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



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Date: **DEC 07 2011** Office: VIENNA FILE:

IN RE: Applicant:

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:

SELF-REPRESENTED

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 \$630. 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,

Michael Shumway

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Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Vienna, Austria, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Croatia 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 been convicted of a crime involving moral turpitude. He seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen wife.

The field office director denied the Form I-601 application for a waiver, finding that the applicant failed to establish extreme hardship to a qualifying relative. *Decision of the Field Office Director*, dated March 11, 2010.

On appeal, the applicant's wife asserts that she is suffering hardship due to the applicant's inability to return to the United States. *Statement from the Applicant's Wife*, dated September 12, 2011.

The record contains, but is not limited to: statements from the applicant's wife; medical records for the applicant's wife; documentation in connection with the applicant's wife's employment in 2001 and earlier; and documentation of the applicant's criminal history. The entire record was reviewed and considered in rendering this decision.

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 shows that, for his conduct on December 12, 1988, the applicant pled guilty to one count of aggravated assault pursuant to Arizona Revised Statutes §§ 13-1203, 1204, 701, 702, 801, and 812. His crime was designated a class 3 felony, and he faced a maximum sentence of five years of incarceration. Arizona Revised Statutes § 13-701(C)(2). He was sentenced to four months of imprisonment and three years of probation.

At the time of the applicant’s conviction, Arizona Revised Statutes § 13-1203 stated:

A. A person commits assault by:

1. Intentionally, knowingly or recklessly causing any physical injury to another person; or
2. Intentionally placing another person in reasonable apprehension of imminent physical injury; or
3. Knowingly touching another person with the intent to injure, insult or provoke such person.

...

At the time of the applicant’s conviction, Arizona Revised Statutes § 13-1204 stated:

A. A person commits aggravated assault if such person commits assault as defined in § 13-1203 under any of the following circumstances:

1. If such person causes serious physical injury to another.
2. If such person uses a deadly weapon or dangerous instrument.

...

B. Aggravated assault pursuant to subsection A, paragraph 1 or 2 of this section is a class 3 felony except if the victim is under fifteen years of age in which case it is a class 2 felony punishable pursuant to § 13-604.01. Aggravated assault pursuant to subsection A, paragraph 7 of this section is a class 5 felony. Aggravated assault pursuant to subsection A, paragraph 3, 4, 5, 6 or 8 of this section is a class 6 felony.

As the applicant was convicted, in part, under Arizona Revised Statutes § 13-1204, and his crime was designated a class 3 felony, it is evident that his offense fell under Arizona Revised Statutes § 13-1204(A)(1) or (2). See Arizona Revised Statutes § 13-1204(B). Arizona Revised Statutes § 13-1204(A)(2) addresses an aggravated assault where the perpetrator “uses a deadly weapon or dangerous instrument.” There is ample support that assault with a deadly weapon constitutes a crime involving moral turpitude. See *Matter of Logan*, 17 I&N Dec. 367 (BIA 1980); *Matter of Medina*, 15 I. & N. Dec. 611, 614 (BIA 1976)(stating “assault with a deadly weapon is generally deemed to be a crime involving moral turpitude.”). Thus, convictions under Arizona Revised Statutes § 13-1204(A)(2) can be deemed categorically crimes involving moral turpitude.

Arizona Revised Statutes § 13-1204(A)(1) addresses aggravated assault where the perpetrator “causes serious physical injury to another” in the course of committing an assault as described by Arizona Revised Statutes § 13-1203. The Board of Immigration Appeals (BIA) has determined that assault that results in great bodily harm to another person can constitute a crime involving moral turpitude where the statute in question requires, at a minimum, intentional or reckless conduct, and where the required degree of resulting harm rises to a sufficiently egregious level. *In Re Solon*, 24 I. & N. Dec. 239, 244-45 (BIA 2007). Each assault described in Arizona Revised Statutes § 13-1203 requires, at a minimum, a reckless state of mind. See Arizona Revised Statutes §§ 13-1203(A)(1)-(3). Thus, the AAO turns to an analysis of the gravity of harm required to sustain a conviction under Arizona Revised Statutes § 13-1204(A)(1).

