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

U.S. Citizenship and Immigration Services

(b)(6)

DATE: AUG 0 5 2015

FILE:
APPLICATION RECEIPT:

IN RE:

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

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Tampa, Florida and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the waiver application will be approved.

The applicant is a native and citizen of Cuba. In a decision dated July 15, 2014, the Field Office Director found that the applicant was inadmissible under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of committing crimes involving moral turpitude. The Field Office Director indicated that the applicant requires a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h). However, the Field Office Director concluded that the applicant did not establish that his qualifying spouse would experience extreme hardship, and therefore he was ineligible for a waiver under section 212(h) of the Act. The Application for Waiver of Grounds of Inadmissibility (Form I-601) was denied accordingly.

On appeal, the applicant, through counsel, asserts that the Field Office Director erred in denying the applicant's waiver application, claiming that his U.S. citizen spouse and legal permanent resident parents will experience hardships that considered together amount to extreme hardship.

The record contains, but is not limited to: an appeal brief and other correspondence from the applicant's attorneys; a psychological evaluation; letters from the applicant and his spouse (one with an attached written summary of their expenses); letters from family and friends; identification documents for the applicant; a copy of their Florida Resale Certificate for Sales Tax for their business; documentation from the Florida Department of children and families; a receipt for their rent; country condition documentation for Cuba; other applications and petitions; documentation of birth, marriage, residence, and citizenship; and criminal records. The entire record was reviewed and considered in rendering this decision.

We will first address the finding of inadmissibility. Section 212(a)(2)(A)(i)(I) 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.

The Board of Immigration Appeals (Board) 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.)

For cases arising in the Eleventh Circuit, the determination of whether a conviction is a crime involving moral turpitude begins with a categorical inquiry that "depends upon the inherent nature of the offense, as defined in the relevant statute, rather than the circumstances surrounding a defendant's particular conduct." *Itani v. Ashcroft*, 298 F.3d 1213, 1215-16 (11th Cir. 2002); *see also Vuksanovic v. U.S. Att'y Gen.*, 439 F.3d 1308, 1311 (11th Cir. 2006) (citing *Taylor v. United States*, 495 U.S. 575, 600 (1990)); *Sosa-Martinez v. U.S. Att'y Gen.*, 420 F.3d 1338, 1342 (11th Cir. 2004). However, where the statute under which an alien was convicted is "'divisible'—that is, it contains some offenses that are [crimes involving moral turpitude] and others that are not[,] . . . the fact of conviction and the statutory language alone are insufficient to establish . . . under which subpart [the alien] was convicted." *Jaggernauth v. U.S. Att'y Gen.*, 432 F.3d 1346, 1354-55 (11th Cir. 2005). Under such circumstances, "the record of conviction – i.e., the charging document, plea, verdict, and sentence – may also be considered." *Fajardo v. U.S. Att'y Gen.*, 659 F.3d 1303, 1305 (11th Cir. 2011) (citing *Jaggernauth*, *supra*, at 1354-55). The Eleventh Circuit does not permit inquiry beyond the record of conviction. *See Fajardo*, *supra*, at 1310 (11th Cir. 2011) (rejecting *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)).

On [redacted] 2007, the applicant pled guilty to resisting an officer with violence to his or her person and to resisting an officer without violence to his or her person in violation of Sections 843.01 and 843.02 of the Florida Statutes for acts which were committed on or about March 21, 2006. On [redacted], 2007, the applicant was sentenced to 1 year of probation, fines, anger management classes, and community service.

At the time of the applicant's conviction, Section 843.01 of the Florida Statutes stated in part:

> Whoever knowingly and willfully resists, obstructs, or opposes any officer as defined in s. 943.10(1), (2), (3), (6), (7), (8), or (9); ...or other person legally authorized to execute process in the execution of legal process or in the lawful execution of any legal duty, by offering or doing violence to the person of such officer or legally authorized person, is guilty of a felony of the third degree...

At the time of the applicant's conviction, Section 843.02 of the Florida Statutes stated in part:

> Whoever shall resist, obstruct, or oppose any officer as defined in s. 943.10(1), (2), (3), (6), (7), (8), or (9); ...or other person legally authorized to execute process in the execution of legal process or in the lawful execution of any legal duty, without offering or doing violence to the person of the officer, shall be guilty of a misdemeanor of the first degree...

Assault on a law enforcement officer has been found to be a crime involving moral turpitude where the perpetrator knows the victim to be a law enforcement officer performing his official duty and the assault involves some additional aggravating factor, such as bodily injury to the officer. *See Matter*

