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



U.S. Citizenship  
and Immigration  
Services

DATE: JUL 17 2013

Office: HIALEAH

FILE: [REDACTED]

IN RE: Applicant: [REDACTED]

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

ON BEHALF OF APPLICANT:  
[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (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 that reads "Michael Shumway".

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Administrative Appeals Office (AAO) previously granted the applicant's motion to reconsider and dismissed his waiver application as unnecessary. The matter is now before the AAO on motion from the field office director. The AAO will reconsider its decision *sua sponte*. The prior decision will be withdrawn, the appeal will be dismissed, and the waiver application will be denied.

The applicant is a native and citizen of Honduras 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 a crime involving moral turpitude. He has two U.S. citizen children. 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 children.

The field office director concluded that the applicant had failed to establish that his qualifying relatives would suffer extreme hardship if the waiver application were denied. *Decision of Field Office Director*, dated February 24, 2010. On appeal, the AAO found that the applicant had not established extreme hardship to his qualifying relatives and dismissed the appeal. *AAO Decision*, dated May 30, 2012.

In his motion to reconsider, the applicant asserted that his conviction did not constitute a crime involving moral turpitude and that his children would suffer extreme hardship if his waiver application remained denied. *Brief in Support of Motion to Reconsider*, dated June 28, 2012. The AAO granted the applicant's motion to reconsider and found that he was not inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude. We dismissed the waiver application as unnecessary. *AAO Decision*, dated February 7, 2013. On February 15, 2013, the Eleventh Circuit Court of Appeals issued a published decision apparently contradicting our finding. *See Cano v. U.S. Att'y Gen.*, 709 F.3d 1052 (11th Cir. 2013). On April 9, 2013, the field office director of the Hialeah Field Office filed a Service Motion to Reopen/Reconsider based on the decision in *Cano*.

In response to the field office director's motion, counsel for the applicant contends that there is no regulatory authority for the field office to file a motion to reconsider. Counsel also asserts that even if the AAO finds that it has jurisdiction to consider the motion, the motion is untimely as it was filed more than 30 days after the issuance of the AAO's previous decision. Furthermore, counsel contends that the motion must be dismissed because it was not filed on Form I-290B. Counsel also argues that the holding in *Cano* is not inconsistent with the AAO's prior finding that the applicant's conviction is not for a crime involving moral turpitude.

We note that, notwithstanding counsel's arguments regarding Service motions, the AAO may reconsider its own decision pursuant to 8 C.F.R. § 103.5(a)(5). Because the Eleventh Circuit's published decision in *Cano* directly addresses the statute under which the applicant was convicted, the AAO will reconsider our decision dated February 7, 2013 for purposes of entering a new decision consistent with *Cano*. We note that the applicant has been given 30 days to submit a brief, and has submitted a brief that we have considered in rendering this decision. *See*

8 C.F.R. § 103.5(a)(5)(ii). In general, the AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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

(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.

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

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

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

(Citations omitted.)

As noted in our previous decisions, the applicant's case arises within the jurisdiction of the Eleventh Circuit Court of Appeals, which has recently reaffirmed the traditional categorical approach for determining whether a crime involves moral turpitude, declining to follow *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008). *See Fajardo v. U.S. Att'y Gen.*, 659 F.3d 1303 (11th Cir. 2011) (finding the U.S. Congress to have intended that determinations of whether offenses are crimes involving moral turpitude be made using the traditional categorical/modified categorical approach). 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." *Id.* at 1305 (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990)). The court noted that where the statutory definition of a crime included "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 – [might] also be considered." *Id.* (citing *Jaggernauth v. U.S. Att'y Gen.*, 432 F.3d 1346, 1354-55 (11th Cir. 2005)). Pursuant to *Fajardo*, the AAO will limit any modified categorical inquiry in this matter to the applicant's records of conviction.

The record reflects that the applicant was convicted on [REDACTED] of resisting an officer with violence to his or her person in violation of Fl. Stat. § 843.01, a third degree felony punishable by a maximum of five years of imprisonment. He was placed on probation for a period of two years and ordered to take an anger management course and pay court costs.

At the time of the applicant's conviction, Fl. Stat. § 843.01 provided, in pertinent part, that "[w]hoever knowingly and willfully resists, obstructs, or opposes any officer . . . by offering or doing violence to the person of such officer . . . is guilty of a felony of the third degree . . . ."

In *Cano*, the Eleventh Circuit found that a conviction under Fla. Stat. § 843.01 is categorically a crime involving moral turpitude. 709 F.3d 1052 (11th Cir. 2013). The court noted that to be convicted under section 843.01, a defendant must have "(1) knowingly (2) resisted, obstructed, or opposed a law enforcement officer (3) who was in the lawful execution of any legal duty (4) by offering or doing violence to his person." *Id.* at 1054 (quoting *Yarusso v. State*, 942 So.2d 939, 942 (Fla. 2d DCA 2006)). Additionally, the court noted that "the intent requirement . . . applies to both resisting arrest and the offer or use of violence." *Id.* (citing *U.S. v. Romo-Villalobos*, 674 F.3d 1246 (11th Cir. 2012)). Noting that Florida courts have distinguished a conviction under section 843.01 from other crimes against law enforcement officers, such as simple assault, the court explained that section 843.01 requires more than mere unwanted touching but instead "involves the use or threat of physical force." *Id.* Therefore, the court found that "because Fla. Stat. § 843.01 requires intentional violence against an officer, it criminalizes 'conduct [that] exhibits a deliberate disregard for the law, which we consider to be a violation of the accepted rules of morality and the duties owed to society.'" *Id.* (quoting *Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988)).

