Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

H6

[redacted]

FILE: [redacted] Office: MEXICO CITY (CIUDAD JUAREZ), MEXICO Date: MAR 09 2011

IN RE: [redacted]

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

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 $630. 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,

Michael Rhumway

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting District Director, Mexico City (Ciudad Juarez), Mexico. 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 to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking readmission within ten years of his last departure from the United States. The applicant is married to a U.S. citizen, has two U.S. citizen children, and one U.S. citizen step-child. He seeks a waiver of inadmissibility in order to reside in the United States.

In a decision, dated March 12, 2008, the acting district director found that the applicant was inadmissible for having been unlawfully present in the United States for over one year and was seeking readmission within ten years of his last departure from the United States. In addition, the acting district director noted that the applicant was removed from the Untied States as an aggravated felon. Finally, the acting district director found that the hardship presented in the record did not show that the applicant's spouse would suffer hardship rising to the level of extreme hardship. The application was denied accordingly. In the same decision the acting district director also denied the applicant's Application for Permission to Reapply for Admission (Form I-212) which was filed at the same time as the applicant's waiver application.

In a Notice of Appeal to the AAO (Form I-290B), dated April 7, 2008, counsel states that the acting district director erred as a matter of fact and law in finding that the family hardship did not reach the level of extreme hardship. In addition, counsel states that the denial of the applicant's Form I-212 was in error.

The record indicates that the applicant was convicted in Harris County, Texas of Failing to Stop and Give Information, a Class B Misdemeanor, on June 22, 2001 and was sentenced to thirteen days in jail and Assault, a Class A Misdemeanor, on February 12, 1999 and was sentenced to one year probation.

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

> (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 . . . or an attempt or conspiracy to commit such a crime . . . is inadmissible.

The Board of Immigration Appeals (Board) has "observed that moral 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." *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992). Additionally, "[m]oral turpitude has been defined as an act which is per se morally reprehensible and intrinsically wrong, or malum in se, so it is the nature of the act itself and not the

statutory prohibition of it which renders a crime one of moral turpitude." *Matter of Franklin*, 20 I&N Dec. 867, 868 (BIA 1994). In order to determine whether a conviction involves moral turpitude, the decision-maker must "look first to statute of conviction rather than to the specific facts of the alien's crime." *Matter of Silva-Trevino*, 24 I&N Dec. 687, 688 (A.G. 2008).

Section 550.022 of the Texas Transportation Code states, in pertinent part:

> (a) Except as provided by Subsection (b), the operator of a vehicle involved in an accident resulting only in damage to a vehicle that is driven or attended by a person shall:
>
> > (1) immediately stop the vehicle at the scene of the accident or as close as possible to the scene of the accident without obstructing traffic more than is necessary;
> >
> > (2) immediately return to the scene of the accident if the vehicle is not stopped at the scene of the accident; and
> >
> > (3) remain at the scene of the accident until the operator complies with the requirements of Section 550.023.
> >
> > ...
>
> (c) A person commits an offense if the person does not stop or does not comply with the requirements of this section. An offense under this section is:
>
> ...
>
> (2) a Class B misdemeanor, if the damage to all vehicles is $200 or more.

Although the U.S. Court of Appeals for the Fifth Circuit has held that failure to stop and render aid following a fatal auto accident in violation of Texas law is a crime involving moral turpitude, *see Garcia-Maldonado v. Gonzales*, 491 F.3d 284 (5th Cir. 2007), the applicant's conviction is for a misdemeanor which only resulted in property damage. This conduct does not reflect the "inherently base, vile, or depraved," behavior found in moral turpitude offenses. *Perez-Contreras*, 20 I&N Dec. at 617-18. Further, a violation of this section of the Texas Transportation Code does not require evil intent. The BIA has held that the malicious destruction of property is not a crime involving moral turpitude when the statute under which the alien was convicted does not require base or depraved conduct. *See Matter of M*, 2 I&N Dec. 686 (BIA 1946)(unlawful destruction of railway telegraph equipment found not to involve moral turpitude); *Matter of C-*, 2 I&N Dec. 716 (BIA 1947)(no moral turpitude in damaging a glass door of private property); *Matter of B*, 2 I&N Dec. 867 (BIA 1947)(willfully damaging mailboxes and other private property found not to involve moral turpitude). Accordingly, there is no basis to find that moral turpitude inheres in this misdemeanor conviction.