of Danesh, 19 I&N Dec. 669 (BIA 1988) (distinguishing cases in which knowledge of the police officer's status was not an element of the crime and where bodily injury or other aggravating factors were not present to elevate offense beyond "simple" assault); *Matter of Logan*, 17 I&N Dec. 367, 368-69 (BIA 1980) (holding that a conviction for interference with a law enforcement officer rose above the level of simple assault because the defendant had "knowingly threatened to employ deadly physical force" by pulling a knife on the officer.); *Matter of O-*, 4 I&N Dec. 301 (BIA 1951) (finding that violation of a German law involving an assault on a police officer was not a crime involving moral turpitude because knowledge that the person assaulted was a police officer engaged in the performance of his duties was not an element of the crime); *Matter of B-*, 5 I&N Dec. 538 (BIA 1953) (*as modified by Matter of Danesh*, 19 I&N Dec. at 672-73.) (concluding that assault on prison guard was not a crime involving moral turpitude because offense charged appeared to be only "simple" assault and no bodily injured was alleged); *Ciambelli ex rel. Maranci v. Johnson*, 12 F.2d 465 (D. Mass 1926) (finding that assault on an officer was not a crime involving moral turpitude in spite of fact that defendant was armed with a razor because the razor was not used in the assault). The Board found in *Matter of B-* that a defendant who was convicted of assaulting a prison guard with knowledge that the guard was engaged in his lawful duties had not been convicted of a crime involving moral turpitude because the offense was similar to simple assault and did not involve the use of a weapon. 5 I&N Dec. at 541.

In *Cano v. U.S. Att'y Gen.*, the Eleventh Circuit found that a conviction for resisting an officer with violence to his or her person in violation of Fla. Stat. § 843.01 is categorically a crime involving moral turpitude. 709 F.3d 1052 (11th Cir. 2013). The court noted that to be convicted under section 843.01, a defendant must have "(1) knowingly (2) resisted, obstructed, or opposed a law enforcement officer (3) who was in the lawful execution of any legal duty (4) by offering or doing violence to his person." *Id.* at 1054 (quoting *Yarusso v. State*, 942 So.2d 939, 942 (Fla. 2d DCA 2006)). Additionally, the court noted that "the intent requirement . . . applies to both resisting arrest and the offer or use of violence." *Id.* (citing *U.S. v. Romo-Villalobos*, 674 F.3d 1246 (11th Cir. 2012)). Noting that Florida courts have distinguished a conviction under section 843.01 from other crimes against law enforcement officers, such as simple assault, the court explained that section 843.01 requires more than mere unwanted touching but instead "involves the use or threat of physical force." *Id.* Therefore, the court found that "because Fla. Stat. § 843.01 requires intentional violence against an officer, it criminalizes 'conduct [that] exhibits a deliberate disregard for the law, which we consider to be a violation of the accepted rules of morality and the duties owed to society.'" *Id.* (quoting *Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988)).

Florida courts have found that "violence is a necessary element of the offense" of resisting arrest under Fla. Stat. § 843.01. *U.S. v. Romo-Villalobos*, 674 F.3d 1246, 1249 (11th Cir. 2012) (citing *Rawlings v. State,* 976 So.2d 1179, 1181 (Fla. 5th DCA 2008)); *see also Walker v. State,* 965 So.2d 1281, 1284 (Fla. 2d DCA 2007). Therefore, a conviction under Fla. Stat. § 843.01 cannot occur "from a passive resistance to arrest" but instead must involve "assault by force or violence on an arresting officer." *Danesh* at 672; *see also Harris v. State*, 5 So. 3d 750, 751 (Fla. Dist. Ct. App. 2009) ("Offering to do violence plainly involves the 'threat of physical force or violence' while actually doing violence plainly involves the 'use . . . of physical force or violence.'") As noted above, the conviction also requires that a defendant knew that his victim was a police officer engaged in his lawful duties. *Cano* at 1054. Accordingly, the conviction rises above the level of simple assault to require both knowledge of the police officer's status and the aggravating factor of intentional use or threatened use of physical violence. *Id.* Therefore, we find that a conviction under

Fla. Stat. § 843.01 is categorically a crime involving moral turpitude which renders an alien inadmissible under section 212(a)(2)(A)(i)(I) of the Act. We will not address whether Section 843.02 of the Florida Statutes represents a crime involving moral turpitude, given that the applicant's conviction pursuant to Fla. Stat. § 843.01 is categorically a crime involving moral turpitude.

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

> (h) The Attorney General [Secretary of the Department of Homeland Security (Secretary)] 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 [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
> >
> > (ii) 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 [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 . . .

A section 212(h) waiver of the bar to admission resulting from a violation of section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant is not a consideration under the statute and will be considered only to the extent that it results in hardship to a qualifying relative. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Moralez*, 21 I&N Dec. 296 (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 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, 883 (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 *Mower 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.*

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., Matter of 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). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. *See Salcido-Salcido*, 138 F.3d 1292, 1293 (9th Cir. 1998) (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *but see Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

