

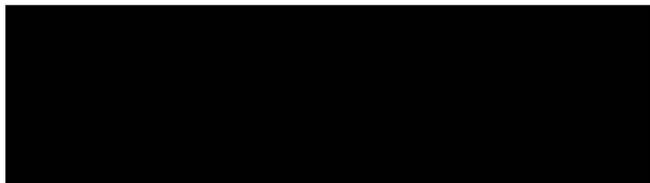
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Division of Personal Affairs

U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

PUBLIC



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FILE:



Office: CIUDAD JUAREZ

Date:

APR 28 2009

IN RE:



APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(a)(9)(B)(v) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1182(a)(9)(B)(v)

ON BEHALF OF APPLICANT: SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Officer in Charge (OIC), Ciudad Juarez, Mexico, denied the instant waiver application. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of Mexico, the spouse of a U.S. citizen, and the beneficiary of an approved Form I-129F petition. The applicant was found inadmissible to the United States pursuant to section 212(a)(9)(B)(i) of the Immigration and Nationality Act (INA, the Act), 8 U.S.C. § 1182(a)(9)(B)(i). The applicant seeks a waiver of inadmissibility in order to reenter the United States to live with his wife.

The OIC found that the applicant had been unlawfully present in the United States for more than a year and is therefore inadmissible pursuant to section 212(a)(9)(B)(i) of the Act. The OIC also found that the applicant had failed to establish extreme hardship to his U.S. citizen spouse and denied the application.

On appeal, the applicant provided additional evidence. Although the applicant did not appear to contest the OIC's determination of inadmissibility, the law and evidence that led to that determination will be discussed.

Section 212(a)(9)(B)(i) of the Act provides:

Any alien (other than an alien lawfully admitted for permanent residence) who –

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 1254a(e) of this title) prior to the commencement of proceedings under section 1225(b)(1) or section 1229(a) of this title, and again seeks admission within 3 years of the date of such alien's departure or removal, or

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States,

is inadmissible.

The applicant stated on his Form I-601, Application for Waiver of Ground of Excludability, that, after entering without inspection, he lived in Fort Worth, Texas from July 1998 to October 1999, and in Denver Colorado from October 1999 to June 2005. Various documents in the record showing that the applicant was arrested for a May 29, 2000 sex assault in Lake County, Colorado confirm that the applicant was then in the United States.

The applicant's wife submitted a Form I-134, Affidavit of Support, dated September 27, 2005, in which she stated that the applicant was then living in Chalchihuites, Zacatecas, Mexico. The

applicant submitted a letter, dated October 25, 2005, which gave his address in Ciudad Juarez, Mexico.

The evidence in the record, including the applicant's admission, is sufficient to show that the applicant was illegally present in the United States from July 1998 through June 2005, and that he has since left the United States. The applicant is therefore inadmissible pursuant to section 212(a)(9)(B)(i) of the Act. This decision will now address whether waiver of the applicant's inadmissibility is available, and, if so, whether waiver of inadmissibility should be granted.

Section 212(a)(9)(B)(v) of the Act provides, in pertinent part:

The Attorney General [now Secretary of Homeland Security] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

A waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act is dependent upon a showing that the bar to admission imposes an extreme hardship on a qualifying relative, *i.e.*, the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant or his children or stepchildren is not relevant under the statute and will be considered only insofar as it results in hardship to a qualifying relative in the application. The applicant's wife is the only qualifying relative in this case. 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 concept of extreme hardship to a qualifying relative "is not . . . fixed and inflexible," and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals set forth a nonexclusive list of factors relevant to determining whether an alien has established extreme hardship to a qualifying relative. These factors include, with respect to the qualifying relative, the presence of family ties to U.S. citizens or lawful permanent residents in the United States, family ties outside the United States, country conditions where the qualifying relative would relocate and family ties in that country, the financial impact of departure, and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 566. The BIA has held:

Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact 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. *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996). (Citations omitted).

Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

The record contains a marriage license showing that the applicant and his wife were married on April 8, 2003 in Denver, Colorado.

