

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Massachusetts Avenue NW, Rm. 3000
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

H2

FILE: [REDACTED]

Office: LOS ANGELES

Date: DEC 04 2008

IN RE: [REDACTED]

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

ON BEHALF OF APPLICANT:
[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).


John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Los Angeles, California. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of El Salvador who was determined to be inadmissible to the United States 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 crimes involving moral turpitude (receiving stolen property, petty theft, and infliction of corporal injury on a spouse). The applicant is the husband of a U.S. citizen and the beneficiary of an approved Petition for Alien Relative. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with his wife and children.

The district director concluded that the applicant had been convicted of a crime of violence and therefore was required to demonstrate that exceptional and extremely unusual hardship would be imposed on a qualifying relative to warrant a favorable exercise of discretion. The director determined that the applicant had not established such hardship would be imposed and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated August 24, 2006.

On appeal, counsel asserts that U.S. Citizenship and Immigration Services (USCIS) erred in determining that the applicant was required to meet a heightened standard of hardship to a qualifying relative because of his conviction of infliction of corporal injury on his spouse. *See Counsel's Brief in Support of Appeal* at 5. Counsel states that the applicant's conviction was not for a "violent or dangerous crime," and that USCIS erred in applying the heightened standard set out in *Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002), and 8 C.F.R. § 212.7(d), without first making this determination. *Brief* at 7. Counsel maintains that the applicant's domestic violence conviction can be distinguished from the manslaughter conviction of the respondent in *Matter of Jean*, and relies on *Rivas-Gomez v. Gonzales*, 441 F.3d 1072 (9th Cir. 2006), to support an assertion that USCIS erred in failing to make a determination based on the facts underlying the applicant's conviction. *Brief* at 7. Counsel further asserts that USCIS erred in presuming that a "crime of violence" as defined in 18 U.S.C. § 16 is equivalent to a violent or dangerous crime. *Brief* at 8. Counsel further maintains that the applicant's spouse and children, particularly his two sons who suffer from learning disabilities and Attention Deficit Hyperactivity Disorder (ADHD), would suffer extreme emotional and financial hardship if the applicant were removed from the United States. *Brief* at 12-14.

In support of the waiver application and appeal, counsel submitted the following documentation: declarations from the applicant's two daughters and three sons and copies of their school records; letters from the doctor treating two of the applicant's sons for ADHD and lists of the medications prescribed to them; annual reports concerning the individualized education programs for the applicant's two sons with learning disabilities; a declaration from the applicant's wife; background information on Attention-deficit/ Hyperactive disorder and on the medications prescribed to the applicant's sons; a declaration from the applicant's mother and a copy of her permanent resident card; a letter from the applicant's mother's doctor; a declaration from the applicant; copies of permanent resident cards, naturalization certificates, and birth certificates for the applicant's siblings and nieces and nephews; a letter from the church attended by the applicant and his family; copies of income tax returns for the applicant and his wife, and copies of family photographs. The entire record was reviewed and considered in rendering a decision on the appeal.

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

(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

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

The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I) of subsection (a)(2) . . . if-

(1)(A) [I]t is established to the satisfaction of the Attorney General that-

(i) [T]he 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 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.

The applicant was convicted of infliction of corporal injury of a spouse on July 28, 1998 in Los Angeles County, California and sentenced to 23 days home detention and 36 months probation. *See Municipal Court of California, Misdemeanor Advisement of Rights, Waiver, and Probation and Sentencing Form.* Willful infliction of corporal injury on a spouse, cohabitant, or parent of the perpetrator's child, in violation of section 273.5(a) of the California Penal Code, constitutes a crime involving moral turpitude. *Matter of Tran*, 21 I&N Dec. 291 (BIA 1996). Since less than 15 years has passed since March 19, 1998, the date of the criminal activity for which the applicant was last convicted, the applicant is statutorily ineligible for a waiver pursuant to section 212(h)(1)(A) of the Act. He is, however, eligible to apply for a waiver of inadmissibility pursuant to section 212(h)(1)(B) of the Act.

Section 212(h)(1)(B) of the Act provides that a waiver of the bar to admission resulting from section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

The district director found that the applicant was required pursuant to 8 C.F.R. § 212.7(d) to demonstrate exceptional and extremely unusual hardship to a qualifying relative because he was convicted of a violent or dangerous crime. *See Decision of the District Director* dated August 24, 2006. The director did not examine the specific facts involved in the applicant's conviction for infliction of corporal injury on a spouse, but rather concluded that since this offense is a "crime of violence" as defined in 18 U.S.C. § 16, it was a violent or dangerous crime. The U.S. Court of Appeals for the Ninth Circuit held that a determination of whether an offense is a violent or dangerous crime under 8 C.F.R. § 212.7(d) and *Matter of Jean, supra*, depends on the facts underlying the conviction. *Rivas-Gomez v. Gonzales*, 441 F.3d 1072 (9th Cir. 2006). The court stated:

