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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  
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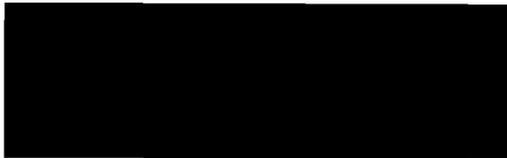
Office: NEWARK, NJ

FILE: 

IN RE: 

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,

*Michael Shumway*

*For* Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Field Office Director, Newark, New Jersey and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant, a native and citizen of El Salvador 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 now seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his U.S. citizen father and two U.S. citizen daughters.

In a decision dated September 16, 2009, the field office director found that the applicant failed to establish his rehabilitation, that his qualifying relatives would experience extreme hardship as a result of his inadmissibility, or that the favorable exercise of discretion was warranted in his case. The application was denied accordingly.

In a Notice of Appeal to the AAO (Form I-290B), dated October 9, 2009, counsel states that the field office director committed a mistake of fact and a mistake of law in the adjudication of the applicant's waiver application. Counsel states that the field office director did not properly evaluate the claims of extreme hardship as they relate to the applicant's two daughters and that the mistake of law resulted in the erroneous decision and improper denial of the applicant's waiver application.

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

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

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

(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 determining whether a crime involves moral turpitude, the Third Circuit Court of Appeals, per *Jean-Louis v. Holder*, 582 F.3d 462 (3<sup>rd</sup> Cir. 2009), makes a categorical inquiry, which consists of looking “to the elements of the statutory offense . . . to ascertain that least culpable conduct hypothetically necessary to sustain a conviction under the statute.” *Id.* at 465-66. The “inquiry concludes when we determine whether the least culpable conduct sufficient to sustain conviction under the statute “fits” within the requirements of a CIMT.” *Id.* at 470.

However, if the “statute of conviction contains disjunctive elements, some of which are sufficient for conviction of [a CIMT] and other of which are not . . . [an adjudicator] examin[es] the record of conviction for the narrow purpose of determining the specific subpart under which the defendant was convicted.” *Id.* at 466. This is true “even where clear sectional divisions do not delineate the statutory variations.” *Id.* In so doing, an adjudicator may only look at the formal record of conviction. *Id.*

The record indicates that on or about May 7, 1991 in Newark, New Jersey the applicant was arrested and charged with Aggravated Assault under N.J.S.A. § 2C:12-1b(2), Possession of a Weapon for an Unlawful Purpose under N.J.S.A. § 2C:39-4d, and Unlawful Possession of a Weapon under N.J.S.A. § 2C:39-5d. On January 10, 1992 he was found guilty of these charges and sentenced to four years probation. The applicant, born on January 10, 1971, was 19 years old when he committed these crimes.

The AAO finds that the applicant’s conviction for aggravated assault under N.J.S.A. § 2C:12-1b(2) is a crime involving moral turpitude. N.J.S.A. § 2C:12-1b(2) states in pertinent part, “A person is guilty of aggravated assault if he...(2) Attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon...” A conviction for aggravated assault is punishable for a maximum of up to ten years in prison.

In *Matter of O-*, 3 I&N Dec. 193 (BIA 1948) and *Matter of Montenegro*, 20 I&N Dec. 603 (BIA 1992), the Board of Immigration Appeals (BIA) held that assault with a weapon is a crime involving moral turpitude. It is noted that as a general rule, simple assault or battery is not deemed to involve moral turpitude for purposes of the immigration laws. *Matter of Fualaau*, 21 I&N Dec. 475, 477 (BIA 1996). However, this general rule does not apply where an assault or battery necessarily involved some aggravating dimension, such as the use of a deadly weapon. See, e.g., *Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988). Thus, the applicant's conviction for aggravated assault is a conviction for a crime involving moral turpitude.

The AAO notes that in the applicant's case, as he is found to be inadmissible for one crime involving moral turpitude that does not meet an exception under section 212(a)(2)(A)(ii) of the Act, we need not discuss whether his other convictions are also 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 conviction 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.

Section 212(h)(1)(A)(ii) and (iii) of the Act requires that the applicant's admission to the United States not be contrary to the national welfare, safety, or security of the United States; and that the applicant establish his rehabilitation. Evidence in the record to establish the applicant's eligibility under section 212(h)(1)(A)(ii) and (iii) of the Act consists of sworn statements from the applicant's father, mother, and daughters. In view of the record, which shows that the applicant has not committed any crimes since the events that occurred in 1991, that he was nineteen years old at the times the crimes were committed, and that he financially and emotionally supports his daughters, the AAO finds that the applicant has provided sufficient evidence to demonstrate that his admission to the United States is not contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated, as required by section 212(h)(1)(A) of the Act.

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

The Attorney General [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 aggravated assault under N.J.S.A. § 2C:12-1b(2) is a violent and dangerous crime as it involves the intent to cause bodily injury and the use of a deadly weapon. It can therefore be concluded that the applicant has been convicted of a violent crime, and is thus subject to the heightened discretionary standard under 8 C.F.R. § 212.7(d).

Accordingly, the applicant must show that “extraordinary circumstances” warrant approval of the waiver. 8 C.F.R. § 212.7(d). Extraordinary circumstances may exist in cases involving national security or foreign policy considerations, or if the denial of the applicant’s admission would result in exceptional and extremely unusual hardship. *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.”).

The record of hardship includes: a letter from counsel, a brief from counsel, sworn statements from the applicant’s father, mother, and daughters, country condition reports from El Salvador, medical documentation, letters verifying the applicant’s daughter’s enrollment in school, and financial documentation.

