

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

(b)(6)



**U.S. Citizenship
and Immigration
Services**

Date: **FEB 25 2013** Office: LOS ANGELES, CA

FILE: [REDACTED]

IN RE: [REDACTED] 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:



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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".
Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Los Angeles, California, 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 pursuant to 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 committed crimes involving moral turpitude. The applicant's child is a U.S. citizen. He seeks a waiver of inadmissibility in order to reside in the United States.

The field office director found that the applicant had failed to establish extreme hardship to a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On appeal, counsel asserts that the applicant did not commit a crime involving moral turpitude and that his child would experience extreme hardship.

The record includes, but is not limited to, statements from the applicant and family members, statements of support, country conditions information on Mexico, financial records, and criminal records. The entire record was reviewed and considered in arriving at a decision on the appeal.

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

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

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

(ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime,

the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

The Board of Immigration Appeals (BIA) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

[M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general....

In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

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

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

If review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. 24 I&N Dec. at 699-704, 708-709. However, this “does not mean that the parties would be free to

present any and all evidence bearing on an alien's conduct leading to the conviction. (citation omitted). The sole purpose of the inquiry is to ascertain the nature of the prior conviction; it is not an invitation to relitigate the conviction itself." *Id.* at 703.

The record reflects that the applicant was convicted of inflicting corporal injury on a spouse in violation of California Penal Code § 273.5(a) on October 26, 1999 and December 3, 2002. The applicant was sentenced to one day and three years of summary probation and 60 days in jail and three years of summary probation respectively.

In 1999, California Penal Code § 273.5(a) stated:

- (a) Any person who willfully inflicts upon his or her spouse, or any person who willfully inflicts upon any person with whom he or she is cohabiting, or any person who willfully inflicts upon any person who is 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.

In 2002, California Penal Code § 273.5(a) stated:

- (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.

Counsel cites to *Morales-Garcia v. Holder*, 567 F.3d 1058 (9th Cir. 2009), in asserting that the applicant has not been convicted of a crime involving moral turpitude, as the court found that non-spousal relationships "embody a lesser level of commitment, trust and dependency than marriage." Counsel asserts that a conviction under California Penal Code § 273.5(a) is not categorically a crime involving moral turpitude; the modified categorical approach should be applied; the certified docket reports do not identify the identity of the victim; the record does not show that he caused injury to his spouse; and the applicant was not married to his spouse until 2007.

The case cited by counsel specifically finds that abuse of a cohabitant is not categorically a crime involving moral turpitude. *Morales-Garcia v. Holder*, at 1067. The AAO notes that there are several categories of relationships which would result in a conviction under California Penal Code § 273.5(a) and the criminal records before the AAO do not establish the applicant's relationship to his victim(s). The burden of proof is on the applicant to establish which category of the statute he was convicted under. Therefore, the AAO finds that the field office director was not in error in finding him inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

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

The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana

- (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 . . . ; and
- (2) the Attorney General [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

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.

As stated, the applicant was twice convicted of inflicting corporal injury on a spouse in violation of California Penal Code § 273.5(a). The applicant has been convicted of violent crimes pursuant to 8 C.F.R. § 212.7(d). A such, the AAO will assess whether he is entitled to a favorable exercise of discretion under section 212(h)(2) of the Act.

To establish eligibility for a waiver of inadmissibility in the present case, the applicant must show that "extraordinary circumstances" warrant its approval. 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. We note that the regulatory standard of exceptional and extremely unusual hardship found in 8 C.F.R. § 212.7(d) is more restrictive than the extreme hardship standard set forth in section 212(h) of the Act. *Cortes-Castillo v. INS*, 997 F.2d 1199, 1204 (7th Cir. 1993).

In *Matter of Montreal-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 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 *Monreal*, the BIA 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 BIA 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 BIA 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 BIA 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 BIA 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 BIA 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 BIA 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.

The AAO now turns to a consideration of whether the record establishes exceptional and extremely unusual hardship if the applicant's waiver application is denied.

