

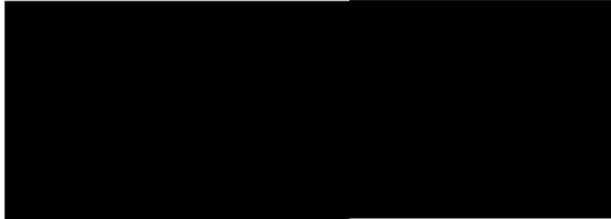
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U.S. Department of Homeland Security  
U.S. Immigration and Citizenship Services  
Office of Administrative Appeals  
20 Massachusetts Avenue, N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship and Immigration Services

**PUBLIC COPY**



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FILE: [Redacted] Office: MEXICO CITY (CIUDAD JUAREZ) Date: MAR 02 2011

IN RE: Applicant: [Redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v), of the Immigration and Nationality Act and section 212(h), 8 U.S.C. § 1182(h) of the Immigration and Nationality Act

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.

Thank you,

for Perry Rhew  
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Jamaica who was found to be inadmissible under section 212(a)(9)(B)(i)(II), of the Immigration and Nationality Act (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 section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of committing a crime involving moral turpitude (threat to commit crime in violation of Mass. Gen. Laws ch. 275, § 2). The director indicated that the applicant sought a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v), of the Act, and section 212(h) of the Act, 8 U.S.C. § 1182(h). The director concluded in the denial letter (dated September 9, 2009), that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. We note that there is a second denial letter (dated September 30, 2009), which amends the original denial letter, and indicates that the applicant was granted lawful permanent status as an immediate relative on July 7, 1999, and is therefore not inadmissible under section 212(a)(9)(B)(ii) of the Act for unlawful presence.

On appeal, the applicant's wife contends that the director erred in stating that the applicant was removed from the United States in 2006 due to a domestic violence conviction, and that there is no extreme hardship. She avers that since 2005 her 13-year-old child has received special education services, and that he would not have access to the same quality of services in Jamaica. The applicant's wife further asserts that her son has diabetes and had two major foot surgeries because of tarsal coalition, and that it would be difficult if he required another surgery while living in Jamaica because she does not know Jamaica's health care system and would not be able to afford health insurance. She declares that cultural differences would prevent her from obtaining a job in Jamaica; and her anxiety and depression, coupled with separation from family members in Massachusetts, would prevent her from adjusting to life in Jamaica. She avers that her daughter visited Jamaica and felt traumatized by its poverty and violence. She states that her children refuse to move to Jamaica because their friends, school, and family members are in Massachusetts. Lastly, the applicant's wife maintains that she is the caretaker of her 73-year-old father, who shows signs of Alzheimer's, and her 68-year-old mother, who has high blood pressure and angina and can no longer drive.

We will first address the finding of inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of committing a crime involving moral turpitude.

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.

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

....

- (I) 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).

Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines "conviction" for immigration purposes as:

A formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where –

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

The Board of Immigration Appeals (Board) 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.)

On April 8, 2001, the applicant was arrested for count 1, abuse prevention order in violation of Mass. Gen. Laws ch. 209A, § 7; and count 2, threat to commit crime in violation of Mass. Gen. Laws ch. 275, § 2. On July 19, 2001, the judge found sufficient facts for both counts, and continued charges without a guilty finding for one year. For both counts the judge placed the applicant on

supervised probation. He was ordered to attend marriage counseling and to have no contact with the victim (his former spouse). Mass. Gen. Laws ch. 275, § 4 states that the maximum period of imprisonment for threat to commit crime in violation of Mass. Gen. Laws ch. 275, § 2 is not more than six months.

