

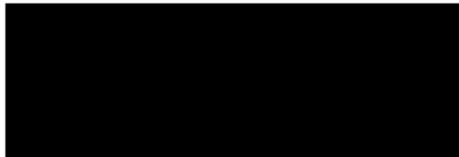
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Avenue, NW, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



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DATE: **MAY 30 2012**

Office: HIALEAH, FL

FILE: 

IN RE: Applicant: 

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

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Hialeah, 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 Honduras who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having committed a crime involving moral turpitude. The applicant's two children are U.S. citizens. 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 children.

The field office director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the waiver application accordingly. *Decision of Field Office Director*, dated February 24, 2010.

On appeal, the applicant asserts that resisting or obstructing an officer with violence is not a crime involving moral turpitude and, alternatively, that the applicant's children would experience extreme hardship if the waiver application is denied. *Form I-290B*, received March 23, 2010.

The record includes, but is not limited to, counsel's brief, medical letters for the applicant's older son, a letter of support from the applicant's employer, and country conditions information on Brazil and Honduras. The entire record was reviewed and considered in arriving at a decision on the appeal.

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.)

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, declining to follow the "administrative framework" set forth by the Attorney General in *Silva-Trevino*. See *Fajardo v. Attorney General*, 659 F.3d 1303 (11th Cir. 2011). (finding the U.S. Congress to have intended that determinations of whether offenses are crimes involving moral turpitude be made using the traditional categorical/modified categorical approach). 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.' " *Id.* at 1305 (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990)). The court noted that where the statutory definition of a crime included "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 – [might] also be considered." *Id.* (citing to *Jaggernaut v. U.S. Att'y Gen.*, 432 F.3d 1346, 1354-55 (11th Cir. 2005)). Pursuant to *Fajardo v. Attorney General*, the AAO will limit any modified categorical inquiry in this matter to the applicant's records of conviction.

The record reflects that the applicant was convicted on April 12, 2002 of resisting an officer with violence to his or her person in violation of Florida Statutes § 843.01, a third degree felony punishable by a maximum of five years imprisonment, and that he was placed on probation for a period of two years and ordered to take an anger management course and pay court costs.¹

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); see also *Matter of O-*, 4 I&N Dec. 301 (BIA 1951) (German law involving an assault on a police officer was not a crime involving moral turpitude because knowledge that the person assaulted was a police officer engaged in the performance of his duties was not an element of the crime); *Matter of B-*, 5 I&N Dec. 538 (BIA 1953) (as modified by *Matter of Danesh*, supra.) (assault on prison guard not a crime involving moral turpitude because offense charged appeared to be only "simple" assault and no bodily injury was alleged); *Ciambelli ex rel. Maranci v. Johnson*, 12 F.2d 465 (D. Mass 1926) (assault on an officer was not a crime involving moral turpitude in spite of fact that defendant was armed with a razor because the razor was not used in the assault).

¹ Counsel asserts that the applicant was not convicted as his adjudication was withheld. The AAO notes that he pled no contest to the charges and this is a conviction under section 101(a)(48)(A) of the Act.

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. Thus, based solely on the statutory language, it appears that Florida Statute § 843.01 encompasses conduct that involves moral turpitude and conduct that does not.

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.”

The AAO notes that not all of the documents comprising the record of conviction have been submitted. The record before the AAO is inconclusive as to whether the applicant caused bodily injury to the officer who arrested him (i.e. “doing” violence). The AAO notes that the burden of proof is on the applicant in these proceedings and that he has not met his burden of proof in establishing that he is not inadmissible under 212(a)(2)(A)(i)(I) of the Act for having committed a *crime involving moral turpitude*.

