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



**U.S. Citizenship
and Immigration
Services**



H2

Date: APR 30 2012 Office: NEWARK

FILE: [REDACTED]

IN RE: Applicant: [REDACTED]

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

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

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

Thank you,

A handwritten signature in cursive script that reads "Michael Shumway".

f Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Jamaica 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 been convicted of a crime involving moral turpitude. He seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen wife and daughter.

The field office director denied the Form I-601 application for a waiver, finding that the applicant failed to establish extreme hardship to a qualifying relative. *Decision of the Field Office Director*, dated September 16, 2009.

On appeal, counsel for the applicant asserts that the applicant has shown that his family will suffer extreme hardship should the present waiver application be denied, and that positive factors in this case outweigh the negative factors. *Statement from Counsel on Form I-290B*, dated October 13, 2009.

The record contains, but is not limited to: a brief from counsel; a psychological evaluation for the applicant's wife and daughter; reports on conditions in Jamaica; documentation in connection with the applicant's and his wife's employment; statements from the applicant, the applicant's wife, and others in support of the application; a custody order regarding the applicant's daughter; and documentation in connection with the applicant's criminal conviction. The entire record was reviewed and considered in rendering this decision.

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

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

The record shows that the applicant was convicted of aggravated assault with a deadly weapon under New Jersey Statutes § 2C:12-1b(2) for his conduct on or about August 8, 1999. Based on this conviction, the applicant was found to be inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude. The applicant does not contest his inadmissibility on appeal. He requires a waiver under section 212(h) of the Act.

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

The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana

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

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

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . .; and

(2) the Attorney General [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

It is noted that the applicant's conviction for aggravated assault with a deadly weapon constitutes a violent or dangerous crime as contemplated by the regulation at 8 C.F.R. § 212.7(d). Accordingly, he must show that denial of his waiver application “would result in exceptional and extremely unusual hardship” in order to establish that discretion may be favorably exercised and his application may be approved. 8 C.F.R. § 212.7(d). As this standard is more restrictive than the “extreme hardship” standard found in section 212(h) of the Act, the AAO will first assess whether he meets the requirements of the regulation at 8 C.F.R. § 212.7(d). *See Cortes-Castillo v. INS*, 997 F.2d 1199, 1204 (7th Cir. 1993).

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). It provides that a "crime of violence," as defined under 18 U.S.C. § 16, for which the term of imprisonment is at least one year, is an aggravated felony. As such, "crime of violence" is limited to those crimes specifically listed in 18 U.S.C. § 16. It is not a generic term with application to any crime involving violence, as that term may be commonly defined. That the DOJ chose not to use the language of section 101(a)(43)(F) of the Act or 18 U.S.C. § 16 in promulgating 8 C.F.R. § 212.7(d) indicates that "violent or dangerous crimes" and "crime of violence" are not synonymous. The Department of Justice clarified the relationship between these distinct terms in the interim final rule codifying 8 C.F.R. § 212.7(d):

[I]n general, individuals convicted of aggravated felonies would not warrant the Attorney General's use of this discretion. In fact, the proposed regulations stated that even if the applicant can meet the "exceptional and extremely unusual hardship" standard for the exercise of discretion, depending upon the severity of the offense, this might "still be insufficient" to obtain the waiver. See 67 FR at 45407. That language would substantially limit the circumstances under which an individual convicted of an aggravated felony would be granted a waiver as a matter of discretion. Therefore, the Department believes that this language achieves the goal of the commenter while not unduly constraining the Attorney General's discretion to render waiver decisions on a case-by-case basis.

67 Fed. Reg. 78675, 78677-78 (December 26, 2002).

Therefore, the fact that a conviction constitutes an aggravated felony under the Act may be indicative that an alien has also been convicted of a violent or dangerous crime, but it is not dispositive. 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." The AAO interprets the phrase "violent or dangerous crimes" in accordance with the plain or common meaning of its terms, consistent with any published precedent decisions addressing discretionary denials under 8 C.F.R. § 212.7(d) or the

standard originally set forth in *Matter of Jean*.

The AAO finds that the applicant's conviction for aggravated assault with a deadly weapon clearly constitutes a violent or dangerous crime. Accordingly, we will assess whether "extraordinary circumstances" warrant approval of the waiver. 8 C.F.R. § 212.7(d).