The record contains a letter, dated October 24, 2005, from Clinica Campesina, a medical clinic in Denver, Colorado. In that letter, [REDACTED] whose job title is given as Mental Health Provider, stated, "Due to financial hardship [the applicant's wife] has developed psychosocial stress that clinically can lead to severe depression." [REDACTED] further stated that the applicant's wife showed signs of stress during her visit that day for psychotherapy, and had been prescribed 20 milligrams of Paxil per day. It concluded that the absence of the applicant has damaged his wife's emotional and physical health.

The record contains another letter from Clinica Campesina, dated October 25, 2005. [REDACTED] the Nurse Practitioner who provided that letter stated, "Because of [the applicant's] absence [the applicant's wife] is showing signs and symptoms of depression." That letter stated that the applicant's wife is being treated for her mental and physical health, but without providing any additional detail.

The record contains a letter, dated October 25, 2005, from the applicant. He stated that he and his wife had then been married two years, and that if he is not permitted to return to the United States she and her daughter will suffer financially. He stated that, without him, her income is insufficient to pay for rent, babysitter, food, utilities, and other expenses, that she has been borrowing money, and that her health has deteriorated. He stated that, "[his wife's] family is of very limited financial resources and even though they would like to help more they are in no position to do so." The applicant further stated that his wife had confided that she would rather die if he cannot return to the United States. The applicant also stated, "Hard as it may be, my wife may be able to survive in the United States and make [a] living for her[self] and [her daughter]."

As to the possibility of his wife relocating to Mexico to live with him, the applicant stated that, in Mexico, very little employment is available even to those with good educational credentials, and even less to him, as he has only a few years of elementary education. He stated that he and his family have no savings and only a small parcel of land that relies on seasonal rains, which are sometimes inadequate. He stated that his wife and her daughter would be unable to adapt to the economic conditions in Mexico and the cultural differences. The applicant stated that, if they lived in Mexico, his wife and her daughter would ". . . not have access . . . to medical care [because] I have none[;] whenever someone gets sick here we must have enough money to cover doctor's or hospital expenses upfront [sic] or [we] will not get any medical services . . ." He also stated that his wife's daughter would also not have access to a good education.

The applicant provided an undated letter from the municipal president of Chachihuites, Zacatecas, Mexico, stating that the region is characterized by small farms dependent on seasonal rains. The applicant also provided web content from a site maintained by the U.S. Department of State. That content confirms that subsistence farming on land without irrigation is common in Mexico, but does not otherwise support the applicant's assertions.

A letter dated September 26, 2005, from [REDACTED], states that the applicant's wife has worked for that company since January 26, 2005, and earns \$19,800 annually.

The record contains a letter from the applicant's wife, dated June 19, 2006, in which she stated that she and her child were born in the United States, and they do not know how to live in Mexico. She further stated that living without the applicant during the previous year had been sad and stressful for her, and she does not wish to live on public assistance. She added that on a recent trip to Mexico to visit the applicant she became pregnant, but lost the baby because of stress and depression. A photocopy of After Care Instructions from St. Anthony's Hospital shows that someone was seen on that date for a miscarriage. It neither specifies the date nor the patient's name.

The AAO notes that, on the Form I-129F, Petition for Alien Fiancé, that she signed on July 20, 2004 and submitted on July 26, 2004, the applicant's wife stated that the applicant had never been in the United States, notwithstanding that they married on April 8, 2003 in Denver, Colorado and he had lived, from that date through June 2005, in Denver, Colorado, apparently with his wife.

Doubt cast on any aspect of the applicant's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the application. Further, the applicant must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). The applicant's wife has provided false information to USCIS in support of her husband's case, and the applicant has evinced a willingness to rely on that evidence. The credibility and reliability of all of the evidence submitted is therefore called into question.

The September 26, 2005 letter from R&J Insurance indicates that the applicant's wife earns \$19,800 annually, and the applicant has stated that this amount is insufficient to pay her expenses. The applicant did not state the monthly amounts his wife incurs for various expenses, nor did he provide any reason those amounts could not be reduced without causing hardship. Although the applicant stated that his wife's family is of modest means and unable to offer financial assistance, he did not provide independent evidence to substantiate this assertion or to show that they are unable to provide other forms of assistance. The applicant himself admitted that, although it would be difficult, his wife and his child may be able to subsist financially without him. The evidence in the record does not support that living without the applicant would constitute a financial hardship for his wife.