In addition, Texas Penal Code § 22.01 states, in pertinent part:

(a) A person commits an offense if the person:

(1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse;

(2) intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse; or

(3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.

(b) An offense under Subsection (a)(1) is a Class A misdemeanor...

The AAO notes that assault may or may not involve moral turpitude. *See Matter of Danesh*, 19 I&N Dec. 669, 670 (BIA 1988). The BIA has stated that offenses characterized as "simple assaults" are generally not considered to be crimes involving moral turpitude. *See Matter of Perez-Contreras*, *supra*; *Matter of Short*, 20 I&N Dec. 136, 139 (BIA 1989). In addition, the BIA has recognized that not all crimes involving the injurious touching of another person reflect moral depravity on the part of the offender. *See Matter of Sanudo*, 23 I&N Dec. 968, 971 (BIA 2006).

The BIA has found further that a finding of moral turpitude involves an assessment of both the state of mind and the level of harm required to complete the offense. *See In re Solon*, 24 I&N Dec. 239, 242 (BIA 2007). Thus, intentional conduct resulting in a meaningful level of harm, which must be more than mere offensive touching, may be considered morally turpitudinous. However, as the level of conscious behavior decreases, i.e., from intentional to reckless conduct, more serious resulting harm is required in order to find that the crime involves moral turpitude. Moreover, where no conscious behavior is required, there can be no finding of moral turpitude, regardless of the resulting harm. This body of law, then, deems intent to be a crucial element in determining whether a crime involves moral turpitude. *Id.* In addition, assault or battery have been found to involve moral turpitude when the offense involved some aggravating dimension, such as the use of a deadly weapon or the infliction of serious injury on persons whom society views as deserving of special protection, such as children, domestic partners or peace officers. *See, e.g., Matter of Danesh,* 19 I&N Dec. 669 (BIA 1988). In the applicant's case his conviction involved injuries to the applicant's spouse's head and leg. Thus, the AAO finds that the applicant's conviction for assault is a crime involving moral turpitude. However, the AAO finds that this conviction qualifies for the petty offense exception. The applicant was sentenced to one year probation and the maximum sentence for a Class A misdemeanor assault in Texas cannot exceed one year. Thus, the applicant is not inadmissible under section 212(a)(2)(A) of the Act.

The AAO notes that a finding that the applicant is not inadmissible under section 212(a)(2)(A) of the Act is not contrary to the immigration judge's finding that the applicant is an aggravated felon under section 101(a)(43)(F), which states, in pertinent part:

(43) The term "aggravated felony" means-

(F) a crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment at least 1 year;...

The AAO also notes that the record indicates that the applicant entered the United States without inspection in 1992 and remained in the United States until he was removed on October 21, 2003. Thus, the applicant accrued unlawful presence from April 1, 1997, the date the unlawful presence provisions were enacted, until October 21, 2003, the date the applicant was removed from the United States. In applying for an immigrant visa the applicant is seeking admission within ten years of his October 21, 2003 departure from the United States. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

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

(B) Aliens Unlawfully Present.-

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

. . . .

(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.

. . . .

(v) Waiver. – The Attorney General [now the Secretary of Homeland Security (Secretary)] 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 [Secretary] 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.

Section 212(a)(9)(B)(v) of the Act provides for a waiver of section 212(a)(9)(B)(i) inadmissibility as follows:

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 . . . 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 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 and/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 spouse is the only qualifying relative 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-Moralez,* 21 I&N Dec. 296, 301 (BIA 1996).

