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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: **JUL 22 2011** Office: MEXICO CITY (CIUDAD JUAREZ)

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,

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Mexico City (Ciudad Juarez), Mexico. 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 Mexico who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having committed crimes involving moral turpitude, and pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking readmission within ten years of his last departure from the United States. The applicant seeks a waiver of inadmissibility to reside in the United States with his U.S. citizen spouse and two children.

In a decision, dated February 3, 2009, the field office director found that the applicant had failed to establish extreme hardship to his qualifying relatives and that the applicant's case did not warrant the favorable exercise of discretion. The Application for Waiver of Ground of Excludability (Form I-601) was denied accordingly.

In a Notice of Appeal to the AAO (Form I-290B), dated February 25, 2009, counsel states that the applicant was not aware that his criminal convictions were a cause for his inadmissibility and that only the applicant's inadmissibility under section 212(a)(9)(B)(II) of the Act was cited in the paperwork he received after his visa interview. Counsel states that he is submitting documentation from the applicant's probation officer and documentation regarding the extreme hardship his wife is suffering as a result of the applicant's departure. She states that the applicant's spouse is taking medication for depression and is in a poor financial situation.

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 the recently decided *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 indicates that on June 22, 2003 the applicant was charged with battery under § 968.075(1)(a), 940.19(1) of the Wisconsin Statutes and disorderly conduct under § 968.075(1)(a), 947.01 of the Wisconsin Statutes. On August 29, 2003 he pled no contest to these charges and was sentenced to 18 months probation. The applicant, born on April 29, 1982 was 21 years old at the time the crime was committed. The record also indicates that on June 1, 2004 the applicant was charged with battery under § 973.055(1), 940.19(1) of the Wisconsin Statutes. On July 14, 2004 he pled no contest to the charge and was sentenced to 18 months probation.

§ 940.19(1), Battery; substantial battery; aggravated battery, states:

(1) Whoever causes bodily harm to another by an act done with intent to cause bodily harm to that person or another without the consent of the person so harmed is guilty of a Class A misdemeanor.

§ 968.075(1)(a), Domestic abuse incidents; arrest and prosecution, states in pertinent part:

(1) Definitions. In this section:

(a) “Domestic abuse” means any of the following engaged in by an adult person against his or her spouse or former spouse, against an adult with whom the person resides or formerly resided or against an adult with whom the person has a child in common:

1. Intentional infliction of physical pain, physical injury or illness.
2. Intentional impairment of physical condition.

...

§ 947.01 Disorderly conduct, states:

Whoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor.

The AAO finds that the applicant’s two convictions for Aggravated Domestic Battery are crimes involving moral turpitude. The AAO notes that assault and battery crimes may or may not involve moral turpitude. *See Matter of Danesh*, 19 I&N Dec. 669, 670 (BIA 1988). The BIA has stated that offenses characterized as simple assaults or batteries are generally not considered to be crimes involving moral turpitude. *See Matter of Perez-Contreras, supra; Matter of Short*, 20 I&N Dec. 136, 139 (BIA 1989). In addition, the BIA has recognized that not all crimes involving the injurious touching of another person reflect moral depravity on the part of the offender. *See Matter of Sanudo*, 23 I&N Dec. 968, 971 (BIA 2006).

The BIA has found further that a finding of moral turpitude involves an assessment of both the state of mind and the level of harm required to complete the offense. *See In re Solon*, 24 I&N Dec. 239, 242 (BIA 2007). Thus, 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. Moreover, where no conscious behavior is required, there can be no finding of moral turpitude, regardless of the resulting harm. This body of law, then, deems intent to be a crucial element in determining whether a crime involves moral turpitude. *Id.*

In addition, where an assault or battery involved some aggravating dimension, such as the use of a deadly weapon or the infliction of serious injury on persons whom society views as deserving of special protection, such as children, domestic partners or peace officers the BIA has found moral turpitude. *See, e.g., Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988). The Wisconsin statutes under which the applicant was convicted indicate that his acts were intentional, involved an aggravating dimension in that they were perpetrated against his domestic partner, and involved bodily harm. Therefore, the AAO finds that the applicant is inadmissible under section 212(a)(2)(A)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(I), for having committed two crimes involving moral turpitude.

