



U.S. Citizenship
and Immigration
Services

(b)(6)

Date: APR 25 2013

Office: SACRAMENTO

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:

INSTRUCTIONS:

Enclosed please find the revised 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Sacramento, California. An appeal of the denial was dismissed by the Administrative Appeals Office (AAO) on March 15, 2011. As we conclude that the basis on which we dismissed the appeal was in error, we reconsider and withdraw our prior decision *sua sponte*. For the reasons stated herein, the appeal is dismissed.

The applicant is a native and citizen of India 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. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with his Lawful Permanent Resident (LPR) mother.

In a decision dated July 31, 2008, the field office director found the applicant inadmissible for having been convicted of selling liquor to a minor, domestic battery, and "abusing or endangering the health of a child." The field office director concluded that the applicant failed to demonstrate that his LPR mother would suffer extreme hardship as a result of his inadmissibility to the United States and denied the waiver application accordingly.

On appeal, counsel asserted that the field office director made legal errors in evaluating the applicant's inadmissibility under section 212(a)(2)(A)(i)(I) of the Act. Counsel stated that the applicant's convictions for domestic battery and selling liquor to a minor are not crimes involving moral turpitude. Additionally, counsel contended that even if the applicant's conviction for "abusing and endangering the health of a child" involved moral turpitude, the petty offense exception applies because the maximum possible sentence for the offense does not involve imprisonment for more than one year.

In a decision dated March 15, 2011, the AAO found that the field office director erred in advising the applicant to file a Form I-601 waiver application. The AAO found that the waiver application that should have been filed by the applicant was Form I-602, Application by Refugee of Waiver for Grounds of Excludability. This finding was predicated on the documentary evidence in the record indicating that the applicant had filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based upon his status as an asylee. Though we acknowledged that the record of proceedings included a subsequent Form I-485 application based upon an approved Alien Relative Petition (Form I-130) filed on the applicant's behalf by his LPR mother, we noted that the record did not include the approved visa petition. The AAO dismissed the appeal because no purpose would have been served in discussing the applicant's Form I-601 waiver application.

The AAO now takes notice of filed evidence not addressed in our prior decision, evidence demonstrating that the applicant requested adjustment of status with the corresponding Form I-601 waiver of inadmissibility based upon an approved Form I-130 immigrant visa petition, not his previous grant of asylum. The record of proceedings includes both the original and a copy of the approved Form I-130.

Upon review, the AAO finds that the applicant's August 29, 2008 appeal was based upon the Form I-601 filed in reference to the Form I-485 filed February 13, 2007. The aforementioned Form I-485

was based upon an immigrant visa petition that had been approved by Legacy Immigration and Naturalization Service on May 3, 1997. Also in the record is the applicant's previous Form I-485 filed on November 9, 1998 and based upon his status in the United States as an asylee. However, that application is not under consideration as it was denied by the field office director due to abandonment. The matter at hand strictly concerns the Form I-601 waiver application filed on April 15, 2008, based upon the approved visa petition filed by his LPR mother. The AAO's previous finding that the applicant should have filed a Form I-602 was erroneous, and we now acknowledge that the applicant correctly filed a Form I-601 waiver application. Accordingly, the AAO has jurisdiction to review the field office director's decision on the waiver application.

The record includes; but is not limited to: a declaration by the applicant's mother; medical documents; evidence of familial ties to the United States; tax documents and pay stubs; a copy of the Board of Immigration Appeals (Board) decision granting the applicant asylum; 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 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.

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

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

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

(Citations omitted.)

In *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. First, in evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a "realistic probability, not a theoretical possibility," that the statute would be applied to reach conduct that does not involve moral turpitude. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability exists where, at the time of the proceeding, an "actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien's own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude." *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

However, if a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, "the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude." 24 I&N Dec. at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage inquiry in which the adjudicator reviews the "record of conviction" to determine if the conviction was based on conduct involving moral turpitude. *Id.* at 698-699, 703-704, 708. The record of conviction consists of documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.* at 698, 704, 708.

