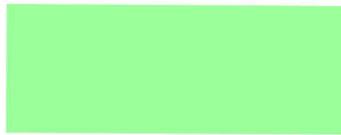




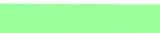
U.S. Citizenship
and Immigration
Services

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Date: OCT 01 2013

Office: SANTA ANA FIELD OFFICE

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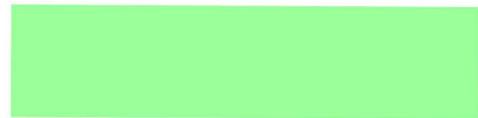
IN RE:

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 (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,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Santa Ana, California, denied the waiver application and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of the Republic of Korea who was found to be inadmissible to the United States 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 committed crimes involving moral turpitude. The record reflects that in 1992 the applicant was convicted in California of sexual battery and that in 2010 the applicant was convicted in Arizona of criminal impersonation. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with his U.S. citizen spouse and son.

The Field Office Director found that the applicant failed to establish that a qualifying relative would experience extreme hardship as a consequence of his inadmissibility. The application was denied accordingly. *See Decision of the Field Office Director* dated February 08, 2013.

On appeal counsel for the applicant contends in the Notice of Appeal (Form I-290B) that USCIS erred in failing to consider the standard to establish extreme hardship. With the appeal counsel submits a brief, medical documentation for the applicant's former spouse, and a psychological assessment of the applicant's son. The record also contains a statement from the applicant's spouse, medical documentation for the applicant and his spouse, and financial documentation. The entire record was reviewed and considered in rendering this decision.

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

(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

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

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

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

(Citations omitted.)

The record reflects that on June 22, 1992, the applicant was convicted of one count of sexual battery in violation of California Penal Code Section 243.4(a),¹ which provided at the time:

(a) Any person who touches an intimate part of another person while that person is unlawfully restrained by the accused or an accomplice, and if the touching is against the will of the person touched and is for the purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of sexual battery. A violation of this subdivision is punishable by imprisonment in a county jail for not more than one year, and by a fine not exceeding two thousand dollars (\$2,000); or by imprisonment in the state prison for two, three, or four years, and by a fine not exceeding ten thousand dollars (\$10,000).

The applicant was sentenced to five years of probation and ordered to pay restitution to the victim of his crime.

In *In re Sanudo*, 23 I&N Dec. 968 (BIA 2006), the BIA noted that, “we have recognized that assault and battery offenses may appropriately be classified as crimes of moral turpitude if they necessarily involved aggravating factors that significantly increased their culpability.” 23 I&N Dec. at 971. Cal. Penal Code § 243.4(a) includes the types of “aggravating” factors that would cause us to find that the conduct at issue represents an inherently base, vile, or depraved act. Unlawfully restraining an unwilling victim to engage in sexual acts represents a vile and depraved act. In *People v. Chavez*, the California Court of Appeal found that the commission of the lesser culpable offense, misdemeanor sexual battery in violation of Cal. Penal Code § 243.4(d)(1), is a crime involving moral turpitude. 84 Cal. App. 4th 25, 100 Cal. Rptr. 2d 680 (2000). The court stated, “the degrading use of another, against her will, for one’s own sexual arousal is deserving of moral condemnation. We hold that sexual battery is a crime of moral turpitude.” 84 Cal. App. 4th 25, 30, 100 Cal. Rptr. 2d 680 (2000). It should be noted that a conviction under Cal. Penal Code § 243.4(a) encompasses conduct that is significantly more depraved than a conviction under Cal. Penal Code § 243.4(d)(1) because the statutory elements include the unlawful restraint of the victim. Accordingly, the AAO finds that the applicant’s felony conviction under Cal. Penal Code § 243.4(a) is categorically a crime involving moral turpitude.

The AAO notes that the record contains a copy of an Order for Dismissal under sections 17, 1203.4 and 1203.4(a) issued by Los Angeles County Superior Court on May 22, 2009. The court ordered the applicant’s guilty or nolo contendere plea and the verdict or finding of guilt set aside and a plea

¹ The decision of the Field Office Director incorrectly indicates that the applicant was convicted of California Penal Code Section 222.

of not guilty entered. The court further ordered the complaint against the applicant dismissed pursuant to the provisions of Cal. Penal Code § 1203.4.

