



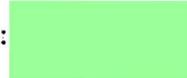
U.S. Citizenship
and Immigration
Services

(b)(6)



DATE FEB 01 2013 OFFICE: MIAMI

FILE:



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:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

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

Thank you,

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 Cuba who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having committed a crime involving moral turpitude. The applicant seeks a waiver of inadmissibility in order to remain in the United States with her U.S. citizen daughter.

The Field Office Director concluded that the record did not establish the existence of extreme hardship to a qualifying relative and denied the waiver application accordingly. *See Decision of the Field Office Director*, dated March 15, 2011.

On appeal, the applicant asserts that she has been convicted of only one crime involving moral turpitude and that she is eligible for and has demonstrated rehabilitation since that conviction.

In support of the waiver application and appeal, the applicant submitted identity documents, a letter from her daughter, financial documents, and her criminal records. 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.)

The applicant's case arises within the jurisdiction of the Eleventh Circuit Court of Appeals, which has reaffirmed the traditional categorical approach for determining whether a crime involves moral turpitude. See *Fajardo v. Attorney General*, 659 F.3d 1303, 1310 (11th Cir. 2011) (finding that the Congress intended the traditional categorical or modified categorical approach to be used to determine whether convictions were convictions for crimes involving moral turpitude and declining to follow the "realistic probability approach" put forth by the Attorney General in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)). In its decision, the Eleventh Circuit defined the categorical approach as " 'looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions.' " 659 F.3d at 1305 (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990)). The court indicated, however, that where the statutory definition of a crime includes "conduct that would categorically be grounds for removal as well as conduct that would not, then the record of conviction – i.e., the charging document, plea, verdict, and sentence – may also be considered." 659 F.3d at 1305 (citing *Jaggernauth v. U.S. Att'y Gen.*, 432 F.3d 1346, 1354-55 (11th Cir. 2005)).

The record reflects that the applicant was convicted of aggravated assault in violation of section 784.021 of the Florida Statutes, in the Circuit Court of the Sixteenth Judicial Circuit, County of Monroe, on October 1, 2002. Aggravated assault is a third degree felony punishable up to five years in prison. See Florida Statutes § 775.082. The applicant was sentenced to 18 months of probation with fees and the special condition of no contact with her daughter.

Florida Statutes § 784.021 provides:

(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

The court information indicates that the applicant was charged with aggravated assault, pursuant to section 784.021 of the Florida Statutes, against her daughter, [REDACTED]. The court information further indicates that the applicant unlawfully and intentionally made an assault upon [REDACTED] with a piece of glass, a deadly weapon, but without intent to kill. The applicant pled guilty to this charge on October 1, 2002. Accordingly, the documents comprising the record of conviction reflect that the applicant was convicted of aggravated assault with a deadly weapon.

Counsel asserts that only an intentional striking constitutes a crime involving moral turpitude and that the applicant's conviction record does not specify a striking. Counsel has not presented any case law in support of this position. It is noted that the Board of Immigration Appeals (Board) has found that assault with a deadly and dangerous weapon involves 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." *Matter of O-*, 3 I&N Dec. 193 (BIA 1948). The Board has also stated 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." *In re Sanudo*, 23 I&N Dec. 968, 971 (BIA 2006).

We take notice that aggravated assault in Florida requires proof of a specific intent to do violence. *See Lavin v. State*, 754 So.2d 784, 787 (Fla. 3d DCA 2000). It is further noted that in *Dey v. State*, 182 So.2d 266, 268 (Fla. 2d DCA 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 *In re Sanudo* and *Matter of O-*, wherein the knowing use or attempted use of deadly force is deemed to involve moral turpitude, we find that an assault with a deadly weapon, whether the assault is committed with the intent to do "bodily harm," or with intent to do "violence" to the person of another, is morally turpitudinous because such an assault is committed with the knowing or attempted use of deadly force. Thus, the AAO finds that the applicant's aggravated assault conviction involves moral turpitude. Since the applicant's aggravated assault with a deadly weapon conviction involves moral turpitude, which renders her inadmissible under section 212(a)(2)(A)(i)(I) of the Act, we need not determine whether any of the applicant's other convictions involve moral turpitude.

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

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), . . . of subsection (a)(2) . . . if –

(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

As the applicant has been convicted of aggravated assault with deadly weapon, in violation of section 784.021 of the Florida Statutes, a dangerous and violent crime, she must also demonstrate that the denial of her application would result in exceptional and extremely unusual hardship.

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

Criminal grounds of inadmissibility involving dangerous or violent crimes. The Attorney General [Secretary], in general, will not favorably exercise discretion under section 212(h)(2) of the Act . . . in cases involving violent or dangerous crimes, except...in cases in which the 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. . . .

Section 245(a)(1) of the California Penal Code provides:

Every person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury is punishable by imprisonment in the state prison for two three or four years, or in a county jail no exceeding on year, or by fine not exceeding ten thousand dollars (\$10,000), or by both such fine and imprisonment.

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*.

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”. *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. She must meet the higher standard of exceptional and extremely unusual hardship.

The record reflects that the applicant is a 68 year-old native and citizen of Cuba. The applicant’s daughter is a 44 year-old native of Cuba and citizen of the United States. The applicant is currently residing in [REDACTED] Florida.

The applicant's daughter asserts that she works and is the mother of four children. The applicant's daughter contends that she is feeling anxious and emotional worrying about the applicant's immigration status and that the applicant is the only one who can take care of her children if she is not able. The applicant's daughter also asserts that the applicant has been there for her family emotionally and monetarily and her absence could cause emotional problems for the applicant's daughter's children. It is initially noted that the applicant's grandchildren are not qualifying relatives in the context of this application so that any hardship they would suffer will be considered only insofar as it affects the applicant's daughter. The record reflects that the applicant financially relies upon disability and retirement benefits. In fact, the applicant applied for a fee waiver in submitting her Form I-290B appeal based upon an assertion that she suffers from financial hardship. There is no supporting evidence that the applicant provides monetary support to her daughter. Further, there is no indication that the applicant's daughter is currently unable to act as a caretaker for her children. It is acknowledged that separation from a parent nearly always creates a level of hardship for both parties. However, the evidence is insufficient to demonstrate that the applicant's daughter would suffer extreme hardship upon separation from the applicant.

The applicant's daughter has made no assertions concerning her ability or desire to relocate to Cuba with the applicant. It is noted that the applicant's daughter is a citizen of the United States, but is also a native of Cuba. There is no supporting documentation concerning the applicant's daughter's ties to the United States. Going on record without supporting documentary evidence generally is not sufficient for purposes of meeting the burden of proof in these proceedings. See *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 record contains insufficient evidence to find that the applicant's daughter would suffer extreme hardship upon relocation to Cuba.

In this case, the record does not contain sufficient evidence to show that the hardships faced by the applicant's daughter, considered in the aggregate, rise to the level of extreme hardship. As the exceptional and extremely unusual hardship standard is more restrictive than the extreme hardship standard, it follows that the applicant has also failed to demonstrate that her qualifying relative would suffer exceptional and extremely unusual hardship if the applicant's waiver application were denied. The AAO therefore finds that the applicant has failed to establish the requisite level of hardship. As the applicant has not established the requisite level of hardship, she has not shown that she warrants a favorable exercise of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. 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.