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



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Date: NOV 02 2011 Office: MEXICO CITY (SANTO DOMINGO) FILE: [REDACTED]

IN RE: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under sections 212(h), 8 U.S.C. § 1182(h), and 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v), of the Immigration and Nationality Act; Application for Permission to Reapply for Admission after Deportation or Removal under section 212(a)(9)(A)(iii), 8 U.S.C. § 1182(a)(9)(A)(iii).

ON BEHALF OF APPLICANT:



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,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the District Director, Mexico City, Mexico, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native of Barbados. The director found the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (INA or the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. The applicant was also found inadmissible under INA § 212(a)(9)(B)(i)(II); 8 U.S.C. § 1182(a)(9)(B)(i)(II) based on unlawful presence in the United States for over one year after he was ordered deported on July 20, 1999. The director indicated that the applicant sought a waiver of inadmissibility pursuant to INA § 212(h), 8 U.S.C. § 1182(h), and INA § 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v), and permission to reapply for admission after deportation or removal under INA § 212(a)(9)(A)(iii), 8 U.S.C. § 1182(a)(9)(A)(iii). 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. Additionally, the director concluded that the positive factors in the applicant's case did not outweigh the negative factors, that the applicant did not merit a favorable exercise of discretion, and denied his Application for Permission to Reapply after Deportation or Removal (Form I-212), accordingly.

On appeal, counsel contends that the applicant has established that his qualifying relatives will experience extreme hardship due to his inadmissibility.

In support of the waiver application, the record includes, but is not limited to, letters from the applicant's U.S. citizen wife, letters from the applicant's children, and a letter from the applicant's mother, doctor's letters regarding the applicant's wife and mother's medical conditions, the applicant's wife's birth certificate, the applicant's marriage certificate, Form I-290B, Form I-601, Forms G-325A, approved I-130 and I-129F petitions filed on the applicant's behalf by his U.S. citizen spouse, and records concerning the applicant's criminal and immigration history in the United States.

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. The AAO will first address the question of whether the applicant is admissible to the United States.

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

(A) *Certain aliens previously removed.*

....  
(ii) *Other aliens.* Any alien not described in clause (i) who -  
(I) has been ordered removed under section 240 or any other provision of law, or  
(II) departed the United States while an order of removal was outstanding,  
and who seeks admission within 10 years of the date of such alien's departure or  
removal . . . is inadmissible.

(iii) *Exception.* -- Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the

Attorney General [now the Secretary of Homeland Security] has consented to the alien's reapplying for admission.

The record illustrates that the applicant is inadmissible pursuant to INA § 212(a)(9)(A)(ii)(I). He was ordered deported to Barbados on July 20, 1999 based on proceedings that were initiated on March 17, 1997. Notably, the record makes clear that the applicant was present before the Immigration Judge on July 20, 1999 and therefore was not ordered deported *in absentia* as stated in counsel's brief. An order of the Board of Immigration Appeals dated November 15, 1999, indicates that an appeal filed by the applicant's attorney was filed five days late and was therefore dismissed as untimely. As a result, the applicant's deportation order was final on July 20, 1999. The applicant is inadmissible due to this order for ten years after the date of his removal from the United States on July 22, 2006. The applicant is eligible to apply for permission to reapply for admission to the United States after deportation during the ten year period pursuant to INA § 212(a)(9)(A)(iii).

The applicant was also found to be inadmissible under INA § 212(a)(9)(B) which provides, in pertinent part:

(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.

The record shows that the applicant remained in the United States after the date of his removal order on July 20, 1999 until he was removed on July 22, 2006. During this period, the applicant accrued unlawful presence of over one year and is therefore inadmissible under INA § 212(a)(9)(B)(i)(II) for a period of ten years after his removal from the United States. He now seeks admission within ten years of his July 22, 2006, removal. Accordingly, he is inadmissible to the United States. A waiver of inadmissibility under INA § 212(a)(9)(B)(v) is available to the applicant, but it is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which only includes the U.S. citizen or lawfully resident spouse or parent of the applicant. Under this ground of inadmissibility, 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 his mother are the stated qualifying relatives for this analysis. Moreover, 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).

The applicant was also found to be inadmissible under Section 212(a)(2)(A) of the Act which states, in pertinent parts:

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

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

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

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

(Citations omitted.)