The determination in *Jean* was fact-based, not categorical. Moreover, in a subsequent decision the BIA specifically limited *Jean's* heightened waiver requirement to "dangerous or violent crimes."³ *In re K-A-*, 23 I&N Dec. 661, 666 (BIA 2004). Therefore, the IJ erred when he applied the "extreme hardship" standard without first making a determination based on the facts underlying [REDACTED]'s conviction that [REDACTED]'s crime was violent or dangerous. *Id.*

Section 273.5 of the California Penal Code provides, in pertinent part:

(a) Any person who willfully inflicts upon a person who is his or her spouse, former spouse, cohabitant, former cohabitant, or the mother or father of his or her child, corporal injury resulting in a traumatic condition, is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not more than one year, or by a fine of up to six thousand dollars (\$6,000) or by both that fine and imprisonment.¹

* * *

(c) As used in this section, "traumatic condition" means a condition of the body, such as a wound or external or internal injury, whether of a minor or serious nature, caused by a physical force.

The AAO notes that the crime the applicant was convicted of is a crime of violence as defined in 18 U.S.C. § 16 because it involves the use of physical force. The record does not establish, however, that the act committed by the applicant is a violent or dangerous crime. Pursuant to section 273.5(c) of the California Penal Code, infliction of a minor wound or injury can result in a conviction, and the record indicates that the applicant was convicted of a misdemeanor and imposed with a sentence of 30 days in prison, which was suspended. There is no indication that the injury inflicted on the applicant's spouse was serious in nature, and the AAO finds that the heightened standard set forth in 8 C.F.R. § 212.7(d) and *Matter of Jean, supra*, for violent or dangerous crimes is not applicable in the present case.

Matter of Cervantes-Gonzalez, 22 I&N Dec. 560 (BIA 1999), provides a list of factors the Board of Immigration Appeals deems relevant in determining whether an alien has established extreme hardship

¹ In the present case the applicant was charged and convicted of a misdemeanor rather than a felony pursuant to section 17(b)(4) of the California Penal Code.

pursuant to section 212(i) of the Act. These 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.* at 566. The BIA has further stated:

Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact 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. *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (citations omitted).

In addition, the Ninth Circuit Court of Appeals has held, "the most important single hardship factor may be the separation of the alien from family living in the United States," and, "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion." *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted). *See also Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to the BIA) ("We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.") (citations omitted). Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

U.S. court decisions have additionally held that the common results of deportation or exclusion are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). For example, in *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), the BIA held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In addition, in *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), the court held that the common results of deportation are insufficient to prove extreme hardship and defined "extreme hardship" as hardship that was unusual or beyond that which would normally be expected upon deportation. In *Hassan v. INS*, *supra*, the court further held that the uprooting of family and separation from friends does not necessarily amount to extreme hardship, but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported. Moreover, the U.S. Supreme Court additionally held in *INS v. Jong Ha Wang*, 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

In the present case, the record reflects that the applicant is a forty-two year-old native and citizen of El Salvador who initially entered the United States without inspection in 1983, when he was seventeen years old. In addition to his conviction for spousal abuse, he was convicted of petty theft in 1990, receiving stolen property in 1986, and driving under the influence in March 1998. The applicant married his wife, a thirty-eight year-old native of Mexico and citizen of the United States, in 1990. They currently reside in California with their five children.

Counsel asserts that the applicant's spouse and children would suffer emotional and financial hardship if the applicant were removed to El Salvador. Counsel states that the applicant's two sons would suffer particular hardship from being separated from their father because they have both been diagnosed with ADHD and have learning disabilities. Evidence submitted in support of the appeal indicates that the applicant's son [REDACTED] who is now sixteen years old, was performing several years below his grade level in reading, written expression, and math. *See Individualized Education Program for [REDACTED] dated November 16, 2006.* Documentation on the record indicates that when interviewed for his specialized program, [REDACTED] stated that his main goal was continuing with his schooling and graduating, and further stated, "it's tough for me to think about college when I'm not even sure I can make it through high school." *Id.* The education plan indicates that [REDACTED] was reading at the 2.5 grade level when in the ninth grade, and he stated that his goal was to develop the ability to read at the sixth grade level so he could be eligible for a truck-driving career, and also stated that he would need help with financial tasks such as managing a bank account and filing tax returns if he wants to live independently after high school. *Id.*

A letter from [REDACTED]'s doctor states that he is being treated for ADHD and a learning disability and has been prescribed medication and psychotherapy. *See letter from [REDACTED] dated November 13, 2006.* Information on ADHD submitted with the waiver application states that children and adults with the disorder often struggle with low self-esteem, troubled personal relationships and poor performance in school or at work." *See MayoClinic.com, "Attention-deficit/hyperactivity disorder (ADHD).* Further, although the drugs often prescribed for ADHD can relieve symptoms, they do not cure the disorder, and "[c]ounseling, special accommodations in the classroom, and family and community support are other key parts of treatment." *Id.*

