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U.S. Immigration and Citizenship Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CHICAGO, ILLINOIS Date: MAY 18 2010

IN RE: Applicant: [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:

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 $585. 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, Chicago, Illinois, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Mexico who was found 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 a crime involving moral turpitude. The applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h). The director denied the waiver application, finding that the applicant failed to establish that his admission would impose extreme hardship on a qualifying relative. *Decision of the District Director*, dated August 22, 2006. The applicant filed a timely appeal.

On appeal, counsel contends that the director should have approved the waiver application under section 212(h)(1)(A). Counsel asserts that more than 15 years have passed since the applicant was convicted of the crime rendering him inadmissible under the Act; and he avers that the applicant has been rehabilitated and admitting him to the United States would not be contrary to the national welfare, safety, or security of the United States. Counsel declares that the applicant no longer consumes alcohol and is a productive member of his community. Counsel maintains that the applicant intends to financially support his daughter when she returns to school; is helping his adult son, who is recovering from drug abuse; and is supporting his minor son.

Section 212(a)(2) of the Act states that:

> (A)(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 shows that the applicant was convicted of reckless homicide (a class 4 felony) in Chicago, Illinois on May 16, 1983, and sentenced to two years imprisonment. The Appellate Court

of Illinois in *People v. Wilson*, 143 Ill.2d 236, 572 N.E.2d 937 (1991) states that a person is guilty of reckless homicide under Illinois law when three elements are proven beyond a reasonable doubt: "(1) that the individual was operating a motor vehicle; (2) that the individual unintentionally caused a death while operating the vehicle; and (3) that the acts which caused the death were performed recklessly so as to create a likelihood of death or great bodily harm to some person." *Id.* at 245. The Appellate Court further states that the term "recklessness" is defined in section 4-6 of the Criminal Code of 1961. That section provides:

> A person is reckless or acts recklessly, when he consciously disregards a substantial and unjustifiable risk * * *; and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.

Id. at 478.

Although the AAO is unaware of any published federal cases addressing whether the crime of reckless homicide in Illinois is a crime of moral turpitude, in *Matter of Medina*, 15 I&N Dec. 611, 613-14 (BIA 1976), the BIA analyzed the reckless homicide statute of Illinois, section 4-6 of the Criminal Code of 1961. The BIA analyzed the elements of section 4-6 of the Criminal Code of 1961, and held that the criminally reckless conduct defined by section 4–6 served as the basis for a finding of moral turpitude in an aggravated assault case. 15 I&N Dec. at 614. The BIA reasoned that when criminally reckless conduct requires a conscious disregard of a substantial and unjustifiable risk to the life or safety of others, although no harm was intended, the crime involves moral turpitude for immigration purposes. 15 I&N Dec. at 613-614. In view of the BIA's finding that the mental state of "recklessness" under the reckless homicide statute of Illinois, section 4–6 of the Criminal Code of 1961, involves moral turpitude, we find that the offense of reckless homicide under Illinois law constitutes 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 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 . . .

Section 212(h)(1)(A) of the Act provides that the Attorney General may, in his 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. Since the applicant's conviction occurred in 1983, which is more than 15 years ago, it is waivable under section 212(h)(1)(A)(i) of the Act.

Section 212(h)(1)(A)(ii) and (iii) of the Act requires that the applicant's admission to the United States not be contrary to the national welfare, safety, or security of the United States; and that the applicant establish his rehabilitation. Evidence in the record to establish the applicant's eligibility under section 212(h)(1)(A)(ii) and (iii) of the Act consists of letters, an affidavit, and documentation about the applicant's son's recovery from addiction. The applicant acknowledges in his affidavit dated September 16, 2006, that he is trying to help his oldest son stop using drugs and his daughter continue her education. In his letter dated November 15, 2005, the applicant declares that his U.S. citizen daughter is 29 years old and in the past received therapy for depression, and that she now wishes to finish her education as a Spanish teacher. He conveys that he has been financially supporting his sons, daughter, and grandchild. He asserts that his son has been attending therapy sessions at a hospital to overcome a drug addiction. The applicant conveys that if he returned to Mexico his son, who is a lawful permanent resident of the United States, may have a relapse. He avers that what he did in the past was wrong and affected his children and he does not wish to cause them further pain. The record shows that the applicant's son was in an addiction recovery program and that his family, including his mother and father, made a commitment to be involved in his rehabilitation. The applicant's daughter's letter dated September 15, 2006, conveys that the applicant no longer consumes alcohol, changed his life around, and is helping her and her brother. The applicant's son states in his letter dated September 18, 2006 that his father no longer consumes alcohol and lives a full life. He conveys that his father has helped him emotionally and financially and that without his father's support he may not have overcome his drug addition. In view of the record, which shows that the applicant regrets his wrongful acts and has not committed any crimes since, and that he has financially and morally supported his son and daughter, the AAO finds that the applicant has provided sufficient evidence to demonstrate that his admission to the United States is not contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated, as required by section 212(h)(1)(A)(ii) and (iii) of the Act.

Once eligibility for a waiver is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion in favor of the waiver. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296, 301 (BIA 1996). A favorable exercise of discretion is limited in the case of an applicant who has been convicted of a violent or dangerous crime. Specifically, 8 C.F.R. § 212.7(d) states:

> The Attorney General, 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 applicant's conviction for reckless homicide qualifies as a violent or dangerous crime under 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. 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.

