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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

DATE: JUN 14 2013 OFFICE: ST. PAUL, MN FILE: [REDACTED]

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:
[REDACTED]

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg", with a long horizontal flourish extending to the right.

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The application for waiver of inadmissibility was denied by the Field Office Director, St. Paul, Minnesota. 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 El Salvador who was found to be inadmissible 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 been convicted of crimes involving moral turpitude. The applicant 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 his U.S. citizen wife and five U.S. citizen children.

In a decision, dated May 31, 2012, the field office director determined that the applicant failed to establish extreme hardship to a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On appeal, counsel states that the applicant has established that he meets the requirements of the exceptional and extremely unusual hardship standard required of individuals convicted of violent crimes and that a waiver should be granted in his case.

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.)

The present case arises within the jurisdiction of the Eighth Circuit Court of Appeals. In evaluating whether an offense constitutes a crime involving moral turpitude, the Eighth Circuit employs a categorical and modified categorical approach. The Eighth Circuit has rejected the methodology adopted by the Attorney General in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008). *Guardado-Garcia v. Holder*, 615 F.3d 900, 902 (8th Cir. 2010). While the Attorney General determined that assessing whether a crime involves moral turpitude may include looking beyond the record of conviction, the Eighth Circuit has ruled that it is “bound by our circuit’s precedent, and to the extent *Silva-Trevino* is inconsistent, we adhere to circuit law.” *Id.* (citing *Jean-Louis v. Holder*, 582 F.3d 462, 470-73 (3rd Cir. October 6, 2009), for the proposition that “deference is not owed to *Silva-Trevino*’s novel approach”).

The Eighth Circuit stated that “[w]hether a statute defines a crime that involves moral turpitude for deportation under [section 212(a)(2)(A)(i)(I) of the Act] is a question of federal law. Like the BIA, we look to state law to determine the elements of the crime. . . . [W]e do not examine the factual circumstances surrounding [a] crime.” *Franklin v. I.N.S.*, 72 F.3d 571, 572 (8th Cir. 1995)(citations omitted). The Eighth Circuit’s reference to *Jean-Louis v. Holder*, 582 F.3d 462, 470-73 (3rd Cir. October 6, 2009), is instructive, as the Third Circuit discussed the categorical and modified categorical approach to determining whether an offenses constitutes a crime involving moral turpitude while declining to follow *Matter of Silva-Trevino*. The Third Circuit stated that to determine whether a crime constitutes a crime involving moral turpitude, it engages in a categorical inquiry that 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.” *Jean-Louis v. Holder*, 582 F.3d 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 [crime involving moral turpitude (CIMT)].” *Id.* at 470. The Third Circuit continued that, if the “statute of conviction contains disjunctive elements, some of which are sufficient for conviction of [a CIMT] and others 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 indicates that on April 19, 1989, the applicant was convicted of Assault with a Firearm under California Penal Code (CPC) § 245(a)(2) for events that occurred on August 28, 1988. The applicant, born in 1967, was 21 years old when he committed the crime which led to his conviction. He was sentenced to two years imprisonment. Based on this conviction, the applicant was found to be inadmissible under 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 this determination on appeal, and the AAO does not find that it was in error. Accordingly, the applicant 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.

Section 212(h)(1)(A) of the Act provides that the Secretary may, in her discretion, waive the application of subparagraph (A)(i)(I) of subsection (a)(2) if the activities for which the applicant is inadmissible occurred more than 15 years before the date of the applicant's application for a visa, admission, or adjustment of status. The AAO notes that an application for admission or adjustment of status is considered a "continuing" application and "admissibility is determined on the basis of the facts and the law at the time the application is finally considered." *Matter of Alarcon*, 20 I.&N. Dec. 557, 562 (BIA 1992) (citations omitted).

Since the criminal conviction for which the applicant was found inadmissible occurred more than 15 years ago, the inadmissibility can be waived under section 212(h)(1)(A) of the Act. Section 212(h)(1)(A) of the Act requires that the applicant's admission to the United States not be contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated.

We find that the current record does not reflect that the applicant's admission to the United States would not be contrary to the national welfare, safety, or security of the United States, and that the applicant has been rehabilitated because the record fails to establish that the applicant has been fully disengaged from his criminal activities and the gang, [REDACTED] the source of most of his criminal activity. In addition, the record fails to establish that the applicant, as someone with a significantly violent past, is rehabilitated and would be unlikely to commit more violent acts.

The record indicates that the applicant entered the United States without inspection in 1978 with his parents at the age of 10 years old and has resided in the United States ever since. The applicant states that he joined [REDACTED] when he was 15 or 16 years old and left the gang, moving to a different part of Los Angeles in 1989, after his conviction. The record indicates that the applicant and his family relocated to Minnesota and that the applicant has worked as a plumber in Minnesota to support his family of five U.S. citizen children, one of whom he states has a mental disability. The record is not clear as to when the applicant and his family moved to Minnesota. The record also indicates that the applicant testified, under oath, that he lives and works in California for most of the year.

