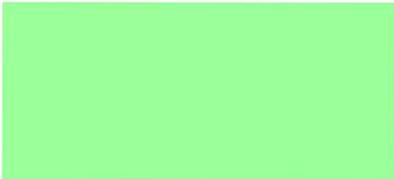




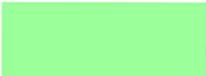
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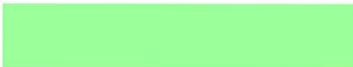
(b)(6)



Date: **FEB 27 2013**

Office: TAMPA, FL

FILE: 

IN RE: Applicant: 

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 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,

  
for Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the District Director, Tampa, Florida, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native of Morocco and citizen of Germany who was found to be inadmissible under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of crimes involving moral turpitude. The director stated that the applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h). The director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On appeal, counsel argues that the crimes of which the applicant was convicted under the German Criminal Code, insult under section 185, causing bodily harm under section 223, causing bodily harm by dangerous means under section 224(1)(5), unlawful imprisonment under section 239, and threats to commit a felony under section 241, are not crimes involving moral turpitude (CIMT), for they do not require a specific intent that is base, vile, or depraved.

Counsel contends that jurisdiction of Eleventh Circuit Court of Appeals is appropriate for the applicant's case on the basis that Florida is the judicial district of the location of the U.S. Citizenship and Immigration Services (USCIS) Field Office that issued the decision appealed. Counsel asserts that the Eleventh Circuit employs a categorical approach to determine whether a crime involves moral turpitude, citing to *Itani v. Ashcroft*, 298 F.3d 1213, 1215-1216 (11<sup>th</sup> Cir. 2002); *Keungne v. U.S. Atty. Gen.*, 561 F.3d 1281, 1284 (11th Cir. 2009); *De la Rosa v. U.S. Atty. Gen.*, 579 F.3d 1327 (11th Cir. 2009). Counsel cited *Keungne* as stating that the inherent nature of the offense, as defined by the criminal statute at issue, must categorically involve moral turpitude. 561 F.3d 1281 at 1284. Counsel asserted that under the categorical approach the specific facts underlying the criminal conviction are not to be examined. *See* 298 F.3d at 1215-1216; *see also* 561 F.3d at 1284 and 579 F.3d at 1336-1337.

Counsel declared that section 185 of the German Criminal Code stated that “[a]n insult shall be punished with imprisonment of not more than one year or a fine and, if the insult is committed by means of an assault, imprisonment of not more than two years or a fine.” Counsel asserted that the crime of insult thus involves an insult, or an insult and the commission of an assault, which do not categorically constitute a CIMT. Counsel argues that the Eleventh Circuit has noted that a crime involves moral turpitude where there is “ ‘an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.’ 561 F.3d 1281 at 1284. Counsel contends that the Board of Immigration Appeals (Board) follows a similar approach, and has held that a crime involves moral turpitude where the act is “accompanied by a vicious motive or a corrupt mind,” citing to *Matter of Flores*, 17 I&N Dec. 225, 227 (BIA 1980); *In Re Khourn*, 21 I&N Dec. 1041, 1046 (BIA 1997) (holding that “evil intent” is a requisite element for a crime involving moral turpitude).

Counsel contends that the offenses in section 185 of the German Criminal Code do not categorically constitute a CIMT, for the statute does not require a vicious motive or corrupt mind or specific intent. Counsel argues that section 192 of the German Penal Code provides that section 185 is

violated even if the insult is true, and it may not be morally reprehensible for a person to make a true statement, even if it is insulting. Counsel cites to cases where the Board and federal courts have found a criminal statute at issue, which prohibited insults, did not necessarily encompass base, vile, or depraved conduct. Counsel argues that an insult accompanied by an assault would not change the analysis, for the Board held that simple assault is generally not considered to be a CIMT, citing to *Matter of Perez-Contreras*, 20 I&N Dec. 615, 618 (BIA 1992); *In Re Sejas*, 24 I&N Dec. 236, 237 (BIA 2007) (“as a general rule, a simple assault and battery offense does not involve moral turpitude . . .”). Counsel contends that an insult is not an aggravating factor that would turn an assault into a CIMT, citing to *Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996) (assaults involving an aggravating dimension such as the use of a deadly weapon or involving the death of another person involve moral turpitude). Accordingly, counsel argues that the applicant’s conviction under section 183 is not for a CIMT.