Declarations from the applicant's children state that the applicant spends time with his family and takes his children to play soccer. *See declarations of [REDACTED] and [REDACTED].* [REDACTED] states that he plays soccer with the applicant and rides dirt bikes with him, and that if the applicant were deported, he would be upset and depressed. *See declaration of [REDACTED]*

The applicant's wife states in her declaration:

Both [REDACTED] and [REDACTED] are very attached to [REDACTED]. When [REDACTED] has to work on the weekends as a truck driver, he would take either [REDACTED] or [REDACTED] with him. I [REDACTED] and [REDACTED] would argue with each other to see who's [sic] turn it was to go with their father. Sometimes [REDACTED] takes the boys to "guy things" such as play basketball at the park.

The applicant's wife further states that the applicant has been "the main breadwinner of the family" since they married in 1990, and without him she would not be able to support the family and they would lose their home. *See declaration of [REDACTED] dated May 25, 2005.* Income tax returns submitted with the waiver application indicate that the applicant's income from driving a truck was the family's only income from 2001 to 2003.

Significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate, are relevant factors in establishing extreme hardship. The record contains evidence that the applicant's sons are being treated for ADHD, a condition that can lead to low self-esteem and difficulty with school and work. The applicant's younger son, who is now sixteen

years old, has particularly serious learning disabilities and he needs special accommodations to improve his performance in reading, writing, and math so that he can graduate from high school and obtain employment as an adult. It appears that in light of this condition, and his close relationship to the applicant, he would experience significant emotional hardship if he were separated from the applicant. This emotional hardship, combined with the financial hardship resulting from the loss of the applicant's income, would be unusual or beyond that which would normally be expected upon deportation or exclusion and would amount to extreme hardship if the applicant were removed from the United States.

The applicant's wife states that if the applicant were removed to El Salvador, she would remain in the United States with their children, "who need to continue with their education in the U.S." She states that none of her children can read or write in Spanish, they have never been to El Salvador, and they would suffer from being in a strange country, separated from their friends, family, and school. *See Declaration of [REDACTED]* at 3. The BIA has held that total acclimation to life in the United States can result in extreme hardship for children if they relocate to their parent's home country, especially for a teenager who has not mastered the language of that country. *See Matter of Kao and Matter of Lin*, 23 I&N Dec. 45 (BIA 2001). Further, conditions in El Salvador are still being affected by a series of earthquakes in 2001, and as a result, TPS for Salvadoran nationals has been extended. The extension was found to be warranted because there continues to be a substantial, but temporary, disruption of living conditions in El Salvador resulting from the series of earthquakes that struck the country in 2001, and because El Salvador remains unable, temporarily, to adequately handle the return of its nationals. Extension of the Designation of El Salvador for Temporary Protected Status, 73 Fed. Reg. 57128 (October 1, 2008). It was determined that reconstruction of damaged infrastructure has not been completed and "[t]ransportation, housing, education, and health sectors are still suffering from the 2001 earthquakes." *Id.* The economic hardship resulting from conditions in El Salvador, combined with emotional hardship caused by separation from their home, friends, and family in the United States and having to adjust to life and schooling in a foreign country, would rise to the level of extreme hardship for the applicant's children.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In *Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996), the BIA held that establishing extreme hardship and eligibility for a waiver does not create an entitlement to that relief, and that extreme hardship, once established, is but one favorable discretionary factor to be considered. In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

In evaluating whether section 212(h) relief is warranted in the exercise of discretion, the factors adverse to the alien 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 and seriousness, and the presence of other evidence indicative of the 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 alien began 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 or service in 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). *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then “balance the adverse factors evidencing an alien’s undesirability as a permanent resident with the social and humane considerations presented on the alien’s behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country.” *Id.* at 300. (Citations omitted).

The unfavorable factors in this matter are the applicant’s criminal history and his unlawful entry into the United States. The favorable factors in this matter are the hardship to the applicant’s wife and children, in particular his son [REDACTED], if he is removed from the United States, the passage of over ten years since the applicant’s last arrest, the applicant’s history of employment and paying income taxes in the United States, the applicant’s length of residence in the United States, and the applicant’s family and property ties in the United States.

The AAO finds that applicant’s criminal conduct cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh this adverse factor, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h), the burden of establishing that the application merits approval remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. Accordingly, the previous decision of the district director will be withdrawn and the application will be approved.

ORDER: The appeal is sustained, the prior decision of the director is withdrawn, and the application for a waiver of inadmissibility is approved.