In the AAO's prior decision, we cited several precedent decisions of the Board of Immigration Appeals in support of the proposition that a crime such as that described in Fla. Stat. § 843.01 is only a crime involving moral turpitude if it involves actual injury to the law enforcement officer – *Danesh, supra.*; *Matter of O-*, 4 I&N Dec. 301 (BIA 1951); *Matter of B-*, 5 I&N Dec. 538 (BIA 1953); *Ciambelli ex rel. Maranci v. Johnson*, 12 F.2d 465 (D. Mass 1926). Although injury, or the lack thereof, has been mentioned among the factors pertinent to the moral turpitude determination, we now acknowledge that the Eleventh Circuit has not read Board precedents as establishing it to be an *essential* element to this determination. Rather, *Cano* is consistent with a reading, also supported by some Board precedents, that assault on a law enforcement officer is a crime involving moral turpitude where the offense involves knowledge that the victim was a law enforcement officer plus an aggravating factor that could be actual injury, but could also be the use of a weapon, or the use of or threat to use physical violence. For example, in *Matter of Logan*, the Board held that a conviction for interference with a law enforcement officer rose above the level of simple assault because the defendant had "knowingly threatened to employ deadly physical force" by pulling a knife on the officer. 17 I&N Dec. 367, 368-69 (BIA 1980). The Board found in *Matter of B-* that a defendant who was convicted of assaulting a prison guard with knowledge that the guard was engaged in his lawful duties had not been convicted of a

crime involving moral turpitude because the offense was similar to simple assault and did not involve the use of a weapon. 5 I&N Dec. at 541.

Florida courts have found that “violence is a necessary element of the offense” of resisting arrest under Fla. Stat. § 843.01. *U.S. v. Romo-Villalobos*, 674 F.3d 1246, 1249 (11th Cir. 2012) (citing *Rawlings v. State*, 976 So.2d 1179, 1181 (Fla. 5th DCA 2008)); *see also Walker v. State*, 965 So.2d 1281, 1284 (Fla. 2d DCA 2007). Therefore, a conviction under Fla. Stat. § 843.01 cannot occur “from a passive resistance to arrest” but instead must involve “assault by force or violence on an arresting officer.” *Danesh* at 672; *see also Harris v. State*, 5 So. 3d 750, 751 (Fla. Dist. Ct. App. 2009) (“Offering to do violence plainly involves the ‘threat of physical force or violence’ while actually doing violence plainly involves the ‘use . . . of physical force or violence.’”) As noted above, the conviction also requires that a defendant knew that his victim was a police officer engaged in his lawful duties. *Cano* at 1054. Accordingly, the conviction rises above the level of simple assault to require both knowledge of the police officer’s status and the aggravating factor of intentional use or threatened use of physical violence. *Id.* Therefore, the AAO finds that the applicant’s conviction under Fla. Stat. § 843.01 is a crime involving moral turpitude which renders him inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

Counsel for the applicant asserts that *Cano* is distinguishable from the applicant’s case. She claims that the court in *Cano* addressed only the issue of intent in Fla. Stat. § 843.01, finding that “the intent element . . . attaches to both the effort to resist arrest and the offer or use of violence.” *Applicant’s Response in Opposition to Field Office’s Motion to Reconsider* at 4. Therefore, counsel contends that the Eleventh Circuit in *Cano* did not address whether Fla. Stat. § 843.01 is a divisible statute or make any distinction between “offering” and “doing” violence. *Id.* However, the court in *Cano* found that a conviction under Fla. Stat. § 843.01 is categorically a crime involving moral turpitude. 709 F.3d at 1054-55. The court found that both “offering or doing violence” is “intentional violence against an officer” and morally turpitudinous conduct. *Id.* *Cano* is controlling in this matter, and whether the Eleventh Circuit should have found that merely “offering” violence is not a sufficient aggravating factor (as opposed to “doing” violence) to render the offense a crime involving moral turpitude, thus requiring a modified categorical analysis of a “divisible” statute to determine if the applicant’s crime was merely that of “offering” violence, is beyond our authority to determine.

Having found the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act for being convicted of a crime involving moral turpitude, the AAO will now fully consider the applicant’s appeal of the denial of his application for a waiver under section 212(h) of the Act.

Section 212(h) states, 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 waiver under section 212(h) is dependent first upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant himself will be considered only to the extent that it results in hardship to his qualifying relatives. If extreme hardship to a 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). The qualifying relatives in this case are the applicant's two U.S. citizen children.

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals (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 U.S. 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 v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (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.