If review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. 24 I&N Dec. at 699-704, 708-709. However, this "does not mean that the parties would be free to present any and all evidence bearing on an alien's conduct leading to the conviction. (citation omitted). The sole purpose of the inquiry is to ascertain the nature of the prior conviction; it is not an invitation to relitigate the conviction itself." *Id.* at 703.

The record reflects that the applicant was convicted in the Superior Court of the State of California, on September 22, 2000, of selling liquor to a minor in violation of California Business and Professions Code § 25658(a). That section provides, in pertinent part, that “every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.”

In California, selling liquor to a minor is a misdemeanor offense against the public welfare under the California Business and Professions Code. Subdivision (a) of the “selling liquor to a minor” statute makes it a misdemeanor to sell, furnish, or give an alcoholic beverage to any person under the age of 21 years. In the case *In Re Jennings*, the Supreme Court of California noted that section 25658(a) “falls easily into the category of crimes courts historically have determined to be public welfare offenses for which proof of knowledge or criminal intent is unnecessary.” 34 Cal.4th 254, 268 (2004). The California Supreme Court further noted that the section 25658(a) “selling liquor to a minor” statute is a strict liability offense that does not require a mental state. *Id.* The statute is closely akin to public welfare offenses that are more regulatory than penal, addressed more to the public welfare than to the individual punishment of the transgressor. *Id.* at 269. The California Supreme Court opined in *Jennings* that the goal of the statute is to avoid a greater societal harm, rather than the imposition of individual punishments. *See id.* To obtain a conviction under section 25658(a), the prosecutor does not need to prove the offender knew the person to whom he or she furnished, sold or gave an intoxicating beverage was not yet 21 years old. *Id.*; *see Proviso Corp. v. Alcoholic Beverage Control Appeals Board*, 7 Cal.4th 561, 569 (1994) (“[T]he laws against sale [of liquor] to minor can be violated despite the seller’s lack of knowledge of the purchaser’s minority.”). As the Supreme Court of California noted in *Jennings*, “[section 25658(a)] prohibits certain transactions with minors to protect them from harmful influences.” *Id.* at 268; *see Lacabanne Properties v. Dept. of Alcoholic Bev. Control*, 261 Cal.App.2d 181, 188 (1968).

As stated by the California Supreme Court, section 25658(a) “criminalizes the mere furnishing, selling or giving of alcohol to an underage person.” *Jennings*, 34 Cal.4th at 275. By the language of section 25658(a), the sale of liquor to a minor does not fit into the types of offenses that courts and the Board have found to involve moral turpitude. The offense does not include as elements the endangerment of a minor, nor does it require proof of injury to others, the intent to inflict the same, child corruption, or any other aggravating factors. Rather, additional aggravating factors, such as the actual endangerment of a minor, infliction of serious bodily injury, exposure to lewd and offensive behavior, or the death of another by an intoxicated underage person, are covered by other sections of California’s Business and Professions and Penal Codes. For instance, section 25658(c) of California’s Business and Professions Code criminalizes purchasing an alcoholic beverage to a person under 21 years of age who in turn causes bodily injury to another. Moreover, section 273a of California’s Penal Code criminalizes the infliction of bodily injury, death, physical pain, mental suffering, and endangerment of a child. Additionally, section 273g of the Penal Code criminalizes engaging in degrading, lewd, immoral or vicious habits or practices in the presence of a child.

The AAO notes that Circuit Courts and the Board have found that the offenses of child abuse and neglecting a child in destitute circumstances have been found to involve moral turpitude. *See Guerrero v. INS*, 407 F.2d 1405, 1407 (9th Cir. 1969); *Matter of Tobar-Lobo*, 24 I&N Dec. 143, 145 (BIA 2007); *Matter of R-*, 4 I&N Dec. 192, 193 (C.O. 1950). In contrast, the Board has found that

violations of liquor laws, and the sale of liquor to individuals covered under special legislation, do not involve moral turpitude. *See Matter of J-*, 2 I&N Dec. 99, 106 (BIA 1944) (“[T]he general sale of liquor in violation of law does not involve moral turpitude.”). For example, in *Matter of J-*, the Board found that the sale of liquor to an “Indian over whom the government exercises control” is not a crime involving moral turpitude. *Id.* at 105. The Board’s decision in *Matter of J-* is relevant to our analysis because in that case the Board noted that the offense of selling liquor to an Indian ward of the Government is analogous to selling liquor to a minor. *See id.* at 106, fn. 13. Additionally, the Board noted that offenses against the public welfare, such as the sale of liquor in violation of law, are generally regulatory offenses without a *mens rea* requirement. *Id.* at 106. It is well-settled that regulatory offenses are not generally considered morally turpitudinous. *See Matter of L-V-C-*, 22 I&N Dec. 594 (BIA 1999).