Counsel asserts that: the applicant's son attends middle school; he has progressed well academically, but he was identified as having a specific learning disability (attention and auditory processing deficits, which impact his ability to learn, retain and apply academic concepts); he has been the beneficiary of an individualized education plan which provides specialized education and accounts for 50% of his time at school; specialized education is severely lacking in Mexico; he has been seen by his physician for pre-diabetes; diabetes has become Mexico's first cause of death and only 20% of those suffering from diabetes have their conditions properly monitored; the applicant's son has never been to Mexico; and he is close to his grandparents, aunts and uncles, and cousins in the United States.

The applicant's states that: his son's friends and school are in the United States; he would be a target to be picked on due to his communication issues; his schooling would be greatly affected; he would

suffer due to poverty in Mexico; there is a lack of jobs, especially for older men; and his son may be kidnapped or targeted by gangs for recruitment.

The psychologist who evaluated the applicant's child states that: he took bilingual education in early elementary school; he struggles with Spanish; he has no real written language skills in Spanish; he plays football and baseball for his school; due to his age and 21-year absence from Mexico, the applicant would have no opportunity to earn a living for his family; the applicant's child cries easily and worries often; and he is vulnerable to depression and his anxiety level is high.

The applicant's child has an individualized education plan; he has a learning disability that impedes his ability to meet grade-level standards; and he has deficits in attention and auditory processing, which impacts his ability to learn, retain and apply academic concepts. The record includes an article on special education in Mexico reflecting that no special education services are available for public secondary school students. The record includes information on human rights issues, the economy, kidnapping, gangs and schools in Mexico, although the information is from 2007 and earlier.

The record reflects that the applicant's older child is 15-years-old and he was born and raised in the United States. The record reflects that he is integrated into the American lifestyle and has some issues with the Spanish language. The AAO notes that the BIA found that a 15-year-old child who lived her entire life in the United States, was completely integrated into the American lifestyle and was not fluent in Chinese would suffer extreme hardship if she relocated to Taiwan. *Matter of Kao and Lin*, 23 I&N Dec. 45 (BIA 2001). The AAO notes, however, that the applicant's case involves a higher standard of hardship. The record reflects that the applicant's child has an individualized education plan for his learning issues and specialized education services are lacking in Mexico. In addition, the applicant's claims related to lack of employment are plausible. The AAO also notes the general country conditions, including safety issues in Mexico. Considering the hardship factors presented, and the normal results of relocation, the applicant's child would suffer exceptional and extremely unusual hardship upon relocating to Mexico.

The applicant's child states that he loves the applicant; the applicant is his best friend; the applicant helps him with his homework and problems with friends; he buys him things for school; and he helps him with baseball.

Counsel states that the applicant's spouse has a derivative application; both of the son's parents would not be allowed to remain in the United States; and he will lose the financial support from the applicant's job. The applicant's 2009 tax return reflects an income of nearly \$25,000. The psychologist states that the applicant's child is afraid that the applicant may be harmed or kidnapped in Mexico.

The record reflects that the applicant and his child are close to each other. In addition, the applicant's non-citizen spouse does not have lawful permanent resident status in the United States although she is pursuing an application based on her brother's petition for her. The AAO notes the loss of the applicant's income for his child as a significant hardship factor. In addition, the

applicant's child's concern for the safety of the applicant has merit. Considering the hardship factors presented, and the normal results of separation, the applicant's child would suffer exceptional and extremely unusual hardship upon remaining in the United States.

The AAO notes that a finding of exceptional and extremely unusual hardship also satisfies the extreme hardship requirement under section 212(h)(1)(B) of the Act. The AAO finds that the applicant merits a favorable exercise of discretion under section 212(h)(2) of the Act.

The AAO additionally finds that the applicant merits an overall favorable exercise of discretion. 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)(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).

See Matter of Mendez-Moralez, 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 adverse factors in the present case are the applicant's crimes, entry without inspection, unauthorized period of stay and unauthorized employment.

The favorable factors include the presence of the applicant's U.S. citizen child and lawful permanent resident parents, exceptional and extremely unusual hardship to his child, hardship to his parents, statements in support of the applicant's character and the lack of a criminal record in over 10 years.

The AAO finds that the violations committed by the applicant cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted.

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 met that burden. Accordingly, the appeal will be sustained and the waiver application will be approved.

ORDER: The appeal is sustained. The application is approved.