On November 24, 2000, the applicant was arrested for count 1, abuse prevention order in violation of Mass. Gen. Laws ch. 209A, § 7; and count 2, assault in violation of Mass. Gen. Laws ch. 265 § 13A (case number [REDACTED]). On January 23, 2001, sufficient facts were found and charges for both counts were continued without a guilty finding until January 22, 2002. For both counts, the applicant was placed on supervised probation. He was ordered to enter and complete a domestic violence program, to not abuse his former spouse, and to comply with the 209A order. The criminal record appears to indicate that the applicant served 60 days in jail.

On November 24, 2000, the applicant was arrested for threat to commit crime in violation of Mass. Gen. Laws ch. 275, § 2 (case number [REDACTED]). On January 23, 2001, sufficient facts were found, and the charge was continued without a guilty finding until January 22, 2002. The judge ordered that the terms and conditions of this charge be concurrent with case number [REDACTED].

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.

On April 8, 2001, the applicant was arrested for threat to commit crime in violation of Mass. Gen. Laws ch. 275, § 2. That statute provides:

If complaint is made to any such court or justice that a person has threatened to commit a crime against the person or property of another, such court or justice shall examine the complainant and any witnesses who may be produced, on oath, reduce the complaint to writing and cause it to be subscribed by the complainant.

In *Commw. v. Kerns*, 449 Mass. 641 (2007), the Supreme Judicial Court of Massachusetts states that the term “threat” is undefined in Mass. Gen. Laws ch. 275, § 2, but is understood as “an expression of intention to inflict a crime on another and an ability to do so in circumstances that would justify apprehension on the part of the recipient of the threat.” *Id.* at 653. The Court indicates that the communication of the threat “must be made to (or be intended to reach) the person who is the intended target of the threatened crime, so as to cause fear or apprehension in that person.” (citation omitted). *Id.* Lastly, the Court states that courts in Massachusetts have concluded that a person may be punished for making a threat to commit a crime, even when the threat fails to reach its intended victim, so long as there is an intent to put the victim in imminent fear. (citation omitted). *Id.* The Court reasoned that legislators designed Mass. Gen. Laws ch. 275, § 2 to “require proof that the threat was made in circumstances which, viewed objectively, could have caused the intended victim to fear that the defendant had both the intention and ability to carry out the threat.” *Id.* at 654. We observe that threatening to commit a crime against the person of another involves making threats of bodily harm. *See Commw. v. Ditsch*, 19 Mass. App. Ct. 1005 (1985) (Appeals Court affirmed the judgment of conviction of the defendant, who was convicted of having made threats of bodily harm to his mother-in-law while he was incarcerated).

Thus, the AAO finds that the plain language of Mass. Gen. Laws ch. 275, § 2 encompasses crimes that both do and do not involve moral turpitude. Threatening to commit a crime against property of another may not involve moral turpitude in view of the Board’s finding that malicious mischief in breaking the glass in a door of a building and damaging a mailbox were not crimes involving moral turpitude in *In Re C-*, 2 I&N Dec. 716 (BIA 1947) and in *In Re B-*, 2 I&N Dec. 867 (BIA 1947). However, the Board has held that the intentional transmission of a “threat to kill another or inflict physical injury against the victim” is “evidence of a vicious motive or a corrupt mind” and qualifies as a crime involving moral turpitude. *In re Ajami*, 22 I&N Dec. 949, 952 (BIA 1999). We further note that in *Ajami*, the Board cites previous decisions wherein it found that threatening behavior was an element of a crime involving moral turpitude. (citing *Matter of B-*, 6 I&N Dec. 98 (BIA 1954) (involving usury by intimidation and threats of bodily harm); *Matter of C-*, 5 I&N Dec. 370 (BIA 1953) (involving threats to take property by force); *Matter of G-T-*, 4 I&N Dec. 446 (BIA 1951) (involving the sending of threatening letters with the intent to extort money); *Matter of F-*, 3 I&N Dec. 361 (C.O. 1948; BIA 1949) (involving the mailing of menacing letters that demanded property and threatened violence to the recipient).

