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



U.S. Citizenship
and Immigration
Services

[Redacted]

Date: **APR 23 2013**

Office: MIAMI

FILE: [Redacted]

IN RE: Applicant: [Redacted]

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:

[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 AAO inappropriately applied the law 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 with the field office or service center that originally decided your case by filing a Form I-190B, 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 a 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,

A handwritten signature in black ink that reads "Ron Rosenberg".

Ron Rosenberg
Acting 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 Nicaragua who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of crimes involving moral turpitude. The applicant was further found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having been convicted of a crime relating to a controlled substance. 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 U.S. citizen spouse and children.

In a decision dated May 13, 2011, the field office director denied the Form I-601 application for a waiver, finding that the applicant failed to establish that his U.S. citizen wife and children would experience extreme hardship as a consequence of his inadmissibility. The field office director further denied the waiver application as a matter of discretion after finding that the applicant's convictions and multiple arrests showed a blatant disregard for the laws of the United States and demonstrated the applicant had not rehabilitated.

On appeal, counsel for the applicant asserts that the field office director erred in finding that the record evidence did not establish that the applicant's bar to admission would result in extreme hardship to his U.S. wife and children. Counsel contends that the evidence outlining educational, emotional, and financial difficulties to the applicant's U.S. citizen wife and children demonstrate extreme hardship to his qualifying relatives.

The record contains, but is not limited to: the applicant's legal memorandum; medical documentation; the applicant's birth certificate; an affidavit by the applicant's wife; an affidavit by the applicant's middle daughter; evidence of the applicant's family members lawful residence in the United States; country conditions documentation; birth certificates; a marriage certificate; documentation concerning the applicant's daughter's learning disabilities; and documentation regarding the applicant's criminal history.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record has been reviewed and considered in rendering a decision on the appeal.

Section 212(a)(2)(A) of the Act provides, in pertinent part, that:

(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, or

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.)

This case arises within the jurisdiction of the Eleventh Circuit Court of Appeals. In evaluating whether an offense constitutes a crime involving moral turpitude, the Eleventh Circuit employs the categorical and modified categorical approach. *Sanchez-Fajardo v. U.S. Att'y Gen.*, 659 F.3d 1303, 1305-06 (11th Cir. 2011). "To determine whether a conviction for a particular crime constitutes a conviction of a crime involving moral turpitude, both [the Eleventh Circuit] and the BIA have historically looked to 'the inherent nature of the offense, as defined in the relevant statute....'" *Id.* at 1305. "If the statutory definition of a crime encompasses some conduct that categorically would be grounds for removal as well as other conduct that would not, then the record of conviction—i.e., the charging document, plea, verdict, and sentence—may also be considered." *Id.* (citing *Jaggernaut v. U.S. Att'y Gen.*, 432 F.3d 1346, 1354-55 (11th Cir. 2005)).

The Eleventh Circuit has rejected the methodology adopted by the Attorney General in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008). 659 F.3d at 1308-11. While the Attorney General determined that assessing whether a crime involves moral turpitude may include looking beyond the record of conviction, the Eleventh Circuit has stated that "[w]hether a crime involves the depravity or fraud necessary to be one of moral turpitude depends upon the inherent nature of the offense, as defined in the relevant statute, rather than the circumstances surrounding a defendant's particular conduct." *Itani v. Ashcroft*, 298 F.3d 1213, 1215-16 (11th Cir. 2002). In *Sanchez-Fajardo*, the Eleventh Circuit affirmed its reasoning in *Vuksanovic v. U.S. Att'y Gen.*, 439 F.3d 1308, 1311 (11th Cir. 2006), stating that "the determination that a crime involves moral turpitude is made categorically based on the statutory definition or nature of the crime, not the specific conduct predicating a particular conviction." 659 F.3d at 1308-09.

The record reflects that on or about September 22, 1995, the applicant was convicted in the [REDACTED] of: (1) aggravated assault with a deadly weapon in violation of [REDACTED] (2) aggravated battery in violation of [REDACTED] (3) shooting or throwing deadly missile in violation of [REDACTED] and (4) battery in violation of [REDACTED]. The applicant was sentenced to two years of probation and court costs for these offenses. The field office

director found the applicant was inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of crimes involving moral turpitude.

At the time of the applicant's conviction, [REDACTED] provided, in pertinent part, that:

(1) An "aggravated assault" is an assault:

- (a) with a deadly weapon without intent to kill; or
- (b) with an intent to commit a felony.

(2) Whoever commits an aggravated assault shall be guilty of a felony of the third degree, punishable as provided in [REDACTED]

The definition of "assault" is under [REDACTED], which states, in pertinent part:

(1) An "assault" is an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent.

In *Matter of O--*, 3 I&N Dec. 193 (BIA 1948), the Board found that assault with a deadly and dangerous weapon (which was unspecified in the complaint) in violation of section 6195 of the General Statutes of Connecticut would involve moral turpitude because "it is inherently base . . . because an assault aggravated by the use of a dangerous or deadly weapon is contrary to accepted standards of morality in a civilized society, and . . . always constituted conduct contrary to acceptable human behavior." *Id.* at 197. Further, in *Matter of Sanudo*, 23 I&N Dec. 968, 971 (BIA 2006), the Board states that "assault and battery with a deadly weapon has long been deemed a crime involving moral turpitude . . . because the knowing use or attempted use of deadly force is deemed to be an act of moral depravity that takes the offense outside the "simple assault and battery" category." (citations omitted).