In *Matter of Monreal-Aguinaga*, 23 I& N Dec. 56, 62 (BIA 2001), the BIA determined that exceptional and extremely unusual hardship in cancellation of removal cases under section 240A(b) of the Act is hardship that "must be 'substantially' beyond the ordinary hardship that would be expected when a close family member leaves this country." However, the applicant need not show that hardship would be unconscionable. *Id.* at 61. The AAO notes that the exceptional and extremely unusual hardship standard in cancellation of removal cases is identical to the standard put forth by the Attorney General in *Matter of Jean, supra*, and codified at 8 C.F.R. § 212.7(d).

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

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

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

23 I&N Dec. at 63-4.

In the precedent decision issued the following year, *Matter of Andazola-Rivas*, the BIA noted that, "the relative level of hardship a person might suffer cannot be considered entirely in a vacuum. It

must necessarily be assessed, at least in part, by comparing it to the hardship others might face.” 23 I&N Dec. 319, 323 (BIA 2002). The issue presented in *Andazola-Rivas* was whether the Immigration Judge correctly applied the exceptional and extremely unusual hardship standard in a cancellation of removal case when he concluded that such hardship to the respondent’s minor children was demonstrated by evidence that they “would suffer hardship of an emotional, academic and financial nature,” and would “face complete upheaval in their lives and hardship that could conceivably ruin their lives.” *Id.* at 321 (internal quotations omitted). The BIA viewed the evidence of hardship in the respondent’s case and determined that the hardship presented by the respondent did not rise to the level of exceptional and extremely unusual. The BIA noted:

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

23 I&N Dec. at 324.

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

An analysis under *Monreal-Aguinaga* and *Andazola-Rivas* is appropriate. See *Gonzalez Recinas*, 23 I&N Dec. at 469 (“While any hardship case ultimately succeeds or fails on its own merits and on the particular facts presented, *Matter of Andazola* and *Matter of Monreal* are the starting points for any analysis of exceptional and extremely unusual hardship.”).

In a statement dated June 22, 2009, the applicant’s wife provided that she and the applicant began their relationship in 2002. She explained that the applicant’s daughter is a priority for him, and that as of the date of her letter the applicant had daily communication and weekend visitation with his daughter. She explained that the applicant and his daughter would face significant emotional harm should they be separated. She expressed that she and the applicant are committed to each other, and that they are each other's emotional, financial, and spiritual support. She noted that they intend to

have more children. She lauded the applicant's character and indicated that he expresses remorse for his criminal conviction.

In a statement dated June 22, 2009, the applicant expressed remorse for his criminal conviction, and he noted that the offense occurred in 1999 when he was 20 years old. He indicated that his family will be destroyed if he is compelled to reside outside the United States, and that his wife and daughter cannot live in Jamaica. He stated that his mother, who resides in Jamaica, reported that socioeconomic conditions in Jamaica are poor. He added that he has not resided in or visited Jamaica since the age of 17, and that he has established a life in the United States.

The applicant provided documentation to show that the mother of his daughter consented to him having residential custody on July 14, 2009. In a letter dated October 26, 2009, the mother of the applicant's daughter stated that she no longer financially provides for their daughter, and that she and the applicant believes it's in their daughter's best interests to reside with the applicant and his wife. She noted that she will not agree to allowing the applicant's daughter to leave the United States to live in Jamaica. The applicant has provided letters from his daughter's grandparents and other relatives who expressed that the applicant is a good father, and that his daughter will suffer significant emotional hardship should he reside outside the United States.

The applicant provides a psychoemotional and family dynamics assessment from a licensed mental health counselor and certified clinical psychopathologist, [REDACTED] dated October 24, 2009. [REDACTED] reported the results of multiple mental status examinations administered to the applicant's wife and daughter, and discussed the applicant's and his wife's history and concerns. He concluded the applicant's wife and daughter will face significant emotional hardship should they become separated from the applicant or endure a traumatic relocation to Jamaica.

Upon review, the applicant has shown that denial of the present waiver application would result in exceptional and extremely unusual hardship to his U.S. citizen daughter. The record shows that the applicant has sole physical custody of his 13-year-old daughter, and that her mother willingly relinquished custody and ceased to support her financially. It is evident that the applicant's daughter relies on him for emotional and economic support. The applicant's daughter would be left without a willing and able parent to care for her should the applicant return to Jamaica and she remain in the United States. These circumstances constitute exceptional and extremely unusual hardship for a 13-year-old child.