Because Mass. Gen. Laws ch. 267, § 2 encompasses conduct that both does and does not involve moral turpitude, a conviction under that provision is not categorically a crime involving moral turpitude. As such, the AAO must review the record of conviction, which consists of consists of

documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript to determine if the conviction was based on conduct involving moral turpitude. As previously discussed, for a finding of moral turpitude for threatening to commit a crime against another there must be evidence in the record establishing the intentional transmission of threats to kill or inflict physical injury.

The police report dated April 8, 2001 describes the incident for which the applicant was arrested:

About 11:57PM, compl. [REDACTED] came into District 2 to report that her estranged husband . . . had violated a restraining order earlier this evening. [REDACTED] stated she was at her car in the parking lot of Packy's Pub . . . when the suspect was in the parking lot with a female at his car, a red neon, suspect said to [REDACTED]. [REDACTED] some thing to the effect "you gonna take me to court, wait till this is over, I'm gonna kill your son, I'm gonna kill you." [REDACTED] got into her car to drive home to [REDACTED]. Suspect followed her . . . pulling up close to her car, while [REDACTED] was stopped at a traffic light. In the Grove Hall intersection, suspect pulled up beside her and got out of his car. The light turned green and [REDACTED] drove off. Suspect followed her on [REDACTED] to [REDACTED] and on [REDACTED] in [REDACTED]. In [REDACTED] [REDACTED] took a detour towards the police station to avoid suspect. She then went home and retrieved the restraining order . . . from Quincy District Court, expiring 1/23/02, [which] includes a no abuse to plaintiff (includes threat or duress). [REDACTED] states she is in fear of suspect. . . .

The police report states that the applicant's estranged spouse had a restraining order against the applicant, who communicated a threat to kill his estranged wife and her son. In accordance with our discussion of *Amaji*, where intentional transmission of threats to kill or inflict physical injury involves moral turpitude, we conclude that the conduct for which the applicant was arrested and convicted under Mass. Gen. Laws ch. 275, § 2 involves moral turpitude.

We note that the applicant was also arrested on November 24, 2000 for threat to commit crime, and that there is not sufficient documentation in the record of conviction to determine whether his conviction for this crime involved moral turpitude. To meet his burden, the applicant must, at a minimum, submit the available documents that comprise the record of conviction and show that these fail to establish that his conviction was based on conduct involving moral turpitude. To the extent such documents are unavailable, this fact must be established pursuant to the requirements in 8 C.F.R. § 103.2(b)(2). The record contains the criminal docket, the tender of plea or admission and waiver of rights, and the criminal complaint. However, these documents do not establish the conduct for which the applicant was arrested. The applicant has not established, in accordance with the requirements in 8 C.F.R. § 103.2(b)(2), that all of the documents comprising his record of conviction for threat to commit crime are unavailable. Because the submitted documents do not demonstrate that the applicant's offense was not a crime involving moral turpitude, and the applicant has not disputed the finding that it was such a crime, we will not disturb the finding that the applicant's conviction of threat to commit crime is a crime involving moral turpitude.

On November 24, 2000, the applicant was arrested for assault contrary to Mass. Gen. Laws ch. 265, § 13A. At the time of the applicant's arrest that section provided:

Whoever commits an assault or an assault and battery upon another shall be punished by imprisonment for not more than two and one half years in a house of correction or by a fine of not more than five hundred dollars.

. . .

