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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: JUN 2 1 2013 OFFICE: MEXICO CITY FILE:

IN RE:

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

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office 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 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 10 years of his last departure from the United States. The applicant was also found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having committed a crime involving moral turpitude. The applicant seeks a waiver of inadmissibility in order to remain in the United States with his lawful permanent resident parents and U.S. citizen children.

The Field Office Director concluded that the record failed to establish the existence of extreme hardship for a qualifying relative, and denied the application accordingly. *See Decision of the Field Office Director*, dated October 18, 2012.

On appeal, the applicant expresses remorse for his prior criminal history and asserts that he has changed since that incident. The applicant contends that he tries to be a role model to his children and grandchildren.

In support of the waiver application and appeal, the applicant submitted letters of support, medical documentation concerning the applicant's parents, reports on conditions in Mexico, financial documentation, and records concerning the applicant's criminal history. The entire record was reviewed and considered in rendering a decision on the appeal.

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

> (B) ALIENS UNLAWFULLY PRESENT.-
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> (i) In general.- Any alien (other than an alien lawfully admitted for permanent residence) who-
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> . . . .
>
> (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.
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> . . . .
>
> (v) Waiver.-The Attorney General has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of

> admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

The record reflects that the applicant entered the United States without admission or parole on or about March 5, 1984 and remained in the United States until his removal on July 9, 2008. The applicant accrued unlawful presence in the United States from April 1, 1997, the effective date of the unlawful presence provisions under the Act, until his departure on July 8, 2008. As the applicant accrued over one year of unlawful presence in the United States and he now seeks readmission within 10 years of his last departure, he is inadmissible under section 212(a)(9)(B)(i)(II) of the Act. The applicant does not contest his inadmissibility on appeal.

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

> (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –
>
> > (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.
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> (ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-
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> > (I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or
> >
> > (II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

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

However, if a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, "the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude." 24 I&N Dec. at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage inquiry in which the adjudicator reviews the "record of conviction" to determine if the conviction was based on conduct involving moral turpitude. *Id.* at 698-699, 703-704, 708. The record of conviction consists of documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.* at 698, 704, 708.

If review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. 24 I&N Dec. at 699-704, 708-709. However, this "does not mean that the parties would be free to present any and all evidence bearing on an alien's conduct leading to the conviction. (citation omitted). The sole purpose of the inquiry is to ascertain the nature of the prior conviction; it is not an invitation to relitigate the conviction itself." *Id.* at 703.

The record reflects that on October 13, 1988, the applicant was convicted of felony assault with a deadly weapon other than a firearm, pursuant to section 245(a)(1) of the California Penal Code. The applicant was sentenced to 180 days of incarceration and three years of probation. The field office director found the applicant to be inadmissible for having been convicted of a crime involving moral turpitude. The applicant has not disputed this determination on appeal. As the applicant has not disputed inadmissibility on appeal and the record does not show the field office director's finding of inadmissibility to be erroneous, the AAO will not disturb the field office director's inadmissibility finding under section 212(a)(2)(A)(i)(I) of the Act. It is noted that the Ninth Circuit Court of Appeals in *Gonzales v. Barber* determined that assault with a deadly weapon under the California Penal Code is categorically a crime involving moral turpitude. 207 F.2d 398, 400 (9th Cir. 1953).

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

> (h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), . . . of subsection (a)(2) . . . if –
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> (1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General that-
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> (i) the alien is inadmissible only under subparagraph (D)(i) or (D)(ii) of such subsection or 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
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> (iii) the alien has been rehabilitated; or
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> (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 . . . .

As the applicant's conviction for a crime involving moral turpitude took place on October 13, 1988, over 15 years prior to the date of the applicant's instant appeal, he is eligible to apply for a waiver pursuant to section 212(h)(1)(A) of the Act. The applicant asserts that he was 20 years of age at the time of his criminal arrest and that he is ashamed of what happened. The applicant also asserts that he is aware that he previously broke the law, but that he has since fathered two children and has two grandchildren for whom he tries to be a role model.

The applicant asserts that he has not transgressed the law since his once criminal conviction and has filed income taxes every year. It is noted that there is no indication that the applicant has any further criminal contacts, but there is also no supporting documentation concerning his payment of taxes.

The record contains letters of support from the applicant's family members contending that the applicant has learned from his prior mistakes and that he has done well for himself. The applicant's children assert that the applicant has purchased three properties in the United States and that he they look up to him as a father figure and role model in their lives. The applicant's prior employer submitted a letter stating that the applicant is unfailing polite, professional, and competent. Based upon the record, the applicant has demonstrated his rehabilitation pursuant to section 212(h)(1)(A) of the Act.

