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



U.S. Citizenship  
and Immigration  
Services

DATE: **AUG 26 2013**

OFFICE: LOS ANGELES

IN RE:

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

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Field Office Director, Los Angeles, California and subsequently appealed to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The applicant is a native and citizen of El Salvador 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 crimes 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 U.S. citizen spouse and child.

The Field Office Director concluded that the record failed to establish the existence of extreme hardship for a qualifying relative and denied the application accordingly. *See Decision of the Field Office Director*, dated February 16, 2012.

On appeal, counsel for the applicant asserts that the applicant's spouse relies upon the applicant in the United States so that it would affect her greatly if they were separate. Counsel further asserts that the applicant's spouse cannot relocate to El Salvador to reside with the applicant because of a medical condition and her life in the United States.

In support of the waiver application and appeal, the applicant submitted identity documents, letters of support, financial documentation, and family photographs. The entire record was 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 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.)

To determine if a crime involves moral turpitude, the Ninth Circuit Court of Appeals employs the categorical approach set forth in *Taylor v. United States*, 110 S.Ct. 2143 (1990). See *Nicanor-Romero v. Mukasey*, 523 F.3d 999, 1004 (9th Cir. 2008), *overruled on other grounds by Marmolejo-Campos v. Holder*, 58 F.3d 903, 911 (9th Cir. 2009). The purpose of the categorical approach is to determine whether the full range of conduct encompassed by the statute constitutes a crime of moral turpitude. *Cuevas-Gaspar v. Gonzalez*, 430 F.3d 1013, 1017 (9th Cir. 2005), *abrogation on other grounds recognized by Holder v. Martinez-Gutierrez*, 132 S.Ct. 2011, 2020-21 (2012). If the statute “criminalizes both conduct that does involve moral turpitude and other conduct that does not, the modified categorical approach is applied.” *Marmolejo-Campos*, 558 F.3d at 912 (citing *Fernando-Ruiz v. Gonzalez*, 466 F.3d 1121, 1163 (9th Cir. 2006)); see also *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1161 (9th Cir. 2009). However, there must be “a realistic probability, not a theoretical possibility, that the statute would be applied to reach conduct that did not involve moral turpitude.” *Nicanor-Romero*, 523 F.3d at 1004 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). To demonstrate a “realistic probability,” the applicant must point to his or her own case or other cases in which the state courts in fact did apply the statute to conduct not involving moral turpitude. 523 F.3d at 1004-05. A realistic probability also exists where the statute expressly punishes conduct not involving moral turpitude. See *U.S. v. Vidal*, 504 F.3d 1072, 1082 (9<sup>th</sup> Cir. 2007).

Once a realistic probability is established, the modified categorical approach is applied, which requires looking to the “limited, specified set of documents” that comprise what is known as the record of conviction – the charging document, a signed plea agreement, jury instructions, guilty

pleas, transcripts of a plea proceeding and the judgment – to determine if the conviction entailed admission to, or proof of, the elements of a crime involving moral turpitude. *Castillo-Cruz*, 581 F.3d at 1161 (citing *Fernando-Ruiz*, 466 F.3d at 1132-33); see also *Marmolejo-Campos*, 558 F.3d at 912 (citing *Cuevas-Gaspar*, 430 F.3d at 1020). The Ninth Circuit has reaffirmed that courts may not examine evidence outside the record of conviction in determining whether a conviction was for a crime involving moral turpitude. See *Olivas-Motta v. Holder*, --- F.3d ---, 2013 WL 2128318 (9th Cir. May 17, 2013) (rejecting *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)). Where the burden of proof is on the applicant, as in the present case, the applicant cannot sustain that burden where the record of conviction is inconclusive. *Young v. Holder*, 697 F.3d 976, 989 (9th Cir. 2012).

The record reflects that amongst other convictions, the applicant was convicted in the Municipal [REDACTED] on December 19, 1989 of inflicting corporal injury on a spouse or cohabitant. The applicant was again convicted of inflicting corporal injury on a spouse or cohabitant on August 10, 1998. The applicant was convicted of willful cruelty to a child on that same date and again convicted of this crime on February 18, 2000.

The field office director found the applicant to be inadmissible for having been convicted of crimes involving moral turpitude. The applicant has not disputed this determination on appeal. As the applicant has not disputed inadmissibility on appeal and the record does not show the field office director's finding of inadmissibility to be erroneous, the AAO will not disturb the field office director's inadmissibility finding.

