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

U.S. Citizenship
and Immigration
Services

[redacted]

H2

Date: AUG 09 2012 Office: SAN SALVADOR, EL SALVADOR FILE: [redacted]

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.

Thank you,

Michael Shumway

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting Field Office Director, San Salvador, El Salvador, and 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 found to be 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 crimes involving moral turpitude. The director stated that the applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h). The director concluded that the applicant had failed to establish that her bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On appeal, counsel submits evidence in which to support the argument that the applicant's husband will experience extreme hardship if the waiver is denied.

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.

The record of conviction reflects that on January 12, 1994, the applicant was convicted of "assault with a deadly weapon other than a firearm or by any means of force likely to produce great bodily injury" under Cal. Penal Code § 245(a)(1). The judge sentenced the applicant to serve 3 years of probation, and 90 days in jail. On November 23, 1993, the applicant was convicted of "carrying a concealed weapon on her person" in violation of Cal. Penal Code § 12025(a)(2), and was sentenced to serve 2 years of probation and 33 days in jail. On April 4, 2000, the applicant was convicted of "inflict corporal injury to spouse and/or roommate" in violation of Cal. Penal Code § 273.5(a), and sentenced to serve 3 years of probation and 4 days in jail.

The director found that the applicant was convicted of crimes involving moral turpitude. As counsel concedes on appeal that the applicant's convictions under Cal. Penal Code §§ 245(a)(1) and 273.5(a) are crimes involving moral turpitude, and the record does not show the finding of inadmissibility to be erroneous, we will not disturb the finding of the director.

The record establishes that the applicant has been convicted of crimes involving moral turpitude, rendering her inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The applicant was convicted of "assault with a deadly weapon other than a firearm or by any means of force likely to produce great bodily injury." The regulation at 8 C.F.R. § 212.7(d) provides:

> The Attorney General [Secretary, Department of Homeland Security], in general, will not favorably exercise discretion under section 212(h)(2) of the Act (8 U.S.C.

1182(h)(2)) to consent to an application or reapplication for a visa, or admission to the United States, or adjustment of status, with respect to immigrant aliens who are inadmissible under section 212(a)(2) of the Act in cases involving violent or dangerous crimes, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of the application for adjustment of status or an immigrant visa or admission as an immigrant would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the alien's underlying criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act.

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

Nevertheless, we will use the definition of a crime of violence found in 18 U.S.C. § 16 as guidance in determining whether a crime is a violent crime under 8 C.F.R. § 212.7(d), considering also other common meanings of the terms "violent" and "dangerous". The term "dangerous" is not defined specifically by 18 U.S.C. § 16 or any other relevant statutory provision. Thus, in general, we interpret the terms "violent" and "dangerous" in accordance with their plain or common meanings, and consistent with any rulings found in published precedent decisions addressing discretionary denials under the standard described in 8 C.F.R. § 212.7(d). 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." 67 Fed. Reg. at 78677-78.

The AAO finds that "assault with a deadly weapon other than a firearm or by any means of force likely to produce great bodily injury" is a violent crime. As we find that there are not national security or foreign policy considerations that would warrant a favorable exercise of discretion, the applicant must, in addition to the statutory requirement of proving extreme hardship, demonstrate that denial of admission would result in exceptional and extremely unusual hardship.

In *Matter of Monreal-Aguinaga*, 23 I& N Dec. 56, 62 (BIA 2001), the Board 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*, *supra*, and codified at 8 C.F.R. § 212.7(d).

The Board 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 Board 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 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 an exclusive list. *Id.*

We note that in *Monreal*, the Board provided additional examples of the hardship factors it deemed relevant for establishing exceptional and extremely unusual hardship:

> [T]he ages, health, and circumstances of qualifying lawful permanent resident and United States citizen relatives. For example, an applicant who has elderly parents in this country who are solely dependent upon him for support might well have a strong case. Another strong applicant might have a qualifying child with very serious health issues, or compelling special needs in school. A lower standard of living or adverse country conditions in the country of return are factors to consider only insofar as they may affect a qualifying relative, but generally will be insufficient in themselves to support a finding of exceptional and extremely unusual hardship. As with extreme hardship, all hardship factors should be considered in the aggregate when assessing exceptional and extremely unusual hardship.

