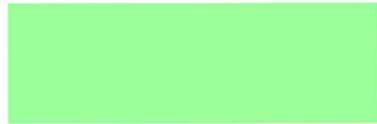




U.S. Citizenship
and Immigration
Services

(b)(6)



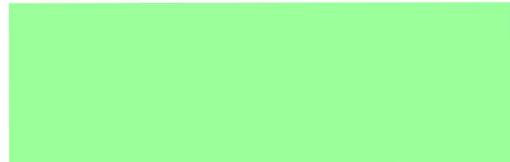
Date: **OCT 01 2013** Office: SAN FERNANDO VALLEY

FILE:

IN RE:

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(h) of the 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, San Fernando Valley, denied the waiver application. 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 Mexico who was found to be inadmissible under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having committed a crime involving moral turpitude. The applicant is the beneficiary of an approved I-130 Petition for Alien Relative filed on her behalf by her U.S. citizen daughter. She is applying for a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with her U.S. citizen children.

On January 22, 2013, the Field Office Director denied the application for a waiver (Form I-601), finding that the applicant failed to establish extreme hardship to a qualifying relative.

On appeal, counsel for the applicant states that the evidence compels a finding of extreme hardship.

In support of the waiver application, the record includes, but is not limited to: a brief from counsel for the applicant; affidavits from the applicant's children; biographical information for the applicant and her children; biographical and medical records for the applicant's children; school records for the applicant's children; country conditions information for Mexico; and documentation in connection with the applicant's criminal and immigration history.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record was reviewed and considered in rendering a decision on the appeal.

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

- (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –
- (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

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.)

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*, 716 F.3d 1199 (9th Cir. 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).

The record reflects that on January 15, 2008, the applicant was convicted in the Superior Court of California, County of Orange, of Assault with Force Likely to Produce Great Bodily Injury in violation of section 245(a)(1) of the California Penal Code. The record indicates that the offense occurred on December 17, 2006, and the applicant was concurrently convicted of Reckless Driving and driving without a license. The applicant was sentenced to serve 60 days in jail, to pay restitution and fees, and to complete 3 years of probation. The AAO notes that the record indicates that the applicant had two prior arrests and convictions from 1995, one in violation of California Penal Code

section 484(A) (theft) and the others in violation of California Vehicle Code sections 27360A, 27315D, and 12500A.

At the time of the applicant's conviction on January 15, 2008, section 245(a)(1) of the California Penal Code provided, in pertinent part:

Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars (\$10,000), or by both the fine and imprisonment.

The offense underlying the applicant's crime, assault, is defined under the California Penal Code as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." Cal. Penal Code § 240 (West 2006). Section 245(a)(1) of the California Penal Code is divisible in that it can be violated by either the commission of (1) assault with a deadly weapon or instrument other than a firearm or (2) by means of force likely to produce great bodily injury. The conviction record, which is not complete, does not indicate the specific subpart under which the applicant was convicted. We will first examine whether assault with a deadly weapon or instrument is categorically a crime involving moral turpitude.

The Ninth Circuit Court of Appeals in *Gonzales v. Barber* determined that assault with a deadly weapon under the California Penal Code is categorically a crime involving moral turpitude. 207 F.2d 398, 400 (9th Cir. 1953); *see also Matter of O*, 3 I&N Dec. 193, 197 (BIA 1948) ("But the offense here is not merely *mala prohibita*, it is inherently base, and this is so because an assault aggravated by the use of a dangerous or deadly weapon is contrary to accepted standards of morality in a civilized society."); *In re Sanudo*, 23 I&N Dec. 968, 971 (BIA 2006) (stating, "assault and battery with a deadly weapon has long been deemed a crime involving moral turpitude by both this Board and the Federal courts, because the knowing use or attempted use of deadly force is deemed to be an act of moral depravity that takes the offense outside the 'simple assault and battery' category). Pursuant to the Ninth Circuit's finding in *Gonzales v. Barber*, we conclude that assault with a deadly weapon or instrument is categorically a crime involving moral turpitude.