In consideration of *Matter of J-*, and the provisions of California’s Penal and Business Codes dealing with the endangerment, abuse, and corruption of minors, the AAO finds that there is not a realistic probability that the offense of selling liquor to a minor under California Business and Professions Code § 25658(a) involves reprehensible conduct so contrary to the accepted rules of morality as to constitute a crime involving moral turpitude. Accordingly, the applicant’s conviction for misdemeanor selling liquor to a minor is not a crime involving moral turpitude because “none of the circumstances in which there is a realistic probability of conviction involves moral turpitude.” *Silva-Trevino*, 24 I&N Dec. at 699 n.2.

The record further reflects that the applicant was convicted in the Superior Court of the State of California, [REDACTED] on October 19, 2006, of Domestic Battery in violation of Cal. Penal Code § 243(e) and of misdemeanor “abusing or endangering the health of a child” in violation of Cal. Penal Code § 273a(b). The applicant was sentenced to 60 days in jail and he was ordered to attend anger control classes for a period of 52 weeks.

On appeal, counsel asserted that the applicant’s conviction for domestic battery in violation of Cal. Penal Code § 243(e) is not a crime involving moral turpitude. Counsel stated that the applicant was convicted of an act similar to the respondent in *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006). Counsel stated that such an offense is in the nature of a simple battery, as traditionally defined, and that the Board has found that such an offense on its face does not implicate any aggravating dimension that would lead to the conclusion that it is a crime involving moral turpitude.

Cal. Penal Code § 242 defines battery as, “any willful and unlawful use of force or violence upon the person of another.”

Cal. Penal Code § 243(e) provides that:

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 *Matter of Sanudo*, the Board 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 Board assessed the manner in which California courts have applied the "use of force or violence" clause of Cal. Penal Code § 242. *Id.* The Board 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 Board assessed the situations in which assault and battery offenses may be classified as crimes involving moral turpitude. The Board 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 Board 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 Board further held that under the modified categorical analysis, the admissible portion of the respondent's conviction record failed to reflect that "his battery was injurious to the victim or that it involved anything more than the minimal nonviolent 'touching' necessary to constitute the offense." *Id.*

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 Board'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.

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 § 243 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.

Since a conviction for domestic battery under Cal. Penal Code § 243(e) is not categorically a crime involving moral turpitude, the AAO applies the modified categorical approach and considers whether the record of conviction reflects that the applicant’s conviction involved morally turpitudinous conduct. Here, the applicant submitted the record of conviction, which is comprised of the Criminal Complaint and the Judgment and Sentence. The record reflects that the applicant was originally charged of “inflicting corporal injury to a cohabitant” but the applicant negotiated a plea and was convicted of domestic battery, a different crime from the one originally charged. It appears that the Complaint was amended by way of oral motion before the court and the judge noted the agreement in the Judgment. As such, further examination of the applicant’s criminal indictment is unnecessary, given that the record of conviction reflects the applicant was not convicted of the charged offense of inflicting corporal injury to a cohabitant. *See Matter of Ahortalejo-Guzman*, 25 I&N Dec. 465, 468 (BIA 2011) (stating that immigration adjudicators are not allowed to “undermine plea agreements by going behind a conviction ... to determine that an alien was convicted of a more serious turpitudinous offense”). Consequently, the documents comprising the record of conviction include the Judgment, which references the amended complaint, and the Sentence. Here, none of the applicant’s conviction documents indicate that he was convicted of a battery involving an aggravating factor. The record of conviction does not reflect that the applicant was convicted of an assault and battery offense which has been found to involve moral turpitude, such as assault and battery with a deadly weapon or the infliction of serious injury on a person deserving of special protection, such as children, domestic partners, or peace officers. The Judgment merely indicates that the applicant was convicted of domestic battery. The record of conviction also does not reflect that the applicant’s domestic battery was injurious to the victim, or that it involved anything more than the minimal unwanted touching necessary to constitute the offense. Like the Board in *Matter of Sanudo*, the AAO finds that the existence of a domestic relationship in the commission of the offense is insufficient to establish that the applicant’s conviction involved moral turpitude. 23 I&N Dec. at 973 (“[T]he 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.”); *see also Galeana-Mendoza v. Gonzales*, 465 F.3d at 1062 (“As we have also explained, adding the special relationship between Galeana and the mother of his children does not alone have the effect of turning a battery under California Penal Code section 243(e) into a crime involving moral turpitude.”).