It is noted that the BIA found in *In re Tran*, 21 I&N Dec. 291, (BIA 1996), that willful infliction of corporal injury on a spouse, co-habitant or parent of the perpetrator's child, in violation of section 273.5(a) of the California Penal Code, constitutes a crime involving moral turpitude. See also *Grageda v. INS*, 12 F.3d 919, 922 (9th Cir. 1993) ("Because spousal abuse is an act of baseness or depravity contrary to accepted moral standards, and willfulness is one of its elements . . . spousal abuse under section 273.5(a) is a crime of moral turpitude."); *Guerrero de Nodahl v. INS*, 407 F.2d 1405, 1406-07 (9th Cir. 1969) ("[W]e rule that inflicting 'cruel or inhuman corporal punishment or injury' upon a child is so offensive to American ethics that the fact that it was done purposely or willingly (the California definition of 'willful') ends debate on whether moral turpitude was involved. When the crime is this heinous, willful conduct and moral turpitude are synonymous terms.").

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 –

(1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General that-

(i) the alien is inadmissible only under subparagraph (D)(i) or (D)(ii) of

such subsection or the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status.

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(iii) the alien has been rehabilitated; or

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

A section 212(h) waiver of the bar to admission resulting from section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse, parent, or child of the applicant. Hardship to the applicant is not considered in section 212(h) waiver proceedings unless it causes hardship to a qualifying relative, in this case the applicant's spouse and child.<sup>1</sup> Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. See *Matter of Mendez*, 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

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<sup>1</sup> It is noted that the applicant has not made any assertions concerning any hardship that his child would suffer if his waiver application were denied, as counsel asserts that the section 212(h) waiver only considers hardship to children less than 21 years of age. As such, the only qualifying relative that will be considered in the context of this waiver is the applicant's spouse.

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

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

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

The record reflects that the applicant is a 59 year-old native and citizen of El Salvador. The applicant's spouse is a 61 year-old native and citizen of the United States. The applicant is currently residing with his spouse in Los Angeles, California.

Counsel for the applicant asserts that the applicant's spouse has a longstanding relationship with the applicant that spans 23 years prior to their marriage on June 28, 2003. Counsel contends that the longest they have been separated were during the six months of alcohol abuse rehab that the applicant attended in 2000. Counsel asserts that the applicant's spouse trusts the applicant more

now that he is no longer abusive and feels that she can depend only on him for help. Counsel further asserts that the applicant drives the applicant's spouse to the doctor and market because she cannot drive on freeways. It is noted that the record does not contain a letter from the applicant's spouse and that absent supporting evidence, the assertions of counsel will not satisfy the applicant's burden of proof. See *Matter of Obaighbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel asserts that the applicant's spouse would suffer financial hardship because she does not work as much due to a medical condition. Counsel contends that the applicant's spouse's son resides with her and currently provides financial assistance, but will soon move out. The record contains a letter, dated September 29, 2006, stating that the applicant's spouse was hospitalized for severe anemia and that she is receiving treatment for a thyroid disorder. The record does not contain any updated information concerning the applicant's spouse's medical condition or any indication that it has affected her ability to work. Further, the most recent tax returns for the applicant and his spouse, from 2006, indicate income from the applicant's spouse alone, listing the applicant's occupation as homemaker. Based upon the record, there is no indication that the applicant's spouse would be unable to maintain her financial obligations in the absence of the applicant. There is insufficient evidence in the record, in the aggregate, to find that the applicant's spouse would suffer extreme hardship upon separation from the applicant.

Counsel for the applicant asserts that the applicant's spouse could not accompany the applicant to El Salvador because of her medical condition and because her life is in the United States. The record does not contain any updated information concerning any medical treatment the applicant's spouse is receiving nor any indication that she would be unable to receive such treatment, as needed, in El Salvador.

As noted, the applicant's spouse has not submitted any information concerning any hardship she would experience upon relocation to El Salvador. It is noted that counsel asserts that the applicant's spouse's son currently resides with her in the United States and that the applicant's spouse is a native of the United States. However, the record contains insufficient evidence to find that the applicant's spouse would suffer extreme hardship upon relocation to El Salvador.

In this case, the record does not contain sufficient evidence to show that the hardships faced by the applicant's spouse, considered in the aggregate, rise to the level of extreme hardship. In addition, as the applicant has been convicted of inflicting corporal injury on a spouse or cohabitant, which we deem a violent or dangerous crime, he must also demonstrate extraordinary circumstances to warrant a favorable exercise of discretion.

