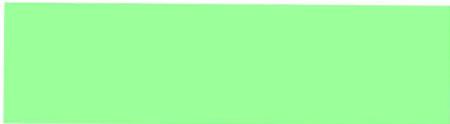


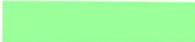
(b)(6)

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**

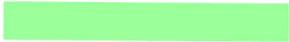


Date: **JUL 23 2013**

Office: LOS ANGELES, CA

FILE: 

IN RE:

Applicant: 

APPLICATION:

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

ON BEHALF OF APPLICANT:



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. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

A handwritten signature in black ink that reads "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Los Angeles, California, denied the waiver application 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 Japan who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i) of the Act for having been convicted of a crime involving moral turpitude. The applicant seeks a waiver of inadmissibility pursuant section 212(h) of the Act in order to live with his U.S. citizen wife and children in the United States.

The field office director found that the applicant failed to establish extreme hardship to a qualifying relative and denied the application accordingly.

On appeal, counsel contends the applicant's wife will suffer extreme hardship if the applicant's waiver application were denied, particularly considering she does not earn sufficient income to support herself and her three children, she has lived in the United States for more than eighteen years, and her children would suffer emotional and psychological distress.

The record contains, *inter alia*: a copy of the marriage certificate of the applicant and his wife, indicating they were married on June 1, 2002; an affidavit from the applicant; an affidavit and a letter from ; a psychological evaluation; letters of support; documents from the children's school; copies of tax returns and other financial documentation; conviction documents; and an approved Immigrant Petition for Alien Relative (Form I-130). The entire record was reviewed and considered in rendering this decision on the appeal.

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

- (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 . . . or an attempt or conspiracy to commit such a crime . . . is inadmissible.

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

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

....

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General 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 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.)

The record shows, and the applicant does not contest, that on [REDACTED] the applicant was convicted of willfully inflicting corporal injury on his spouse (now ex-wife) in violation of California Penal Code § 273.5 in the Superior Court of California, County of Los Angeles. He was sentenced to twenty days in jail, placed on probation for 36 months, and ordered to complete domestic violence counseling among other things. In addition, the record shows, and the applicant does not contest, that on [REDACTED] the applicant was convicted of willfully inflicting corporal injury on his current spouse in violation of the same statute in the same court. The applicant was placed on probation for 36 months, ordered to complete domestic violence counseling, and ordered to pay restitution among other things.

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.

At the time of the applicant’s first conviction in [REDACTED] California Penal Code section 273.5 stated:

- (a) Any person who willfully inflicts upon his or her spouse, or any person who willfully inflicts upon any person with whom he or she is cohabiting, or any person who willfully inflicts upon any person who is the mother or father of his or her child, corporal injury resulting in a traumatic condition, is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not more than one year, or by a fine of up to six thousand dollars (\$6,000) or by both that fine and imprisonment.¹

The Ninth Circuit Court of Appeals, within which the present case arises, has held that spousal abuse under California Penal Code section 273.5(a) is a crime of moral turpitude. *Grageda v. INS*, 12 F.3d 919, 922 (9th Cir. 1993) (“Because spousal abuse is an act of baseness or depravity contrary to accepted moral standards, and willfulness is one of its elements, we hold that spousal abuse under section 273.5(a) is a crime of moral turpitude.”); *see also In re Tran*, 21 I&N Dec. 291 (BIA 1996) (holding that a conviction for willful infliction of corporal injury on a spouse, co-habitant, or parent of the perpetrator’s child, in violation of section 273.5(a) of the California Penal Code, constitutes a crime involving moral turpitude). Therefore, the applicant’s convictions under California Penal Code section 273.5(a) are for crimes involving moral turpitude.

The applicant is seeking a section 212(h) waiver of the bar to admission resulting from a violation of section 212(a)(2)(A)(i)(I) of the Act. A waiver under section 212(h) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent or child of the applicant. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996). In most discretionary matters, the alien bears the

¹ At the time of the applicant’s October 2009 conviction, the statute also included former spouses and former cohabitants.

burden of proving eligibility simply by showing equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957). However, the AAO cannot find, based on the facts of this particular case, that the applicant merits a favorable exercise of discretion solely on the balancing of favorable and adverse factors. The applicant's conviction for willfully inflicting corporal injury on his spouse indicates that he is subject to the heightened discretion standard of 8 C.F.R. § 212.7(d) as this crime is a violent and/or dangerous crime.

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. 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.