Thus, the only remaining step in the *Silva-Trevino* methodology is the third, which provides for consideration of probative evidence outside the record of conviction, such as an admission by the alien or testimony before an immigration adjudicator. *See Matter of Guevara Alfaro*, 25 I&N Dec. 417, 422 (BIA 2011) (“[I]f the record of conviction is inconclusive, ..., probative evidence beyond the record of conviction (such as an admission by the alien or testimony before the Immigration Judge) may be considered when evaluating whether [a crime] involves moral turpitude.”). Here, the record does not include admissions by the applicant nor transcripts or summary of the applicant’s testimony before the immigration adjudicator. Additionally, the record reflects that the applicant

was unable to obtain the police department report related to the applicant's domestic battery conviction; [REDACTED] of the [REDACTED] Police Department indicated to the applicant that "immigration must request [the] report due to child involved and [the applicant] is suspect."

The documentation in the record therefore does not reflect that the applicant was convicted of engaging in conduct comprising only of the minimal unwanted touching necessary to constitute the offense of battery. As previously indicated, the existence of a domestic relationship between the applicant and the victim is insufficient by itself to establish moral turpitude. Additionally, the record contains evidence indicating that the applicant requested the police report related to the offense under consideration, but that this request was denied by an officer from the [REDACTED] Police Department. However, based on these considerations, the AAO determines that the record does not sufficiently demonstrate that the applicant was convicted of a battery which only involved an offensive unwanted touching. It is noted that, unlike a removal hearing in which the government bears the burden of establishing an alien's removability, the burden of proof (including the burden of production) in the present proceedings is on the applicant to establish that he is not inadmissible. See Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not submitted any evidence or written statement under oath establishing that his battery conviction involved only an unwanted touching. Consequently, the AAO must find that the applicant has not met his burden to demonstrate that his domestic battery conviction was not a crime involving moral turpitude. The applicant is therefore inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The record further reflects that the applicant was convicted in the Superior Court of the State of California, [REDACTED] on October 19, 2006, of "abusing or endangering the health of a child" in violation of Cal. Penal Code § 273a(b), which is a misdemeanor punishable by up to one year in jail. See Cal. Penal Code § 19.2. The applicant was sentenced to 60 days in jail and he was ordered to attend anger control classes for a period of 52 weeks.

Cal. Penal Code § 273a(b) provides, in pertinent part, that:

Any person who, under circumstances or conditions other than those likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health may be endangered, is guilty of a misdemeanor.

Initially, it is noted that in the case of *Guerrero v. INS*, 407 F.2d 1405 (9th Cir. 1969), the Ninth Circuit Court of Appeals noted that a crime of child abuse with the element of "inflicting an injury upon a child" is "so offensive to American ethics that the fact that it was done willingly ends debate on whether moral turpitude was involved." *Guerrero v. INS*, 407 F.2d at 1407. Consequently, "abusing the health of a child" under Cal. Penal Code § 273a(b) would constitute a crime involving moral turpitude given that it contains the additional element of "willfully caus[ing] unjustifiable physical pain [upon a child]..., or willfully causing the [child] to be injured...." Conversely, in *People v. Sanders*, 10 Cal. App. 4th 1268 (1992), the California Court of Appeals noted that child endangerment offenses under Cal. Penal Code § 273a do not involve moral turpitude. *People v. Sanders*, 10 Cal. App. 4th at 1275. The Court of Appeals noted that violations by the statute can occur in a "wide variety of situations: the

