U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
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Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

[redacted]

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[redacted]

DATE: APR 2 0 2012 Office: HARLINGEN, TX

IN RE: [redacted]

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

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Michael Shumway

for Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States under 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 a crime involving moral turpitude. The applicant is married to a U.S. citizen and the father of four U.S. citizens. He seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h) in order to remain in the United States.

The Field Office Director concluded that the record did not establish that the bar to the applicant's admission would result in extreme hardship for any of his children and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Field Office Director's Decision,* dated September 18, 2009.

On appeal, the applicant submits additional evidence of hardship. *Form I-290B, Notice of Appeal or Motion,* dated September 28, 2009.

The record includes, but is not limited to, statements from the applicant and his spouse; a medical statement relating to one of the applicant's sons; a loan relating to the purchase of property by the applicant and his spouse; documentation of auto and life insurance policies; a bank statement; tax returns and W-2 Wage and Tax Statements for the applicant's spouse; earnings statements and a letter of employment for the applicant's spouse; and court records relating to the applicant's conviction. The entire record was reviewed and all relevant information considered in reaching a decision on the appeal.

Section 212(a)(2)(A) of the Act states in pertinent part, that:

> (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.

The Board of Immigration Appeals (BIA) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

> [M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general....
>
> In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional

> conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

In *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining inadmissibility under section 212(a)(2)(i)(I) of the Act, adopting the "realistic probability" standard used by the Supreme Court in *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183 (2007). The methodology requires an adjudicator to review the criminal statute at issue to determine if there is a "realistic probability, not a theoretical possibility," that the statute could be applied to reach conduct that does not involve moral turpitude. 24 I&N Dec. 687, 698 (A.G. 2008)(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 has been 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 reflects that on April 23, 1992, the applicant pled nolo contendere to aggravated assault under Texas Penal Code § 22.02, a third degree felony for which he was sentenced to six years in prison and fined $1,000. The court suspended the six-year sentence and placed the applicant on probation for six years.

The Field Office Director found the applicant's conviction for aggravated assault under Texas Penal Code §22.02 to be a conviction for a crime involving moral turpitude. As the applicant has not disputed this finding on appeal, and the review does not show this finding to be erroneous, the

applicant is inadmissible to the United States pursuant to section 212(a)(2)(i)(I) of the Act for having been convicted of a crime involving moral turpitude.

A waiver of a section 212(a)(2)(A)(i)(I) inadmissibility may be granted under section 212(h) of the Act if:

> (1)(A) [I]t is established to the satisfaction of the Attorney General [Secretary of Homeland Security] that-
>
> (i) [T]he 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 . . . .

The record establishes that the aggravated assault committed by the applicant took place more than 15 years ago and does not indicate that his admission would be contrary to the welfare, safety, or security of the United States. It fails, however, to demonstrate his rehabilitation, as required by section 212(h)(1)(A)(iii). While the applicant in a May 2, 2008 statement contends that he successfully completed his probation and indicates that he is submitting proof to that effect, the AAO finds no such documentation in the record. We also find no other affirmative evidence that relates to the applicant's rehabilitation, such as statement(s) from the applicant expressing his remorse for his actions; statements from the applicant's family, friends or others attesting to his rehabilitation, etc. In the absence of such evidence, the AAO does not find the applicant to have established that he is rehabilitated. Accordingly, he is not eligible for a waiver under section 212(h)(1)(A) of the Act.

The applicant, however, remains eligible for waiver consideration under section 212(h)(1)(B) of the Act based on his U.S. citizen spouse and/or children. Although an applicant may normally establish statutory eligibility for a waiver under section 212(h)(1)(B) of the Act by demonstrating that his or her inadmissibility would result in extreme hardship to a qualifying relative, the AAO notes that the applicant in the present case has been convicted of aggravated assault, a violent or dangerous crime, and must meet the heightened hardship standard of 8 C.F.R. § 212.7(d).

The regulation at 8 C.F.R. § 212.7(d) provides:

> The Attorney General [Secretary, Department of Homeland Security], in general, will not favorably exercise discretion under section 212(h)(2) of the Act (8 U.S.C.