The BIA stated that “intentional conduct resulting in a meaningful level of harm, which must be more than mere offensive touching, may be considered morally turpitudinous. However, as the level of conscious behavior decreases, i.e., from intentional to reckless conduct, more serious resulting harm is required in order to find that the crime involves moral turpitude.” *In Re Solon*, 24 I. & N. Dec. at 242. In *In Re Solon*, the BIA found that all convictions for third degree assault under New York Penal Law § 120.00(1) constitute crimes involving moral turpitude. 24 I. & N. Dec. at 245. The BIA discussed degrees of harm that satisfy third degree assault under New York Penal Law § 120.00(1), noting that “the courts have required evidence of a certain objective level of pain (or impairment of physical condition) in order to sustain a charge of, or a conviction for, assault in the third degree.” *Id.* at 244. The BIA observed that New York courts have found that a bite on one’s hand with no evidence of pain or impairment, and general hitting and kicking were insufficient levels of harm to support a conviction for third degree assault. *Id.* Yet, the BIA noted that “there was sufficient evidence to support a conviction for third-degree assault where the record showed that the victim was struck repeatedly, sustaining bruises, scratches, and bite and rope marks, that she sought medical treatment after the incident, and that the bruises remained ‘very painful’ for a couple of days after the incident.” *Id.* (citing *People v. Rambali*, 813 N.Y.S.2d 103, 104 (N.Y. App. Div. 2006)).

The BIA indicated that New York Penal Law § 120.00(1) requires an “intent to cause physical injury”, which is a greater degree of criminal intent than recklessness. *Id.* at 243. However, Arizona Revised Statutes § 13-1204(A)(1) requires only recklessness. Pursuant to the reasoning of the BIA, a greater degree of minimum harm is required in order to find that offenses under Arizona Revised Statutes § 13-1204(A)(1) categorically involve moral turpitude. *In Re Solon*, 24 I. & N. Dec. at 242. However, the AAO finds the BIA’s analysis in *In Re Solon* instructive. The BIA found intentionally

causing "bruises [that] remained 'very painful' for a couple of days after the incident" sufficient to sustain a finding of moral turpitude. In comparison, "serious physical injury" is described by Arizona Revised Statutes § 13-105(39) as that which "includes physical injury that creates a reasonable risk of death, or that causes serious and permanent disfigurement, serious impairment of health or loss or protracted impairment of the function of any bodily organ or limb." The gravity of the harms described in Arizona Revised Statutes § 13-105(39) far surpasses bruises that remained very painful for several days. Thus, though Arizona Revised Statutes § 13-1204(A)(1) may be satisfied by a reckless state of mind, the AAO finds that the serious physical injury required rises to a level that supports a finding of turpitudinous conduct. Accordingly, all offenses under Arizona Revised Statutes § 13-1204(A)(1) constitute crimes involving moral turpitude.

Based on the foregoing, the applicant is inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude, and he requires a waiver under section 212(h) 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

(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 . . . ; 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.

Section 212(h)(1)(A) of the Act provides that the Secretary may, in her 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. An application for admission to the United States is a continuing application, and admissibility is determined on the basis of the facts and the law at the time the application is finally considered. *Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992).