However, as the applicant has been convicted of felony assault with a deadly weapon other than a firearm, a dangerous and violent crime, he must also demonstrate that the denial of his application would result in exceptional and extremely unusual hardship whether he seeks a waiver under section 212(h)(1)(A) or 212(h)(1)(B) of the Act.

8 C.F.R. § 212.7(d) provides, in pertinent part:

> Criminal grounds of inadmissibility involving dangerous or violent crimes. The Attorney General [Secretary], in general, will not favorably exercise discretion under section 212(h)(2) of the Act . . .in cases involving violent or dangerous crimes, except...in cases in which the 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. . . .

Section 245(a)(1) of the California Penal Code provides, in pertinent part:

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

The 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). It provides that a "crime of violence," as defined under 18 U.S.C. § 16, for which the term of imprisonment is at least one year, is an aggravated felony. As such, "crime of violence" is limited to those crimes specifically listed in 18 U.S.C. § 16. It is not a generic term with application to any crime involving violence, as that term may be commonly defined. That the DOJ chose not to use the language of section 101(a)(43)(F) of the Act or 18 U.S.C. § 16 in

promulgating 8 C.F.R. § 212.7(d) indicates that "violent or dangerous crimes" and "crime of violence" are not synonymous. The Department of Justice clarified the relationship between these distinct terms in the interim final rule codifying 8 C.F.R. § 212.7(d):

> [I]n general, individuals convicted of aggravated felonies would not warrant the Attorney General's use of this discretion. In fact, the proposed regulations stated that even if the applicant can meet the "exceptional and extremely unusual hardship" standard for the exercise of discretion, depending upon the severity of the offense, this might "still be insufficient" to obtain the waiver. See 67 FR at 45407. That language would substantially limit the circumstances under which an individual convicted of an aggravated felony would be granted a waiver as a matter of discretion. Therefore, the Department believes that this language achieves the goal of the commenter while not unduly constraining the Attorney General's discretion to render waiver decisions on a case-by-case basis.

67 Fed. Reg. 78675, 78677-78 (December 26, 2002).

Therefore, the fact that a conviction constitutes an aggravated felony under the Act may be indicative that an alien has also been convicted of a violent or dangerous crime, but it is not dispositive. Decisions to deny waiver applications on the basis of discretion under 8 C.F.R. § 212.7(d) are made on a factual "case-by-case basis." The AAO interprets the phrase "violent or dangerous crimes" in accordance with the plain or common meaning of its terms, consistent with any published precedent decisions addressing discretionary denials under 8 C.F.R. § 212.7(d) or the standard originally set forth in *Matter of Jean*. Given the plain language of the statute under which the applicant was convicted, punishing assault upon a person with a deadly weapon, the AAO finds that the applicant's conviction renders him subject to the heightened discretion standard of 8 C.F.R. § 212.7(d).

Accordingly, the applicant must show that "extraordinary circumstances" warrant approval of the waiver. 8 C.F.R. § 212.7(d). Extraordinary circumstances may exist in cases involving national security or foreign policy considerations, or if the denial of the applicant's admission would result in exceptional and extremely unusual hardship. *Id.* Finding no evidence of foreign policy, national security, or other extraordinary equities, the AAO will consider whether the applicant has "clearly demonstrate[d] that the denial of . . . admission as an immigrant would result in exceptional and extremely unusual hardship" to a qualifying relative. *Id.*

The exceptional and extremely unusual hardship standard is more restrictive than the extreme hardship standard. *Cortes-Castillo v. INS*, 997 F.2d 1199, 1204 (7th Cir. 1993). Since the applicant is subject to 8 C.F.R. § 212.7(d), merely showing extreme hardship to his qualifying relatives under section 212(h) of the Act is not sufficient. He must meet the higher standard of exceptional and extremely unusual hardship.[1]

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[1] As the applicant's application for a 212(h) waiver is subject to the heightened standard of exceptional and extremely unusual hardship, which is more restrictive than the extreme hardship

The applicant is a 46-year old native and citizen of Mexico. The applicant's daughter is a 24-year-old native and citizen of the United States. The applicant's son is a 23-year-old native and citizen of the United States. The applicant's father is a 71-year-old native of Mexico and lawful permanent resident of the United States. The applicant's mother is a 64-year-old native of Mexico and lawful permanent resident of the United States. The applicant is currently residing in Mexico and his qualifying relatives are residing in Roswell, New Mexico.

The applicant's father asserts that it would be helpful to have the applicant in the United States to assist the applicant's father and mother physically, financially, and mentally, as they continue to age. The applicant's father also asserts that he suffers from stress and depression because he worries about the applicant's safety in Mexico. It is noted that the record does not contain a letter from the applicant's mother.

