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



U.S. Citizenship
and Immigration
Services

Date: DEC 30 2013

Office: SAN FERNANDO VALLEY, CA

FILE: [REDACTED]

IN RE: [REDACTED]

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

ON BEHALF OF APPLICANT:
[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

A handwritten signature in cursive script, appearing to read "Michael Shumway".

for Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, San Fernando Valley, California denied the waiver application. A subsequent appeal of this decision was dismissed by the Administrative Appeals Office (AAO). The appeal is now on motion. The motion will be granted and the appeal sustained.

The applicant is a native and citizen of Mexico who was found to be inadmissible under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having committed a crime involving moral turpitude. The applicant is the beneficiary of an approved I-130 Petition for Alien Relative filed on her behalf by her U.S. citizen daughter. She is applying for a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with her three U.S. citizen children.

On January 22, 2013, the field office director denied the application for a waiver (Form I-601), finding that the applicant failed to establish extreme hardship to a qualifying relative.

On appeal, counsel stated that the evidence compelled a finding of extreme hardship. In support of the waiver application, the record included a brief from counsel, affidavits from the applicant's children, biographical information for the applicant and her children, biographical and medical records for the applicant's children, school records for the applicant's children, country conditions information for Mexico, and documentation in connection with the applicant's criminal and immigration history.

In our decision, dated October 1, 2013, we affirmed the field office director's finding that the applicant was inadmissible under section 212(a)(2)(A)(i)(I) of the Act, for having committed a crime involving moral turpitude. In regards to the hardship that the applicant's children would suffer if they were to be separated from the applicant, we noted that the applicant's children were all adults living with the applicant or nearby; that the applicant had been living in the United States for most of her children's lives; and that the applicant's two daughter suffer from a history of serious depression. We found that because the record failed to include an explanation in plain language from the treating physician of the exact nature and severity of the daughter's conditions and descriptions of any treatment or family assistance needed, the AAO was not in the position to reach conclusions concerning the severity of a medical condition or the treatment needed. Additionally, we found that the record did not indicate there would be financial hardship upon separation. We then concluded that although the record indicated that the applicant's children would likely endure hardship as a result of long-term separation from their mother, the record did not establish that the hardships that any of them would face, considered in the aggregate for each child, are beyond the hardships normally experienced by families separated due to immigration inadmissibility.

In regards to the hardship that the applicant's children would suffer if any of them were to relocate to Mexico to reside with the applicant, the record contained very little information aside from the documentation that the children were born and raised in the United States and that they are each presently pursuing a community college education. Additionally, we noted the children's family ties in the United States, including their ties to each other and for the eldest daughter to her child, but found that the record did not establish how severing those ties or relocating as a family unit would result in extreme hardship to any of the children. We also noted the country conditions information

submitted regarding Mexico and took administrative note of the Travel Warning in regards to Mexico issued by the U.S. Department of State on November 20, 2012. We found that counsel's assertions regarding relocation to Mexico being dangerous were not supported by the record because the record failed to state to which part of the country the family would relocate and how the conditions in Mexico would specifically affect the children. We found that based on the information provided, considered in the aggregate, the record did not illustrate that the hardship of relocation would be beyond what is normally experienced by families dealing with removal or inadmissibility. We found that the applicant had failed to establish extreme hardship to a qualifying relative as a result of her inadmissibility.

We also found that that the applicant's crime, Assault with Force Likely to Produce Great Bodily Injury, was a violent or dangerous crime and the applicant would have to meet the heightened discretionary standard under 8 C.F.R. §212.7(d) for a favorable exercise of discretion.

On motion, counsel asserts that the AAO erred in finding no extreme hardship in the applicant's case, that we did not give enough weight to family separation, and that we ignored the mental health documentation concerning the applicant's two daughters, [REDACTED] and the ties the applicant's children have to the community. Counsel also asserts that the applicant is not subject to the heightened discretionary standard under 8 C.F.R. §212.7(d) because the applicant has a criminal record of only two misdemeanors and no traumatic injury resulted from her crime. He states that although the applicant is not subject to this heightened discretionary standard, she meets this heightened standard of hardship. He submits additional hardship evidence on motion, including: affidavits from the applicant and her children; a letter from [REDACTED] psychiatrist and other medical records; medical records concerning the applicant's cancer diagnosis; and reports on medical care in Mexico.

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.

We have previously found and counsel does not contest that the applicant is inadmissible for having committed a crime involving moral turpitude. The record reflects that on January 15, 2008, the applicant was convicted in the Superior Court of California, [REDACTED] of Assault with Force Likely to Produce Great Bodily Injury in violation of section 245(a)(1) of the California Penal Code. The record indicates that the offense occurred on December 17, 2006, and the applicant was concurrently convicted of Reckless Driving and driving without a license. The applicant was sentenced to serve 60 days in jail, to pay restitution and fees, and to complete 3 years of probation. The AAO notes that the record indicates that the applicant had two prior arrests and convictions from 1995, one in violation of California Penal Code section 484(A) (theft) and the others in violation of California Vehicle Code sections 27360A, 27315D, and 12500A. Because our previous

findings are not being contested, we will not address the applicant's inadmissibility under section 212(a)(2)(A)(i)(I) of the Act on motion.

However, we will address whether the applicant's conviction for Assault with Force Likely to Produce Great Bodily Injury in violation of section 245(a)(1) of the California Penal Code is a violent or dangerous crime.