The applicant's conviction for aggravated assault occurred over 15 years ago. However, the record shows that the applicant has been charged with driving under the influence of alcohol on multiple occasions, and he was convicted of one offense on or about August 23, 1993. The record shows that he was charged with two offenses relating to driving under the influence of alcohol for his conduct on or about February 9, 1999, one count of simple DUI, and one count of driving with a higher blood-alcohol content that places him in a more egregious level of misconduct. The applicant has not provided documentation to show the disposition of these charges. If the applicant was convicted of a crime involving moral turpitude within the preceding 15 years, he is not eligible for consideration for a waiver under section 212(h)(1)(A) of the Act. In such case, he must establish eligibility for a waiver under section 212(h)(1)(B) of the Act by showing that a qualifying relative will suffer extreme hardship upon denial of the application. However, even if the applicant establishes that he meets the requirements of section 212(h)(1)(B), we cannot favorably exercise discretion in the applicant's case except in an extraordinary circumstance. *See* 8 C.F.R. § 212.7(d).

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). Black’s Law Dictionary, Seventh Edition (1999), defines violent as “of, relating to, or characterized by strong physical force” and dangerous as “likely to cause serious bodily harm.” 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 a violation under Arizona Revised Statutes §§ 13-1204(A)(1) or (2), which proscribe an aggravated assault with at least a reckless state of mind, perpetrated with a deadly weapon or that causes serious physical injury to another, constitutes a violent and dangerous crime within the meaning of 8 C.F.R. § 212.7(d), and the heightened discretionary standards found in that regulation are applicable in this case.

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. *Id.* 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. *Id.*

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 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.

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.”). The AAO notes that exceptional and extremely unusual hardship to a qualifying relative must be established in the event that he or she accompanies the applicant or in the event that he or she remains in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant’s waiver request.

In a statement dated September 12, 2011, the applicant's wife indicated that she and the applicant have been married for 20 years. She explained that the applicant was diagnosed with diabetes and became a diabetic amputee while in Europe. She asserted that nationalized medicine in Croatia did not provide the level of care he would have had in the United States. She described her economic difficulty supporting the applicant, including that her working days were reduced which lowered her compensation. She stated that the applicant relocated to Nicaragua to reduce their costs so she could support him. She noted that the applicant is age 67 and she is age 62, and that she also suffers from health problems. She asserted that she has been treated for depression which required hospitalization. She indicated that she has also developed high blood pressure. She noted that she and the applicant do not have children or relatives, and that they solely depend on each other.

In a statement dated August 15, 2010, the applicant's wife explained that the applicant returned to Croatia due to medical problems. She expressed that separation from the applicant is emotionally difficult for her, and it's affecting her health. She asserted that she collapsed when she learned of the denial of the applicant's waiver application, and she was transported to an emergency room for treatment. She referenced a letter from her physician, and asserted that it shows that her emotional reaction to her circumstances is not normal.

In a statement dated April 3, 2010, the applicant's wife described her history of immigrating to the United States in the early 1970s. She explained that she has developed her career and roots in the United States, and that she would face difficulty returning to Europe. She explained that she would be unable to practice her profession of architectural lighting in Croatia or other parts of southern Europe. She noted that her ability to engage in employment is a matter of survival, as she and the applicant are relying on her income. The applicant's wife described her and the applicant's health problems, and she indicated that the applicant's leg was amputated on October 5, 2007 long after his arrival to Croatia.

The record contains documentation from an emergency department that states that the applicant's wife was treated on March 15, 2010 for chest pain, headache, and hypertension. The documentation notes that the applicant's wife's chest pain is due to poor blood flow around her heart and elevated blood pressure, and indicates that the treating medical providers recommended that the applicant's wife be admitted to a hospital yet she left against medical advice. The record contains a letter from the applicant's wife's physician, [REDACTED], dated March 31, 2010, who notes that the applicant's wife has been under her care since May 30, 2006 and that she has a history of anxiety and depression. [REDACTED] commented that the applicant's wife has an exaggerated response to her personal problems, notably the applicant's absence, and that the applicant's wife is on medication for blood pressure and anxiety and is extremely depressed. The record contains another note from [REDACTED] dated May 5, 2009, that confirms that the applicant's wife has been treated for anxiety and depression since 2006.