The record indicates that the applicant was convicted of Assault in the Second Degree, New York Penal Law § 120.05, subsection 6, on September 27, 1996, and sentenced to six months imprisonment and five years of probation to be served concurrently. Assault in the second degree is a class D felony, punishable by 2 to 7 years imprisonment. Although the record indicates that the applicant was not sentenced to a term of imprisonment in excess of six months, the maximum sentence of imprisonment for a conviction under New York Penal Law § 120.05 exceeds one year, therefore the applicant does not qualify for any exception to the ground of inadmissibility at INA § 212(a)(2)(A).

New York Penal Law § 120.05, Assault in the Second Degree, in pertinent part, states:

A person is guilty of assault in the second degree when:

...

6. In the course of and in furtherance of the commission or attempted commission of a felony, other than a felony defined in article one hundred thirty which requires corroboration for conviction, or of immediate flight therefrom, he, or another participant if there be any, causes physical injury to a person other than one of the participants; or

...

Assault in the second degree is a class D felony.

In *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General, clarified that for a

crime to qualify as a crime involving moral turpitude (CIMT) for purposes of the INA, it “must involve both reprehensible conduct and some degree of scienter, whether specific intent, deliberateness, willfulness, or recklessness.” The BIA has also held 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 Matter of 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. *See Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988) (finding that an aggravated assault against a peace officer, which results in bodily harm to the victim and which involves knowledge by the offender that his force is directed to an officer who is performing an official duty, constitutes a crime involving moral turpitude); *see also Matter of Solon*, 24 I&N Dec. at 245 (finding that the offense of assault in the third degree in violation of section 120.00(1) of the New York Penal Law is a crime involving moral turpitude, as such an offense requires both a specific intent to cause injury and physical injury to the victim).

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. *Matter of Silva-Trevino*, 24 I&N Dec. 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).

A conviction under N.Y.P.L. § 120.05 does not categorically involve moral turpitude, but rather it can be considered a “divisible statute” because there is a realistic probability that convictions under this statute may not involve moral turpitude. *See Gill v. INS*, 420 F.3d 82, 90-91 (2d Cir. 2005) (holding that N.Y.P.L. § 120.05(4) is not a crime of moral turpitude because it requires only that the defendant acted with criminal recklessness instead of specific intent); *see also Dickson v. Ashcroft*, 346 F.3d 44, 48 (2d Cir. 2003) (defining a “divisible statute” as one that “encompasses diverse classes of criminal acts-some of which would categorically be grounds for removal and others of which would not”). Moreover, the subsection of N.Y.P.L. § 120.05 under which the applicant was convicted could realistically involve moral turpitude or not, as the moral turpitudiness flows, in part, from the underlying felony referred to in the statute. *See Matter of Quadara*, 11 I&N Dec. 457 (BIA 1996) (finding that “[i]nasmuch as the intent to commit robbery with which the crime was committed obviously involves moral turpitude, the conviction of assault in the second degree with intent to commit robbery likewise involves moral turpitude”).

Where the conviction is not categorically a CIMT, a modified categorical inquiry is used to inspect the specific documents comprising the record of conviction (such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, or the plea transcript) to discern the nature of the underlying conviction. *Id.* at 690, 698-99. Finally, if the record of conviction is inconclusive, the Attorney General has held that because moral turpitude is not an element of an offense, evidence beyond the record of conviction may be considered when evaluating whether an alien’s crime involved moral turpitude. *Id.* at 690, 699-701.

In moving to an examination of evidence in the record of conviction, the indictment underlying the applicant's conviction indicates that the applicant was also arrested and charged with robbery in the first degree (N.Y.P.L. § 160.15), assault in the third degree (N.Y.P.L. § 120.00), and grand larceny in the fourth degree (N.Y.P.L. § 155.30 (5)), all of which have been found to categorically involve moral turpitude. *See Matter of Solon*, 24 I&N Dec. 239 (BIA 2007) (holding that the offense of assault in the third degree in violation of section 120.00(1) of the New York Penal Law is a crime involving moral turpitude); *Matter of Martin*, 18 I. & N. Dec. 226 (BIA 1982) (holding that the crime of robbery is a crime involving moral turpitude); and *Matter of Scarpulla*, 15 I&N Dec. 139, 140 (BIA 1974) (stating, "It is well settled that theft or larceny, whether grand or petty, has always been held to involve moral turpitude . . ."). In matters of admissibility, the applicant has the burden of proof, and, based on the record of conviction, the applicant has not established that his conviction does not involve moral turpitude. *See* section 291 of the Act, 8 U.S.C. § 1361.