The AAO notes that aggravated assault in Florida requires proof of a specific intent to do violence. *See Lavin v. State*, 754 So.2d 784, 787 (Fla.App. 3 Dist., 2000). The AAO further notes that in *Dey v. State*, 182 So.2d 266, 268 (Fla.App., 1966), the Court states that aggravated assault is an assault with a deadly weapon that is "likely to produce death or great bodily harm." (citing *Goswick v. State*, 143 So.2d 817 (Fla.1962)). In view of the decisions in *Matter of Sanudo* and *Matter of O--*, wherein the knowing use or attempted use of deadly force is deemed to involve moral turpitude, the AAO finds that aggravated assault with a deadly weapon in violation of section [REDACTED] is categorically morally turpitudinous because such an assault is committed with the knowing or attempted use of deadly force. Consequently, based on the foregoing discussion, the AAO finds that the applicant's aggravated assault conviction involves moral turpitude. The

applicant does not contest his inadmissibility on appeal. Since the applicant's aggravated assault with a deadly weapon conviction involves moral turpitude, which renders him inadmissible under section 212(a)(2)(A)(i)(I) of the Act, we need not separately address the applicant's other September 22, 1995 convictions for aggravated battery, simple battery, and shooting or throwing a deadly missile.

The field office director also found the applicant inadmissible under section 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II) for having been convicted of a crime relating to a controlled substance. That section provides, in pertinent part, that:

(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –

....

(I) a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

The record shows that on October 24, 2001, the applicant was convicted in the [redacted] of "possession of cannabis/20 grams or less," in violation of [redacted]. The record of conviction conclusively demonstrates that the applicant was found guilty of a controlled substance violation involving less than 20 grams of marijuana. The field officer found that the applicant's conviction of possession of cannabis rendered him inadmissible under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II). The applicant does not contest inadmissibility resulting from this conviction on appeal.

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), (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 if–

(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 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

The AAO notes that the applicant's most recent conviction for a crime involving moral turpitude occurred on or about September 22, 1995. As the conduct underlying the conviction took place over 15 years ago, he may satisfy the waiver requirements of section 212(h)(1)(A)(i) of the Act. An application for admission or adjustment is a "continuing" application, and inadmissibility is adjudicated on the basis of the law and facts in effect at the time of admission. *Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992). However, the AAO notes that the applicant remains inadmissible under section 212(a)(2)(A)(i)(II) for his 2001 conviction of possession of marijuana, less than 20 grams.

As the applicant requires a waiver under section 212(h)(1)(B) of the Act, he must establish that the denial of the present waiver application would result in extreme hardship to a qualifying relative, irrespective of whether he has met the requirements for a waiver under section 212(h)(1)(A) of the Act. Therefore, the AAO will next address hardship to the applicant's qualifying relative under section 212(h)(1)(B) of the Act.

A section 212(h)(1)(B) waiver of the bar to admission resulting from violation of section 212(a)(2)(A)(i)(II) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant is not a consideration under the statute and will be considered only to the extent that it results in hardship to a qualifying relative. 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). In this case, the applicant asserts that denial of his admission will impose extreme hardship upon his U.S. citizen spouse and children.

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 the 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 is 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 reflects that the applicant is a 50-year-old native and citizen of Nicaragua who entered the United States without inspection in 1986. On May 22, 1996, the applicant married [REDACTED] a United States citizen. The applicant has two United States citizen children: [REDACTED] born on October 13, 1997, in Miami, Florida, and [REDACTED] born on October 23, 1990, in Miami, Florida. They both reside with the applicant and his wife in Miami, Florida. It is asserted by counsel and the applicant's wife that the applicant held stable employment in the construction industry until the year 2008. They further assert that the applicant is now self-employed doing minor repair work such as painting and plumbing. The applicant's wife indicated in

her affidavit dated February 10, 2010 that she is employed twice a week as a laborer earning \$60 - \$70 per week. The applicant's wife indicates that the family receives \$670 a month in economic assistance for their youngest daughter.

Counsel for the applicant asserts that the only relative residing in Nicaragua is the applicant's oldest daughter. The record reflects that the applicant's immediate family members reside lawfully in the United States, including his mother, father, aunt, and five siblings. The applicant's middle daughter, [REDACTED] indicates in an affidavit dated April 28, 2010 that "all of [her] family lives [] in the United States and [they] are very close to each other." She provided no further details about the relationship she has with the applicant's family members. Neither the applicant's spouse nor their younger daughter, [REDACTED] indicates that they are close to any of their relatives in the United States.