In a statement dated May 11, 2009, the applicant's wife expressed that she and the applicant have been married for a long time, and that their situation has caused her to live alone after 20 years of marriage. She noted that, as a religious Catholic, she would not be able to start again without the applicant. She described incidents of social awkwardness due to the absence of the applicant. Upon review, the applicant has shown that his wife will suffer exceptional and extremely unusual hardship should the present waiver application be denied. The record contains clear documentation to show that the applicant's wife, at age 61, suffers from significant physical and mental health problems for which she has received treatment over the course of at least five years. She has been treated for anxiety and depression, including emergency room care and recommended hospitalization for chest pain. A physician has drawn a connection between the stress of her separation from the applicant and her health problems, characterizing her as "stable, but extremely depressed." The AAO finds the applicant's wife's numerous statements and medical records to distinguish her physical and emotional condition from that which is commonly experienced by individuals who face the inadmissibility of a spouse.

The applicant's wife is enduring significant challenges due to her current separation from the applicant which has persisted since 2004. They have been married since 1989, and it is evident that unwillingly residing apart after many years of cohabitation creates significant emotional difficulty for the applicant's wife. She noted that they do not have children or other relatives, and it is evident that the lack of support from other family members exacerbates the hardship of separation from the applicant. The AAO observes that a complete lack of family support is an unusual circumstance.

The applicant's wife asserts that she and the applicant rely on her employment for economic support, and that the applicant's absence causes financial difficulty for her. The applicant has not presented any recent documentation of his or his wife's income, expenses, or employment. Thus, the AAO is unable to fully assess the economic impact their circumstances is having on his wife. However, due consideration is given to the applicant's wife's concerns. The applicant's wife discussed the applicant's health problems, including complications due to diabetes that resulted in an amputation. The applicant has not submitted medical documentation for himself, yet indications in the record reflect that he has had a leg amputated. It is evident that the applicant's health is a significant concern for his wife, and that she suffers psychological difficulty due to his inability to seek treatment in the United States.

Considering all stated elements of hardship in aggregate, the record supports that the applicant's wife will continue to suffer hardship if separated from the applicant that rises to an exceptional and extremely unusual level.

The record shows that the applicant's wife will also endure exceptional and extremely unusual hardship should she relocate to Croatia to maintain family unity. As discussed above, the applicant's wife is facing uncommon physical and mental health problems. She has been under the care of the same physician since 2006, and it is evident that she would face an interruption of the continuity of her treatment should she relocate abroad. The AAO acknowledges her concerns for the quality of healthcare in Croatia compared to the United States. As the applicant's wife was recommended for hospitalization for pain related to circulation around her heart, it is reasonable that quality healthcare is an important concern for her. She reported that the applicant's amputation could have been avoided with treatment in the United States. While this fact has not been supported by medical evidence in the record or reports comparing healthcare in Croatia to that of the United States, the AAO gives consideration to the emotional impact the applicant's experience with healthcare in Croatia has had on his wife.

The applicant's wife is a native of the Czech Republic, and she explained that she does not speak a local language in Croatia. It is evident that a lack of language ability would create challenges for her should she relocate to Croatia, particularly considering that she and the applicant are dependent on her ability to engage in employment. The applicant's wife expressed concern for her access to continued employment in her field of architectural lighting. While the record does not contain sufficient evidence to clearly support this contention, the AAO notes her concerns. The applicant's wife immigrated to the United States in 1977, and she has invested substantial effort in developing a career and integrating into life in the country, which gives weight to her concern that she would face unusual emotional and logistical difficulty now adapting to life in a foreign country.