> 1182(h)(2)) to consent to an application or reapplication for a visa, or admission to the United States, or adjustment of status, with respect to immigrant aliens who are inadmissible under section 212(a)(2) of the Act in cases involving violent or dangerous crimes, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of the application for adjustment of status or an immigrant visa or admission as an immigrant would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the alien's underlying criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act.

The AAO notes that the words "violent" and "dangerous" and the phrase "violent or dangerous crimes" are not further defined in the regulation, and the AAO is aware of no precedent decision or other authority containing a definition of these terms as used in 8 C.F.R. § 212.7(d). A similar phrase, "crime of violence," is found in section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F). Under that section, a crime of violence is an aggravated felony if the term of imprisonment is at least one year. As defined by 18 U.S.C. § 16, a crime of violence is an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, *or* any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. We note that the Attorney General did not 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 dependent 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 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. 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.

In the applicant's May 2, 2008 statement, he indicates that:

> [t]he reason I am asking for a pardon is because when I lived with my partner, I found her in bed with another man. We fought and she got in the middle of us and I wounded her in the stomach . . . . I proceeded to take her to the hospital, but on my way there, the car broke down. I called the ambulance . . . .

The AAO finds the aggravated assault committed by the applicant to be a violent or dangerous crime, whether considered under the definition provided by 18 U.S.C. §16 or the common understanding of these terms, and that he is subject to the requirements of 8 C.F.R. § 212.7(d).

The AAO finds no evidence in the record that demonstrates there are national security or foreign policy issues, or any other extraordinary circumstances that the regulation at 8 C.F.R. § 212.7(d) indicates could warrant a favorable exercise of discretion. Therefore, we will consider the extent to which the record establishes that the denial of the waiver application would result in exceptional and extremely unusual hardship to a qualifying relative.

The exceptional and extremely unusual hardship standard is more restrictive than the extreme hardship standard. *Cortes-Castillo v. INS*, 997 F.2d 1199, 1204 (7th Cir. 1993. In *Matter of Monreal-Aguinaga*, 23 I& N Dec. 56, 62 (BIA 2001), the Board of Immigration Appeals (BIA) determined that exceptional and extremely unusual hardship in cancellation of removal cases under section 240A(b) of the Act is hardship that "must be 'substantially' beyond the ordinary hardship that would be expected when a close family member leaves this country." However, the applicant need not show that hardship would be unconscionable. *Id.* at 61.

The BIA stated that in assessing exceptional and extremely unusual hardship, it would be useful to view the factors considered in determining extreme hardship. *Id.* at 63. In *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560, 565-66 (BIA 1999), the BIA provided a list of factors it deemed relevant in determining whether an alien has established the lower standard of extreme hardship. The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. The BIA added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not an exclusive list. *Id.*

In *Monreal*, the BIA provided additional examples of the hardship factors it deemed relevant for establishing exceptional and extremely unusual hardship:

> [T]he ages, health, and circumstances of qualifying lawful permanent resident and United States citizen relatives. For example, an applicant who has elderly parents in this country who are solely dependent upon him for support might well have a strong case. Another strong applicant might have a qualifying child with very serious health issues, or compelling special needs in school. A lower standard of living or adverse country conditions in the country of return are factors to consider only insofar as they may affect a qualifying relative, but generally will be insufficient in themselves to support a finding of exceptional and extremely unusual hardship. As with extreme hardship, all hardship factors should be considered in the aggregate when assessing exceptional and extremely unusual hardship.

23 I&N Dec. at 63-4.

In the precedent decision issued the following year, *Matter of Andazola-Rivas*, the BIA noted that, "the relative level of hardship a person might suffer cannot be considered entirely in a vacuum. It must necessarily be assessed, at least in part, by comparing it to the hardship others might face." 23 I&N Dec. 319, 323 (BIA 2002). The issue presented in *Andazola-Rivas* was whether the immigration judge correctly applied the exceptional and extremely unusual hardship standard in a cancellation of removal case when he concluded that such hardship to the respondent's minor children was demonstrated by evidence that they "would suffer hardship of an emotional, academic and financial nature," and would "face complete upheaval in their lives and hardship that could conceivably ruin their lives." *Id.* at 321 (internal quotations omitted). The BIA viewed the evidence of hardship in the respondent's case and determined that the hardship presented by the respondent did not rise to the level of exceptional and extremely unusual. The BIA noted:

> While almost every case will present some particular hardship, the fact pattern presented here is, in fact, a common one, and the hardships the respondent has outlined are simply not substantially different from those that would normally be expected upon removal to a less developed country. Although the hardships presented here might have been adequate to meet the former "extreme hardship" standard for suspension of deportation, we find that they are not the types of hardship envisioned by Congress when it enacted the significantly higher "exceptional and extremely unusual hardship" standard.