8 C.F.R. § 212.7(d) provides, in pertinent part:

The Attorney General [Secretary, Department of Homeland Security], in general, will not favorably exercise discretion under section 212(h)(2) of the Act (8 U.S.C. 1182(h)(2)) to consent to an application or reapplication for a visa, or admission to the United States, or adjustment of status, with respect to immigrant aliens who are

inadmissible under section 212(a)(2) of the Act in cases involving violent or dangerous crimes, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of the application for adjustment of status or an immigrant visa or admission as an immigrant would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the alien's underlying criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act.

The AAO notes that the words "violent" and "dangerous" and the phrase "violent or dangerous crimes" are not further defined in the regulation, and the AAO is aware of no precedent decision or other authority containing a definition of these terms as used in 8 C.F.R. § 212.7(d). A similar phrase, "crime of violence," is found in section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F). It provides that a "crime of violence," as defined under 18 U.S.C. § 16, for which the term of imprisonment is at least one year, is an aggravated felony. As such, "crime of violence" is limited to those crimes specifically listed in 18 U.S.C. § 16. It is not a generic term with application to any crime involving violence, as that term may be commonly defined. That the DOJ chose not to use the language of section 101(a)(43)(F) of the Act or 18 U.S.C. § 16 in promulgating 8 C.F.R. § 212.7(d) indicates that "violent or dangerous crimes" and "crime of violence" are not synonymous. The Department of Justice clarified the relationship between these distinct terms in the interim final rule codifying 8 C.F.R. § 212.7(d):

[I]n general, individuals convicted of aggravated felonies would not warrant the Attorney General's use of this discretion. In fact, the proposed regulations stated that even if the applicant can meet the "exceptional and extremely unusual hardship" standard for the exercise of discretion, depending upon the severity of the offense, this might "still be insufficient" to obtain the waiver. See 67 FR at 45407. That language would substantially limit the circumstances under which an individual convicted of an aggravated felony would be granted a waiver as a matter of discretion. Therefore, the Department believes that this language achieves the goal of the commenter while not unduly constraining the Attorney General's discretion to render waiver decisions on a case-by-case basis.

67 Fed. Reg. 78675, 78677-78 (December 26, 2002).

Therefore, the fact that a conviction constitutes an aggravated felony under the Act may be indicative that an alien has also been convicted of a violent or dangerous crime, but it is not dispositive. Decisions to deny waiver applications on the basis of discretion under 8 C.F.R. § 212.7(d) are made on a factual "case-by-case basis." The AAO interprets the phrase "violent or dangerous crimes" in accordance with the plain or common meaning of its terms, consistent with any published precedent decisions addressing discretionary denials under 8 C.F.R. § 212.7(d) or the standard originally set forth in *Matter of Jean*. It is noted that the Ninth Circuit in *US v. Laurico-Yeno* found that, as a person cannot be convicted without the intentional use of force under

California Penal Code § 273.5, a conviction for inflicting corporal injury on a spouse or cohabitant categorically falls within the scope of a crime of violence. 590 F.3d 818, 821 (9th Cir. 2010).

Accordingly, the applicant must show that “extraordinary circumstances” warrant approval of the waiver. 8 C.F.R. § 212.7(d). Extraordinary circumstances may exist in cases involving national security or foreign policy considerations, or if the denial of the applicant’s admission would result in exceptional and extremely unusual hardship. *Id.* Finding no evidence of foreign policy, national security, or other extraordinary equities, the AAO will consider whether the applicant has “clearly demonstrate[d] that the denial of . . . admission as an immigrant would result in exceptional and extremely unusual hardship” to a qualifying relative. *Id.*

The exceptional and extremely unusual hardship standard is more restrictive than the extreme hardship standard. *Cortes-Castillo v. INS*, 997 F.2d 1199, 1204 (7th Cir. 1993). Since the applicant is subject to 8 C.F.R. § 212.7(d), merely showing extreme hardship to his qualifying relatives under section 212(h) of the Act is not sufficient. He must meet the higher standard of exceptional and extremely unusual hardship. As the applicant has failed to demonstrate extreme hardship to a qualifying relative under section 212(h) of the Act, it follows that he has also failed to demonstrate that he has met the higher standard of exceptional and extremely unusual hardship.<sup>2</sup>

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.

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<sup>2</sup> If the applicant is eligible for a 212(h)(1)(A) waiver based upon a demonstration that the activities for which the applicant is inadmissible took place over 15 years prior to his application; that the applicant has been rehabilitated; and that his admission would not be contrary to the national welfare, safety, and security of the United States; the applicant would still be subject to 8 C.F.R. § 212.7(d) and required to demonstrate extraordinary circumstances. The AAO has determined that the applicant has failed to demonstrate extraordinary circumstances in this matter.