Cal. Penal Code § 1203.4 (West 2001) provides, in part:

(a) In any case in which a defendant has fulfilled the conditions of probation for the entire period of probation, or has been discharged prior to the termination of the period of probation, or in any other case in which a court, in its discretion and the interests of justice, determines that a defendant should be granted the relief available under this section, the defendant shall, at any time after the termination of the period of probation, if he or she is not then serving a sentence for any offense, on probation for any offense, or charged with the commission of any offense, be permitted by the court to withdraw his or her plea of guilty or plea of nolo contendere and enter a plea of not guilty; or, if he or she has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and, in either case, the court shall thereupon dismiss the accusations or information against the defendant and except as noted below, he or she shall thereafter be released from all penalties and disabilities resulting from the offense of which he or she has been convicted

The AAO finds that a dismissal under Cal. Penal Code § 1203.4 does not expunge the applicant's convictions for immigration purposes. Under the current statutory definition of "conviction" provided at section 101(a)(48)(A) of the Act, no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). Any subsequent, rehabilitative action that overturns a state conviction, other than on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings, is ineffective to expunge a conviction for immigration purposes. *Id.* at 523, 528. In *Matter of Pickering*, the Board of Immigration Appeals reiterated that if a court vacates a conviction for reasons unrelated to a procedural or substantive defect in the underlying criminal proceedings, the alien remains "convicted" for immigration purposes. *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003). It appears from the record that the dismissal of the applicant's convictions was by a state rehabilitative statute. There is nothing in the record to show that it was based on a defect in the conviction or in the proceedings underlying the conviction. Thus, the applicant remains "convicted" within the meaning of section 101(a)(48)(A) of the Act.

A waiver under section 212(h) is discretionary and the crime involving moral turpitude for which the applicant was convicted, sexual battery, is additionally a "violent or dangerous crime" as contemplated by 8 C.F.R. § 212.7(d). *Lisbey v. Gonzales*, 420 F.3d 930 (9th Cir. 2005) found that sexual battery under CPC § 243.4(a) is a crime of violence under 18 U.S.C. §16(b) and hence an aggravated felony under § 101(a)(43)(F) because the crime requires the intimate touching of another person while that person is under unlawful restraint; whereas battery under § 242 of CPC is not categorically a crime of violence under 18 U.S.C. §16. *See Ortega-Mendez v. Gonzales*, 450 F.3d 1010 (9th Cir. 2006).

The discretionary standard for violent or dangerous crimes was first articulated by the Attorney General in *Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002). The respondent in *Matter of Jean* was convicted of second-degree manslaughter in connection with the death of a nineteen-month-old child. The Attorney General noted:

It would not be a prudent exercise of the discretion afforded to me by this provision to grant favorable adjustments of status to violent or dangerous individuals 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 status adjustment would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the alien's underlying criminal offense, such a showing might still be insufficient. From its inception, the United States has always been a nation of immigrants; it is one of our greatest strengths. But aliens arriving at our shores must understand that residency in the United States is a privilege, not a right. For those aliens, like the respondent, who engage in violent criminal acts during their stay here, this country will not offer its embrace.

23 I&N Dec. at 383-84.

The Attorney General, through his rule making authority, codified the discretionary standard for violent or dangerous crimes set forth in *Matter of Jean*. The regulation at 8 C.F.R. § 212.7(d) provides:

The Attorney General [Secretary, Department of Homeland Security], in general, will not favorably exercise discretion under section 212(h)(2) of the Act (8 U.S.C. 1182(h)(2)) to consent to an application or reapplication for a visa, or admission to the United States, or adjustment of status, with respect to immigrant aliens who are inadmissible under section 212(a)(2) of the Act in cases involving violent or dangerous crimes, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of the application for adjustment of status or an immigrant visa or admission as an immigrant would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the alien's underlying criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act.

The record also reflects that the applicant was convicted on July 9, 2010, in Arizona under A.R.S. § 13-2006 on three counts of Criminal Impersonation, a Class 6 felony, for offenses that occurred in 2004.

A.R.S. § 13-2006 provides that;

A. A person commits criminal impersonation by:

1. Assuming a false identity with the intent to defraud another; or
2. Pretending to be a representative of some person or organization with the intent to defraud; or
3. Pretending to be, or assuming a false identity of, an employee or a representative of some person or organization with the intent to induce another person to provide or allow access to property. This paragraph does not apply to peace officers in the performance of their duties.