As to the crime of threatening the commission of a felony under section 241 of the German Criminal Code, counsel states that section 241 provides that “[w]hosoever threatens a person with the commission of a felony against him or a person close to him shall be liable to imprisonment for not more than one year or a fine.” Counsel argues that violation of section 241 does not involve moral turpitude because the statute does not require the specific intent to cause the victim to fear serious harm, citing to *Matter of Ajami*, 22 I&N Dec. 949, 951-952 (BIA 1999) (conviction for stalking under Michigan law was a CIMT for it required proof that the violator repeatedly made threats of death or serious bodily injury with the specific intent to place the victim in fear of harm). Counsel declares that section 241 does not require that the violator’s statements or acts cause the victim to fear bodily harm, citing to *Matter of Ajami*, 22 I&N Dec. 949 (BIA 1999) (offense is CIMT as it required that the victim fear for her physical safety). In addition, counsel asserts that section 241 prohibits threats to commit any felony under German law, and thus encompasses crimes that would not involve moral turpitude such as simple assault and unlawful imprisonment. Counsel argues that a person who threatens to engage in conduct which is not morally turpitudinous has not committed a CIMT, particularly where the statute does not require intent to cause fear of harm, citing to *Matter of Short*, 20 I&N Dec. 136, 139 (BIA 1989) (finding that an assault committed with the intent to engage in a felony that does not involve moral turpitude is not a CIMT). Counsel thus concludes that violation of section 241 would not involve moral turpitude as a person could be convicted for a threat to engage in a crime that would not involve moral turpitude.

In regard to unlawful imprisonment under section 239 of the German Criminal Code, counsel contends that the crime is not a CIMT because the statute does not require evil intent or a corrupt motive. Counsel states that section 239 states that “[w]hoever imprisons a person or otherwise deprives him of his freedom shall be liable to imprisonment of not more than five years or a fine.” Counsel argues that since section 239 does not require specific intent for conviction, the inherent nature of the offense would not involve evil intent or a corrupt motive, citing to *Flores*, 17 I&N Dec. at 227 (crime is found where the act is accompanied by a vicious motive or corrupt mind). Counsel contends that section 239 does not require that the violator create a risk of bodily harm to the victim, citing to *Sharpe v. Riley*, 271 F. Supp. 2d 631, 635-636 (E.D. Pa. 2003) (finding a conviction for unlawful restraint under Pennsylvania law was a CIMT for it required creating a risk of serious bodily harm or involuntary servitude). Counsel argues that section 239 could be violated by pulling a harmless prank such as temporarily locking a person in a room or in their car, or by locking an intoxicated person in a room to prevent him from driving a vehicle. Counsel states that because

section 239 does not require a specific intent or motive for conviction, and may be violated by a person with a laudable motive, conviction under section 239 is not a CIMT.

Counsel states that the applicant was convicted under section 223 of the German Criminal Code, which states that “[w]hosoever physically assaults or damages the health of another person, shall be liable to imprisonment of not more than five years or a fine.” Counsel argues that section 223 prohibits simple assault, which does not involve moral turpitude, citing to *Matter of Perez-Contreras*, 20 I&N Dec. at 618 (simple assault is generally not considered to be a CIMT). Counsel contends that the Board held that conviction under the predecessor to section 223 does not involve a CIMT because the offense is merely simple assault, citing to *Matter of J-*, 4 I&N Dec. 26, 27-28 (BIA 1950). Counsel states that the Board held that specific intent and the level of harm required by the criminal statute at issue distinguishes simple assault from morally reprehensible assault, citing to *Matter of Solon*, 24 I&N Dec. 239, 241-242 (BIA 2007). Counsel asserts that the Board has stated that the term “simple assault” is defined as a crime committed by willful attempt to inflict injury upon another person, or by a threat to inflict injury, citing to *Matter of Martin*, 23 I&N Dec. 491, 494 (BIA 2002). Counsel states that if the assault statute requires specific intent to cause harm and there is a “meaningful level of harm” caused, the offense might be a CIMT. *Matter of Solon*, 24 I&N Dec. 239 at 241-242. Counsel contends that the crime under section 223 does not involve moral turpitude, for the statute does not require specific intent to cause bodily injury or harm, or require any aggravating factor such as the use of a deadly weapon or serious bodily injury.

