they reside apart from the applicant, the record does not support that their psychological hardship would rise to an extreme level.

The record supports that the applicant earns the majority of his household's income, and that his wife and daughter will face significant financial consequences should he depart the United States. However, he has not shown that his wife would be unable to earn sufficient income to meet her and their daughter's needs in his absence. We are unable to determine the applicant's family's current assets, such to show whether the applicant's wife would have access to resources or income in addition to her earnings from employment. The record also lacks a complete description of the applicant's household's current expenses. Thus, the applicant has not established that his wife or daughter will endure unusual economic challenges.

As discussed above, counsel contends that conditions in Cuba are poor, and that the applicant and his family members would face difficulty there as a result. However, the applicant has not submitted any reports on conditions in Cuba, or specifically stated how his wife and daughter would be personally affected. We acknowledge the assertions that the economic climate in Cuba is significantly less favorable than that of the United States. However, the applicant has not established that conditions in the country are sufficiently harsh such that all individuals residing there face conditions that constitute extreme hardship. In the absence of clear assertions from the applicant, the AAO may not speculate regarding difficulties his family members will face upon denial of the waiver application. In proceedings regarding a 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.

All stated elements of hardship have been considered in aggregate. Based on the foregoing, the applicant has not shown that his wife, daughter, or son will suffer extreme hardship should the present waiver application be denied. Accordingly, the applicant has not shown that denial of his waiver application "would result in extreme hardship" to his wife or children, as required for a waiver under section 212(h) of the Act. The waiver application must be denied for this reason.

The AAO also finds that the applicant has not established that he warrants a favorable exercise of discretion.<sup>2</sup> The applicant's criminal history extends over an approximately 14-year period, and his conduct does not constitute isolated incidents. He has shown a long pattern of engaging in criminal activity and disregarding the laws of the United States. His conviction for aggravated battery with great bodily harm involved significant violence, in which he bit the ear off of an 18-year-old victim in a highway altercation. Counsel presents an assessment of the facts of the applicant's aggravated battery conviction, and asserts that his actions were self-defense. However, the records associated

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<sup>2</sup> We note that the applicant has been convicted of a violent or dangerous crime, and therefore would have to meet the discretionary standard found at 8 C.F.R. § 212.7(d) even had he demonstrated extreme hardship to a qualifying relative.

with the applicant's conviction do not support counsel's assertions, and a police report presents an account of the incident that reflects that the applicant was the aggressor in a "road rage" conflict. It is presumed that the applicant was afforded the opportunity to assert self-defense in a criminal trial, and instead he pled *nolo contendere*. The AAO may not relitigate the facts of the applicant's criminal convictions in the present proceeding, and counsel's characterization of the applicant's conduct is not persuasive.

It is noted that the applicant was convicted of resisting arrest and driving with a suspended license for his conduct on July 10, 1989. A police report associated with this incident indicates that the applicant was stopped by a law enforcement officer due to his involvement in another "road rage" incident, and he proceeded to provoke the officer, use profanity, and violently resist arrest that resulted in injury to the officer. These facts reveal that the applicant has a propensity for violent behavior, particularly associated with roadway aggression. Rather than accept responsibility for his actions, the applicant now denies culpability. The AAO finds that these events support that he does not have remorse and he has not rehabilitated himself, such that he continues to pose a risk to others in the United States. It is noted that the applicant's most recent conviction, involving the most severe violence, occurred when he was 33 years old, and his criminal actions cannot be deemed the transgressions of youth. The applicant's convictions for theft-related offenses and multiple incidences of driving with a suspended license further call into question his veracity and respect for the laws of the United States.

Based on the foregoing, the AAO finds that the gravity of the applicant's criminal history, including serious violence, theft, and a lack of remorse, outweigh the positive factors in this case, such as hardship that he and his family members would face upon denial of the waiver application. Accordingly, the applicant does not warrant a favorable exercise of discretion, and this constitutes another reason for denial of the waiver application.

In proceedings regarding a 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.