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U.S. Citizenship  
and Immigration  
Services

DATE: MAR 28 2013

OFFICE: MIAMI, FL

FILE: [REDACTED]

IN RE: [REDACTED]

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

ON BEHALF OF APPLICANT:

[REDACTED]

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 with the field office or service center that originally decided your case by filing a 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,

A handwritten signature in black ink that reads "Michael Shumway".

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

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

The applicant is a native and a 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. He is the spouse of a lawful permanent resident and the father of three U.S. citizens. The applicant seeks a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h) in order to reside in the United States.

The Field Office Director concluded that the applicant had failed to establish that the bar to his admission would result in extreme hardship for a qualifying relative or that he warranted a favorable exercise of discretion. She denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Decision of the Field Office Director*, dated September 30, 2011.

On appeal, counsel asserts that the applicant has never been convicted of a crime involving moral turpitude. Alternately, he contends that the applicant's spouse and three U.S. citizen daughters would suffer extreme hardship if the waiver application is denied, particularly his youngest daughter who experienced an intraventricular brain hemorrhage at birth. *Form I-290B, Notice of Appeal or Motion*, dated October 26, 2011; *see also Counsel's Brief on appeal*.

The record of proceeding includes, but is not limited to, the following evidence: counsel's briefs; medical and disability documentation for the applicant's youngest daughter; and records relating to the applicant's arrests and convictions. The entire record was reviewed and all relevant evidence considered in reaching a decision on the appeal.

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

(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) a violation (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

The record reflects that on January 29, 1993, the applicant was convicted of Robbery with Force, Florida Statutes (FL ST) § 812.13, a first degree felony, with adjudication withheld. He was placed on probation for one year and five months. On February 9, 2000, the applicant was found guilty of Prostitution, FL ST § 796.07(2), with adjudication withheld, and was fined. The applicant has not contested his inadmissibility for this conviction on appeal.

As previously noted, the record also establishes that the applicant was convicted of Prostitution, FL ST § 796.06, which describes prostitution as “the giving or receiving of the body for sexual activity for hire but excludes sexual activity between spouses.” Although the record does not indicate the behavior for or the subsection of the statute under which the applicant was convicted, we note that the BIA has long held that an act of prostitution is a crime involving moral turpitude. *Matter of W*, 4 I&N Dec. 401-02, 404 (BIA 1951)(finding a Canadian citizen convicted of practicing prostitution in violation of Seattle, Washington City Ordinance 73095 § 1 to have been convicted of a crime involving moral turpitude); see also *Matter of Turcotte*, 12 I&N Dec. 206, 208 (BIA 1967)(noting that the language of Florida Statutes 796.07(3)(A), “[t]o offer to commit, or to commit, or to engage in, prostitution, lewdness or assignation,” was “almost identical” to the wording of Seattle City Ordinance 73095, a crime involving moral turpitude). Therefore, we also find the applicant’s conviction for Prostitution, FL ST § 796.06, to be a crime involving moral turpitude and to bar the applicant’s admission to the United States under section 212(a)(2)(i)(I) of the Act.

Section 212(h) of the Act provides:

(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) [I]t is established to the satisfaction of the Attorney General that–

(i) [T]he 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 . . . .

If eligibility is established under section 212(h)(1)(A) or section 212(h)(1)(B) of the Act, United States Citizenship and Immigration Services (USCIS) then assesses whether an exercise of discretion is warranted. In most discretionary matters, the alien bears the burden of proving eligibility simply by

showing equities in the United States that are not outweighed by adverse factors. *See Matter of T-S-Y*, 7 I&N Dec. 582 (BIA 1957).<sup>1</sup>

In the present case, however, the AAO cannot find that the exercise of discretion may be based solely on the balancing of favorable versus adverse factors. The applicant has been convicted of Robbery with Force, FL ST § 812.13, which is not only a crime involving moral turpitude, but also a violent or dangerous crime that triggers the requirements of 8 C.F.R. § 212.7(d), which states:

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.