Moreover, even if the AAO were to determine that the record of conviction did not establish moral turpitude, the third step set forth by the Attorney General in *Matter of Silva-Trevino* allows an examination of the evidence in the record not considered part of the record of conviction. That evidence in the record, which includes a deposition submitted in relation to the indictment, describes the alleged conduct underlying the applicant's conviction which included an attack on the victim by the four defendants in an elevator, where the victim was pushed to the ground and held there, allegedly by the applicant, while the contents of his pockets were stolen and the victim was beaten, kicked and slashed by the defendants. *See Id.* at 690, 699-704, 709 (setting forth the third step in the analysis of whether a crime involves moral turpitude). As such, the AAO will not disturb the director's finding that the applicant's conviction under N.Y.P.L. § 120.05 involved moral turpitude and that he is therefore inadmissible under INA § 212(a)(2)(A)(i)(I).

The record indicates that the applicant was also convicted of attempted criminal possession of a weapon third degree, New York Penal Law § 110-265.02, on August 14, 1995. The applicant was sentenced to intermittent imprisonment of four weeks. The AAO will not consider whether the applicant's conviction for Attempted Criminal Possession of a Weapon constitutes a CIMT as the applicant's conviction for Assault in the Second Degree is a CIMT and is not amenable to the petty offense exception under section 212(a)(2)(ii)(II) of the Act. The applicant was arrested and charged with two crimes on March 15, 1996<sup>1</sup>, but the record does not reflect any additional criminal arrests, charges, or convictions since that time.

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

The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . 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 . . . ; 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.

Section 212(h)(1)(A) of the Act provides that the Secretary may, in her 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. An application for admission to the United States is a continuing application, and admissibility is determined on the basis of the facts and the law at the time the application is finally considered. *Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992).

However, even if the applicant establishes that he meets the requirements of section 212(h)(1)(A), the AAO notes the applicant's conviction for assault in the second degree may be determined to be a violent or dangerous crime requiring that the applicant meet the heightened discretionary standard of exceptional and extremely unusual hardship under 8 C.F.R. § 212.7(d). *See* 8 C.F.R. § 212.7(d). Counsel for the applicant has not addressed this issue or the heightened standard.

The regulation at 8 C.F.R. § 212.7(d) provides:

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

insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act.

The AAO notes that the words “violent” and “dangerous” and the phrase “violent or dangerous crimes” are not further defined in the regulation, and the AAO is aware of no precedent decision or other authority containing a definition of these terms as used in 8 C.F.R. § 212.7(d). A similar phrase, “crime of violence,” is found in section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F). Under that section, a crime of violence is an aggravated felony if the term of imprisonment is at least one year. As defined by 18 U.S.C. § 16, a crime of violence is an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. We note that the Attorney General declined to reference section 101(a)(43)(F) of the Act or 18 U.S.C. § 16, or the specific language thereof, in 8 C.F.R. § 212.7(d). Thus, we find that the statutory terms “violent or dangerous crimes” and “crime of violence” are not synonymous and the determination that a crime is a violent or dangerous crime under 8 C.F.R. § 212.7(d) is not dependent on it having been found to be a crime of violence under 18 U.S.C. § 16 or an aggravated felony under section 101(a)(43)(F) of the Act. *See* 67 Fed. Reg. 78675, 78677-78 (December 26, 2002).

We use the definition of a crime of violence found in 18 U.S.C. § 16 as guidance in determining whether a crime is a violent crime under 8 C.F.R. § 212.7(d), considering also other common meanings of the terms “violent” and “dangerous.” The term “dangerous” is not defined specifically by 18 U.S.C. § 16 or any other relevant statutory provision. Thus, in general, we interpret the terms “violent” and “dangerous” in accordance with their plain or common meanings, and consistent with any rulings found in published precedent decisions addressing discretionary denials under the standard described in 8 C.F.R. § 212.7(d). Black’s Law Dictionary, Seventh Edition (1999), defines violent as “of, relating to, or characterized by strong physical force” and dangerous as “likely to cause serious bodily harm.”