Using the above definitional framework, the AAO finds the offense punished under California Penal Code § 273.5 to be a violent crime for the purposes of 8 C.F.R. § 212.7(d). We also note that in *U.S. v. Laurico-Yeno*, 590 F.3d 818, 821 (9th Cir. 2010), the Ninth Circuit Court of Appeals found that because a person cannot be convicted without the intentional use of force under California Penal Code § 273.5, a conviction for inflicting corporal injury on a spouse or cohabitant categorically falls within the scope of a crime of violence. Because the record does not include 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.*

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). Since the applicant is subject to 8 C.F.R. § 212.7(d), merely showing extreme hardship to a qualifying relative under section 212(h) of the Act is insufficient.²

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.*

² In that the applicant is subject to the hardship standard set forth in the regulation at 8 CF.R. § 212.7(d), the AAO has not considered his eligibility for a waiver under section 212(h)(1)(B) of the Act, which requires a waiver applicant to meet the lower standard of extreme hardship to a qualifying relative.

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.

Monreal-Aguinaga, 23 I&N Dec. at 63-64.

In the precedent decision issued the following year, *Matter of Andazola-Rivas*, 23 I&N Dec. 319, 323 (BIA 2002), 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.” 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.

Andazola-Rivas, 23 I&N Dec. at 324.

However, the BIA in *Matter of Gonzalez Recinas*, 23 I&N Dec. 467, 470 (BIA 2002), 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.” 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. *Gonzalez Recinas*, 23 I&N Dec. at 472. The BIA stated, "[w]e 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.

In this case, the applicant's wife states that she and her husband have two children together and that she has a son from a previous relationship. The applicant's wife contends that if she stays in the United States without her husband, the children will rarely get to see their father. She states that they do not have enough money to pay for trips between the United States and Japan. In addition, she states that she cannot afford to live on her own in the United States because she works 16 hours per week earning minimum wage and only has a middle school education. Furthermore, she states that if she moves to Japan to be with her husband, her oldest son will either be unable to see his biological father if he moves with her or will be unable to see his mother if he remains in the United States. According to the applicant's wife, her oldest son sees his biological father regularly. She also contends that in Japan, the fees needed for the children's education are so high that they would likely have to quit school. She asserts that she is in an impossible position and that it is causing her extreme heartache and stress. She contends she is struggling, cannot sleep, feels helpless, and has a difficult time making even the most basic decisions. In addition, the applicant's wife states that her children would have an extremely difficult time in Japan because they do not speak Japanese and it is very difficult for foreigners to integrate into Japanese culture. According to the applicant's wife, her children, particularly her oldest son because his biological father is African-American, will be called terrible names and bullied. Moreover, she states she has lived in the United States for almost twenty years, coming to the United States when she was twenty-four years old. She states she does not have anything in Japan, does not know where they would live in Japan, and has no money to start a life in Japan. Additionally, she states she fears living in Japan because of earthquakes and high levels of radiation.

After a careful review of the record, we cannot find that the applicant's spouse or children will suffer exceptional and extremely unusual hardship as a result of separation. Although the AAO acknowledges that the record shows hardship considering the applicant's wife's contentions that she has lived in the United States for almost twenty years, that none of her three children speak Japanese, that her children may have a difficult time integrating into Japanese culture and affording school, and that she earns an income that would be below the poverty line if she were to support her family on her own, nonetheless, the AAO finds that the hardships related to separation and relocation presented in this case do not rise to the level of exceptional and extremely unusual hardship. According to the applicant's wife, she and her husband "are alone in the U.S.," as her mother continues to live in Japan, and according to the applicant's Biographic Information form (Form G-325A) in the record, both of his parents continue to reside in Japan. Therefore, the record shows that the applicant's wife continues to have family ties to Japan and, because she lived there until she was twenty-four years old, is familiar with Japanese culture. Regarding emotional and psychological hardship, the AAO notes that a psychological evaluation in the record asserts that the oldest son "does not see his biological father often and ha[s] [a] minimal relationship with him." The fact that the evaluation

appears to be based on a single interview and contradicts the applicant's wife's contention that her son, who is currently eighteen years old, sees his biological father regularly and that they are very close, diminishes the evaluation's value to a determination of extreme hardship. Regarding financial hardship, tax documents in the record show the applicant was the sole income earner in 2008 and 2009. According to the applicant's wife, she now works 16 hours per week. There is no indication in the record suggesting she is unable to work full-time and the AAO notes that her children are now currently eight, ten, and eighteen years old. Although the AAO acknowledges a significant financial hardship, even considering all of the evidence cumulatively, the AAO does not find that the hardships presented in this case rise to the level of exceptional and extremely unusual hardship.

The applicant has not demonstrated that the evidence in the record in the aggregate shows that the hardships of relocation or separation produce a truly exceptional situation that would meet the exceptional and extremely unusual hardship standard. *See Matter of Monreal-Aguinaga*, 23 I&N Dec. 56 at 62. Because the applicant failed to demonstrate that he merits a favorable exercise of discretion under 8 C.F.R. ^ 212.7(d), the appeal will be dismissed.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. ^ 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.