definition [] includes both active and passive conduct, i.e. child abuse by direct assault and child endangerment by extreme neglect.” *Id.* at 1273. For child endangerment offenses, “there is no requirement that actual bodily injury occur.” *Id.* The Court of Appeals further noted that because child endangerment can be violated by wholly passive conduct, free from any element of force, violence, threat, fraud, deceit, or stealth, it is not a crime involving moral turpitude. *Id.* at 1274. Additionally, while the Board has generally held that abuse or neglect of children constitutes a crime involving moral turpitude where the criminal statute includes as elements willfulness and a child in destitute circumstances, *see Matter of R-*, 4 I&N Dec. 192, 193 (C.O. 1950), it has also found that child neglect or abandonment cases lacking these additional elements do not constitute crimes involving moral turpitude, *see Matter of E-*, 2 I&N Dec. 134 (BIA 1944; A.G. 1944). Consequently, based upon the statutory language and the above-referenced precedent decisions, it appears that Cal. Penal Code § 273a(b) encompasses conduct that involves moral turpitude and conduct that does not.

The AAO now turns to an examination of the documents comprising the judicial record of conviction for the purpose of determining the specific subpart under which the applicant was convicted. *See Silva-Trevino*, 24 I&N Dec. at 698-699, 703-704, 708. In *Shepard*, the Supreme Court opined that the record of conviction includes the charging document, the plea agreement or transcript of the plea colloquy in which the defendant confirmed the basis for the factual plea, or a comparable judicial record of information. *Shepard v. United States* 544 U.S. 13, 26 (2005). Here, the record includes the criminal complaint and a certified copy of the judgment and sentence. Count three of the criminal complaint states in language tracking Cal. Penal Code § 273a(b) that the applicant was charged with:

“abusing or endangering health of a child, in that [the applicant] did willfully and unlawfully, under circumstances other than those likely to produce great bodily harm or death, cause or permit a child to suffer, and inflict thereon unjustifiable physical pain or mental suffering, and, having the care or custody of said child to be injured, and did permit said child to be placed in a situation that its person and health was endangered.”

The certified copy of the judgment and sentence merely indicates that the applicant pled no contest to charge three of the complaint and that he was sentenced to 60 days in jail and he was ordered to attend anger control classes for a period of 52 weeks. Thus, the record of conviction does not indicate the specific subpart under which the applicant was convicted.

The only remaining step in the *Silva-Trevino* methodology is the third, which provides for consideration of probative evidence outside the record of conviction. *See Matter of Guevara Alfaro*, 25 I&N Dec. 417, 422 (BIA 2011) (“[I]f the record of conviction is inconclusive, ..., probative evidence beyond the record of conviction (such as an admission by the alien or testimony before the Immigration Judge) may be considered when evaluating whether [a crime] involves moral turpitude.”). Here, the record does not include such evidence. The documentation in the record therefore does not reflect that the applicant was convicted of engaging in conduct comprising only of the minimal passive conduct of child endangerment by extreme neglect. Based on these considerations, the AAO determines that the record does not sufficiently demonstrate that the applicant was convicted of the subpart of the statute criminalizing child endangerment. It is once

again noted that, unlike a removal hearing in which the government bears the burden of establishing an alien's removability, the burden of proof (including the burden of production) in the present proceedings is on the applicant to establish that he is not inadmissible. Here, the applicant has not submitted any evidence or written statement under oath establishing that his "abusing or endangering the health of a child" conviction was for passive conduct that did not involve any element of force, violence, threat, fraud, deceit, or stealth, or for conduct which did not result in injury to the child. Consequently, the AAO must find that the applicant has not met his burden to demonstrate that his "abusing or endangering the health of a child" conviction was not a crime involving moral turpitude. The applicant is therefore inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

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

The AAO notes that section 212(h) of the Act provides that a waiver of inadmissibility is first dependent upon a showing that the bar to admission imposes an extreme hardship on a qualifying family member. In this case, the relative that qualifies is the applicant's LPR mother. Under the statute, hardship to the applicant himself is not relevant and will be considered only if it results in hardship to a qualifying relative. If extreme hardship to a qualifying relative is established, USCIS then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996).