At the time of the applicant's conviction on January 15, 2008, section 245(a)(1) of the California Penal Code provided, in pertinent part:

Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars (\$10,000), or by both the fine and imprisonment.

The offense underlying the applicant's crime, assault, is defined under the California Penal Code as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." Cal. Penal Code § 240 (West 2006). We affirm the previous finding by the AAO that the applicant's crime is a violent or dangerous crime and the applicant is subject to the heightened discretionary standard under 8 C.F.R. 212.7(d).

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

The Attorney General [Secretary], 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 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 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). Black’s Law Dictionary, Seventh Edition (1999), defines violent as “of, relating to, or characterized by strong physical force” and dangerous as “likely to cause serious bodily harm.” 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.

We do not find counsel’s assertions regarding the applicant’s crime being not dangerous or violent to be persuasive. It is irrelevant, for these purposes, whether the crime committed was a misdemeanor or a felony. We cannot re-litigate the applicant’s offense and must presume that the applicant’s actions coincided with the actions described in the statute. The applicant’s conviction for assault likely to produce great bodily injury is, consistent with common definitions, a violent or dangerous crime.

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.

A waiver of inadmissibility under section 212(h)(1)(B) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawful permanent resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. The applicant's three U.S. citizen children are qualifying relatives in this case. However, as stated above, even if the applicant establishes that she meets the requirements of section 212(h)(1)(B), the Secretary may not favorably exercise discretion in the applicant's case except in extraordinary circumstances. *See* 8 C.F.R. § 212.7(d).

Accordingly, the applicant must show that "extraordinary circumstances" warrant approval of the waiver. 8 C.F.R. § 212.7(d). Extraordinary circumstances may exist in cases involving national security or foreign policy considerations, or if the denial of the applicant's admission would result in exceptional and extremely unusual hardship. *Id.* Finding no evidence of foreign policy, national security, or other extraordinary equities, the AAO will consider whether the applicant has "clearly demonstrate[d] that the denial of . . . admission as an immigrant would result in exceptional and extremely unusual hardship" to a qualifying relative. *Id.*

In *Matter of Monreal-Aguinaga*, 23 I& N Dec. 56, 62 (BIA 2001), the BIA determined that exceptional and extremely unusual hardship in cancellation of removal cases under section 240A(b) of the Act is hardship that "must be 'substantially' beyond the ordinary hardship that would be expected when a close family member leaves this country." However, the applicant need not show that hardship would be unconscionable. *Id.* at 61

The 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-Aguinaga*, 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.”).

We find that the applicant’s youngest daughter, [REDACTED] will suffer not only extreme hardship, but also exceptional and extremely unusual hardship as a result of her mother’s inadmissibility. We note that by focusing our decision on [REDACTED] we do not mean to minimize the hardship to the applicant’s other children. However, [REDACTED] situation is exceptional and, as such, will be the focus of this decision.

The record indicates that [REDACTED] has a history of suffering from severe depression and has attempted suicide on two occasions. Her most recent attempt on her life was in 2012. The record indicates, through medical documentation and statements from the applicant and her family that [REDACTED] lives with the applicant, who is her closest confidante, and requires the continued care and support of the applicant. The record establishes that [REDACTED] takes numerous medications for her mental health condition and is consistently treated by a medical team. We find that due to the seriousness of [REDACTED] condition, the continued care she requires, and the special relationship she has with her mother as her care giver, she would suffer exceptional and extremely unusual hardship as a result of being separated from her mother.

We also find that [REDACTED] would suffer exceptional and extremely unusual hardship as a result of relocating to Mexico. The record establishes that the applicant’s family has very few ties to Mexico and that access to adequate health care in Mexico is not assured for [REDACTED] condition. Given the unique problems surrounding the treatment of mental health conditions, relocation to Mexico would be exceptional and extremely unusual in that it would cause a break in [REDACTED] mental health care, require her to leave the current medical team that has been treating her for years, and require her to sever family and cultural ties to the United States, which are factors made more significant by the impact they are likely to have on her already fragile mental health.

Additionally, the AAO finds that the gravity of the applicant’s offense does not override the extraordinary circumstances in the applicant’s case. The adverse factors in the present case are the



applicant's criminal record and her unlawful entry in 1989. The favorable factors in the present case are the hardship the applicant's children would suffer as a result of her inadmissibility and the support the applicant provides to her children, especially her two daughters who suffer from depression. We note that the record states that the applicant entered the United States to flee a childhood of abuse in 1989 when she was 16 years old. The record indicates that she began having children shortly after her entry and has been a loving and dedicated mother. The record also indicates that the applicant is recovering from a diagnosis of oral cancer, for which she has health insurance in the United States. Given the documentation in the record concerning health care in Mexico, we can find that the applicant would suffer medical hardship if she were to be found inadmissible and had to relocate to Mexico. Finally, the applicant has had no criminal record since 2006, she expressed regret over her actions, and is apologetic about the events in her past.

The AAO finds that the applicant has established that the favorable factors in her case outweigh the unfavorable factors. In discretionary matters, the applicant bears the full burden of proving her eligibility for discretionary relief. *See Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976). Here, the applicant has now met that burden. Accordingly, the motion is granted and the appeal is sustained.

ORDER: The motion is granted and the appeal is sustained.