In *U.S. v. Lockley*, the 11<sup>th</sup> Circuit, the jurisdiction within which the present case arises, held that a conviction for attempted robbery under FL ST § 812.13(1) is categorically a crime of violence for the purposes of U.S. Sentencing Guidelines. 632 F.3d 1238, *certiorari denied* 132 S.Ct. 257. As defined by 18 U.S.C. § 16, a crime of violence is an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. While the terms "violent or dangerous crimes" and "crime of violence" are not synonymous, we, nevertheless, use the definition of a crime of violence found in 18 U.S.C. § 16 as guidance in determining whether a crime is a violent crime under 8 C.F.R. § 212.7(d), considering also other common meanings of the terms "violent" and "dangerous." The term "dangerous" is not defined specifically by 18 U.S.C. § 16 or any other relevant statutory provision. In general, we interpret the terms "violent" and "dangerous" in accordance with their plain or common meanings, and consistent with any rulings found in published precedent decisions addressing discretionary denials under the standard described

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<sup>1</sup> The record also indicates that the applicant was arrested on March 19, 1987 for Possession of Marijuana, 20 grams or under, FL ST § 893.13(1)(f), resulting in his conviction. Accordingly, the applicant's admission to the United States is also barred pursuant to section 212(a)(2)(A)(i)(II) for having committed a controlled substance violation. However, the AAO need not consider the applicant's section 212(a)(2)(A)(i)(II) inadmissibility further as his eligibility for a waiver in connection with his convictions for crimes involving moral turpitude will also waive his inadmissibility related to his drug conviction.

in 8 C.F.R. § 212.7(d). Based on our review of the record and the 11<sup>th</sup> Circuit's reasoning in *Lockley*, we conclude that the applicant has been convicted of a violent crime for the purposes of 8 C.F.R. § 212.7(d).

The record does not include evidence of foreign policy or national security considerations. Accordingly, the applicant must demonstrate that the denial of the waiver application would result in exceptional and extremely unusual hardship, a more restrictive standard than that of extreme hardship. *Cortes-Castillo v. INS*, 997 F.2d 1199, 1204 (7<sup>th</sup> Cir. 1993).

In *Matter of Monreal-Aguinaga*, 23 I& N Dec. 56, 62 (BIA 2001), the BIA determined that exceptional and extremely unusual hardship in cancellation of removal cases under section 240A(b) of the Act is hardship that "must be 'substantially' beyond the ordinary hardship that would be expected when a close family member leaves this country," but that the applicant need not show that hardship would be unconscionable. *Id.* at 61. The BIA also stated that in assessing exceptional and extremely unusual hardship, it would be useful to view the factors considered in determining extreme hardship. *Id.* at 63. Accordingly, the AAO will first consider the applicant's waiver application under the extreme hardship requirement of section 212(h)(1)(B) of the Act. Should the record establish that the hardship resulting from the applicant's inadmissibility satisfies section 212(h) of the Act, we will proceed with a consideration of whether such hardship also meets the heightened standard imposed on the applicant by 8 C.F.R. § 212.7(d).

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 BIA 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 BIA 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 BIA 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 BIA 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.

On appeal, counsel states that the applicant’s spouse and three daughters would experience extreme hardship if the applicant’s waiver application is denied. He contends that separation would have a devastating effect on their physical and psychological health, stunting their development and devastating them emotionally. He specifically raises the hardship that would be experienced by [REDACTED] the applicant’s youngest daughter, who suffered an intraventricular brain hemorrhage at the time of her birth. Counsel asserts that [REDACTED] suffers from headaches, seizures and other secondary medical complications, and that her medical condition is so severe that she has been classified as disabled. He further states that her condition requires constant monitoring as it can prove fatal due to cranial pressure compressing the brain and that the medical treatment she requires is costly. Counsel contends that [REDACTED]’s mother, the applicant’s former spouse, cannot manage all of her daughter’s needs by herself. He also states that the applicant provides his daughter with the emotional and financial support she needs. Counsel asserts that [REDACTED] is permanently impaired and that she has extraordinary and unique needs, which require the efforts and finances of both her parents.