The applicant's daughter asserts that due to separation from the applicant, she was forced to quit college and secure full-time employment. The applicant's daughter also asserts that she has responsibility for her father's financial obligations in the United States so that she cannot pursue her education in the absence of the applicant. The applicant's daughter contends that she is depressed and stressed due to her obligations and has been suffering emotional hardship since being separated from her parents. The applicant's daughter asserts that she is also concerned every day about the safety of her parents in Mexico.

The applicant's son asserts that he was forced to find a full-time job and forego a college education after high school to maintain the applicant's financial obligations in the United States. The applicant's son also asserts that his father has always been an exemplary role model and that their family no longer participates in weekly family gatherings since the absence of the applicant.

It is acknowledged that separation from a parent or child nearly always creates hardship for both parties. It is noted that there is no medical documentation in the record supporting the applicant's qualifying relatives' assertions that they are suffering from depression. It is also noted that the record contains evidence of the applicant's ownership of three properties in the United States. There is no indication that the applicant's qualifying relatives have been unable to meet these financial obligations in the absence of the applicant. There is also no other financial documentation in the record, including tax returns or any indication as to whether the applicant's properties are currently accruing any income. There is insufficient evidence in the record, in the aggregate, to find that the applicant's qualifying relatives are suffering exceptional and extremely unusual hardship upon separation from the applicant.

The applicant's father asserts that he and the applicant's mother do not have the mobility that they used to, due to their advancing age, for visits Ciudad Juarez, and do not wish to return to reside in Mexico. The applicant's father contends that he struggles constantly over whether he should return to Mexico to reside with the applicant or remain in the United States with his other family

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standard of his 212(a)(9)(B)(v) waiver application, his appeal will be adjudicated in accordance with his 212(h) waiver application.

members, including seven children and 20 grandchildren. The applicant's father asserts that he and his spouse are also concerned about the crime level in Mexico.

It is noted that the record contains a physician's letter containing primary diagnoses of hypertension, headaches, and gout for the applicant's father and diabetes II, vertigo, and back pain for the applicant's mother. It is also noted that the physician's letter, dated December 22, 2011, also states that the applicant's parents were undergoing further studies due to the primary diagnoses. The record contains medical test results, but no documentation asserting the impact of these studies on the primary diagnoses. Absent an explanation in plain language from the treating physician of the nature and severity of any condition and a description of any treatment or family assistance needed, the AAO is not in the position to reach conclusions concerning the severity of a medical condition or the treatment needed.

The applicant's father asserts that he would not be able to gain employment in Mexico, due to his age and that he would not be able to pay his or the applicant's debts in the United States upon relocation. It is noted that the record does not contain any information concerning any of the applicant's parents' debts in the United States or the extent to which they are contributing to the applicant's outstanding debts. There is also no information concerning the extent to which the applicant's parents' family members would and could contribute to their finances, as necessary. Going on record without supporting documentary evidence generally is not sufficient for purposes of meeting the burden of proof in these proceedings. *See 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)). It is noted that the applicant's parents are both natives of Mexico.

It is noted that the applicant's son does not make any assertions concerning any hardship he would experience if he relocated to Mexico. The applicant's daughter asserts that the economy in Mexico is tragic and that she worries about her parents' safety in Mexico. It is noted that the applicant's children are natives of the United States. The record contains the U.S. Department of State's travel warning concerning Mexico, including a statement to defer non-essential travel to Ciudad Juarez, where the applicant is currently residing. The record does not contain any updated information concerning Mexico's economy. It is also noted that the applicant's daughter states that she and her brother do visit the applicant in Mexico, though not often. The applicant's father also visits the applicant in Mexico and contemplates whether or not to relocate to Mexico to reside with the applicant. In the aggregate, the evidence is insufficient to find that the applicant's qualifying relatives would suffer exceptional and extremely unusual hardship upon relocation to Mexico.

In this case, the record does not contain sufficient evidence to show that denial of the present waiver application would result in exceptional and extremely unusual hardship for the applicant's family. As the applicant has not established the requisite level of hardship, the applicant has not shown that he qualifies for a favorable exercise of discretion. 8 C.F.R. § 212.7(d).

In proceedings for application for waiver of grounds of inadmissibility under sections 212(a)(9)(B)(v) and 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden.

The applicant filed a Form I-212, which was denied concurrently with his Form I-601 on March 26, 2010. 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. *Matter of Martinez-Torres,* 10 I&N Dec. 776 (Reg. Comm. 1964). As the applicant is inadmissible under sections 212(h) and 212(a)(9)(B)(v) of the Act, no purpose would be served in granting the applicant's Form I-212 application. The appeal will therefore be dismissed.

ORDER: The appeal is dismissed.