The applicant's spouse indicated in her affidavit that their youngest daughter, [REDACTED] was diagnosed with a learning disability. As corroborating evidence, the applicant submitted copies of Individual Education Plans prepared by the school's Division of Special Education, which demonstrate that [REDACTED] has a specific learning disability in reading comprehension, writing skills, completing tasks, and the time required to master educational objectives. The record indicates that in the year 2006, [REDACTED] benefitted from individualized educational plans designed to meet her academic and educational needs. There is no evidence in the record from which to conclude that [REDACTED] currently benefits from such a specialized educational plan. The applicant has not asserted, and the record does not otherwise reflect, that the applicant's daughter would be unable to benefit from a special education program should she relocate to Nicaragua. Additionally, the applicant has not asserted and the record evidence does not indicate that the educational system in Nicaragua is deficient, that their daughter will be unable to benefit from that country's education system, or that she would be unable to pursue and complete secondary education in the area where they would be living in Nicaragua.

The applicant's middle daughter, [REDACTED] states that she depends on the moral and financial support of her parents. She indicates that she would be destitute if the applicant is removed to Nicaragua and that her parents help with the care of her daughter. [REDACTED] asserts that she cannot relocate to Nicaragua if the applicant is not granted permanent residence because she will be unable to secure employment and will be unable to return to school.

With regards to separation from the applicant, the AAO notes that from the general assertions of the applicant's wife and middle daughter, the applicant's qualifying relatives will experience some emotional difficulties if he is denied admission into the United States. The AAO recognizes the significance of family separation as a hardship factor, but concludes that the difficulties described by the applicant's wife and daughter, and as demonstrated by the evidence in the record, are the common results of removal or inadmissibility and do not rise to the level of extreme hardship. U.S. court decisions have repeatedly held that the common results of removal or inadmissibility are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991).

With regards to the assertions of financial difficulties upon separation from the applicant, the AAO notes that the submitted evidence is insufficient to demonstrate that the applicant's qualifying relatives will experience financial difficulties if he is denied admission into the United States. The

applicant's wife asserts that the applicant is self-employed in plumbing and painting. Yet, the record does not contain any evidence of his income, or how his earnings meet the family's financial needs in a way that separation from the applicant would result in extreme hardship to his qualifying relatives. Rather, the record reflects that the applicant's spouse is employed as a laborer twice a week and that the family receives state assistance for their U.S. citizen minor daughter. The record does not contain pay stubs, copies of income tax returns, other financial documentation or an explanation detailing the inadequacy of the applicant's wife earnings and state assistance in providing for their household. Further, no evidence detailing expenses related to the household or to the care of the applicant's grandchild were submitted with the appeal. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The AAO takes note of the current country conditions in Nicaragua from the information provided in U.S. Department of State report included in the record. The applicant has not indicated, however, how those conditions would affect his qualifying relatives specifically. The general country conditions do not prove in the instant case that the applicant's middle daughter would be unable to obtain employment in Nicaragua or that she will be unable to enroll in school in that country. Additionally, from the financial information in the record, it is not possible to determine if she would suffer financial hardship if she were to be unemployed in Nicaragua. Furthermore, the record evidence does not reflect that the applicant's minor daughter would relocate to a country with a deficient educational system, or that she would be unable to pursue and complete secondary education in the area where they would be living in Nicaragua. *See generally Matter of Andaloza-Rivas*, 23 I&N Dec. at 323. Lastly, no information is provided from which to determine whether employment would be available to the applicant's spouse. Even were the AAO to take notice of poor economic conditions in Nicaragua, it has long been settled that economic detriment alone is insufficient to support a finding of extreme hardship. *See Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996).

The AAO further notes that Nicaragua was designated for Temporary Protected Status (TPS) in January 1999, due to the devastation caused by Hurricane Mitch. *See* 76 Fed. Reg. 68493 (November 4, 2011). The TPS designation for Nicaragua has been extended through July 5, 2013, because: "[t]here continues to be a substantial, but temporary, disruption of living conditions in El Salvador resulting from a series of earthquakes in 2001, and Nicaragua remains unable, temporarily, to handle adequately the return of its nationals." *Id.* However, adverse country conditions, by themselves, are insufficient to demonstrate extreme hardship. *See generally Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568.

To conclude, the AAO cannot meaningfully distinguish the asserted hardships presented in this case from those typically expected upon denial of admission. That is, the record evidence reflects hardships that are not substantially different from those that would normally be expected upon removal or denial of admission. Thus, when the evidence of hardship in the record is considered collectively, we find that the applicant has not shown that his qualifying relatives will endure "extreme hardship if they remained in the United States without him or if they relocated to

Nicaragua. Accordingly, the applicant has not demonstrated that the asserted financial, emotional, and educational hardship to his qualifying relatives meets the required extreme hardship standard.

Additionally, even should the applicant demonstrate he meets the statutory requirements for a section 212(h)(1)(B) waiver by showing extreme hardship to his qualifying relatives, the applicant would still need to demonstrate he meets the requirements of 8 C.F.R. § 212.7(d) to warrant a favorable exercise of discretion. The applicant was convicted on September 22, 1995 in Florida of aggravated assault with a deadly weapon, aggravated battery with a deadly weapon, battery, and shooting or throwing a deadly missile in violation of various Florida statutes, violent or dangerous crimes.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval 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.