As a qualifying relative is not required to depart the United States as a consequence of an applicant's inadmissibility, two distinct factual scenarios exist should a waiver application be denied: either the qualifying relative will join the applicant to reside abroad or the qualifying relative will remain in the United States. Ascertaining the actual course of action that will be taken is complicated by the fact that an applicant may easily assert a plan for the qualifying relative to relocate abroad or to remain in the United States depending on which scenario presents the greatest prospective hardship, even though no intention exists to carry out the alleged plan in reality. *Cf. Matter of Ige,* 20 I&N Dec. 880, 885 (BIA 1994) (addressing separation of minor child from both parents applying for suspension of deportation). Thus, we interpret the statutory language of the various waiver provisions in section 212 of the Act to require an applicant to establish extreme hardship to his or her qualifying relative(s) under both possible scenarios. To endure the hardship of separation when extreme hardship could be avoided by joining the applicant abroad, or to endure the hardship of relocation when extreme hardship could be avoided by remaining in the United States, is a matter of choice and not the result of removal or inadmissibility. As the Board of Immigration Appeals stated in *Matter of Ige*:

> [W]e consider the critical issue . . . to be whether a child would suffer extreme hardship if he accompanied his parent abroad. If, as in this case, no hardship would ensue, then the fact that the child might face hardship if left in the United States would be the result of parental choice, not the parent's deportation.

Id. See also Matter of Pilch, 21 I&N Dec. 627, 632-33 (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. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *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.*

We observe that 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., In re 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).

Family separation, for instance, has been found to be a common result of inadmissibility or removal in some cases. *See Matter of Shaughnessy*, 12 I&N Dec. at 813. Nevertheless, family ties are to be considered in analyzing hardship. *See Matter of Cervantes-Gonzalez,* 22 I&N Dec. at 565-66. The question of whether family separation is the ordinary result of inadmissibility or removal may depend on the nature of family relationship considered. For example, in *Matter of Shaughnessy*, the Board considered the scenario of parents being separated from their soon-to-be adult son, finding that this separation would not result in extreme hardship to the parents. *Id.* at 811-12; *see also U.S. v. Arrieta*, 224 F.3d 1076, 1082 (9th Cir. 2000) ("Mr. Arrieta was not a spouse, but a son and brother. It was evident from the record that the effect of the deportation order would be separation rather than relocation."). In *Matter of Cervantes-Gonzalez*, the Board considered the scenario of the respondent's spouse accompanying him to Mexico, finding that she would not experience extreme

hardship from losing "physical proximity to her family" in the United States. 22 I&N Dec. at 566-67.

The decision in *Cervantes-Gonzalez* reflects the norm that spouses reside with one another and establish a life together such that separating from one another is likely to result in substantial hardship. It is common for both spouses to relocate abroad if one of them is not allowed to stay in the United States, which typically results in separation from other family members living in the United States. Other decisions reflect the expectation that minor children will remain with their parents, upon whom they usually depend for financial and emotional support. *See, e.g., Matter of Ige*, 20 I&N Dec. at 886 ("[I]t is generally preferable for children to be brought up by their parents."). Therefore, the most important single hardship factor may be separation, particularly where spouses and minor children are concerned. *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *Cerrillo-Perez*, 809 F.2d at 1422.

Regardless of the type of family relationship involved, the hardship resulting from family separation is determined based on the actual impact of separation on an applicant, and all hardships must be considered in determining whether the combination of hardships takes the case beyond the consequences ordinarily associated with removal or inadmissibility. *Matter of O-J-O-*, 21 I&N Dec. at 383. Nevertheless, though we require an applicant to show that a qualifying relative would experience extreme hardship both in the event of relocation and in the event of separation, in analyzing the latter scenario, we give considerable, if not predominant, weight to the hardship of separation itself, particularly in cases involving the separation of spouses from one another and/or minor children from a parent. *Salcido-Salcido*, 138 F.3d at 1293.

The record of hardship includes: counsel's brief, an affidavit from the applicant's spouse, a psychological evaluation, medical documents, letters from the applicant's family, and a college transcript for the applicant's spouse.