In regard to the applicant’s conviction for causing bodily harm by dangerous means, counsel states that section 224(1)(5) of the German Criminal Code provided that “[w]hosoever causes bodily harm . . . by methods that impose a danger to life, shall be liable to imprisonment from six months to ten years, in less serious cases to imprisonment from three months to five years.” Counsel contends that violation of section 224(1)(5) does not involve moral turpitude because it does not require evil intent or a corrupt motive, or specific intent to cause bodily harm. Counsel argues that section 224(1)(5) requires the violator to pose a danger to life, and the Board has held that an offense involves moral turpitude where the statute required the violator to be aware of the serious risk his actions posed and to consciously disregard that risk, citing to *Matter of Franklin*, 20 I&N Dec. 867, 870 (BIA 1994) (moral turpitude is found where the statute required acting with a conscious disregard of a substantial and unjustifiable risk). Counsel asserts that the intent required by a statute must relate to the harm intended or the harm caused, citing to *Matter of Solon*, 24 I&N Dec. at 242 (as the level of conscious behavior decreases, as from intentional to reckless conduct, more serious resulting harm is required for finding moral turpitude). Counsel contends that section 224(1)(5) does not require either specific intent to create a threat to the victim’s life or that the violator knew his method of assault posed a threat to life and consciously disregarded that risk. Accordingly, counsel asserts that a conviction under section 224(1)(5) would not involve moral turpitude.

Counsel argues that assuming *arguendo* that the applicant requires a waiver for inadmissibility under section 212(h) of the Act, the applicant demonstrated extreme hardship to his wife. Counsel asserts that if the applicant is barred admission to the United States and the applicant’s wife relocated to Germany with the applicant, she would have financial hardship, fear unfair treatment from negative attitudes towards Americans, be forced to leave the country where she has lived her entire life, and separate from her family members and relatives in the United States. Counsel declares that the director failed to consider the applicant’s wife’s family ties in the hardship analysis. Counsel asserts that the applicant’s wife has a strong bond with the applicant, who ensures she is not lead astray in

life. Counsel states that the applicant's mother-in-law has serious health problems (her leg was amputated because of diabetes) and his wife assisted in her mother's care, and that the applicant and his wife now live in Connecticut to be closer to his mother-in-law. Counsel declares that the applicant's wife's siblings were the primary care providers, but no longer are available, and the applicant's father-in-law is a truck driver with unusual work hours. Counsel states that the applicant's wife's flexible work schedule allows her to take her mother to medical appointments and elsewhere and ensure she takes her medication. Counsel asserts that the applicant's wife is worried about relocating to Germany and leaving her mother, and has begun seeing a psychiatrist to deal with depression and anxiety. Counsel contends that when the evidence is considered together it demonstrates extreme hardship to the applicant's wife if the waiver is denied.

We will first address the finding of inadmissibility.

The applicant was found to be inadmissible for having been convicted of a crime involving moral turpitude. It is not clear which, if not all, of the applicant's convictions were found to be CIMTs by the director. Section 212(a)(2)(A)(i)(I) 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 . . . or an attempt or conspiracy to commit such a crime . . . is inadmissible.

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.)

The criminal judgment from the District Court Freising dated September 8, 2005 stated that the applicant was found guilty of aggravated battery in two instances; aggravated assault and illegal restraint in coincidence with insult and in coincidence with threat; and aggravated assault in coincidence with insult. The indictment stated that the applicant's crimes were in violation of section 223(1), 224(1)(5), 239(1), 241(1), 185, 194, 52, and 53 of the German Criminal Code. The applicant was sentenced to a term of imprisonment for 11 months, with execution of the prison sentence changed to 3 years-probation, which was to expire on August 25, 2008.

Counsel argues that jurisdiction in the instant case arises within the Eleventh Circuit Court of Appeals. In the context of applications for waivers of inadmissibility filed by applicants residing within the United States, the AAO has always deemed controlling the precedents of the Circuit Court of Appeals for the location where the applicant actually resides. As the applicant resides in Connecticut, his case arises within the jurisdiction of the Second Circuit Court of Appeals.

The Second Circuit Court of Appeals has not expressly rejected *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008). In *Matter of Silva-Trevino*, 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 applicant was convicted for causing bodily harm under section 223(1) of the German Criminal Code, which prohibits the physical assault or damage to the health of another person. Counsel argues that the applicant’s conviction was not for a CIMT because section 223 prohibits simple assault, and the Board in *Matter of J-* held that the predecessor to section 223 forbids simple assault, which is not a CIMT; and the Board in *Matter of Perez-Contreras* also acknowledged that simple assault was not a CIMT. Counsel cites *Matter of Solon* as requiring specific intent to cause a “meaningful level of harm,” for the assault to be a CIMT. 24 I&N Dec. 239 at 241-242. Counsel contends that conviction for assault under section 223 does not require specific intent to cause bodily injury or harm, or any aggravating factor.