In *Matter of Monreal-Aguinaga*, 23 I&N Dec. 56, 62 (BIA 2001), the BIA determined that exceptional and extremely unusual hardship in cancellation of removal cases under section 240A(b) of the Act is hardship that "must be 'substantially' beyond the ordinary hardship that would be expected when a close family member leaves this country." However, the applicant need not show that hardship would be unconscionable. *Id.* at 61. The AAO notes that the exceptional and extremely unusual hardship standard in cancellation of removal cases is identical to the standard put forth by the Attorney General in *Matter of Jean,* 23 I&N Dec. 373 (A.G. 2002), and codified at 8 C.F.R. § 212.7(d).

The BIA stated that in assessing exceptional and extremely unusual hardship, it would be useful to view the factors considered in determining extreme hardship. *Id.* at 63. In *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560, 565-66 (BIA 1999), the BIA provided a list of factors it deemed relevant in determining whether an alien has established the lower standard of extreme hardship. 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. The BIA added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not an exclusive list. *Id.*

In the instant case, the applicant must demonstrate that denial of admission would result in exceptional and extremely unusual hardship to a qualifying relative, who are the applicant's U.S. citizen daughter and lawful permanent resident son.

The applicant's son indicates in a letter dated September 18, 2006, that he has not used drugs for almost one year and probably could not have done this without his father's support. The record shows that when he was first admitted to the Addiction Recovery Center on October 3, 2005, [redacted] a counselor with the Addiction Recovery Center, diagnosed the applicant's son as

having a high relapse potential due to a history of unsuccessful attempts to control or stop a cocaine dependence; and she states that he needs to immerse himself in the recovery community. The applicant indicated that he financially supports his daughter while she attends college, that he financially supported his son and grandchild during his son's recovery from a drug addiction, and that he provides financial support to his youngest U.S. citizen child who was born out of wedlock. The applicant's daughter conveys that her father had a heart attack and receives therapy and that she is concerned that he will not receive the same treatment in Mexico that he has in the United States.

Family separation must be considered in determining hardship. We note that in *Salcido-Salcido v. INS,* 138 F.3d 1292 (9th Cir. 1998) the Ninth Circuit discussed the effect of emotional hardship on the alien and her husband and children as a result of family separation. The Ninth Circuit stated that "the most important single hardship factor may be the separation of the alien from family living in the United States" and that there must be a careful appraisal of "the impact that deportation would have on children and families." *Id.* at 1293. Furthermore, the Ninth Circuit indicated that "considerable, if not predominant, weight," must be attributed to the hardship that will result from family separation. *Id.* Although this case does not arise in the Ninth Circuit, we will give appropriate weight to the hardship of separation.

The asserted hardship factors in this case are emotional hardship as a result of separation from the applicant, concern about the applicant's well-being, and loss of financial support. The AAO notes that substantial weight is given to emotional hardship as a result of family separation. In view of the profound impact that the applicant has had on his son's recovery from addiction and his son's high relapse potential, the AAO finds that when all of the hardship factors are combined, including financial hardship, the applicant has demonstrated that they rise to the level of "exceptional and extremely unusual hardship," as required in 8 C.F.R. § 212.7(d).

With regard to joining the applicant to live in Mexico, counsel indicates in the appeal brief that the applicant's son and daughter have significant ties are to the United States, where they have a home, friends, counselors, doctors, and a job. Counsel contends that Mexico has high unemployment and that applicant and his children would not be able to support themselves there. He states that the applicant requires medical care due to a heart attack and that he does not have any specific skills that would qualify him for employment other than manual labor, which will exacerbate his condition. We note that the submitted billing statements do not convey that the applicant has a serious heart condition; however, the record shows that the applicant is 57 years old and has worked for many years as a laborer and now is a foreperson in the harvesting department of a mushroom company. Counsel avers that there is a concern that the applicant's oldest son may not obtain the type of counseling in Mexico that he receives in the United States. He conveys that the applicant's son remains in therapy and support groups and that the applicant helped fund his son's rehabilitation. The documentation in the record shows that the applicant's son continued to receive drug and alcohol group and individual treatment as of December 22, 2005. It contains his recovery plan, and the clinical resume/narrative summary reveals that the employer of the applicant's son was aware of and supportive of his treatment. We note that the applicant's income tax records for 2005 show his youngest son as a dependent.

The asserted hardship factors are lack of ties to Mexico, difficulty in obtaining employment that will adequately support the applicant's family members, the applicant's heart problems, and the concern

about the applicant's son not receiving counseling that is similar to what he has in the United States. The applicant's son conveys in the letter dated September 18, 2006, that he has not used drugs for almost one year. The drug counselor indicates that the applicant's son has a high relapse potential and needs to immerse himself in the recovery community. In light of those facts, we find that the applicant has demonstrated that if his son joined him to live in Mexico, which would remove him from the support system that helps him overcome his drug addiction, his son's hardship would rise to the level of "exceptional and extremely unusual hardship," as required in 8 C.F.R. § 212.7(d).

The applicant established his eligibility for a waiver under section 212(h)(1)(A) of the Act, and he has demonstrated that he merits a favorable exercise of discretion under 8 C.F.R. § 212.7(d). The appeal will be sustained.

ORDER: The appeal is sustained.