Having established that assault with a deadly weapon or instrument is categorically a crime involving moral turpitude, we will next examine the morally turpitudinous nature of the second part of the statute: assault by any means of force likely to produce great bodily injury. In *Matter of P*, the BIA addressed whether a similar statute under the Michigan Penal Code, assault with intent to do great bodily harm less than the crime of murder, is a crime involving moral turpitude.¹ 3 I&N Dec. 5 (BIA 1947). In determining that such conduct is categorically a crime involving moral turpitude, the BIA stated:

¹ Section 750.84 of the Michigan Penal Code provides, "Any person who shall assault another with intent to do great bodily harm, less than the crime of murder, shall be guilty of a felony punishable by imprisonment in the state prison not more than 10 years, or by fine of not more than 5,000 dollars."

Crimes which are accompanied by an evil intent or a depraved motive, generally connote moral obliquity. It has been said that it is in the criminal intent that moral turpitude inheres. Under this generally accepted standard, it seems clear that the offense denounced by the Michigan statute under consideration involves moral turpitude, and as stated, the absence of a showing that a dangerous or deadly weapon was used is not the operative factor in determining the presence or absence of moral turpitude. Conceivably, an assault with a dangerous weapon may be committed in such a manner as to preclude an evil intent, and therefore baseness or vileness. In short, it is the purpose or intent which accompanied the perpetration of the crime, and the manner and nature by which it is committed, which determines moral turpitude. . . . There can be little or no difference then, so far as moral turpitude is concerned, between the offense of assault with intent to do great bodily harm less than the crime of murder, and assault with a deadly weapon.

3 I. & N. Dec. 5, 8; *see also People v. Elwell*, Cal.App.3d 171, 177 (1988) (holding that assault by means of force likely to produce great bodily injury under the California Penal Code was a crime of moral turpitude which could be used for impeachment purposes.). Accordingly, AAO finds that the applicant's conviction under Cal. Penal Code § 245(a)(1) is categorically a crime involving moral turpitude, and the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act.²

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

The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana

- (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

² The AAO notes that because the applicant's conviction for assault with deadly weapon or force likely to produce great bodily injury has been found to be a crime involving moral turpitude, it is unnecessary to determine if her other convictions also involved moral turpitude.

(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 . . . ; and

(2) the Attorney General [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

...

We will first determine whether the applicant has established eligibility for a waiver under section 212(h) of the Act. A waiver of inadmissibility in this case, under section 212(h)(1)(B) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawful permanent resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. The applicant's three U.S. citizen children are qualifying relatives in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (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 deportation, 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, 885 (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 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.

The AAO recognizes the impact of separation on families and this matter arises within the jurisdiction of the Ninth Circuit Court of Appeals, which has said that “the most important single hardship factor may be the separation of the alien from family living in the United States,” and also, “[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion.” *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted). See also *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to the Board of Immigration Appeals (BIA)) (“We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.”) (citations omitted). Separation of family will therefore be given the appropriate weight under Ninth Circuit law in the assessment of hardship factors in the present case.

In regards to the hardship that the applicant’s children would suffer if they were to be separated from the applicant, counsel simply states that the applicant’s children have never been separated from the applicant and that “[t]hey have an intact relationship” and the applicant’s children depend on the applicant for emotional support. The hardship to each child will be considered separately to determine if the hardship to any of them individually would amount to extreme hardship. The AAO notes that the applicant’s children are 19 years old, 20 years old, and 23 years old. The two younger

adult children state in their affidavits that they reside with the applicant. The older adult child states that she lives nearby and that the applicant helps her care for her young child. The children indicate in their affidavits that their mother has resided in the United States for half of her life and they would worry about her if she would have to return to Mexico. The record indicates that the applicant's two eldest children, her daughters, have a history of serious depression which has included suicide attempts. The AAO takes this information very seriously, but the record fails to indicate the manner in which separation from the applicant would affect either of her daughter's present mental health. The record very generally indicates that the applicant provides emotional support to each of her children, but no specific information was provided. Absent an explanation in plain language from the treating physician of the exact nature and severity of any condition and a description of any treatment or family assistance needed, the AAO is not in the position to reach conclusions concerning the severity of a medical condition or the treatment needed.