B. Criminal impersonation is a class 6 felony.

The statute calls for a maximum penalty of one-and-a-half-years imprisonment. The applicant was sentenced to 90 days incarceration, two years of probation, and restitution.

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

Once a realistic probability is established, the modified categorical approach is applied, which requires looking to the “limited, specified set of documents” that comprise what is known as the record of conviction – the charging document, a signed plea agreement, jury instructions, guilty pleas, transcripts of a plea proceeding and the judgment – to determine if the conviction entailed admission to, or proof of, the elements of a crime involving moral turpitude. *Castillo-Cruz*, 581 F.3d at 1161 (citing *Fernando-Ruiz*, 466 F.3d at 1132-33); see also *Marmolejo-Campos*, 558 F.3d at 912 (citing *Cuevas-Gaspar*, 430 F.3d at 1020). The Ninth Circuit has reaffirmed that courts may not

examine evidence outside the record of conviction in determining whether a conviction was for a crime involving moral turpitude. See *Olivas-Motta v. Holder*, --- F.3d ---, 2013 WL 2128318 (9th Cir. May 17, 2013) (rejecting *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)). Where the burden of proof is on the applicant, as in the present case, the applicant cannot sustain that burden where the record of conviction is inconclusive. *Young v. Holder*, 697 F.3d 976, 989 (9th Cir. 2012).

Fraud has, as a general rule, been held to involve moral turpitude. The U.S. Supreme Court in *Jordan v. De George* concluded that “Whatever else the phrase ‘crime involving moral turpitude’ may mean in peripheral cases, the decided cases make it plain that crimes in which fraud was an ingredient have always been regarded as involving moral turpitude. . . . Fraud is the touchstone by which this case should be judged. The phrase ‘crime involving moral turpitude’ has without exception been construed to embrace fraudulent conduct.” 341 U.S. 223, 232 (1951). In the present case it is noted that the third prong of A.R.S. § 13-2006 does not indicate intent to defraud, although it is an element in the other two subsections. Here, the applicant submitted a court order, plea agreement, presentence investigation, and conditions of probation, which do not specify under which subsection the applicant was convicted. As the applicant has not submitted a full record of conviction he has not met his burden to establish his conviction was not for a crime involving moral turpitude.

The record thus establishes that the applicant has been convicted of two crimes involving moral turpitude, which renders him inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The waiver for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act is found under section 212(h) of the Act.

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

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

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

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

(iii) the alien has been rehabilitated; or

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

As the applicant's second conviction was for conduct that occurred less than 15 years ago, he must seek a waiver under section 212(h)(1)(B) of the Act. A section 212(h)(1)(B) 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. The qualifying relatives in this case are the applicant's current spouse and a son by his former spouse. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Moralez*, 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. *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.

Counsel asserts that the spouse relies on the applicant for basic needs and receives her income through his savings. Counsel asserts that the qualifying spouse has close relations with her two U.S. citizen children from a prior marriage that she would have to leave if she relocated with the applicant and that at 50 years old with no skills or college degree she could not find work in or out of United States. Counsel contends that the applicant's son from a previous marriage relies on the applicant for financial support and that he has psychological problems aggravated by his mother being permanently disabled. Counsel states that the son was raised in the United States so could not acclimate to Korea and that if he lives there he will separate from this disabled mother and forgo education, and if he remains in the United States he will be separated from his ill father. Counsel further asserts that the applicant has no employability in Korea due to his age and medical condition.

The applicant's spouse states that she has been in the United States more than 20 years, that she assists her college children financially and emotionally, and that she depends on the applicant mentally, emotionally, and financially. She states that she was robbed and stabbed in 2008, and since the incident finds it difficult to function normally as she is afraid to be alone, and that in 2010 she sought psychiatric treatment in Korea where the care was more affordable. She states that she works part time as a church accompanist and gives the money to her children for incidental expenses, but that the applicant provides for their overall basic needs. The spouse also states that the applicant has a heart condition that requires monitoring and medication.

A psychological evaluation of the applicant's son states that the son reports being unable to concentrate in school or sleep well due to worry about the applicant. It notes that the son developed slowly, needing summer school to make up classes and that it was the applicant who took care of the schooling. The evaluation states that the son reports his mother as having health problems and needing assistance to move around. The evaluation observes that the son appears to have some developmental delay and noted that the son appears aware of the situation enough to cause anxiety but not having the emotional intellectual ability to resolve it on his own. The evaluator's view was that without the applicant's emotional support the son may not achieve functioning status.