The medical evidence provided appears to imply that the applicant's wife is undergoing continuous treatment for depression and stress. More closely scrutinizing the letters from Clinica Campesina,

however, this office notes that they do not specify when that treatment began. Whether that treatment began prior to October 24, 2005, the date of one of those letters, is unclear, as is whether it continued beyond October 25, 2005, the date of the other letter from that clinic. Whether the applicant's wife's treatment extended beyond issuance of a Paxil prescription is also not made clear in those letters. Further, the letter of October 24, 2005 makes clear that, on that date, the applicant's wife was not suffering from severe depression, although she might in the future.

Although the input of any health professional is respected and valuable, the record fails to reflect an ongoing relationship between the medical professionals who provided the letters and the applicant's wife or any concrete history of treatment for the disorder suffered by the applicant's wife, thus diminishing those letters' value in determining extreme hardship. Further, the AAO notes that neither the mental health professionals' letters nor any other evidence in the record provides any support for the applicant's assertion that his wife is suicidal.

If the applicant's wife were to relocate to Mexico to join him, she would likely be subjected to some degree of hardship. The applicant asserted that his wife and her child would not have ready access to medical care, would be subjected to the differences in the economy, in the availability of employment, in the culture, and in education. Although any change in those factors would likely constitute hardship, the applicant has provided no independent evidence that supports the assertion that they, individually or together, or taken with the other hardship factors, would constitute extreme hardship. The applicant has not demonstrated that his wife would incur extreme hardship if she relocated to live in Mexico.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that the applicant's wife faces extreme hardship if the applicant is refused admission. Rather, the record suggests that she will face no greater hardship than the unfortunate, but expected, disruptions, inconveniences, and difficulties arising whenever a spouse is removed from the United States.

Although the depth of concern and anxiety over the applicant's immigration status is 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 affection and a certain amount of emotional and social interdependence. While, in common parlance, separation or 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 made clear that it did not intend that a waiver be granted in every case where a qualifying relationship, and thus the familial and emotional bonds, exist.

Separation from one's spouse or child is, by its very nature, a hardship. The point made in this and prior decisions on this matter, however, is that the law requires that, in order to meet the "extreme hardship" standard, hardship must be greater than the normal, expected hardship involved in such cases.

U.S. court decisions have repeatedly held that the common results of removal are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9<sup>th</sup> Cir. 1991), *Perez v. INS*, 96 F.3d 390 (9<sup>th</sup> Cir. 1996); *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996) (holding that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship); *Matter of Shaughnessy*, 12 I&N Dec. 810 (BIA 1968) (holding that separation of family members and financial difficulties alone do not establish extreme hardship). “[O]nly in cases of great actual or prospective injury . . . will the bar be removed.” *Matter of Ngai*, 19 I&N Dec. 245, 246 (BIA 1984). Further, demonstrated financial difficulties alone are generally insufficient to establish extreme hardship. *See INS v. Jong Ha Wang*, 450 U.S. 139 (1981) (upholding BIA finding that economic detriment alone is insufficient to establish extreme hardship).

The AAO therefore finds that the applicant failed to establish extreme hardship to his U.S. citizen spouse as required under INA § 212(a)(9)(B)(v), 8 U.S.C. § 1186(a)(9)(B)(v) and that waiver is therefore unavailable. The AAO need not, therefore, consider whether this is an appropriate case in which to exercise its discretion to grant a waiver.

The record suggests an additional basis for inadmissibility that was not relied upon in the decision of denial.

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.

(ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

On May 29, 2000, pursuant to an accusation of rape, which accusation was made by a 16 year old girl, the applicant was arrested, by the Lake County Sheriff's Department, for a violation of C.R.S. 18-3-402(a)(a), assault in the first degree through physical force; and a violation of C.R.S. 18-3-403(a)(e.5), second degree sexual assault. On May 22, 2001, the applicant was convicted, pursuant to his pleas, of a violation of C.R.S. 18-3-204, third degree assault; and a violation of C.R.S. 18-6-801, domestic violence.

The alleged rape occurred on May 28, 2000. The applicant, who was born on September 2, 1973, was 26 years old at the time he committed the crimes that resulted in his arrest.

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.)

