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U. S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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U.S. Citizenship
and Immigration
Services

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Date: DEC 07 2011

Office: LOS ANGELES, CA

FILE: [REDACTED]

IN RE: [REDACTED]

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

ON BEHALF OF APPLICANT:



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 that reads "Michael Shumway".

Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of the Philippines 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 seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with his U.S. citizen spouse, two children, and father and his lawful permanent resident mother.

In a decision, dated June 19, 2009, the field office director found the applicant inadmissible for having been convicted of four counts of assault with a deadly weapon and one count of criminal conspiracy. The field office director then concluded that the record contained no evidence to support a finding that the applicant's qualifying relative would suffer extreme hardship and denied the Application for Waiver of Ground of Excludability (Form I-601) accordingly.

In a Notice of Appeal to the AAO (Form I-290B), dated July 1, 2009, counsel states that the field office director failed to consider all relevant factors when making the decision in the applicant's case. He states that the field office director failed to take all the hardship factors in the aggregate, that the decision does not state to specific facts or evidence submitted by the applicant, and that the decision just makes a general statement as to there being no evidence of hardship in the record.

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.

The AAO notes that this case arises under the jurisdiction of the Ninth Circuit Court of Appeals. The Ninth Circuit has adopted the “realistic probability” approach, as articulated by the U.S. Supreme Court in *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183 (2007), to determine whether or not the elements of a statute categorically render the offense a crime involving moral turpitude. See *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 1004-1007 (9th Cir. 2008).

The record reflects that on January 10, 1995 in Orange County, California, the applicant was

convicted of four counts of assault with deadly weapon or force likely to produce great bodily injury in violation of section 245(a)(1) of the California Penal Code (Cal. Penal Code) and one count of criminal conspiracy in violation of Cal. Penal Code § 182. The applicant, born on December 24, 1975, was nineteen years old at the time of his convictions. He was sentenced to 60 days in prison and three years of probation.

Cal. Penal Code § 245(a)(1) (West 1997) provides:

Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars (\$10,000), or by both the fine and imprisonment.

The offense underlying the applicant's crime, assault, is defined under the California Penal Code as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." Cal. Penal Code § 240 (West 1997). The plea agreement in the applicant's case indicates that the applicant willfully, unlawfully, and intentionally conspired to, and assaulted four other people with a deadly weapon which he personally used and inflicted great bodily injury with, in association with and for the benefit of a criminal street gang.

The Ninth Circuit Court of Appeals in *Gonzales v. Barber* determined that assault with a deadly weapon under the California Penal Code is categorically a crime involving moral turpitude. 207 F.2d 398, 400 (9th Cir. 1953). In addition, the AAO finds that it is well settled that a conspiracy to commit a certain crime involves moral turpitude if the underlying crime involves moral turpitude. See *Matter of P-*, 5 I. & N. Dec. 444, 446 (BIA 1953). Accordingly, the AAO finds that the applicant's convictions under Cal. Penal Code § 245(a)(1) and Cal. Penal Code § 182 are crimes involving moral turpitude.

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

The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if -

(1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that --

- (i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,
- (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
- (iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established

to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . . ; 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 applicant is inadmissible occurred more than 15 years before the date of the applicant'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).

Since the criminal convictions for which the applicant was found inadmissible occurred more than 15 years ago, the inadmissibility can be waived under section 212(h)(1)(A) of the Act. Section 212(h)(1)(A) of the Act requires that the applicant's admission to the United States not be contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated. The AAO finds that the record does establish that the applicant's admission would not be contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated.

However, because the applicant has been convicted of a violent or dangerous crime he must also show that he is deserving of a favorable exercise of the Secretary's discretion in accordance with the heightened standards under section 212.7(d) of the Act. For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Matter of Mendez-Morales*, 21 I&N Dec. 296, 299 (BIA 1996).

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 is a violent and dangerous crime. Moreover, U.S. courts have concurred that conspiracy to commit a violent crime to be subject to the additional discretionary hurdles of 8 C.F.R. § 212.7(d). *See Togbah v. Ashcroft*, 104 Fed. Appx. 788 (3rd Cir. 2004).

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 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 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.”).

In support of the waiver application on appeal, counsel submits: a declaration from the applicant’s spouse, a declaration from the applicant’s parents, a declaration from the applicant’s spouse’s parents, proof of the applicant’s employment for the last five years, a copy of the applicant’s high school diploma, and an employee-of-the-year award given to the applicant from his employer in 2009.