As we noted in our previous decision, the applicant’s spouse is a derivative of his application and if the waiver application is denied, his spouse will also be required to depart the United States. Therefore, if the applicant’s children were to be separated from the applicant, they would also be separated from their mother. On this basis, we previously concluded that the applicant’s children, who are six and three years old, would suffer extreme hardship if they were to remain in the United States without either of their parents. *AAO Decision*, dated May 30, 2012. We will not disturb our previous finding regarding hardship to the applicant’s children on separation.

We also noted in our decision of May 30, 2012 that while the applicant is from Honduras, his spouse is from Brazil. For that reason, we considered whether the applicant had demonstrated extreme hardship to his qualifying relatives upon relocation to either country. We found that the applicant’s children would suffer extreme hardship on relocation to Honduras and will not disturb that finding now. Honduras is designated as a country whose nationals are eligible for Temporary Protected Status (TPS) due to damage from Hurricane Mitch and the continuing inability of the country to handle the return of its nationals. 78 Fed. Reg. 20123-20128 (Apr. 3, 2013). Additionally, the U.S. Department of State warns that Honduras has the highest murder rate in the world and that other serious crimes by transnational criminal organizations are common. See *U.S. Department of State, Travel Warning: Honduras*, dated November 21, 2012. The record also demonstrates that the applicant’s eldest child underwent emergency surgery on

August 14, 2006 for pyloric stenosis, a condition causing excessive pressure in the stomach and incessant vomiting. Since that date, he has suffered from gastroesophageal reflux for which he requires ongoing medical care. The applicant and his family have health insurance in the United States but may not be able to obtain insurance or the proper medical care for the applicant's eldest child in Honduras. Finally, the applicant's children were born in the United States and his eldest child now attends school, so adjustment to life in Honduras would likely be very difficult for them. In the aggregate, the AAO finds that these factors would create extreme hardship for the applicant's children on relocation to Honduras.

The applicant claims that his children would also suffer extreme hardship on relocation to Brazil. He states that he works as an importer of Honduran produce to the United States, with a particular focus on cantaloupe and honeydew melons, and that there is no demand for Honduran produce in Brazil due to large crops of melons in that country. Additionally, the applicant asserts that he has formed professional relationships in the United States over the past 12 years but would lack such contacts in Brazil. Therefore, the applicant fears that he would be unable to support his family in Brazil and that his children would suffer hardship there as a result. He notes that he is currently the sole financial supporter of his family. The applicant's spouse also states that she would be unable to support the family in Brazil. She indicates that although she is originally from Brazil and has a university degree in economics from that country, she has never worked in Brazil and has never worked in the field of economics. She also notes that the only job she has held as an adult was as an independent contractor in Florida real estate, which she last held three years ago.

Counsel also contends that the applicant's job prospects in Brazil would be limited because he is not "professionally literate" in Portuguese. Furthermore, counsel states that the applicant currently lacks documentation allowing him to reside legally in Brazil and that he may be barred from living there due to his criminal history.

The AAO finds that the applicant has failed to show that his children would suffer extreme hardship upon relocation to Brazil. Although the applicant has experience working as a produce importer in the United States, the evidence is insufficient to prove that he would be unable to find work in Brazil. While he has presented internet articles indicating that Brazil has large crops of melons, this does not demonstrate that his experience in importation of produce would be useless in Brazil's large agricultural sector. Additionally, while the applicant's spouse has never worked in Brazil, she is a native of Brazil with a Brazilian university degree and familiarity with the language and culture. Her lack of experience alone is insufficient to show that the applicant's spouse would be unable to work in Brazil to support the family.

The AAO also notes that while the applicant's eldest son requires ongoing medical care, the U.S. Department of State indicates that healthcare in Brazil "is generally good . . . . Prescription and over-the-counter medicines are widely available. Emergency services are responsive." *U.S. Department of State, Country Specific Information: Brazil*, dated April 12, 2013.

Finally, while counsel claims that the applicant currently has no authorization to live in Brazil and may be unable to reside there permanently, there is no evidence in the record to support such a finding. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the applicant's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

We can find extreme hardship warranting a waiver of inadmissibility only where an applicant has demonstrated extreme hardship to a qualifying relative in the scenario of separation *and* the scenario of relocation. A claim that a qualifying relative will remain in the United States and thereby suffer extreme hardship as a consequence of separation can easily be made for purposes of the waiver even where there is no intention to separate in reality. *See Matter of Ige*, 20 I&N Dec. 880, 886 (BIA 1994). Furthermore, to separate and suffer extreme hardship, where relocating abroad with the applicant would not result in extreme hardship, is a matter of choice and not the result of inadmissibility. *Id.*, *see also Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996). As the applicant has not demonstrated extreme hardship to his children on relocation to Brazil, we cannot find that refusal of admission would result in extreme hardship to the qualifying relatives in this case.

The AAO therefore finds that the applicant has failed to establish extreme hardship to a qualifying relative as required under section 212(h) of the Act. As the applicant has not established extreme hardship to a qualifying family member, no purpose would be served in determining whether the applicant merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility, 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 waiver application is properly denied.

**ORDER:** The AAO's prior decision is withdrawn. The appeal is dismissed. The waiver application is denied.