In his letter, dated [REDACTED], counsel states that USCIS erred in finding that there was no connection between the applicant and the residence where his daughters live and where his father is the responsible party on the mortgage. Counsel states that the applicant’s father has attested to the applicant’s contribution to one half of the maintenance of the residence. Counsel also states that USCIS dismissed the severity of the applicant’s daughter’s asthma as a life-threatening disease and the complications which may result from her either losing the financial support of the applicant or relocating to a country like El Salvador. Counsel asserts that because the applicant’s daughters are still minors separation would be an extreme hardship. Counsel also contends that the fact that the U.S. government gives Temporary Protected Status (TPS) to individuals from El Salvador should have been taken into consideration when evaluating hardship upon relocation.

In his brief, counsel states that the applicant’s daughters were born in the United States, have strong community ties to the United States, and would have no way of adapting to the country

conditions in El Salvador. Counsel states that the applicant's oldest daughter suffers from asthma and would receive poor, if any treatment in El Salvador for this medical condition. Counsel also states that if the applicant's daughters do not return to El Salvador with their father, then they will be forced to live in an unstable environment in the United States. He states that their mother is without status in the United States and could be subject to removal at any time. Finally, counsel states that the applicant provides all forms of financial support for his daughters, and without him in the United States they would be without food, shelter, or other life necessities.

In a statement, dated [REDACTED], the applicant's oldest daughter states that she has asthma, for which she takes Albuterol. She states that she has asthma attacks in the spring when there is pollen and that she had to go to the hospital last year to help her breath. She states that she sees her doctor any time she has an attack and takes inhalers during the spring whenever she feels an attack coming on. The applicant's daughter also states that she is very close with her father and that she would be very sad without the love and support he gives her. The AAO notes that medical documentation in the record establishes that the applicant's daughter is being treated for asthma.

In a statement, also dated [REDACTED], the applicant's youngest daughter states that she is very close with her father and that she is scared to grow up without a father.

In a statement, dated [REDACTED] the applicant's father states that the applicant contributes \$1,200 per month to his \$2,400 mortgage and half of the household utilities. He states that without the financial contributions of the applicant he would lose his home. He states that currently he, his wife, and his two granddaughters live in the home. He states that thinking about his son and his two granddaughters without a home or in unsafe housing makes him extremely nervous and anxious, so much so that the he was taken to the hospital where doctors told him that his nerves were affecting his heart and that he needed to find a way to relax. He states that he is unable to sleep at night and is always thinking about his son. The AAO notes that the record does contain a letter from a [REDACTED] dated August 21, 2009 and stating that the applicant's father suffers from a history of hypertension, palpitations, dizziness, anxiety, and depression. [REDACTED] states that due to his medical conditions, the applicant's father would benefit from the emotional support of his son.

In a statement, dated [REDACTED], the applicant's mother states that she has been told that she is close to being diagnosed with diabetes and any increase in stress or frustration will bring on the disease. She states that her son contributes to half of the household expenses and that she has not worked in seven years, has no employable skills, and would not be able to replace the lost income from her son's departure. She also states that it is stressful to see her grandchildren and husband worry about her son and that she cannot sleep at night.

The AAO finds that the applicant's daughters and father will suffer exceptional and extremely unusual hardship as a result of relocating to El Salvador. The U.S. Citizenship and Immigration Services currently offers TPS to qualified nationals of El Salvador residing in the United States. A TPS designation acknowledges that it is unsafe to return to a country because of ongoing armed conflict, an environmental disaster, or other extraordinary and temporary conditions. TPS

for El Salvadorans has been designated through March 9, 2012. The AAO notes that the record includes the 2007 and 2008 U.S. State Department Human Rights Report for El Salvador and the U.S. Department of State Consular Information Sheet for El Salvador. The Consular Information Sheet states that El Salvador is a critical crime-threat country and has one of the highest homicide rates in the world. The report also states that there are very few private hospitals in El Salvador with an environment that would be acceptable to visiting Americans. Thus, the AAO finds that based on the statements from the applicant's qualifying family members, the applicant's daughter's asthma, the fact that the applicant's daughters are minors and the applicant's father is elderly, the conditions in El Salvador, and the designation of TPS for nationals of El Salvador living in the United States, it would be an extremely unusual and exceptional hardship for the applicant's qualifying relatives to relocate to El Salvador.

The AAO also finds that the applicant's two minor daughters would suffer extremely unusual and exceptional emotional and financial hardship as a result of being separated from the applicant. The record indicates that the applicant is very close with his daughters and that he earns \$50,000 to \$60,000 per year in the United States, enabling him to provide financial support for his children.

The AAO notes that the record is insufficient in showing that the applicant's father would suffer extremely unusual and exceptional hardship as a result of the applicant's inadmissibility because the documentation fails to show that the applicant is contributing half of all household expenses for his parents or how the applicant's presence in the United States would help to ease his father's medical ailments. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Nevertheless, the AAO does find exceptional and extremely unusual hardship to the applicant's two minor daughters. Separating the applicant from his two minor children, with whom he has a close relationship, would be exceptional and extremely unusual hardship in this case given their age and the circumstances demonstrated in the record. Thus, the AAO finds that the applicant's inadmissibility would result in exceptional and extremely unusual hardship to his children.

The AAO does not condone the criminal acts committed by the applicant, which are significant negative factors against a favorable exercise of discretion. However, taking into account the hardship to the applicant's children, the applicant's age at the time he committed his crimes, the passage of time since he committed his crimes, and evidence of the applicant's subsequent good character and lack of further criminal offenses, we find that the positive factors outweigh the negative factors in this case.

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

**ORDER:** The appeal is sustained.