We note that, beyond counsel’s assertions, the record offers no evidence of the hardship that would be suffered by the applicant’s spouse or two older daughters if the waiver application is denied and

they remain in the United States. Without supporting documentation, the assertions of counsel are not sufficient to meet the burden of proof in these proceedings. The 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). Accordingly, we do not find the applicant to have established that his spouse or two older daughters would experience hardship beyond that which is normally created by the separation of family.

The record does, however, contain medical documentation of the brain hemorrhage suffered by the applicant's daughter, [REDACTED]. It also includes a December 10, 2003 "Disability Report-Child" that indicates the negative impacts of that hemorrhage on her physical and behavioral development.<sup>2</sup> A Medication Reconciliation Admission/Discharge Order Form, dated July 21, 2009, reflects that the applicant's daughter was, at that time, taking Strattera, Vistaril, Lithium and Risperdal. We also note the property tax statement from Miami-Dade County, dated September 10, 2011, which establishes the applicant as the owner of the property at [REDACTED] Coral Gables, Florida. Also contained in the record is a 2006 rental agreement indicating that the applicant's former spouse and daughters, [REDACTED], live rent free at the [REDACTED] address.

We find the record to establish that the applicant's daughter suffered a significant brain injury at the time of her birth and that, in 2003, she was experiencing serious problems with her physical and behavioral development as a result of that injury. The record also establishes that, as of 2009, she was taking medication. There are, however, no medical statements or reports that discuss [REDACTED] physical and/or behavioral history, her capabilities or disabilities, or her healthcare needs since December 10, 2003, nearly eight years prior to the filing of the appeal. Moreover, we find no evidence, beyond that provided by counsel's assertions, to establish the applicant's involvement in [REDACTED] life. Although [REDACTED] mother indicated in the 2003 disability report that the applicant was helping to care for their daughter, the report predates their 2004 divorce. There is no documentary evidence of the applicant's subsequent involvement in his daughter's care.

The 2006 rental agreement submitted to establish the financial assistance the applicant provides his daughters from his second marriage indicates that the agreement is to continue indefinitely, "as long as [the applicant] owns this house." However, no documentation has been provided to establish that this living arrangement could not continue in the applicant's absence. Neither has any evidence been submitted to demonstrate that the applicant's former spouse is financially dependent on the applicant to provide housing for herself and their daughters. We also observe that there is no evidence in the record that the applicant is paying child support with regard to [REDACTED]. Therefore, in the absence of additional documentary evidence to support the hardship claims, we cannot conclude that [REDACTED] would experience extreme hardship if the waiver application is denied and she remains in the United States with her mother.

<sup>2</sup> The record also includes a November 1, 2001 evaluation of [REDACTED] in Spanish. This documentation will not be considered pursuant to the regulation at 8 C.F.R. § 103.2(b)(3), which requires any foreign language documents to be submitted with an English-language translation.

On appeal, counsel also asserts that relocation would result in extreme hardship for [REDACTED] as her condition could not be managed in Cuba. However, no documentary evidence, e.g., published country conditions materials on Cuba, has been submitted in support of this claim. Moreover, as previously indicated, the current status of [REDACTED] healthcare needs has not been established. Without supporting documentation, the assertions of counsel are not sufficient to meet the burden of proof in these proceedings. The 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). As a result, the record does not demonstrate that [REDACTED] could not obtain adequate care from the Cuban healthcare system. No other hardship claims regarding relocation have been made by the applicant. Accordingly, we cannot find that he has established that relocation to Cuba would result in extreme hardship for a qualifying relative.

As the record in the present matter does not establish extreme hardship under section 212(h) of the Act, it also fails to demonstrate that the applicant's inadmissibility would result in exceptional and extremely unusual hardship, the heightened standard of hardship imposed on the applicant by the regulation at 8 C.F.R. § 212.7(d). Therefore, as the applicant has not demonstrated that he warrants a favorable exercise of discretion under section 212(h)(2) of the Act, the appeal will be dismissed.

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. In discretionary matters, the applicant bears the full burden of proving his or her eligibility for discretionary relief. *See Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976). Here, the applicant has not met that burden.

**ORDER:** The appeal is dismissed.