As the AAO has found the applicant to have committed a crime involving moral turpitude, it will not address whether his conviction for trespass in structure or conveyance in violation of Florida Statutes § 810.08 involves 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 section 212(h)(1)(B) waiver of the bar to admission resulting from violation of section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship on the citizen or lawfully resident spouse, parent, son, or daughter of the applicant. In the present case, hardship to the applicant or his spouse is not a consideration under the statute and will be considered only to the extent that it results in hardship to the qualifying relatives, the applicant’s children. If extreme hardship to the qualifying relative is established, the Secretary then assesses

whether an exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296 (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, the AAO considers the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

The AAO notes that the applicant's spouse's lawful permanent residence case is dependent on the applicant's case and that if the waiver application is not granted, she would also have to depart the United States. The applicant and his spouse are from Honduras and Brazil respectively. Therefore, the AAO will assess hardship to the qualifying relatives based on return to either of these countries.

Counsel states that the applicant's ability to relocate and reintegrate into Honduran society will have a profound impact on his children; Honduras is a third-world country; the applicant's U.S. degrees and experience will not be readily accepted in Honduras, where a different set of laws, marketing practices, contacts and rules of trade apply; he has no job prospects or contacts in Honduras; Honduras is politically unstable due to a coup d'état following a presidential election; Honduras has not recovered from past hurricanes and has been designated for Temporary Protected Status; the applicant's children's safety and future are in jeopardy in Honduras due to its social, political and environmental problems; the applicant's older child requires ongoing medical attention for an unresolved medical problem; his family has health insurance and access to the best pediatric care in the United States; the family cannot relocate to Brazil, where the applicant's spouse is from; Brazil is a complicated country plagued by violence and sporadic political instability; the family has no home or employment in Brazil; and the applicant's spouse has spent her entire adult life in the United States and earned her education here.

The AAO notes that Honduras is currently listed as a country whose nationals are eligible for Temporary Protected Status (TPS) due to the damage done to the country by Hurricane Mitch and the subsequent inability of Honduras to handle the return of its nationals. 76 Fed. Reg. 68488-68493 (November 4, 2011). Under the TPS program, citizens of Honduras are allowed to remain in the United States temporarily. *Id.* The record includes general country conditions information on Honduras and Brazil.

The record includes health insurance cards for the applicant and his family. The applicant's older child's physician states that the child underwent emergency surgery on August 14, 2006 due to pyloric stenosis, an uncommon condition causing excessive pressure in the stomach that leads to incessant vomiting; that the applicant's older child has since suffered from gastroesophageal reflux requiring special alterations to his diet and medical anti-reflux therapies; and that he is currently doing very well but will require constant care and support.

In considering the extent to which relocation to Honduras would result in hardship to the applicant's children, the AAO has noted country conditions in Honduras, particularly the fact that it is a designated TPS country, as well as the difficulties and disruptions that routinely result from a move to another country. When these hardship factors are considered in the aggregate, the AAO finds the

applicant to have established that his children would experience extreme hardship if they relocated to Honduras.

He has not, however, demonstrated that they would suffer extreme hardship upon relocation to Brazil. The AAO notes that the applicant's older child's medical condition appears to be under control. In addition, no documentary evidence establishes that he could not receive suitable medical treatment in Brazil. As the record lacks sufficient documentary evidence of emotional, financial, medical or other types of hardship that, in their totality, establish that the applicant's children would suffer extreme hardship if they move to Brazil, it does not establish that relocation would result in extreme hardship for a qualifying relative.

The AAO notes that the applicant's children are three- and six-years-old. As mentioned, the applicant's spouse's lawful permanent residence case is dependent on the applicant's case. Therefore, if his waiver is not granted, she would have to depart the United States. In this event, the applicant's children would be in the United States without their parents. Considering this issue, and the normal hardships created by separation, the AAO finds that the applicant's children would experience extreme hardship if they remained in the United States.

We 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 relatives in this case.

In that the record does not establish that a qualifying relative would experience extreme hardship as a result of the applicant's inadmissibility, he has not established eligibility for a waiver under section 212(h) of the Act. 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. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.