Additionally, the record does not indicate who supports the children financially or that they would suffer financial hardship if they were to be separated from the applicant. The AAO notes that the record indicates that the applicant is married, but separated from her husband, the children's father. The record does not indicate the role that the children's father plays in their life and whether he would be able to provide emotional (or financial) support to the children in the applicant's absence. The record also indicates that the applicant has 11 siblings that reside in the United States. It is not clear from the record whether those individuals would also be able to provide support to the children in their mother's absence. Moreover, the record fails to indicate why the applicant would not be able to provide emotional support to her children were she to reside in Mexico. Although the AAO notes that the applicant's children would likely endure hardship as a result of long-term separation from their mother, the record does not establish that the hardships that any of them would face, considered in the aggregate for each child, rise to the level of "extreme" beyond the hardships normally experienced by families separated due to immigration inadmissibility.

In regards to the hardship that the applicant's children would suffer if any of them were to relocate to Mexico to reside with the applicant, the record contains very little information aside from the documentation that the children were born in the United States, have resided here their entire lives, and that they are each presently pursuing a community college education. The AAO notes that the fact that economic and educational opportunities for a child may be better in the United States than in a foreign country does not establish extreme hardship. *See Matter of Kim*, 15 I&N Dec. at 89-90. Additionally, the AAO takes note of the children's family ties in the United States, including their ties to each other and for the eldest daughter to her child; however, the record does not establish how severing those ties or relocating as a family unit would result in extreme hardship to any of the children. The AAO also notes the country conditions information submitted regarding Mexico and takes administrative note of the Travel Warning in regards to Mexico issued by the U.S. Department of State on November 20, 2012. Counsel simply states that relocating to "a dangerous country" would result in hardship to the children, but she does not state to which part of the country the family would relocate and how the conditions in Mexico would specifically affect the children. Based on the information provided, considered in the aggregate, the evidence does not illustrate that the hardship suffered in this case, should any of the applicant's children relocate to Mexico, would be beyond what is normally experienced by families dealing with removal or inadmissibility. *Matter of O-J-O-*, 21 I&N Dec. at 383.

Although the applicant's qualifying relatives' concerns over the applicant's immigration status are neither doubted nor minimized, the fact remains that Congress provided for a waiver of inadmissibility only under limited circumstances. In nearly every qualifying relationship, whether between husband and wife or parent and child, there is a deep level of affection and a certain amount of emotional and social interdependence. While, in common parlance, the prospect of separation or involuntary relocation nearly always results in considerable hardship to individuals and families, in specifically limiting the availability of a waiver of inadmissibility to cases of "extreme hardship," Congress did not intend that a waiver be granted in every case where a qualifying relationship, and thus the familial and emotional bonds, exist. The point made in this and prior decisions on this matter is that the current state of the law, viewed from a legislative, administrative, or judicial point of view, requires that the hardship, which meets the standard in section 212(h) of the Act, be above and beyond the normal, expected hardship involved in such cases.

In this case, the record does not contain sufficient evidence to show that the hardships faced by any of the qualifying relatives, each considered individually in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship. 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 he merits a waiver as a matter of discretion. the AAO notes that if it were to conduct a discretionary analysis, because the applicant's conviction is for a violent or dangerous crime, the applicant must prove "exceptional and extremely unusual hardship" to a qualifying relative. 8 C.F.R. § 212.7(d). Because the applicant has not established extreme hardship, we do not need to make a determination on this matter at this time.

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.