Crimes of assault and battery may or may not involve moral turpitude; an assessment of both the mental state and level of harm to complete the offense is required. *See Matter of Solon*, 24 I&N Dec. 239 (BIA 2007). Intentional conduct resulting in a meaningful level of harm may be found to be morally turpitudinous, and aggravating factors are to be taken into consideration. *Id.* at 242. In *In re Sanudo*, 23 I&N Dec. 968, 972 (BIA 2006), the Board indicated that simple assault and battery offenses generally do not involve moral turpitude; however, that determination can be altered if there is an aggravating factor such as the infliction of bodily harm upon persons whom society views as deserving of special protection, such as children or domestic partners or intentional serious bodily injury to the victim. Use of a dangerous or deadly weapon in an assault always involves moral turpitude as it is conduct contrary to acceptable human behavior. *Matter of O--*, 3 I&N Dec. 193, 197 (BIA 1948). Further, in *Matter of Sejas*, 24 I&N Dec. 236 (BIA 2007), the Board held that the offense of assault and battery against a family or household member in violation of Virginia Code § 18.2-57.2 was not categorically a crime involving moral turpitude because the statute does not require “actual infliction of physical injury and may include any touching, however slight” and while Virginia law requires an intent to cause injury “the intended injury may be to the feelings or mind, as well as to the corporeal person.” *Id.* at 238. Lastly, we note that in *In re Fualaau*, 21 I&N Dec. 475 (BIA 1996), the Board held that third degree assault with a criminally reckless state of mind was not a crime involving moral turpitude, and that “for an assault of the nature . . . to be deemed a crime involving moral turpitude, the element of a reckless state of mind must be coupled with an offense involving the infliction of serious bodily injury.” We note that the Board indicates that the assault at issue did not involve a weapon.

Statutory law does not define the elements for assault and battery, which are defined solely by common law. *See Commw. v. Slaney*, 345 Mass. 135 (Mass. 1962). Under Massachusetts common law, “assault and battery” is defined as “the intentional and unjustified use of force upon the person of another, however slight, or the intentional commission of a wanton or reckless act (something more than gross negligence) causing physical or bodily injury to another.” *Commw. v. Correia*, 50 Mass. App. Ct. 455, 456 (Mass. App. Ct. 2000). Further, in *Commw. v. Bianco*, 390 Mass. 254, 263 (Mass.1983), the Supreme Judicial Court of Massachusetts states that General Laws c. 265, § 13A punishes “simple” assault and assault and battery, and that all categories of assault and battery are encompassed in the statute. Assault and battery offenses involving aggravating circumstances are codified under other sections of the Massachusetts General Laws. *See* Mass. Gen. Laws ch. 265 § 13D (assault and battery on public official engaged in performance of public duties), § 13J (assault and battery on a child), § 13K (assault and battery on elderly or disabled person), § 15 (assault and battery with intent to murder), § 15A(b) (assault and battery with dangerous weapon), and § 20 (assault and battery with intent to rob or steal). Thus, the AAO finds that the crime of which the applicant was convicted, violation of Mass. Gen. Laws ch. 265, § 13A, does not categorically involve moral turpitude.

The record contains the criminal docket, the tender of plea or admission and waiver of rights, and the criminal complaint. Though the criminal complaint reflects that the applicant assaulted his estranged wife, the submitted documents do not establish the specific conduct for which the applicant was arrested. The applicant has not established, in accordance with the requirements in 8 C.F.R. § 103.2(b)(2), that all of the documents comprising his record of conviction for assault are unavailable. Because the submitted documents do not demonstrate that the applicant's offense was not a crime involving moral turpitude, and the applicant has not disputed the finding that it was such a crime, we will not conclude that the applicant's conviction of assault is a crime involving moral turpitude.

Thus, based on the record the AAO finds the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having committed crimes involving moral turpitude.

The applicant was convicted of threat to commit a crime (kill his estranged wife and stepson). 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 the conduct of which the applicant was convicted, threat to commit a crime (kill his estranged wife and stepson), is a violent crime. In the instant case, the applicant must demonstrate that denial of admission would result in exceptional and extremely unusual hardship to a qualifying relative, who in the instant case are the applicant’s U.S. citizen spouse and U.S. citizen daughter and stepson.

In rendering this decision, the AAO will consider all of the evidence in the record including birth certificates, the Individual Education Program (IEP) report, letters, income tax returns, money transfers, photographs, U.S. Department of State reports, certificates, the prescription, and other documentation.