Documentation in the record shows that the applicant's prior spouse has rheumatoid arthritis, is being disabled, and has diabetes. Documentation in the record shows that the applicant has been under cardiac care since 2007 and had surgery in 2008. Physician notes from 2010 and 2011 state that the applicant should avoid unnecessary physical or emotional stress.

The AAO finds that the record fails to establish that the applicant's qualifying relatives will suffer extremely hardship as a consequence of being separated from the applicant. Counsel asserts that the applicant's spouse and son rely on the applicant emotionally and cites the spouse's 2008 robbery and stabbing as making her fearful, and the spouse states she sought psychiatric care in 2010. However, other than medical documents from the 2008 incident and a social worker assessment of the spouse following the incident, the record contains no supporting evidence concerning the emotional hardship the applicant's spouse states she would experience due to long-term separation from the applicant or how such emotional hardships are outside the ordinary consequences of removal. The assertions made by the applicant's spouse regarding emotional hardships have been considered. However, assertions cannot be given great weight absent supporting evidence. Going on record without supporting documentary evidence generally is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Counsel asserts that the applicant's son relies on the applicant emotionally and that his education would be disrupted without the applicant. The record contains a psychological assessment of the applicant's son indicating he is worried about the situation of the applicant. However, the report provided does not establish that the hardships the applicant's son would experience are beyond the hardships normally associated when a family member is found to be inadmissible. The AAO recognizes that the applicant's son will endure some hardship as a result of long-term separation from the applicant. However, his situation if he remains in the United States is typical to individuals separated as a result of removal and does not rise to the level of extreme hardship based on the record.

Counsel and the applicant's spouse indicate that the applicant provides financially for the qualifying spouse and son. Financial documentation in the record includes utility bills, banking statements, and rent receipts primarily from 2007 to 2009. No documentation been submitted establishing the spouse's current income, expenses, assets, and liabilities or her overall financial situation to establish that without the applicant's physical presence in the United States the applicant's spouse and son will experience financial hardship. Additionally, although counsel asserts that the applicant is unemployable in Korea, counsel and the applicant's spouse also state that income is derived from the applicant's savings. As such, no evidence has been submitted to establish that were the applicant to relocate to Korea he would be unable to continue to provide for the applicant and his son. Further, courts considering the impact of financial detriment on a finding of extreme hardship have repeatedly held that, while it must be considered in the overall determination, "[e]conomic disadvantage alone does not constitute "extreme hardship." *Ramirez-Durazo v. INS*, 794 F.2d 491, 497 (9th Cir. 1986).

The AAO recognizes that the applicant's spouse and son will endure hardship as a result of separation from the applicant. However, the difficulties that they would face as a result of separation from the applicant, even when considered in the aggregate, do not rise to the level of extreme hardship as contemplated by statute and case law.

The AAO also finds the record fails to establish that the applicant's spouse and son would experience extreme hardship if they were to relocate to Korea to reside with the applicant. Counsel states that the applicant's spouse would be forced to separate from her children and be unable to find employment at her age. The AAO notes that the spouse's children are in college, rather than young children still dependent on parents, and that no country information has been submitted to support that the applicant's spouse would be unable to find employment in Korea, her native country. Further, documentation in the record shows that the applicant and the spouse at one time operated their own businesses, and there is no indication that they will not be able to obtain loans or employment or that they do not have skills they could use in Korea. The AAO notes that without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 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).

Counsel asserts that the applicant's son would be forced to separate from his mother, who relies on his care. Medical documentation in the record shows the son's mother to suffer from rheumatoid arthritis, being disabled, having poorly controlled diabetes, and needing help from family members, but nothing has been submitted to substantiate the son's responsibilities in his mother's care or that she has no other options for care, resulting in extreme hardship to the son were he unable to continue providing care for his mother. Counsel also asserts that the applicant's son would be unable to adjust to Korea if he were to relocate to reside with the applicant. Evidence in the record is insufficient to support this hardship.

In this case, the record does not contain sufficient evidence to show that the hardships faced by the qualifying relatives, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship, and the applicant would therefore fail to demonstrate exceptional and extremely unusual hardship to a qualifying relative, a standard more restrictive than the extreme hardship standard. *Cortes-Castillo v. INS*, 997 F.2d 1199, 1204 (7th Cir. 1993). As the applicant has not established 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 application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.