Moreover, the record indicates that the applicant has been arrested at least five other times spanning the years 1985 to 2003. Most of these arrests would be for crimes considered violent or dangerous and occurred throughout the applicant's young adult life, from the ages of 18 to 31 years old. These arrests include: Burglary, arrested on August 30, 1985 in Los Angeles, California; Robbery, arrested on January 1, 1988 in Los Angeles, California; Assault with a Firearm, arrested on July 25, 1989 while in prison for the above mentioned conviction; Infliction of Corporal Injury on a Spouse/Cohabitant on May 20, 1992 in Norwalk, California; Assault with a Deadly Weapon, Not a Firearm on March 15, 1998 in Los Angeles, California; and Probation Violation on January 27, 2003 in Los Angeles, California. The applicant states that he was not convicted of these crimes and the record supports this assertion. Nevertheless, these arrests are inconsistent with the applicant's statements that he left [REDACTED] in 1990. Furthermore, because of the nature of the applicant's gang associations, the applicant's frequent trips to California raise questions regarding his rehabilitation and fears of retribution from [REDACTED]. Finally, the record contains no evidence that the applicant is fully separated from [REDACTED] or that he is not likely to commit another crime. As we have found that the applicant does not qualify for a section 212(h)(1)(A) waiver, we will now review whether he

meets the standard for a section 212(h)(1)(B) waiver.

The applicant is seeking a section 212(h)(1)(B) waiver of the bar to admission resulting from a inadmissibility under section 212(a)(2)(A)(i)(I) of the Act. A waiver under section 212(h)(1)(B) 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. Hardship the applicant experiences due to inadmissibility is not considered in section 212(h)(1)(B) waiver proceedings, unless it is shown that hardship to the applicant is causing hardship to the applicant's qualifying relatives. The applicant's qualifying relatives are his U.S. citizen wife and five U.S. citizen children.

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 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 indicates that he is subject to the heightened discretion 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 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.

We find that California Penal Code § §245(a)(2) is a violent crime, and the heightened discretionary standard of 8 C.F.R. § 212.7(d) is applicable in this case. 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”. *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 his qualifying relatives under section 212(h) of the Act is not sufficient. He must meet the higher standard of exceptional and extremely unusual hardship. Therefore, the AAO will at the outset determine whether the applicant meets this standard.

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*, 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 must be established in the event that the applicant’s relatives accompany him or in the event that they remain in the United States, as they are not required to reside outside of the United States based on the denial of the applicant’s waiver request.

We find that the applicant’s U.S. citizen wife and five U.S. citizen children would suffer exceptional and extremely unusual hardship as a result of separation and as a result of relocation. The record includes numerous reports and statements regarding conditions in El Salvador and the problems and concerns surrounding former gang members returning to El Salvador from the United States. The record also includes statements from the applicant, taken under oath during a credible fear determination, regarding his gang activity. The applicant’s testimony was found to be credible. The record indicates that there is the potential for violence to be committed against the applicant upon his return to El Salvador because of his membership in [REDACTED], which would cause severe emotional suffering for his family. Similarly, the applicant has very little familial ties to El Salvador, he left El Salvador at the age of 10 years old, and he earns approximately 50% of the household income. Taking these factors together, we find that the applicant’s wife and children would suffer exceptionally and extremely unusual hardship as a result of separation. We also find that given the potential for violence against the applicant, the poor conditions in El Salvador, and the granting of temporary protected status (TPS) to nationals of El Salvador in the United States, the applicant’s spouse and five children would also suffer exceptional and extremely unusual hardship as a result of relocation.

The AAO notes that the Department of Homeland Security (DHS) has granted TPS to nationals of El Salvador residing in the United States through March 9, 2015. This TPS designation was granted to El Salvadoran nationals due to the conditions in the country following a 2001 earthquake. An extension of TPS was granted after DHS made the determination that conditions in El Salvador were still too poor to absorb the return of their nationals. Countries are designated for TPS in situations

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where: there is an ongoing armed conflict within the state and due to that conflict, return of nationals to that state would pose a serious threat to their personal safety; the state has suffered an environmental disaster resulting in a substantial, temporary disruption of living conditions, the state is temporarily unable to handle adequately the return of its nationals, and the state has requested TPS designation; or there exist other extraordinary and temporary conditions in the state that prevent nationals from returning in safety.

Although, we find that the applicant has established that his spouse and children would suffer exceptional and extremely unusual hardship as a result of his inadmissibility, we do not find that he warrants the favorable exercise of discretion because he has not established his rehabilitation. The record does not sufficiently show that he no longer has a propensity to engage in criminal acts in the United States, including violent crimes that pose a serious threat to others.

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. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.