It is noted that the mother of the applicant's daughter asserted that she will not consent to the applicant's daughter relocating to Jamaica with the applicant. While the custody order of the Superior Court of New Jersey contained in the record awarded the applicant residential custody of his daughter, it states that he shares joint legal custody with his daughter's mother. Thus, it appears that the applicant is not at liberty to unilaterally choose to relocate his daughter to Jamaica, and he would require the consent of his daughter's mother or a new court order. The AAO is unable to determine whether the applicant would in fact obtain permission to legally relocate his daughter to Jamaica, and his removal may result in forced separation from his daughter who depends on him.

Should the applicant's daughter relocate to Jamaica, she would face significant hardship, including separation from her community and academic activities, separation from her country of nationality and residence, separation from her biological mother and other relatives, and the challenge of adapting to an unfamiliar country and culture. She would share in the applicant's emotional and economic challenges. The AAO acknowledges that conditions in Jamaica pose challenges and that the applicant has concerns for his daughter's well-being there. The AAO finds that the aggregate of difficulties that the applicant's daughter would endure in Jamaica constitute exceptional and extremely unusual hardship for 13-year-old child.

Based on the foregoing, the applicant has shown that denial of the present waiver application would result in exceptional and extremely unusual hardship to his daughter. 8 C.F.R. § 212.7(d).

Additionally, the AAO finds that the gravity of the applicant's offense does not override the extraordinary circumstances in the applicant's case. In determining the gravity of the applicant's offense, the AAO must not only look at the criminal act itself, but also engage in a traditional discretionary analysis and "balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Matter of Mendez-Morales*, 21 I&N Dec. 296, 300 (BIA 1996)(Citations omitted).

The negative factors in this case consist of the following:

The applicant has been convicted of a violent or dangerous crime in the United States. The applicant overstayed his B-2 nonimmigrant status and remained for lengthy period without a legal immigration status.

The positive factors in this case include:

The applicant's U.S. citizen daughter will experience exceptional and extremely unusual hardship should he reside outside the United States, as well as hardship to the applicant's wife. The record does not reflect that the applicant has committed a crime since 1999, in approximately 13 years. The record shows that the applicant has only committed a single crime, and that his offense occurred at the age of 20. The applicant's U.S. citizen wife will face significant hardship should he reside outside the United States. The applicant has shown a propensity to work and pay taxes, and to support his wife and daughter. The applicant has taken responsibility for his daughter when her mother determined that she was no longer able to provide physical or economic support. Numerous individuals attest to the applicant's devoted care of his daughter and cultivation of a close family unit.

The applicant's prior act of violence is troubling and raises serious concerns regarding his character and risk to others in the United States. His prior lack of regard for U.S. immigration law cannot be condoned. However, the AAO observes that the applicant's single criminal act occurred at a young age, and he has expressed credible remorse for his transgression. The record does not show that he engaged in criminal activity before or after his conviction.

The record contains information regarding a protection order entered against the applicant on or about November 8, 2008 that restrained him from certain contact with the mother of his daughter and “the child of the protected person.” The applicant has not provided any explanation or documentation regarding this order or events that led to its issuance. The order raises concerns regarding the applicant's conduct with respect to the mother of his daughter, particularly given that he was previously convicted of aggravated assault with a deadly weapon. However, the record contains two letters from the mother of the applicant's daughter in which she confirms that she voluntarily consented to the applicant having custody of their child for their child's best interest. As discussed above the applicant provided a court order that reflects that he in fact has sole physical custody of his daughter. The record does not contain any documentation to show the applicant was arrested or charged with a crime after his assault in 1999, and there is ample evidence that he has resolved conflicts with the mother of his daughter through mutual agreement and court action.

Considering all presented evidence in totality, the AAO finds that the benefits of keeping the applicant's family intact in the United States outweigh the gravity of his prior misconduct, such that a favorable exercise of discretion is warranted.

As the applicant has shown that his daughter will suffer “exceptional and extremely unusual hardship” as contemplated by the regulation at 8 C.F.R. § 212.7(d), he has also met the lesser standard of showing that a qualifying relative will suffer “extreme hardship”, as required by section 212(h) of the Act. Accordingly, he has established that he is eligible for a waiver under section 212(h) of the Act. As discussed above, the applicant has shown that he warrants a favorable exercise of discretion.

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

ORDER: The appeal is sustained.