We are not persuaded by counsel's contention that conviction for assault under section 223 does not require specific intent to cause bodily injury or harm. Section 15 of the German Criminal Code provides: "Unless the law expressly provides for criminal liability based on negligence, only intentional conduct shall attract criminal liability." Thus, the crime under section 223, as well as the applicant's other crimes, require intentional conduct for conviction. We recognize that assault and battery crimes have been found to be morally turpitudinous where there is intentional conduct resulting in a meaningful level of harm and where aggravating factors are to be taken into consideration. See, e.g., *Matter of Solon*, 24 I&N Dec. 239 at 242. The Board has also found:

[M]oral turpitude necessarily inheres in assault and battery offenses that are defined by reference to the infliction of bodily harm upon a person whom society views as deserving of special protection, such as a child, a domestic partner, or a peace officer, because the *intentional or knowing infliction of injury* on such persons reflects a degenerate willingness on the part of the offender to prey on the vulnerable or to disregard his social duty to those who are entitled to his care and protection.

*Matter of Sanudo*, 23 I&N Dec. 968, 971 (BIA 2006) (emphasis added).

By its terms, section 223 forbids physical assault or damage to the health of another person and specific intent to physically assault or damage health of another person is required for conviction. The Board has found moral turpitude where there is intentional conduct resulting in a meaningful level of harm and where aggravating factors are present. We note that the section 223 does not specify the level of harm inflicted or whether the offense would encompass aggravating factors, which would transform simple assault into a CIMT. However, we do know that section 226 of the German Criminal Code prohibits causing grievous bodily harm such as loss of sight in one or both eyes, loss of hearing, speech or ability to procreate; or being permanently and seriously disfigured. The conduct under section 226 would categorically constitute CIMT.

There is a realistic probability that the language of section 223 encompasses conduct involving moral turpitude and conduct that does not. For instance, section 223 would apply to intentional conduct that causes more than a *de minimis* level of physical harm but is less than grievous bodily harm.

Thus, we will review the applicant's record of conviction from which we may determine whether the applicant's assault offenses are for crimes involving moral turpitude. The indictment stated that at a date during February or March 2004, the applicant was charged with "squeezing the left wrist of his wife" and bending one of her fingers. It stated that on August 10, 2004 the applicant kicked his wife with his foot into the knee of his wife, causing the kneecap to become dislodged and the applicant's wife to have serious pain and require a splint. At the end of August or beginning of September 2004, the applicant allegedly grabbed his wife at the neck and choked her, so that she became dizzy. On March 2, 2005, the applicant was alleged to have spit into the face of his wife and throw her on the floor, kneel on top of her, hold her mouth closed with one hand while reaching for her throat with the other hand, and then choke her for approximately three minutes, causing his wife to feel that she was unable to breathe.

Based upon the evidence in the record, the AAO finds that the applicant's conviction involved causing intentional harm and injury to his spouse, a crime involving moral turpitude. He is therefore inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

Furthermore, the applicant was convicted for causing bodily harm by dangerous means under subsection 5 of section 224(1) of the German Criminal Code, which prohibits causing bodily harm by methods that pose a danger to life. Intentionally causing bodily harm to another person by conduct that creates a threat to the life of that person would categorically involve moral turpitude. See *Matter of Tran*, 21 I&N Dec. 291 (BIA 1996) (willful infliction of corporal injury on a spouse, cohabitant, or parent or child constitutes a CIMT); *Matter of Deanda-Romo*, 23 I&N Dec. 597 (BIA 2003) (Texas misdemeanor conviction of assault with bodily injury to a spouse was a CIMT); *Matter of Garcia-Hernandez*, 23 I&N Dec. 590 (BIA 2003) (holding California misdemeanor conviction for corporal injury to a spouse was a CIMT); and *Matter of P-*, 7 I&N Dec. 376 (BIA 1956) (atrocious assault and battery in violation of New Jersey Statute Annotated, Chapter 90, § 2A:90-1, held to be a CIMT for the elements of this crime are "maiming or wounding by an assault and battery that is savagely brutal or outrageously or inhumanly cruel or violent."). Thus, this conviction renders the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The applicant was convicted of threatening the commission of a felony contrary to section 241 of the German Criminal Code, which prohibited threatening a person with the commission of a felony against him or a person close to him. Counsel cites *Matter of Ajami* as requiring specific intent to cause the victim to fear serious bodily injury for finding a CIMT. 22 I&N Dec. 949, 951-952. Counsel argues that section 241 does not require that the violator's statements or acts cause the victim to fear bodily harm. Counsel cites *Matter of Short* as holding that an assault committed with the intent to engage in a felony that does not involve moral turpitude is not a CIMT. Counsel argues that section 241 forbids threats to commit *any* felony under German law, and as such encompasses conduct that may or may not involve moral turpitude.

