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FILE: [REDACTED] Office: MEXICO CITY (CIUDAD JUAREZ) Date SEP 09 2010

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i), and Section 212(h) of the 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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Officer-in-Charge, Mexico City, Mexico, and 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 to the United States pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for seeking admission into the United States by fraud or willful misrepresentation; section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having been convicted of a crime involving a controlled substance; and section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of committing a crime involving moral turpitude. The applicant sought a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), and section 212(h) of the Act, 8 U.S.C. § 1182(h). The director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. The applicant submitted a timely appeal.

On appeal, the applicant's wife contends that the submitted evidence demonstrated extreme hardship. She asserts that her 10-year-old daughter had to undergo psychological counseling as a result of moving from Mexico and separation from her father.

The AAO will first address the grounds of inadmissibility. With regard to seeking admission into the United States by fraud or willful misrepresentation, section 212(a)(6)(C) of the Act provides, in pertinent part, that:

- (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

U.S. Citizenship and Immigration Services (USCIS) records show that on November 21, 1995, the applicant sought admission into the United States through the San Ysidro Port of Entry by claiming to be a U.S. citizen. He was taken into custody, and an immigration judge ordered his exclusion from the United States on November 24, 1995. USCIS records reflect that on August 22, 1997, the applicant attempted to enter the United States at the Paso Del Norte Port of Entry in El Paso, Texas, by presenting to a primary inspector a valid Border Crossing Card, (Form I-586), bearing the name Jesus Ramirez and date of birth of February 3, 1959. On September 24, 1997, the applicant was convicted of "knowingly possessing an identification not lawfully issued to him with the intent that such document be used to defraud the United States" in violation of 18 U.S.C. section 1028(a)(4). Based on the record, we find the applicant inadmissible under section 212(a)(6)(C) of the Act for attempting to procure admission into the United States based on the willful misrepresentation of the material fact of his identity and eligibility for admission into the United States.

Section 212(i) of the Act provides a waiver for fraud and material misrepresentation. That section states that:

- (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, 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 [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

A waiver of inadmissibility under section 212(i) 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 lawfully resident spouse or parent of the applicant. Hardship to the applicant or his children can be considered only insofar as it results in hardship to a qualifying relative. The applicant's wife and mother are the only qualifying relatives in this case. If extreme hardship to a qualifying relative is established, USCIS then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996).

The applicant was found inadmissible for having been convicted of a crime involving a controlled substance. The record reflects that in Seattle, Washington, on December 25, 1991, the applicant was arrested for and charged with possession of marijuana, 40 grams or less (a misdemeanor). He was found guilty of the charge and the trial court sentenced him to serve 90 days in jail, with 88 days suspended.

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

(2) Criminal and related grounds. —

(A) Conviction of certain crimes. —

- (i) In general. — Except as provided in clause (ii), any 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, or
  - (II) a violation of (or 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.

....

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

The Attorney General may, in his discretion, waive the application of . . . subparagraph (A)(i)(II) . . . insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if –

(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 . . .

Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines “conviction” for immigration purposes as:

A formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where –

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

The marijuana conviction renders the applicant inadmissible under section 212(a)(2)(A)(i)(II) of the Act, U.S.C. § 1182(a)(2)(A)(i)(II). A section 212(h) waiver applies to controlled substance cases that involve a single offense of possession of 30 grams or less of marijuana. The incident report reflects that the applicant possessed marijuana in the amount of 40 grams or less. With regard to ascertaining the exact amount of marijuana possessed by the applicant, the letter by the court manager, King County District Court, State of Washington, West Division, dated November 30, 2004, conveys that the applicant's file relating to the marijuana conviction was closed in 1994, and that the records management guidelines provide that the citation, complaint, court docket, and case files are to be retained for three years after final disposition; and consequently, the records pertaining to the applicant's marijuana offense were destroyed according to the retention schedule. The trial court's docket substantiates that the criminal record of the marijuana offense was destroyed due to a retention policy and that no police report is available. However, we note that the applicant submitted into the

record an affidavit dated March 24, 2006 by the arresting officer, which was witnessed and signed by a drug enforcement agent. The arresting officer recounts the applicant's arrest on December 25, 1991, and states that "I am very certain and confident that the amount of Marijuana in this particular case was far less than thirty (30) grams in weight." In view of the arresting officer's affidavit, which establishes that the amount of marijuana underlying the applicant's controlled substance conviction involved simple possession of 30 grams or less of marijuana, the applicant is eligible for consideration of a section 212(h) waiver.