In *Matter of Monreal-Aguinaga*, 23 I&N Dec. 56, 62 (BIA 2001), the Board 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 Board 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 Board 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 Board 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 Board 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 *Matter of Andazola-Rivas*, the Board 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 Board 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 Board 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 Board 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 Board 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 Board 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.

The applicant’s wife asserts in the letter dated October 7, 2009, that the applicant has a close relationship with her son who was born on March 25, 1996, and their daughter who was born on June 5, 2001. She contends that if the applicant is not admitted to the United States she will suffer severe and unusual hardship. She indicates that for the past four years her son attended a therapeutic day school. She states that when he was eight years old he was diagnosed with tarsal coalition (the bones in his foot fused together), causing severe pain on both feet. She states that in 2004 her son underwent two surgeries for flat feet and was wheelchair bound for six months, used crutches for seven months, and received physical therapy. She indicates that her son was recently diagnosed with diabetes and takes medication and checks his blood sugar several times every day. The prescription in the record for the applicant’s step-son is for medication to control high blood sugar in people with type 2 diabetes (non-insulin-dependent diabetes). The submitted Individualized Education Program (IEP) from Brookline Public Schools conveys that the applicant’s son’s has an emotional disability. He was diagnosed with Dysthymic Disorder, early onset; Anxiety Disorder Not Otherwise Specified; and Attention Deficiency Hyperactivity Disorder (ADHD), Combined Type. The IEP indicates that his disability is “manifested across family, social and academic contexts.” The applicant’s son receives regular evaluations for emotional communication, social interaction, and academic participation. The IEP states that he “requires therapeutic intervention and assistance in all school settings to help him identify his feelings and regulate his response to stressors. A high staff to student ratio and immediate access to counseling staff are necessary to help [redacted] self-soothe, calm down if escalated, and then process difficult events.”

Furthermore, the applicant’s wife contends in her October 7, 2009 letter that that she supports her household as well as her husband’s. The record contains PayPal money transfer statements, which reflect money transfers to the applicant on July 13, 2007, August 22, 2007, October 25, 2007, November 7, 2007, January 4, 2008, and February 14, 2008. Further, the applicant’s wife states that she was diagnosed with depression and anxiety disorder and that she has panic attacks. The applicant’s wife avers that she and her children have been received weekly psychotherapy for over two years. [redacted] with Brookline Community Mental Health Center states in the letter dated February 11, 2008 that the applicant’s wife has been a client since December 2005, when her husband was detained. She states that she has been her psychotherapist since August 2007 and is certified to make clinical assessments and diagnosis. [redacted] indicates that the applicant’s wife has generalized anxiety disorder and major depressive disorder, recurrent, moderate. She states that the applicant was the primary financial supporter of his family and that after his detainment his wife and children became homeless and moved into a shelter, where they resided for over one year. She avers that psychotherapy helps the applicant’s children deal with the loss of their father, and that the applicant’s wife receives treatment to help manage her depression and anxiety.

The record contains billing statement from The Brookline Center reflecting regular weekly visits since December 2005.

The applicant's wife conveys in the letter dated November 10, 2010 that it would be difficult for her to move to Jamaica because her son is under the care of an orthopedic surgeon and an endocrinologist in order to monitor his excessive bone growth and blood sugar metabolism. She indicates that she is not certain whether he will need major surgery for his foot. She conveys that he is undergoing physical therapy, and that if they move to Jamaica they will not be able to afford medical insurance because her husband works on a farm and his crops have been ruined several times this year, and that she regularly sends him money to help with his necessities. The applicant's wife avers that she receives weekly acupuncture treatments for anxiety, insomnia, and depression, and discontinued taking medication because she experienced suicidal thoughts.