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. *Id.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common

rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. See generally *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

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

The actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. See, e.g., *Matter of Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. See *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); but see *Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

The AAO now turns to the issue of whether the applicant has established that a qualifying relative would experience extreme hardship as a result of his inadmissibility.

The asserted hardship factors to the qualifying relative are the emotional and medical hardships the applicant's mother would experience in the event of separation. The record reflects that the applicant's mother is 72 years of age and has been a lawful permanent resident for 14 years. In her declaration dated March 5, 2008, the applicant's mother states that she "desperately wants to keep her family together," and that if the applicant is denied admission "[her] heart would break at [her] age, fearing what would happen to [the applicant] if he were to return to India." The applicant's mother asserts that "[she] knows [that] when the [applicant] left India there were many problems for him." Here, the AAO acknowledges that the applicant was granted asylum on account of his

political opinion for incidents that occurred in 1991 and 1992, but our determination must be based also on evidence of present circumstances, and the record contains insufficient evidence of dangers to the applicant, which could in turn result in significant emotional hardship to his mother.

With regards to medical hardships, the applicant's mother states that she is being treated by a doctor every month, that she was diagnosed and treated for cancer in the mouth, and that she is now taking medicine for this condition. Counsel indicates on appeal that the applicant's mother's cancer is now in remission. The applicant's mother worries that the applicant will not be at her side to help her if she has to receive radiation treatment again. The applicant's mother states that the applicant shares the responsibility of caring for her with his brother [REDACTED]. She indicates that [REDACTED] takes her to medical appointments because he speaks English. The applicant's mother further indicates that the applicant is the one who cares for her daily needs, as he shops for groceries, reminds her to take her medicine, and cleans for her.

Here, the AAO finds that the hardships related to separation presented in this case do not rise to the level of extreme hardship. Though the AAO acknowledges the caring relationship between the applicant and his mother, and that she would experience emotional difficulties as a result of separation from the applicant, we find that the evidence does not demonstrate that this hardship is extreme. The record reflects that the applicant's mother has five children residing in the United States and, though the applicant's mother asserts that three of the five children are married, she does not indicate and the record does not otherwise demonstrate that they are unable or unwilling to care for her. Thus, the record evidence indicates that the applicant's qualifying relative faces no greater hardship than the unfortunate but common difficulties arising whenever a spouse is denied admission. The Board has long held that the common or typical results of inadmissibility do not constitute extreme hardship, and has listed separation from family members and emotional difficulties as factors considered common rather than extreme. 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). 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).

Moreover, though the applicant's mother noted that she is becoming frail, the record does not contain documentation addressing her current specific medical needs. Additionally, though the applicant's mother indicates that the applicant provides daily care, she also states that the applicant shares this responsibility with her son [REDACTED]. Specifically, the applicant's mother indicates on appeal that her son [REDACTED] also cares for her and is responsible for taking her to medical appointments. The record does not demonstrate that [REDACTED] will be unable to care for her on a daily basis should the need arise. Thus, there is no evidence in the record from which to conclude that the applicant is the sole caretaker of her mother, and that her mother has no other family members willing to assist with her care. 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)). Though the AAO is sympathetic to the applicant's mother's circumstances, the record evidence is insufficient to demonstrate extreme hardship to the applicant's qualifying relative. Put another way,

(b)(6)

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while it is understood that the separation of qualifying relatives often results in emotional challenges, the applicant has not distinguished his mother's emotional hardship upon separation from that which is typically faced by the qualifying relatives of those deemed inadmissible.

The applicant's mother does not sufficiently address the possibility of relocation to India. We acknowledge that relocation would separate her from her children in the United States. However, as she has not asserted that she would relocate if the waiver application is denied, or articulated the hardship relocation may entail, we cannot conclude that she would suffer extreme hardship if she relocated to India.

The documentation in the record fails to establish the existence of extreme hardship to the applicant's mother. 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 an application for a waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility rests 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.