The applicant was also found inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of committing a crime involving moral turpitude. Section 212(a)(2) of the Act states that:

(A)(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.)

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.” *Silva-Trevino*, 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. *Id.* 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.

The Judgment and Sentence conveys that on July 27, 1994, in the Superior Court of Washington for King County, the applicant was found guilty and convicted of second-degree assault in violation of section 9A.36.021(1)(c) of the Revised Code of Washington. He was sentenced to serve 9 months in jail with credit for 110 days, and to abide by the terms of a no contact order for 10 years.

Section 9A.36.021(1)(c) of the Revised Code of Washington provides that “[a] person is guilty of assault in the second degree if he or she . . . “[a]ssaults another with a deadly weapon.” Section 9A.04.110(6) of the Revised Code of Washington states that a “deadly weapon” means:

[A]ny explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance, including a “vehicle” as defined in this section, which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.

The BIA in *In re Sanudo*, 23 I&N Dec. 968 (BIA 2006), stated that assault and battery offenses are crimes of moral turpitude if they involve aggravating factors, such as a deadly weapon, that significantly increases culpability. *Id.* at 971. Assault and battery with a deadly weapon is a crime involving moral turpitude 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.” *Id.* Assault and battery offenses involving the intentional infliction of serious bodily injury on another involves moral turpitude because “such intentionally injurious conduct reflects a level of immorality that is greater than that associated with a simple offensive touching.” *Id.*

A conviction for second-degree assault in violation of Wash. Rev. Code § 9A.36.021(1)(c) requires assaulting another person with a deadly weapon, and Wash. Rev. Code § 9A.04.110(6) defined a “deadly weapon” as being “readily capable of causing death or substantial bodily harm.” In view of the BIA’s holding that assault with a deadly weapon is a crime involving moral turpitude, we find

that violation of Wash. Rev. Code § 9A.36.021(1)(c) involves moral turpitude and the officer-in-charge was correct in finding the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of committing a crime involving moral turpitude.

The waiver for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act is also found under section 212(h) of the Act. That section provides, in pertinent part:

(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 . . .

Section 212(h)(1)(A) of the Act provides that the Attorney General may, in his discretion, waive the application of subparagraph (A)(i)(I) of subsection (a)(2) if 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. Since the applicant's assault conviction occurred in 1994, which is more than 15 years ago, it is waivable under section 212(h)(1)(A)(i) of the Act.

In rendering this decision, the AAO will consider all of the evidence in the record as it relates to the applicant's section 212(h) and 212(i) waivers. Moreover, because the applicant's assault with a weapon offense qualifies as a violent crime, the applicant must prove "exceptional and extremely unusual hardship" to a qualifying relative to warrant a favorable exercise of discretion, so the AAO will evaluate whether the evidence meets this standard. 8 C.F.R. § 212.7(d). In order to show "exceptional and extremely unusual hardship," the applicant must show more than "extreme hardship." See *Matter of Monreal-Aguinaga*, 23 I&N Dec. 56, 62 (BIA 2001) (holding in cancellation of removal case that the "standard requires a showing of hardship beyond that which has historically been required in suspension of deportation cases involving the 'extreme hardship' standard"). The hardship "must be substantially beyond the ordinary hardship that would be expected when a close family member leaves this country," and is "limited to truly exceptional situations." *Id.* (internal quotation marks omitted). However, the applicant need not show that hardship would be unconscionable. *Id.* at 60.