23 I&N Dec. at 63-4.

In the precedent decision issued the following year, *Matter of Andazola-Rivas*, the Board noted that, "the relative level of hardship a person might suffer cannot be considered entirely in a vacuum. It must necessarily be assessed, at least in part, by comparing it to the hardship others might face." 23 I&N Dec. 319, 323 (BIA 2002). The issue presented in *Andazola-Rivas* was whether the Immigration Judge correctly applied the exceptional and extremely unusual hardship standard in a cancellation of removal case when he concluded that such hardship to the respondent's minor children was demonstrated by evidence that they "would suffer hardship of an emotional, academic and financial nature," and would "face complete upheaval in their lives and hardship that could conceivably ruin their lives." *Id.* at 321 (internal quotations omitted). The Board viewed the evidence of hardship in the respondent's case and determined that the hardship presented by the respondent did not rise to the level of exceptional and extremely unusual. The Board noted:

> While almost every case will present some particular hardship, the fact pattern presented here is, in fact, a common one, and the hardships the respondent has outlined are simply not substantially different from those that would normally be expected upon removal to a less developed country. Although the hardships presented here might have been adequate to meet the former "extreme hardship" standard for suspension of deportation, we find that they are not the types of hardship envisioned by Congress when it enacted the significantly higher "exceptional and extremely unusual hardship" standard.

23 I&N Dec. at 324.

However, the Board in *Matter of Gonzalez Recinas*, a precedent decision issued the same year as *Andazola-Rivas*, clarified that "the hardship standard is not so restrictive that only a handful of applicants, such as those who have a qualifying relative with a serious medical condition, will qualify for relief." 23 I&N Dec. 467, 470 (BIA 2002). The Board found that the hardship factors presented by the respondent cumulatively amounted to exceptional and extremely unusual hardship to her qualifying relatives. The BIA noted that these factors included her heavy financial and familial burden, lack of support from her children's father, her U.S. citizen children's unfamiliarity with the Spanish language, lawful residence of her immediate family, and the concomitant lack of family in Mexico. 23 I&N Dec. at 472. The Board stated, "We consider this case to be on the outer limit of the narrow spectrum of cases in which the exceptional and extremely unusual hardship standard will be met." *Id.* at 470.

An analysis under *Monreal-Aguinaga* and *Andazola-Rivas* is appropriate. *See Gonzalez Recinas*, 23 I&N Dec. at 469 ("While any hardship case ultimately succeeds or fails on its own merits and on the particular facts presented, *Matter of Andazola* and *Matter of Monreal* are the starting points for any analysis of exceptional and extremely unusual hardship.").

In rendering this decision, the AAO will consider all of the evidence in the record, which consists of divorce records, a marriage certificate, a naturalization certificate, criminal records, letters, medical and financial records, receipts, a lease agreement, a taxi cab driver's identification card, U.S. Department of State information on El Salvador, and other documentation.

The applicant stated in the letter dated July 9, 2010 that since her deportation her husband has been anxious, stressed, depressed, and sick. The applicant stated that she took care of her husband when she was in the United States. She conveyed that her husband is blind in one eye, which causes mobility problems, and takes medication for his vision. She asserted that in El Salvador 15 to 20 people are killed daily, and since her husband is a foreigner something bad might happen to him there.

The applicant's husband stated in the declaration dated July 7, 2010 that since the applicant's deportation on April 26, 2004 he has suffered emotional and financial hardship. He stated that the applicant helped increase his taxi business, but since her deportation he has not had enough money to support himself and the applicant, and has been too distracted to drive safely. He claimed to have sold his 14 vehicles for $95,000 in May 2005, and to have lived off the proceeds for over a year, and to have sold his house for $114,000 in December 2006. The applicant's husband stated that to save

money he now shares an apartment with a friend. He conveyed that he bought his own taxi cab in 2007 and that he supports the applicant because she has not been able to find work in El Salvador on account of her age and gender. He indicated that he cannot visit his wife often because he must work and that his income is supplemented by assistance he provides his disabled sister, her husband, and a disabled friend. He stated that his application to be an interpreter in Iraq for the U.S. Army in 2006 failed because he could not pass the physical examination. The applicant's husband stated that he has high blood pressure, high cholesterol, is borderline diabetic, is blind in his right eye and has 20/80 vision with corrective lenses for his left eye. He asserted that his visits to an ophthalmologist every three months are covered by worker's compensation insurance, but does not know if coverage will transfer to El Salvador or if his medicines are available in El Salvador. He claims to pay out-of-pocket for dental and primary care visits. The applicant's husband asserted that all of his siblings reside legally in the United States and he has no children. He described having a close relationship with his wife. He stated that he has lived in the United States since 1978.