A violation of New York Penal Law § 120.05(6) which involves physical injury to a person other than one of the participants in the course of the commission or attempted commission of a felony, where the underlying felony is robbery, is likely violent and dangerous crime within the meaning of 8 C.F.R. § 212.7(d), and thus the heightened discretionary standards found in that regulation would likely be applicable in this case.

We need not make a determination on the issue of whether the applicant needs or qualifies for a waiver under 8 C.F.R. § 212.7(d) at this this time, however, before we first determine whether the applicant has met his burden of proof to show extreme hardship to a qualifying spouse for his inadmissibility under INA § 212(a)(9)(B)(i)(II). If the applicant does not first meet his burden under this section of the law, no purpose is served in assessing his ability meet his burden under INA § 212(h) and 8 C.F.R. § 212.7(d).

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 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 mother and the applicant's wife are the only qualifying relatives in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and the AAO 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.*

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).

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.

On appeal, counsel asserts that the applicant's U.S. citizen spouse and U.S. citizen mother will suffer extreme hardship if he is not admitted to the United States. An analysis under *Matter of Cervantes-Gonzalez* is appropriate. 22 I&N Dec. at 566-67. The AAO notes that extreme hardship to qualifying relatives must be established in the event that they accompany the applicant abroad or in the event that they remain in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

In relation to hardship to the applicant's mother caused by the separation from her son, counsel submitted a letter from the applicant's mother dated April 11, 2008. In that letter, the applicant's mother states that she is 62 years old and suffers from serious health problems, including diabetes and arthritis. The applicant submitted a letter from [REDACTED] dated April 18, 2008, stating that the applicant's mother was under his care for "uncontrolled diabetes mellitus, anemia, hypertension and gastritis" and that as a result of those illnesses that she was unable to work. [REDACTED] does not mention arthritis in his letter. The applicant's mother states that, before he was deported, she relied on the applicant to take her to her doctor's appointments and the hospital, as well as assist her in making sure that she was eating in accordance with the diet prescribed by her doctor. [REDACTED] letter does not state, however, whether the applicant was involved in his mother's care. And no other evidence is provided from neighbors or friends, or from the applicant himself, to support the claim that the applicant was involved in caring for his mother. The applicant's mother further states that she was hospitalized due to her inability to fill her prescriptions and that she was very sad that her son could not be by her side while she was in the hospital. It is unclear, however, whether she was unable to fill the prescription because of lack of transportation or lack of finances, and whether either of those is a result of the applicant's inadmissibility to the United States. The applicant's mother also claims financial hardship due to her inability to work, but the connection of applicant to his mother's financial hardship is not clear. The applicant does not provide any evidence that he assisted his mother financially before his deportation. Additionally, there is no evidence in the record as to whether the applicant has any siblings or if his mother has any other relatives or friends who are able to assist her with transportation and her diet. The applicant does not state whether his U.S. citizen spouse is able to assist his mother, and if not, why not. Moreover, the applicant does not provide any evidence that his mother is a U.S. citizen. In fact there is no evidence in the record of her current U.S. immigration status. Statements of counsel are not evidence. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

As to the hardship to the applicant's U.S. citizen spouse due to her separation from the applicant, the applicant's spouse states that she is suffering emotional and physical hardship as a result of the separation from the applicant. The applicant's spouse in a letter dated April 17, 2008 states that she suffers from a serious gynecological condition. She also states that she was lonely, depressed, distraught, suicidal and empty the day that her husband was deported to Barbados. She states that she continues to suffer from moderate depression due to her husband's inadmissibility. No evidence apart from the applicant's spouse's statements is submitted to illustrate whether she has suffered from a psychological condition as a result of the applicant's deportation, such as a letter from a

psychologist or social worker. In relation to the applicant's spouse's physical condition, a letter from [REDACTED] states that she is "undergoing a serious gynecological condition" that "requires frequent visits to the doctor's office." [REDACTED] however, does not state what her condition is, how her husband's absence affects her condition, and how long her treatment is expected to last. The applicant's spouse states that her condition is life threatening, but [REDACTED] does not verify that assertion. The applicant's spouse also explains that she fractured her fibula and requires aggressive physical therapy and treatment, but no documentation is provided from the hospital or from the physical therapist to document this condition or the applicant's spouse's stated claims that her condition was worsened because of the actions of strangers who she states mistreated her. From the evidence, the AAO cannot determine how the applicant's spouse's medical hardship is tied to or affected by the applicant's admissibility. The AAO notes that at that time of the applicant's deportation, the applicant was not married. The applicant's spouse stated that they resided together and intended to start a family, but they were not married until after he was deported to Barbados. No evidence is provided to illustrate that the applicant and his spouse resided together prior to his deportation. Moreover, no independent evidence is provided to illustrate what support, if any, the applicant provided to his spouse prior to his deportation.