It is noted that the applicant's inadmissibility under section 212(a)(2)(A)(i)(I) of the Act is a permanent bar to admission unless he obtains a waiver. Thus, his wife is faced with the potential of permanent separation from her husband or permanent relocation outside the United States. Considering all elements of hardship in aggregate, the record shows that the applicant's wife will suffer exceptional and extremely unusual hardship should she join the applicant abroad. 8 C.F.R. §

212.7(d). However, a finding of extraordinary circumstances is not necessarily sufficient to warrant a favorable exercise of discretion. *Id.*

The AAO finds that the applicant's past misconduct, and the unresolved concerns it raises as to future conduct if admitted, outweighs the favorable factors in his case. In determining whether a favorable exercise of discretion is warranted, the AAO generally engages in a traditional discretionary analysis and "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." *Matter of Mendez-Morales*, 21 I&N Dec. 296, 300 (BIA 1996)(Citations omitted).

The negative factors in this case consist of the following:

The applicant has been convicted of crimes, including at least one crime involving moral turpitude. The record shows that the applicant was convicted for driving under the influence of alcohol in 1993, and he was arrested for further driving under the influence offenses on February 9, 1999.

The positive factors in this case include:

The applicant's U.S. citizen wife will experience exceptional and extremely unusual hardship should he reside outside the United States. The record does not reflect that the applicant has engaged in criminal activity since 1999, in approximately 12 years. While the applicant has not provided adequate medical documentation to fully assess his physical health, there is an indication that he had a leg amputated, his wife asserted that he lacked advanced healthcare in Croatia, and he would benefit from healthcare in the United States. The applicant's wife explained that she and the applicant have no children or other family, and it is evident that they would both benefit physically and emotionally from being reunited.

The applicant's conviction for aggravated assault raises concern due to the violent nature of this crime. However, the offense occurred approximately 23 years ago and the record does not show that he has engaged in violent activity at any other time. The AAO is persuaded that the applicant does not have a propensity to commit further violent acts.

However, the record shows that the applicant has a history of dangerous behavior involving the use of alcohol. The applicant's multiple incidents of driving under the influence of alcohol are troubling. His most recent arrest in the United States occurred in 1999, and the record does not show whether he has continued to drive under the influence of alcohol since that date. The applicant has been outside the United States since 2004, in Croatia, Nicaragua, and possibly other countries, and the AAO is unaware of whether he has been cited for additional incidents of driving under the influence of alcohol abroad. The applicant's wife contends that he has ceased drinking alcohol due to his health problems and required diet as a result of diabetes. In a statement dated November 7, 2001, the applicant's wife asserts that the applicant "will never be able to gain a drivers [sic] license because of his failing eye sight. He will never be able to drive because the diabetes is affecting his eye sight." However, the applicant has not submitted any documentation to support these assertions,

such as his own medical records or recommendations from a physician regarding his diet and practices. The applicant has not submitted any medical evidence to show that he is experiencing problems with his vision.

The applicant's wife asserted that the applicant's driving under the influence was caused by “[y]outh and stupidity,” yet the applicant's arrests for driving under the influence of alcohol occurred while he was between the ages of 46 and 54, over an eight year period well beyond his youth. The applicant has not submitted any explanation or documentation to show that this period involved unusual circumstances for him that would suggest this behavior was uncharacteristic of him. Nor has the applicant asserted or shown that he has sought or received assistance for alcohol abuse. It is noted that the applicant’s conviction for aggravated assault was due to an altercation that took place in or near a bar, which suggests that it was, at least in part, another episode of misconduct related to the use of alcohol.

The record shows a clear pattern of the applicant’s irresponsible use of alcohol, taking place over a period of many adult years and involving driving on public roads. The AAO is not persuaded that the applicant has reformed himself, as he has been outside the United States since 2004 with no supporting evidence of changed behavior. The applicant’s incidents of driving under the influence of alcohol in the United States show that he has a lack of regard for the laws of the United States and that he presents a serious danger to those residing in the country. The AAO is sensitive to the fact that denial of the present waiver application will result in significant hardship for the applicant’s wife. However, as presently constituted, the record supports that admitting the applicant to the United States would present a risk of serious harm to other individuals here that outweighs the benefits of allowing him to reside in the United States. Thus, the AAO is unable to favorably exercise discretion in the present matter.

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 not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.