The stated hardship factors in the instant case are the emotional and financial impact to the applicant's wife and children if they remain in the United States without the applicant. The record demonstrates that the applicant's stepson, who will turn 15 years old in March, has dysthymic disorder, anxiety disorder, and ADHD; that he requires special help at school as described in the IEP, such as in regulating his responses to stressors; and has diabetes and tarsal coalition, for which his mother indicates he underwent surgery and receives physical therapy. In addition, the record reflects that the applicant's wife and children have regularly attended psychotherapy sessions since December 2005 in order to deal with their loss of the applicant. [REDACTED] indicates that the applicant's wife has generalized anxiety disorder and major depressive disorder, recurrent, moderate. She states that the applicant's wife and children the applicant was the primary financial supporter of his family and that after his detainment his wife and children became homeless and moved into a shelter, where they resided for over one year. Thus, we find that the evidence in the record corroborates that the emotional impact to the applicant's wife and children as a result of separation from the applicant is exceptional and extremely unusual.

With regard to living in Jamaica, the applicant's wife asserts in the letter dated October 7, 2009 that moving to a new country with a different language and culture would impact the progress that her son has made with great effort in attending a private therapeutic school. She indicates that she is not aware of any school in Jamaica that would compare to [REDACTED]. Further, she states that her son's psychological and health problems will make moving to Jamaica difficult. She indicates that Massachusetts has a high standard of health care, which she feels she will not be able to afford in Jamaica. She states that it will be cruel to have her children live in Jamaica, a poverty-stricken country where their safety, security, and education will be compromised. She conveys that in Jamaica she would have no job prospects, whereas in the United States she has the opportunity to work and continue her education. She indicates that she does not speak Patois and that unemployment in Jamaica is 12.5 percent, and underemployment is 35 to 40 percent. She states that the applicant has had difficulty finding any permanent employment since his arrival in Jamaica in March 2006, and that even if both of them were employed they would live in poverty. She indicates that she is financially supporting her husband. In addition the applicant's wife conveys that their personal safety will be at risk in Jamaica due to crime. She states that she will not have a vehicle in Jamaica and would have to travel by public transportation and taxi, which the U.S. Department of State reports can be dangerous. The applicant's wife avers that when she visited Jamaica her husband and his family members were concerned about her safety. The applicant's wife

avers that she has lived in Massachusetts since she was 15 years old and that her entire family members, all of whom she and her children maintain a close relationship, live nearby. She states that she assists her parents.

We note that the U.S. Department of State Background Note - 2010 for Jamaica states that per capita income was \$4,500 for 2009. U.S. Department of State, Bureau of Western Hemisphere Affairs, *Background Note - 2010: Jamaica*, 1 (August 9, 2010). Further, it indicates that “[t]he economy faces serious long-term problems . . . large-scale unemployment and underemployment, and a debt-to-GDP ratio of almost 120%. . . . High unemployment exacerbates the serious crime problem, including gang violence that is fueled by the drug trade.” *Id.* at 4. In addition, the U.S. Department of State Country Reports on Human Rights Practices – 2009 for Jamaica states that actual school attendance in Jamaica was about “64 percent due to the expense of school uniforms, lunch, and books, coupled with lost wages for not working on family farms or selling items on the street.” U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, *Country Reports on Human Rights Practices – 2009: Jamaica*, 9 (March 11, 2010). Lastly, the U.S. Department of State Country Specific Information - 2009 for Jamaica reports that gang violence and shooting are common in certain areas of Kingston and Montego Bay, and that violent crime is a serious problem in Jamaica, particularly in Kingston. U.S. Department of State, Bureau of Consular Affairs, *Country Specific Information -2009: Jamaica*, 1-2 (February 26, 2009). Further, it is reported that medical care is more limited than in the United States, and that doctors and hospitals in Jamaica often require cash payment prior to providing services. *Id.* at 3.