In the letter dated January 26, 2009, the applicant's husband stated that he met the applicant in June 1996 and lived with her for eight years before marrying on February 7, 2002. He stated that they divorced on April 22, 2003 and remarried on September 22, 2003. The applicant's husband asserted that in regard to his wife's domestic violence conviction, his wife drank more than her limit, and her condition was worsened because she had a thyroid disease. He claimed that they argued, and he called emergency because his wife had injured her finger with broken bottles. He stated that his wife was arrested after she was treated, and that he dropped the charges he filed against her. The applicant's husband described his wife as having a prior relationship with someone in October 1993.

The asserted hardship factors to the applicant's husband in relocating to El Salvador are lack of personal safety due to crime, concern about the availability and affordability of medicine in El Salvador, lack of family ties to El Salvador, and having lived in the United States since 1978. The submitted medical records are consistent with the applicant's husband's assertion of having health problems. He has mid-to-moderate chronic obstructive pulmonary disease, hypertension (controlled with medicine), hyperlipidemia (controlled with medicine), and glaucoma (controlled with medicine). The physician stated in the letter dated May 17, 2010 that the applicant's husband is under severe stress and anxiety, is blind in one eye and has deteriorating vision in his other eye, and is depressed due to separation from his wife. In addition, the U.S. Department of State report is in accord with the applicant's claim that violent crime is widespread in El Salvador and that not all medicines found in the United States are available in El Salvador, and that medicines often have a different brand name and are often more expensive than in the United States. *See* U.S. Department of State, Bureau of Consular Affairs, *Country Specific Information – 2010: El Salvador* (January 27, 2010). The claim that the applicant has not been able to work due to her age and gender is corroborated by receipts showing monthly financial support to the applicant by her husband from 2004 to 2010. Furthermore, the applicant's husband would be limited in obtaining employment in El Salvador due to his significant health problems. In sum, when the asserted hardship factors are considered in the aggregate, lack of personal safety due to crime, concern about the availability and affordability of medicine in El Salvador, lack of family ties to El Salvador, and having lived in the United States since 1978, we find they establish that the hardship to the applicant's husband in relocation to El Salvador is exceptional and extremely unusual hardship.The asserted hardship factors to the applicant's husband in remaining in the United States while his wife lives in El Salvador are emotional and financial in nature. The assertion of financial hardship is substantiated

by the income tax records for 2009 reflecting the applicant's husband's income was only $9,912, receipts in the record establishing that the applicant's husband provides a substantial part of his income to financially support his wife in El Salvador, and financial records substantiating that the applicant's husband's sold his house and taxi business, and rents an apartment. The lease agreement dated July 1, 2009 reflects that the applicant's husband rents an apartment with three people, and the escrow officer's letter dated December 13, 2006 stated that the applicant's husband's proceeds from the sale of [redacted] was $82,841 and [redacted] share was $114,841. The letters from the escrow officer dated September 6, 2005 and September 8, 2005 indicate that the applicant's husband's sold personal property (goodwill and 15 taxicabs) in the amount of $140,000. Income tax records for 2009 reflecting the applicant's husband's income was only $9,912, and receipts in the record establishing that he provides a substantial part of his income to financially support his wife in El Salvador. The assertion of emotional hardship due to separation is consistent with the physician's letter dated May 17, 2010 in which he stated that the applicant's husband has severe stress and depression due to separation from his wife. When we consider the asserted factors in the aggregate, we find they do support a finding of exceptional and extremely unusual hardship.

The applicant has demonstrated that the hardships meet the "exceptional and extremely unusual hardship" standard as required in 8 C.F.R. § 212.7(d), and we find that there are extraordinary circumstances warranting a favorable exercise of discretion in this case.

In *Matter of Mendez-Moralez,* 21 I&N Dec. 296, 301 (BIA 1996), the Board stated that once eligibility for a waiver is established, it is one of the favorable factors to be considered in determining whether the Secretary should exercise discretion in favor of the waiver. Furthermore, the Board stated that:

> In evaluating whether section 212(h)(1)(B) 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).

Id. at 301.

The AAO must then, "[B]alance 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 adverse factors in the present case are the criminal convictions in 1993, 1994, and 2000 and any unlawful presence and unauthorized employment. The favorable factors in the present case are the "exceptional and extremely unusual hardship" to the applicant's husband, his letter commending the applicant's character, and the passage of 12 years since the applicant's last criminal conviction. The AAO finds that the crimes and immigration violations committed by the applicant are serious in nature, nevertheless, when taken together, the favorable factors in the present case outweigh the adverse factors, 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) of the Act, the burden of proving eligibility rests with the applicant. *See* section 291 of the Act. Here, the applicant has now met that burden. Accordingly, the appeal will be sustained and the waiver application will be approved.

ORDER: The appeal is sustained.