Section 241 prohibits threatening a person with the commission of a felony against him or a person close to him. The applicant was convicted under a statute which, by its terms, encompasses conduct which may or may not involve moral turpitude, as a person is convicted under section 241 for the commission of threatening *any* felony against a person. The record of conviction must be considered to determine the conduct for which the applicant was convicted.

The indictment stated the following:

On February 27, 2005 the defendant and the claimant [defendant's spouse] were in the common apartment . . . When the claimant wanted to leave the apartment, the defendant locked the claimant into the apartment, so that the claimant could not leave the house.

In addition the defendant insulted the claimant with the expressions "whore" and "bitch" to thereby express his contempt.

In addition the defendant told the claimant, that he had acquaintances in Holland, who would kill someone for 6,000.00 Euro. As the claimant does not deserve to

continue to live. As intended by the defendant, the claimant thought this threat was serious.

Only on the morning of February 28, 2005 did the defendant allow the claimant to leave the apartment.

In regard to *Matter of Ajami*, the Board held that aggravated stalking in violation of Mich. Comp. Laws § 750.411i is a crime involving moral turpitude because “the intentional transmission of threats is evidence of a vicious motive or a corrupt mind.” *Id.* at 952. The respondent was convicted under Mich. Comp. Laws Ann. § 750.411i(2)(c), which read:

An individual who engages in stalking is guilty of aggravated stalking if the violation involves any of the following circumstances: . . . (t)he course of conduct includes the making of 1 or more credible threats against the victim, a member of the victim's family, or another individual living in the victim's household.

*Id.* at 951. In essence, the Michigan aggravated stalking statute criminalized the course of conduct which includes the making of one or more "credible threats" against the victim, a member of the victim's family, or another individual living in the victim's household. A "credible threat" means a threat to kill an individual or a threat to inflict physical injury upon another individual that is made in any manner that causes the individual hearing the threat to reasonably fear for his safety. See Mich. Comp. Laws § 750.411i(1)(a)-(e).

Upon reviewing the record, we find that the applicant's conviction was for a CIMT as the applicant on multiple occasions and over a long period of time had physically injured his spouse, so when the applicant told his wife that she did not deserve to live and he could have her killed, she believed the threat was serious. Therefore, we find his crime to be a crime involving moral turpitude rendering the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The applicant asserted in the letter dated July 2, 2008 that the criminal accusations against him were not true, and were made by his former wife so she would be awarded custody of their children. The applicant stated that in court he did not testify or say anything against his former wife because he wanted to get the divorce over with as soon as possible, and thought the criminal proceeding was only about the divorce.

The applicant seems to claim that he did not provide a defense to his former wife's accusations. This claim is not in accord with the evidence in the record as it shows that the applicant had representation from a defense attorney, [REDACTED] in the criminal case against his former wife for battery. Furthermore, the Board held in *In Re Max Alejandro Madrigal-Calvo*, 21 I&N Dec. 323, 327 (BIA 1996), that collateral attacks on a conviction do not operate to negate the finality of the conviction unless and until the conviction is overturned. (citations omitted). A collateral attack on a judgment of conviction cannot be entertained “unless the judgment is void on its face,” and “it is improper to go behind the judicial record to determine the guilt or innocence of an alien.” *Id.*

Accordingly, the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude.

We observe that even were we to apply decisions from the Eleventh Circuit Court of Appeals, for the conviction of causing bodily harm by dangerous means, we would find the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The Eleventh Circuit has recently reaffirmed the traditional categorical approach for determining whether a crime involves moral turpitude. *See Fajardo v. Attorney General*, 659 F.3d 1301, 1310 (11<sup>th</sup> 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 *Jaggernaut v. U.S. Att’y Gen.*, 432 F.3d 1346, 1354-55 (11<sup>th</sup> Cir. 2005)).