The applicant's spouse also states that she is suffering from financial hardship due to the costs of hiring various attorneys to assist with the applicant's immigration matters as well as the costs of communicating with the applicant, but she does not provide any evidence of her income, expenses, or the costs associated with the applicant's inadmissibility, therefore it is not possible to assess whether this hardship is extreme.

In regards to relocation to Barbados, the applicant's spouse states that she would suffer extreme hardship if she were to relocate to Barbados to live with the applicant. She states that she has a career in the United States and that she could not receive the necessary medical treatment for her conditions in Barbados. The applicant, however, has not provided sufficient evidence or details to document his wife's career in the United States, why she would suffer if she were not able to continue that career, and why she would not be able to obtain work in Barbados. In the applicant's spouse's letter, she mentions her degree, her field of employment, her reputation in her field, paid educational opportunities in her field, pay increases, insurance, and retirement, but she does not provide any evidence of these factors for consideration, such as copies of her degrees, evidence of ongoing education, letters from her supervisor or colleagues, evidence of pay increases, documentation of her insurance, and proof of retirement accounts. The applicant's spouse also states that her parents would suffer extreme hardship. Congress, however, did not call for hardship to the applicant's spouse's U.S. citizen parents to be considered under INA § 212(a)(9)(B)(v), therefore, the applicant's spouse would need to provide evidence that hardship to her parents would cause her some type of hardship, whether financial, emotional, or both. Additionally, the applicant has not submitted any evidence indicating what hardship the applicant's mother would suffer were she to choose to reside in Barbados with the applicant. The applicant's mother is a native of Barbados and there is no evidence submitted that she would not be able to obtain medical care in that country.

The applicant has submitted letters from two of his children in the United States. Congress, however, did not call for hardship to the applicant children to be taken into consideration under INA § 212(a)(9)(B)(v), therefore, the applicant would need to provide evidence that hardship to his children causes hardship to one of his qualifying relatives, either his mother or his spouse, in order

for that hardship to be considered. Moreover, the AAO notes that the applicant has not provided birth certificates for any of his children.

A review of the documentation in the record, when considered in the aggregate fails to reflect that the applicant's U.S. citizen spouse and/or mother would suffer extreme hardship if he were not permitted to reside in the United States. Although, the AAO notes that the record contains evidence that the applicant's spouse and mother are suffering hardship, even when the record is reviewed as a whole, the applicant has not provided enough evidence for the AAO to determine that the hardship is connected to his inadmissibility and that the level of hardship rises to the level of extreme hardship required by the statute. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991); *Perez*, 96 F.3d at 392 (defining "extreme hardship" as hardship that was unusual or beyond that which would normally be expected upon deportation); *Matter of Pilch*, 21 I&N Dec. at 631. The burden of proof is upon the applicant to establish he is eligible for the benefit sought. Section 291 of the Act, 8 U.S.C. § 1361.

The AAO therefore finds that the applicant has failed to establish extreme hardship to his U.S. citizen spouse as required under section 212(a)(9)(B)(v) of the Act. As the applicant has not established extreme hardship to a qualifying family member no purpose would be served in determining whether the applicant merits a waiver INA § 212(h) and 8 C.F.R. § 212.7(d), or as a matter of discretion.

The AAO notes that the District Director denied the applicant's Form I-212 Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) in the same decision. *Matter of Martinez-Torres*, 10 I&N Dec. 776 (reg. Comm. 1964) held that an application for permission to reapply for admission is denied, in the exercise of discretion, to an alien who is mandatorily inadmissible to the United States under another section of the Act, and no purpose would be served in granting the application. As the applicant is inadmissible under INA § 212(a)(9)(B)(i)(II), and does not qualify for a waiver of that inadmissibility, no purpose would be served in granting the applicant's Form I-212.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish he is eligible for the benefit sought. After a careful review of the record, it is concluded that the applicant has not met that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.