In the recently decided *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. First, in evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a "realistic probability, not a theoretical possibility," that the statute would be applied to reach conduct that does not involve moral turpitude. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability exists where, at the time of the proceeding, an "actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien's own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude." *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

However, if a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, "the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude." 24 I&N Dec. at 697 (citing *Duenas-*

*Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage inquiry in which the adjudicator reviews the “record of conviction” to determine if the conviction was based on conduct involving moral turpitude. *Id.* at 698-699, 703-704, 708. The record of conviction consists of documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.* at 698, 704, 708.

If review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. 24 I&N Dec. at 699-704, 708-709. However, this “does not mean that the parties would be free to present any and all evidence bearing on an alien’s conduct leading to the conviction. (Citation omitted). The sole purpose of the inquiry is to ascertain the nature of the prior conviction; it is not an invitation to relitigate the conviction itself.” *Id.* at 703. Finally, in all such inquiries, the burden is on the alien to establish “clearly and beyond doubt” that he is “not inadmissible.” *Id.* at 709 (citing *Kirong v. Mukasey*, 529 F.3d 800 (8th Cir. 2008))

C.R.S § 18-3-204, third degree assault, states,

A person commits the crime of assault in the third degree if the person knowingly or recklessly causes bodily injury to another person or with criminal negligence the person causes bodily injury to another person by means of a deadly weapon.

C.R.S. § 18-6-801 is a sentencing enhancement that applies when any person who is convicted of any crime, the underlying factual basis of which has been found by the court on the record to include an act of domestic violence, as defined in section 18-6-800.3(1), or any crime against property, whether or not such crime is a felony, when such crime is used as a method of coercion, control, punishment, intimidation, or revenge directed against a person with whom the actor is or has been involved in an intimate relationship,

C.R.S. § 18-6-800.3(1) defines "Domestic violence" as an act or threatened act of violence upon a person with whom the actor is or has been involved in an intimate relationship, or any other crime against a person or against property or any municipal ordinance violation against a person or against property, when used as a method of coercion, control, punishment, intimidation, or revenge directed against a person with whom the actor is or has been involved in an intimate relationship.

Willful infliction of corporal injury on a spouse, cohabitant, or parent or child of the perpetrator's constitutes a crime involving moral turpitude. *Matter of Tran*, 21 I. & N. Dec. 291 (BIA 1996). Assault and battery against a family or household member is not categorically a crime involving moral turpitude if the statute does not require intentional actual infliction of physical injury.

Because the assault statute pursuant to which the applicant was convicted includes both knowingly causing injury and recklessly causing injury, it encompasses some behavior that constitutes a crime involving moral turpitude and some behavior that does not.

Similarly, because the domestic violence statute pursuant to which the applicant was convicted encompasses actual violence that caused physical injury, violence that did not cause physical injury, and many other acts, it, too, encompasses some behavior that constitutes a crime involving moral turpitude and some behavior that does not.

As was noted above, in such a situation, pursuant to *Silva-Trevino*, a review of the other evidence pertinent to the applicant's crime, to determine whether the act he committed evinces moral turpitude, is appropriate.

The police officer's report of May 30, 2000 states that, after the attack, the applicant's victim had bruises on her arms, chin, and neck, scratches on her back and arms. The officer also stated that, when he asked the applicant whether she needed to go to the hospital, she said that she did.

A Victim Impact Statement in the record, dated May 31, 2000, noted that, two days after the assault, the victim was still bleeding from the sexual assault; that the applicant had bitten the victim on the chin and neck; that the victim then had bruises where she was bitten; and that she had abdominal pain. The victim had been to the emergency room on May 29, 2000 and seen a doctor for a follow-up examination on May 31, 2000. The statement further indicated that the victim stated that she had not yet returned to school and did not intend to attend again before the school year ended.

The evidence pertinent to the applicant's crimes makes clear that, during the course of the applicant's commission of those crimes, the applicant intentionally inflicted physical injury on his victim. The AAO finds, therefore, that the applicant's convictions are for crimes involving moral turpitude and the applicant is inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act. As was noted above, the applicant has not demonstrated that denial of his waiver application would cause extreme hardship to his spouse, the only qualifying relative in this matter. Therefore waiver of this inadmissibility is unavailable to the applicant. For this additional reason, the application may not be approved.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of proving eligibility rests with the applicant. INA § 291, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.