In support of the initial waiver application, filed on May 13, 2009, counsel submits: a brief, a declaration from the applicant’s spouse, birth certificates for the applicants children, copies of the applicant’s spouse’s educational and professional credentials, a monthly budget with supporting documentation, proof of U.S. citizenship for the applicant’s family, hardship letters from the applicant’s daughter and mother, country conditions information for the Philippines, and photographs of the applicant and his spouse.

The declarations and letters submitted by the applicant’s family reveal that the applicant has been rehabilitated, no longer associates with people from his past, and is a family-oriented and hardworking person. The record also indicates that the applicant received a “valuable employee of the year” in 2009 from his employer, the Whitaker Wellness Institute Medical Clinic and despite his criminal activities in 1995, received his high school diploma in 1996.

In regards to hardship, the record indicates that the applicant has extensive family ties to the United States with two U.S. citizen children (ages 16 and 4 years old); a U.S. citizen father, mother-in-law, sister-in-law, and father-in-law; and a lawful permanent resident mother. The record also establishes that the applicant’s spouse was born in the United States and is employed as a Licensed Vocational Nurse.

The AAO finds that the applicant has established that his spouse and children would suffer exceptional and extremely unusual hardship as a result of relocating to the Philippines. The applicant’s oldest child is 16 years old and court documentation in the record shows that she spends her week in the custody of the applicant and her weekends with her mother. If the applicant’s

daughter were to relocate to the Philippines she would not be able to see her mother on a regular basis. The AAO finds that the applicant's oldest daughter will also face language and cultural barriers as a result of relocating to the Philippines where she has not lived and does not speak the language. The situation for the applicant's daughter reaches the level of exceptional and extremely unusual hardship because exacerbating the already extremely hard circumstances she would face upon relocation is the fact that the applicant has no family or any other ties in the Philippines as he left the country when he was only 12 years old.

In addition, the applicant's spouse would suffer emotional hardship upon relocation from being separated from her parents. She would also suffer financial hardship from leaving her employment as a nurse and in not being able to find employment of a similar salary to continue to pay on her student loans. In her statement, the applicant's spouse expresses concern about being stressed and fearful due to crime and unemployment in the Philippines. The AAO notes that the U.S. State Department Country Information Sheet, dated May 6, 2009 and submitted as part of the record, describes terrorist and gang activity in parts of the Philippines and states that Filipino-Americans are often targeted for kidnappings. The sheet also states that medical care can cost tens of thousands of dollars. In an article, dated April 26, 2009, the Trade Union Congress of the Philippines states that Filipino nurses seeking employment in the United States is down by 10.5%, which means that the Philippines now has more than an estimated 500,000 nurses looking for employment. Another article states that as many as 1,000 Filipino nurses are estimated to be leaving for employment in Japan. Thus, the AAO finds that it is exceptional and extremely unusual emotional hardship for the applicant's oldest daughter to separate from her mother and relocate to the Philippines where she does not know the language, is not familiar with the culture, and where the applicant has no more community or familial ties. The AAO also finds that the applicant's spouse would suffer exceptional and extremely unusual hardship in having to relocate to a country with a small child, where she is unlikely to find employment, where she does not know the language, and where she nor the applicant have any familial or community ties.

The AAO finds further that the applicant has established that his spouse and children would suffer exceptional and extremely unusual hardship as a result of separation. The applicant has had primary custody of his oldest daughter since she was in the first grade and separating her from her father would be extreme emotional hardship. The record also indicates that the applicant's spouse could not afford the family's monthly expenses without the applicant. The monthly income spreadsheet submitted as part of the record shows that the applicant earns approximately 46% of the household income. Given the families income, the record indicates that it is unlikely that the family could visit the applicant often in the Philippines, essentially separating the family permanently. The AAO finds that this separation would amount to exceptional and extremely unusual hardship.

Additionally, the AAO finds that the gravity of the applicant's offense does not override the extraordinary circumstances in the applicant's case. The AAO also finds that the traditional discretionary analysis demonstrates that the applicant warrants a favorable exercise of discretion. This analysis entails "balance[ing] 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-Moralez*, 21 I&N Dec. 296, 300 (BIA 1996) (citations omitted).

The adverse factor in the present case is the applicant's criminal record. The favorable factors in the present case are the hardship the applicant's spouse and children would suffer as a result of his inadmissibility; the support the applicant provides to his spouse and children; the presence of extensive family ties in the United States including his parents and two U.S. citizen children; a consistent record of employment; no criminal record for sixteen years; and the fact that the applicant was only nineteen years old at the time he committed his crimes.

The AAO finds that the applicant has established that the favorable factors in his application outweigh the unfavorable factors. In discretionary matters, the applicant bears the full burden of proving his eligibility for discretionary relief. *See Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976). Here, the applicant has now met that burden. Accordingly, the appeal will be sustained.

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