23 I&N Dec. at 324.

However, the BIA in *Matter of Gonzalez Recinas*, a precedent decision issued the same year as *Andazola-Rivas*, clarified that "the hardship standard is not so restrictive that only a handful of applicants, such as those who have a qualifying relative with a serious medical condition, will qualify for relief." 23 I&N Dec. 467, 470 (BIA 2002). The BIA found that the hardship factors presented by the respondent cumulatively amounted to exceptional and extremely unusual hardship to her qualifying relatives. The BIA noted that these factors included her heavy financial and familial burden, lack of support from her children's father, her U.S. citizen children's unfamiliarity with the Spanish language, lawful residence of her immediate family, and the concomitant lack of family in Mexico. 23 I&N Dec. at 472. The BIA stated, "We consider this case to be on the outer limit of the narrow spectrum of cases in which the exceptional and extremely unusual hardship standard will be met." *Id.* at 470.

An analysis under *Monreal-Aguinaga* and *Andazola-Rivas* is appropriate. *See Gonzalez Recinas*, 23 I&N Dec. at 469 ("While any hardship case ultimately succeeds or fails on its own merits and on the particular facts presented, *Matter of Andazola* and *Matter of Monreal* are the starting points for any analysis of exceptional and extremely unusual hardship."). The AAO notes that exceptional and extremely unusual hardship to a qualifying relative must be established in the event that he or she relocates with 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 the United States based on the denial of the applicant's waiver request.

In a September 26, 2009 statement submitted on appeal, the applicant's spouse asserts that a denial of the waiver application would result in her family being broken apart. She states that the applicant's children have been abandoned by their birth mother who has moved to Mexico and that it would be a case of extreme cruelty for them to lose their father as well. She also contends that the applicant would want his children to remain in the United States with her to continue their education, but that separation from their father would be unbearable for them and would not work. The applicant's spouse further reports that one of the applicant's sons, 11-year-old [redacted], has Attention Deficit Hyperactivity Disorder (ADHD) for which he is taking medication. She contends that Danilo needs his father with him to help him deal with his disorder and that the applicant is Danilo's "only comfort." The applicant's spouse also states that as a result of a recent physical attack in which the applicant was injured, she is the only one working and that in the current economy, it is very difficult to maintain a household with three growing children.

In support of the preceding claims, the record contains an April 29, 2008 statement from [redacted] who states that [redacted] has been under his care since September 2006 for Attention Deficit Hyperactivity Disorder and Mood Disorder.

The record establishes that the applicant has four U.S. citizen children who are now 10, 11, 13 and 21 years old. Although both the applicant and his spouse assert that the applicant's sons' birth mother has abandoned them and moved to Mexico, leaving them in the care of the applicant, the record includes no evidence that supports these claims. The record does not contain any statements from teachers, doctors or clergy, or school records that indicate the applicant's prior partner is no longer a part of her children's lives or that the applicant is caring for them. The AAO notes that while the record contains a 2006 life insurance application in which the applicant lists all four of his U.S. citizen children as well as two children in Mexico as "other persons proposed for insurance," the applicant's inclusion of his U.S. citizen children in this document is not proof that they have been abandoned by their mother and are now solely his responsibility.

While [redacted] statement establishes that the applicant's 11-year-old son, Danilo, is being treated for ADHD and Mood Disorder, it does not indicate that the applicant plays any role in his son's treatment or that his presence is required for the success of the treatment. The record also contains no documentary evidence that demonstrates the impact of separation on the applicant's children's mental or emotional heath.