Thus, we would have reviewed the applicant’s record of conviction, i.e., the charging document, plea, verdict, and sentence, in order to determine whether his aggravated assault offense was for a CIMT. *Fajardo*, 659 F.3d at 1305.

The waiver for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act is found under section 212(h) of the Act. That section provides in pertinent part:

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

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

A section 212(h) waiver of the bar to admission resulting from violation of section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant is not a consideration under the statute and will be considered only to the extent that it results in hardship to a qualifying relative. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996).

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.

In rendering this decision, the AAO will consider all of the evidence in the record.

The declared hardships to the applicant's wife in joining the applicant to live in Germany are not being able to care for her mother, separation from her family members in the United States, lack of family ties to Germany, lack of familiarity with the German language, having to give up her job and retirement, not being able to find a place to live, and anxiety about being disliked because she is from the United States. The letter from [REDACTED] dated May 12, 2010 stated that the applicant's wife had sessions for symptoms of severe depression and anxiety and that her symptoms are caused by the conflict between taking care of her mother and separation from the applicant, should he not be able to remain in the United States. We believe that the record is somewhat inconsistent with [REDACTED] statement as it reveals that the applicant's wife did not live near her mother for at least two years. In the letter dated March 4, 2009, the applicant's wife asserted that she and the applicant moved to Florida, where they lived independently from the rest of her family for two years because they wanted a stable place to live, work, raise children, and have a business. She stated "I have never in my life have been so happy, had my life so planned out before, like now." In the affidavit dated February 22, 2010, the applicant's wife stated that her sisters and brother took care of her mother while she lived in Florida. The applicant's wife declared that of her two sisters, one will be moving out of the family home, and the other will have a baby, and that her brother will be moving to Florida, so she must take care of her mother. The record reflects that the applicant and his wife live 20 miles from his mother-in-law, and the applicant's wife will be employed during the day, even though she intends to schedule time to take her mother to medical appointments. Except for not being able to drive, there is no evidence that the applicant's mother-in-law is not able to perform major life activities on her own, or that she does not have access to other means of transportation. The applicant's wife claimed that neither she nor the applicant has friends or relatives in Germany, so they will not be able to find a place to live. As the applicant has lived in Germany until his arrival in the United States in September 2005, we are not persuaded that they will not be able to find a place to live in Germany. The applicant's wife asserted that she is concerned about her personal safety in Germany due to anti-American sentiments, but no evidence has been submitted in support of this assertion. We recognize that the applicant's wife will have the hardship of overcoming a language barrier; giving up her job, which she has held for three years; and separating from her mother and family members and friends in the United States. However, when all of the asserted hardships are considered together, they fail to establish that the hardship to the applicant's wife is extreme and therefore more than the common results of inadmissibility and removal.

The declared hardships to the applicant's wife in remaining in the United States while the applicant lives in Germany are no longer having a positive and strong relationship with her husband, and being in financial straits. The letters and affidavits from the parents, friend, and brother-in-law of the applicant's wife are in agreement with the claim that the applicant has a close relationship with his wife. We have already discussed the letter from [REDACTED] dated May 12, 2010. In regard to financial hardship, the applicant's wife argued that without the applicant's income she will be homeless because she will not be able to pay rent, household expenses, and the \$48,831 in student loans, and \$45,361 car loan. The SallieMae loan invoice reflects monthly payments due of \$660.17 and the total balance of \$61,424, and the car loan monthly payment is \$588 for 72 payments. We cannot determine from the tax records whether the applicant's wife has a sufficient income in which to support herself. However, the applicant's sisters have moved from their family home, and the applicant has not addressed the possibility that the applicant's wife would live with her parents. We acknowledge that the applicant has a close relationship with his wife and she will have emotional

hardship in remaining in the United States without him. However, when we consider the asserted hardship factors together, we find they fail to demonstrate that the hardship to the applicant's wife is more than the common or typical results of inadmissibility. The applicant has not shown that the hardship to his wife is extreme.

Based upon the record before the AAO, the applicant in this case fails to establish extreme hardship to a qualifying family member for purposes of relief under section 212(h) of the Act.

Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion. We note, however, that given that the applicant was convicted of a violent or dangerous crime, he would have to meet the requirements of 8 C.F.R. § 212.7(d) to warrant 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. *See* Section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.