In his brief, dated April 29, 2008, counsel states that all of the applicant's spouse's relatives live in the United States, including her U.S. citizen children; the applicant's spouse's health is deteriorating because she needs a total knee replacement and requires the applicant's help; the applicant's spouse is having trouble supporting her family; and that the applicant's spouse is sad, depressed, and sick. Counsel also states that the Mexican economy is not good.

Counsel asserts that the applicant and his spouse have already been separated for a few years, managing to stay together through frequent visits, but that because of the applicant's spouse's physical condition travel is becoming an obstacle. Counsel states that the applicant's spouse is receiving counseling for her depression and that she suffers from various other medical ailments. Counsel expresses concern over the applicant's spouse being able to find treatment for her ailments in Mexico or in her remaining in the United States without the support and comfort only her spouse could bring.

In her affidavit, dated April 28, 2008, the applicant's spouse states that since the applicant was deported in 2003 her life has been miserable. She states that she is struggling with raising her 17-

year-old, 5-year-old, and one-year-old children alone. She states that she has been exhausted and depressed and is now faced with ill health. The applicant's spouse explains that she was involved in an accident where she injured her knee, which she continues to have problems with today. She states that she has had two surgeries and numerous other procedures to try and help with her pain and mobility problems and now she requires a total knee replacement. She states that she suffers from osteoporosis, high blood pressure, arthritis depression, and a nervous disorder. The applicant's spouse expresses concern over her ability to ambulate and as a result to work. She states that she does not have disability insurance and has to pay for her treatments out of pocket, which she would not be able to do in Mexico. She states that she does not know who will cook, clean, or bath her children, including her new baby. She states that her children are suffering and seeing them suffering is hurting her. Finally, the applicant's spouse states that she has been separated from her spouse for five years and it has destroyed her life, her husband's life, and the lives of their children. She states that they do not have anywhere to live in Mexico.

The AAO notes that the record includes a letter from the applicant's spouse's doctor, [redacted], dated April 7, 2008, which states that the applicant's spouse has advanced traumatic arthritis in her left knee and needs a total knee replacement. [redacted] states that she will require her husband's help due to her mobility being impaired after surgery.

A psychological assessment performed by [redacted] on March 31, 2008 finds that the applicant's spouse reported feelings of extreme sadness, suicidal thoughts, anxiety, guilt, fear, and excessive consistent worry about being able to care for her children. [redacted] states that these feelings and symptoms are consistent with a diagnosis of depression. [redacted] recommends that the applicant's spouse undergo psychotherapy and that she consult with a psychiatrist for medication therapy.

The AAO notes that the record also includes three letters from family members stating that the applicant's spouse has suffered from being separated from the applicant, that she is a hard worker, and that they would like to keep their family united.

The record includes a college transcript for the applicant's spouse showing that she earned her Bachelor of Arts degree in teaching in December 2006.

The AAO finds that the current record shows that the applicant's spouse is suffering extreme hardship as a result of separation. The AAO acknowledges that the psychological assessment submitted by the applicant does not establish a significant doctor-patient relationship in that the applicant was interviewed only once by [redacted]. However, given the seriousness of the applicant's spouse's symptoms, including suicidal ideations, the physical limitations on the applicant, and the statements by the applicant and her family members regarding her emotional suffering, the AAO finds that the applicant has established that his spouse is suffering extreme emotional hardship as a result of his absence. However, the record does not establish that the applicant would suffer extreme hardship upon relocation. The record does not establish that the applicant's spouse would not be able to find employment in Mexico or that she would not be able to find medical care in Mexico. The applicant's spouse states that she could not afford her medical care

in Mexico, but submits no documentation to support this statement. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)).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 Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Because the applicant must show extreme hardship to his spouse in the event of separation and in the event of relocation, the AAO cannot find that he qualifies for a waiver of inadmissibility under the Act.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's spouse caused by the applicant's inadmissibility to the United States. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

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

ORDER: The appeal is dismissed.