It further fails to establish that the applicant's spouse would experience emotional or financial hardship in his absence. Although the applicant's spouse contends in her September 26, 2009 statement that she needs the applicant with her, the record does not document the emotional impact that separation from the applicant would have on her. The record also lacks evidence that would establish the applicant's spouse's financial circumstances in his absence. The record includes the applicant's spouse's tax returns for 2004 and 2005, and her earnings statements for 2006, but no evidence demonstrates the applicant's or his spouse's income at the time the appeal was filed, nor is

there any documentation that would establish the applicant's spouse's financial obligations in his absence, including those relating to the support of his children. Although we note that the applicant's spouse's tax returns for 2004 and 2005 indicate that she claimed the applicant's now 21-year-old son as a foster child during both years, the record includes no subsequent tax records or any other financial documents that demonstrate the applicant's spouse would be responsible for supporting his three younger sons.

Without further documentary evidence to support the preceding claims of hardship, the AAO is unable to find that separation from the applicant would result in extreme or exceptionally unusual hardship for his spouse or children.

In her September 26, 2009 statement, the applicant's spouse also asserts that she and the applicant's children would experience hardship if they relocate to Mexico. She contends that moving to Mexico would force the applicant's children to drop out of school, denying them the U.S. education they deserve, as well as the opportunity to make something of themselves. The applicant's spouse further maintains that as the applicant's children were born in the United States, they would not be allowed to attend school in Mexico. Denying the applicant's sons the education they deserve, she states, would be a case of extreme cruelty.

The applicant's spouse also reports that the applicant was recently the victim of an attack and is still recuperating. She asserts that after his cast is removed and his head wounds heal, he will require physical therapy and will need the best medical care he can receive. If the applicant is removed to Mexico, she maintains, he would not receive the medical care he needs to recover fully and would have no one to care for him. Conversely, the applicant's spouse also maintains that if the waiver application is denied, she would have to quit her job and move to Mexico with the applicant, where she would not receive the same salary she is paid in the United States. She further points to the violence prevalent in Mexico and asserts that if the family relocates, they would live in fear. The applicant's spouse states that the applicant's children have never visited Mexico because they are afraid that something will happen to them.

Although the AAO acknowledges the claims made regarding the injuries suffered by the applicant in a physical attack, we find no medical documentation in the record to establish these injuries or the applicant's need for medical care. Further, as previously discussed, the applicant is not a qualifying relative in this proceeding and the record fails to establish how any hardship he might experience in Mexico would affect his spouse or children.

The AAO does, however, note that the BIA has previously found that a 15-year-old child who had lived her entire life in the United States, was completely integrated into the American lifestyle and was not fluent in Chinese would suffer extreme hardship if she relocated to Taiwan. *Matter of Kao and Lin*, 23 I&N Dec. 45 (BIA 2001). The BIA concluded that uprooting the child at her stage of education and social development and requiring her to survive in a Chinese-only environment would be such a significant disruption that it would constitute extreme hardship. The BIA, having found extreme hardship to be established for the 15-year-old, determined that it was unnecessary to

consider whether relocation to Taiwan would also constitute extreme hardship for her younger siblings.

The AAO also acknowledges the applicant's spouse's claims regarding the violence in Mexico and notes that the U.S. Department of State has issued a travel warning for U.S. citizens regarding the significant increase in drug-related violence across Mexico. The warning, most recently updated on February 8, 2012, specifically advises U.S. citizens to defer nonessential travel to the State of Tamaulipas, noting the general risk of armed robbery and carjacking on Tamaulipas' highways, and the midnight to 6am curfew that must be observed by U.S. government employees in the city of Matamoros, the city where the applicant and his father were born and where the applicant and his family would likely reside. The travel warning also indicates that gun battles between rival Transnational Criminal Organizations or with Mexican authorities have taken place in many parts of Mexico, but especially in the area of the Mexico-United States border.

Nevertheless, as the record does not also establish that the applicant's inadmissibility would result in exceptional and extremely unusual hardship for his children as a result of separation, we find that he has failed to establish eligibility for a favorable exercise of discretion under section 212(h) of the Act.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, appeal will be dismissed.

ORDER: The appeal is dismissed.