With regard to the hardship the applicant's qualifying spouse would experience upon separation, the qualifying spouse asserts that she could not bear to be apart from the applicant and that she could not leave him in a country where he would fear for his safety and wellbeing. She describes the emotional support that the applicant provides her with respect to her career, and their dreams of growing a business and having children. She describes that the applicant's immigration problems have devastated her and she has suffered from a lack of energy and has been sleeping often as an escape. She also describes her childhood, which involved moving to the Netherlands when she was nine years old and then to the Netherland Antilles when she was thirteen years old. Both she and the

psychological evaluation indicate that she had difficulties separating from her family and friends with each relocation. The qualifying spouse also describes how these experiences made her quiet and introverted, and indicates that the applicant helped her to open up and to not shut down around people. The psychological evaluation confirms that the applicant is severely depressed, that she is experiencing anxiety, and that she was also diagnosed with adjustment disorder. In addition, the applicant's parents, who are also qualifying relatives, indicate that they will suffer emotional hardships if the applicant must return to Cuba. The applicant's father indicates that he has "gone into a depressive state" and his blood pressure has risen since the applicant's waiver was denied. He asserts that the applicant is the only person who could help him with any problems. The applicant's mother also indicates that she is suffering and has been tormented by the fact that her son may have to return to Cuba. She explains that she had been separated from her son (who is her only child) for ten years before she was able to come to the United States, and she indicates that he is her only support as well.

The applicants parents' claims that they will experience hardship without the applicant present are not supported by evidence of record. Little weight can be afforded to assertions in the absence of supporting evidence. See *Matter of Kwan*, 14 I&N Dec. 175 (BIA 1972) ("Information in an affidavit should not be disregarded simply because it appears to be hearsay; in administrative proceedings, that fact merely affects the weight to be afforded it."). 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)). As such, we cannot find that the applicant has shown his parents will experience extreme hardship upon separation.

The qualifying spouse also asserts that she relies upon the applicant financially. She states that the applicant earns more than her and that she would be unable to handle their financial burden, including their financial debt, by herself. She states that she started a job recently with the State of Florida, but that she is still on probation. She indicates that before she found this position, the applicant was her sole financial support. The applicant indicates that he works installing showers and mirrors. The psychological evaluation also indicates that the qualifying spouse would be unable to pursue their retail business without the applicant's help, which has been the qualifying spouse's dream since she was 15 years old. The psychological evaluation also indicates that she would be unable to afford to visit the applicant in Cuba. While the qualifying spouse provides a detailed list of her income and expenses, she provides limited objective documentation of her financial situation. Proof of their business and of their rent expense, however, was submitted.

Nonetheless, considering the evidence in the aggregate, including documentation on the spouse's psychological issues, her dependence on the applicant, and her concern for the applicant, which is based on objective evidence on country conditions, as well as evidence of potential financial hardships, the record establishes the applicant's spouse would suffer extreme hardship as a result of her separation from the applicant.

With respect to the potential hardship that the spouse could encounter upon relocation to Cuba, the spouse states that she was born in the United States, is close with family members in the United States, including her grandparents and her husband's family members, and she has no family ties to Cuba. In addition to her own letters, letters from family members and friends were provided to confirm the close nature of the relationship that the qualifying spouse has with them. She states that

relocation will be extremely difficult for her because it would mean that she would have to leave her government job, which is affording them health benefits and a retirement plan, and that she would be unable to find employment in Cuba. She asserts that she also dreams of growing their retail business, as aforementioned, and describes how she and the qualifying spouse have started a small business selling retail items at flea markets. The qualifying spouse also indicates that she is concerned about relocating to Cuba where she would not have the same freedoms, where resources are scarce, such as food, and where her safety may be threatened as a U.S. citizen. The record contains a 2012 Country Report for Cuba describing the issues in Cuba. While relations between the United States and Cuba have improved, we will take notice that Cuba still faces many political, economic, and human rights issues and problems, and that if the applicant's spouse relocated to Cuba she could potentially lose freedoms that she currently enjoys in the United States. Furthermore, the record demonstrates that the spouse has had difficulties relocating in the past, and that she would experience similar difficulties as an adult. Therefore, the record shows that the spouse will suffer extreme hardship in the event of relocation to Cuba.

Considered in the aggregate, the applicant has established that his spouse would face extreme hardship if the applicant's waiver request is denied.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Id.* at 299. The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

In *Matter of Mendez-Moralez*, in evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the BIA stated that:

> The factors adverse to the applicant include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature, recency and seriousness, and the presence of other evidence indicative of an alien's bad character or undesirability as a permanent resident of this country. . . . The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where the alien began his residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value and service to the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends, and responsible community representatives).
> *Id.* at 301.

The BIA further states that upon review of the record as a whole, a balancing of the equities and adverse matters must be made to determine whether discretion should be favorably exercised. The equities that the applicant for relief must bring forward to establish that he merits a favorable

exercise of administrative discretion will depend in each case on the nature and circumstances of the ground of exclusion sought to be waived and on the presence of any additional adverse matters, and as the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence. *Id.* at 301.

The unfavorable factors in this matter are the applicant's criminal convictions. The favorable factors in this matter are the extreme hardships the applicant's U.S. citizen spouse would face if the applicant is not granted this waiver, whether she accompanied the applicant or remained in the United States; the applicant's ties to the United States, including to his legal permanent resident parents, grandmother, aunts, cousin and friends; and the passage of 8 years since the events which led to his criminal convictions.

Although the applicant's criminal violations are serious, the record establishes that the positive factors in this case outweigh the negative factors and a favorable exercise of discretion is warranted.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met.

ORDER: The appeal is sustained.