The asserted hardship factors in the instant case are having to live in poverty and will not be able to have or afford counseling and healthcare services that are comparable to what they now receive; where the education of his children, particularly his 14-year-old step-son who has emotional and health problems, will be of an inferior quality in comparison to what they now have; where the applicant and his wife will have limited employment prospects; where they feel unsafe; and where they will be separated from family members in the United States. The record establishes that the applicant’s step-son has dysthymic disorder, anxiety disorder, and ADHD, and that his ability to function at school requires that he have a high staff to student ratio and immediate access to counseling staff in order to help him regulate his responses to stressors. The applicant’s wife asserts that they will live in poverty in Jamaica because they will have limited employment prospects in a country with high unemployment and underemployment, and that this will affect their son, who will not be able to receive an equivalent education in Jamaica to the one that he now has. Furthermore, she states that they not have access to or be able to afford health services. We observe that the applicant’s visa application shows that he was employed in Jamaica as a taxi driver, and that the applicant’s wife indicates that he now works on a farm and that she sends money to her husband to pay for his necessities. Her assertions about limited employment prospects, the high likelihood of living in poverty and not being able to provide her son with the type of special education that he requires and now receives are corroborated by the money transfers to her husband and by the U.S. Department of States reports, which state that there is large-scale unemployment and underemployment in Jamaica, that the per capita income was \$4,500 for 2009, and that many children cannot attend school in Jamaica because they cannot afford school uniforms, lunch, and books, and are required to work in order to support the family. In addition, we recognize that relocation to Jamaica will result in the applicant’s son having to leave his stable environment of school, friends, and family members, which, in consideration of his psychological disorders, will

adversely affect his education. When the asserted hardship factors are considered collectively, we find the applicant has demonstrated the hardship that his stepson, will experience as a result of joining the applicant to live in Jamaica would be exceptional and extremely unusual.

In *Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996), the Board stated that once eligibility for a waiver is established, it is one of the favorable factors to be considered in determining whether the Secretary should exercise discretion in favor of the waiver. Furthermore, the Board stated that:

In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

*Id.* at 301.

The AAO must then, "[B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Id.* at 300. (Citations omitted).

The adverse factors in the present case are the criminal convictions of abuse prevention order in 2000 and 2001, two offenses of threat to commit crime in 2001, and assault in 2000.

The favorable factors are the exceptional and extremely unusual hardship to the applicant's son; his close relationship with his wife and children; [REDACTED] letter indicating that the applicant financially and emotionally supported his wife and children; the letter by [REDACTED] reflecting that the applicant completed their domestic violence program, which he attended from May 29, 2001 to February 11, 2002; the letter by [REDACTED] dated January 5, 2006, which states that she has known the applicant since 2000, and that he is a good friend, a wonderful father to her nephew and niece, and very hardworking. [REDACTED] conveys in the letter dated January 10, 2006 that she has known the applicant for over five years and that he is a wonderful father and is great to her sister. [REDACTED] states in an undated letter that she has known the applicant for six years, and describes him as hardworking, cheerful, and willing to help others. [REDACTED] indicates in the letter dated January 17, 2006 that he has known the applicant for five years and that he is trustworthy and caring, a good father, and assists

the aged and other members of the community. The record contains the applicant's certificates of recognition dated January 17, 2006 for marketing, business, self-esteem, and health I. Lastly, in an undated letter [REDACTED] states that the applicant was like a brother to her and that she could call him any time to take her children to and from school. She indicates that they worked together at a restaurant for seven years, where the applicant was the head cook and got along with fifteen other employees. Lastly, we note that it has been nine years since the applicant's most recent criminal convictions in 2001.

The AAO finds that the crimes committed by the applicant are serious in nature. The applicant was convicted of threat to commit a crime and assault in January 2001 and threaten to commit a crime in July 2001. However, we take notice that the threat to commit a crime and assault of which he was convicted on January 23, 2001 (which offenses were committed on November 24, 2000), do not categorically involve moral turpitude, and because we do not have the applicant's complete record of conviction, we cannot conclusively state that the conduct for which he was convicted in those offenses involve moral turpitude. Thus, when the adverse and favorable factors are weighed together, we find the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

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

**ORDER:** The appeal is sustained.