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

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

. . . .

(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

The AAO notes that section 212(h) of the Act provides that a waiver of inadmissibility is dependent first upon a showing that the bar to admission imposes an extreme hardship on a qualifying family member. In this case, the relatives that qualify are the applicant's spouse and two children. Hardship to the applicant himself is not considered under the statute and will be considered only insofar as it results in hardship to a qualifying relative. If extreme hardship is established, the Secretary then assesses whether an exercise of discretion is warranted.

However, the AAO finds that as the applicant has been convicted of a violent crime his waiver application cannot be granted unless he establishes that he is deserving of a favorable exercise of the Secretary's discretion 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 adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

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 domestic battery causing bodily harm is a violent crime. The AAO notes that the incident report related to the applicant's 2004 arrest indicates that the applicant kicked his domestic partner in the leg causing extreme pain and swelling. 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 [REDACTED] a precedent decision issued the same year as [REDACTED], 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 [REDACTED] and [REDACTED] is appropriate. [REDACTED] 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: two statements from the applicant’s spouse; psychological evaluations regarding the applicant and the applicant’s spouse; a letter from the applicant’s spouse’s doctor; documentation showing that the applicant’s spouse has been granted financial assistance in order to continue to attend college; and documentation showing that the applicant’s spouse is struggling to pay her rent, utilities, and to maintain her home without the applicant.

In her statement, dated February 26, 2009, the applicant’s spouse states that her financial situation has worsened since the departure of the applicant, she is greatly depressed, is on medication, and that the applicant has been attending counseling. In a statement dated January 17, 2008 and submitted

with the initial waiver application, the applicant's spouse states that she has three children, (two with the applicant and one from a previous relationship), ages 12, 9, and 5 years old. The applicant's spouse also states that she cannot leave the United States because she has a chronic medical condition called hypothyroidism for which she takes daily medication since 2002. She states that she currently needs to see the doctor every six weeks. She also states that her son suffers from chronic ear infections and all of her children are covered by Medicaid in the United States. She states further that if she left the United States she would not be able to pursue her education and she does not speak Spanish. The applicant's spouse also expresses concern over leaving her community ties in the United States as she is an active member of the Bad River Band of Chippewa Indians. She states that she and her family follow native traditions and she would not be able to follow these traditions in Mexico.

A letter from a counselor in Mexico, dated February 25, 2009, states that the applicant has been seeking treatment for his domestic violence problem and that the counselor has noticed a change in the applicant's behavior. The counselor states that the applicant has admitted having psychological problems and no longer consumes drugs or alcohol, thus he feels that the applicant is no longer a danger to his family.

In a letter, dated February 25, 2009, a [REDACTED], states that she evaluated the applicant and gave her an initial diagnosis of Adjustment Disorder with Anxiety and Depression. [REDACTED] states that the applicant's spouse is under a great deal of stress with raising young children and going to school full time. She states that the applicant's spouse will have to work this summer to support her family, dropping her classes, and postponing her graduation for one semester. [REDACTED] states that the applicant's spouse states that her children are acting out and that she has been experiencing suicidal thoughts and is on medication for anxiety and depression. In addition to the letter from [REDACTED] the record includes a letter from the applicant's doctor's office. The letter, dated February 10, 2009, states that the applicant's spouse was seen in their clinic for depression and thyroid dysfunction, that she has been prescribed medication and counseling, and that she has expressed suicidal thoughts. The letter states that they are concerned about the applicant's spouse's potential for suicide and her long term ability to care for her children without the emotional and financial support of the applicant.

In view of the seriousness surrounding the applicant's spouse's emotional hardship, including her doctor's and the social worker's concern over her potential for suicide, the AAO finds that when all of the hardship factors are combined, including emotional hardship, medical hardship, financial hardship, the hardship the applicant would face leaving her tribal community, and the hardship she faces caring for three minor children without her spouse, the applicant has demonstrated that these hardships rise to the level of "exceptional and extremely unusual hardship," as required in 8 C.F.R. § 212.7(d).

The applicant has established his eligibility for a waiver under section 212(h)(1)(B) 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.