Family separation must be considered in determining hardship. In *Salcido-Salcido v. INS*, 138 F.3d 1292 (9th Cir. 1998) the Ninth Circuit discussed the effect of emotional hardship on the alien and her husband and children as a result of family separation. The Ninth Circuit stated that "the most important single hardship factor may be the separation of the alien from family living in the United States" and that there must be a careful appraisal of "the impact that deportation would have on children and families." *Id.* at 1293. Furthermore, the Ninth Circuit indicated that "considerable, if not predominant, weight," must be attributed to the hardship that will result from family separation. *Id.* In *Yong v. INS*, 459 F.2d 1004 (9th Cir. 1972), the Ninth Circuit reversed a BIA decision

denying an application for suspension of deportation. The Ninth Circuit noted that “[s]eparation from one's spouse entails substantially more than economic hardship.” *Id.* at 1005.

The record contains letters, birth certificates, photographs, criminal records, and other documentation. The AAO notes that the letter dated December 17, 2004 by the applicant's spouse does not have an English language translation. The regulation at 8 C.F.R. § 103.2(b)(3) states:

(3) Translations. Any document containing foreign language submitted to USCIS shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

In that the letter is written completely in Spanish and has no translation, the letter will carry no weight in this proceeding.

Regarding the hardships of remaining in the United States without the applicant, the applicant's daughter asserts in her undated letter that she has a close relationship with her father and needs him to be with her in the United States. The applicant's wife contends in her letter dated August 16, 2007 that she moved with her one-year-old daughter to Mexico to be with the applicant. She states that they lived in [REDACTED] to take care of her in-laws, and that she and her daughter returned to the United States one year later. The undated letter by the mental health therapist conveys that the applicant's daughter participated in counseling sessions from February 20, 2006 to April 24, 2007, which helped her adjust from the language, culture, and educational system in Mexico to that in the United States. The mental health therapist states that the applicant's daughter repeated the third grade so her adjustment difficulties would be minimized and her father called her almost every evening so she would continue feeling connected to him. She declares that the applicant's daughter made sufficient progress in counseling so their sessions ended in April 2007, shortly before she moved to Seattle, where her mother will continue coursework for her undergraduate degree at the University of Washington. The therapist stated that the applicant's daughter's adjustment would be smoother if her father were part of her daily life.

The hardship factors asserted in the present case are the emotional hardship to the applicant's wife as a result of separation from her husband and the difficulties her daughter has experienced in adjusting to life in the United States as a result of separation from the applicant. In view of the applicant's wife's concern about her daughter's mental health and her adjustment to life in the United States, such that she had her daughter repeat the third grade, undergo more than one year of counseling, and ensure that she has daily communication with the applicant, we find that the record reflects that the emotional hardship to the applicant's wife, particularly because it includes her concern about the effect that separation from the applicant will have on their daughter, meets the “exceptional and extremely unusual hardship” standard set forth in 8 C.F.R. § 212.7(d).

With regard to the hardships associated with joining the applicant to live in Mexico, the applicant's mother-in-law contended in her letter dated August 17, 2007 that it is a hardship for her granddaughter to grow up in [REDACTED] Mexico, in order to be with her father. She maintained that her daughter had to go to places that were dangerous, that their car and laundry were stolen, and that they decided to move from her son-in-law's aunt's house because they witnessed a neighbor

molesting a six-year-old girl. The applicant's mother-in-law indicated that her granddaughter was treated roughly at school because she is lighter-skinned.

The asserted hardship factors in joining the applicant to live in Mexico are living in a dangerous location and concern about how the applicant's daughter is treated at school. However, the applicant has not provided any documentation to show that the location where his wife and daughter would live is dangerous. Furthermore, we note that it has not been demonstrated that the applicant's wife will not have educational opportunities at a university in Mexico similar to those she has at the University of Washington. When all of the alleged hardship factors are considered in the aggregate, we find that they fail to establish that the hardship endured by the applicant's wife as a result of joining the applicant to live in Mexico meets the "exceptional and extremely unusual hardship" standard set forth in 8 C.F.R. § 212.7(d).

Accordingly, the applicant failed to demonstrate that he merits a favorable exercise of discretion under 8 C.F.R. § 212.7(d), and the appeal will be dismissed.

**ORDER:** The appeal is dismissed.