



U.S. Citizenship
and Immigration
Services

(b)(6)

Date: SEP 03 2013

Office: SAN FRANCISCO

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 (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,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, San Francisco, 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 Mexico who was found inadmissible under INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I), based on his convictions for crimes involving moral turpitude. The record reflects that the applicant entered the United States in 1990 as a visitor and was convicted of battery against his spouse in 1996, 1999, and 2009. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) and seeks a waiver of inadmissibility pursuant to INA § 212(h), 8 U.S.C. § 1182(h), to remain in the United States.

The field office director found that the applicant failed to establish that a qualifying relative would experience extreme hardship as a consequence of his inadmissibility. The application was denied accordingly. *See Decision of the Field Office Director* dated July 19, 2012.

On appeal the applicant submits a declaration from his spouse along with her medical records. The record also contains affidavits from the applicant, his children and friends, and medical records for the applicant. The entire record was reviewed and considered in rendering a 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 (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

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

[M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general....

In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

The record reflects that the applicant was convicted on August 29, 1996, and on March 16, 1999, of

battery against his spouse in violation of Cal. Penal Code §§ 243(e). In the former case the applicant was sentenced to 15 days in jail, a fine of \$200, and three years of probation (Alameda County Superior Court Case No. [REDACTED]). In the latter case the applicant was sentenced to 60 days jail, a fine of \$200, and three years of probation (Alameda County Superior Court Case No. [REDACTED]). On January 22, 2009 the applicant was convicted of battery in violation of Cal Penal Code § 242. The applicant was sentenced to three days in jail, a fine of \$120, and three years of probation. (Alameda County Superior Court Case No. 414831).

In *In re Sanudo*, 23 I&N Dec. 968 (BIA 2006), the BIA analyzed whether domestic battery in violation of Cal. Penal Code §§ 242 and 243(e) constitutes a crime involving moral turpitude. 23 I&N Dec. at 969. First, the BIA assessed the manner in which California courts have applied the “use of force or violence” clause of Cal. Penal Code § 242. *Id.* The BIA noted that courts have held that “the force used need not be violent or severe and need not cause pain or bodily harm.” *Id.* at 969 (citing *Gunnell v. Metrocolor Labs., Inc.*, 112 Cal. Rptr. 2d 195, 206 (Cal. Ct. App. 2001)). Second, the BIA assessed the situations in which assault and battery offenses may be classified as crimes involving moral turpitude. The BIA noted that those offenses include assault and battery coupled with aggravating factors such as the use of deadly weapon, the intentional infliction of serious bodily injury, and bodily harm upon individuals deserving of special protection such as a child, domestic partner, or a peace officer. 23 I&N Dec. at 971-72. The BIA also held that “the existence of a current or former ‘domestic’ relationship between the perpetrator and the victim is insufficient to establish the morally turpitudinous nature of the crime,” and, therefore, a conviction for domestic battery does not qualify categorically as a crime involving moral turpitude. *Id.* at 972-73. The BIA further held that under the modified categorical analysis, the admissible portion of the respondent’s conviction record failed to reflect that “his battery was injurious to the victim or that it involved anything more than the minimal nonviolent ‘touching’ necessary to constitute the offense.” *Id.*

The Ninth Circuit Court of Appeals addressed whether Cal. Penal Code §§ 242 and 243(e) constitutes a crime involving moral turpitude in the case *Galeana-Mendoza v. Gonzalez*, 465 F.3d 1054 (9th Cir. 2006). The Ninth Circuit noted agreement with the BIA’s decision in *Sanudo*. 465 F.3d at 1062. The court followed the “categorical” and “modified categorical” approach, as then defined, to determine whether the conviction was a crime involving moral turpitude. The Ninth Circuit theorized that, “throwing a cup of cola on the lap of someone to whom one is or had been engaged, slighting shoving a cohabitant, or poking the parent of one’s children rudely with the end of a pencil are all ‘offensive touching[s]’ of qualifying individuals and can constitute domestic battery under section 243(e).” *Id.* at 1061. The Ninth Circuit determined that since the full range of conduct proscribed by the statute at hand did not categorically involve moral turpitude, the court would conduct a modified categorical analysis and look “beyond the language of the statute to a narrow, specified set of documents that are part of the record of conviction, including the indictment, the judgment of conviction, jury instructions, a signed guilty plea, or the transcript from the plea proceedings to determine whether the applicant was convicted of a crime involving moral turpitude.” *Id.* at 1057-1058 (citations omitted).

As noted above, the BIA in *Sanudo* determined that bodily harm upon individuals deserving of special protection such as a child, domestic partner, or a peace officer, constitutes morally

turpitudinous conduct. 23 I&N Dec. 968, 971-72 (BIA 2006). For his 1996 and 1999 convictions under Cal. Penal Code § 243(e) the applicant submitted a Criminal Records Search from Alameda County Superior Court showing his conviction and sentencing, but did not submit a full record of conviction, and the record is inconclusive as to whether in committing battery against his spouse he inflicted bodily harm. Where the burden of proof is on the applicant, as in the present case, the applicant cannot sustain that burden where the record of conviction is inconclusive. *Young v. Holder*, 697 F.3d 976, 989 (9th Cir. 2012). As the applicant has not disputed on appeal that his convictions for battery against his spouse are crimes involving moral turpitude, and the record does not show the finding of inadmissibility to be erroneous, we will therefore not disturb the finding of the field office director.

As the applicant has been found to be inadmissible under section 212(a)(2)(A)(i)(I) of the Act for multiple convictions for crimes involving moral turpitude, he requires a waiver of inadmissibility under section 212(h) of the Act.

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

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), . . . 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 [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien

The AAO notes that section 212(h) of the Act provides that a waiver of inadmissibility is dependent first upon a showing that the bar to admission imposes an extreme hardship on a qualifying family member. Hardship to the applicant himself is not relevant under the statute and will be considered only insofar as it results in hardship to a qualifying relative.

Once extreme hardship is established, the Secretary then assesses whether an exercise of discretion is warranted. 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 has been convicted of battery against his spouse and therefore, the Secretary of Homeland Security will not favorably exercise discretion in his case except in an extraordinary circumstance. *See* 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.

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.*

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 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 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.”). The AAO notes that exceptional and extremely unusual hardship to a qualifying relative must be established in the event that he or she accompanies the applicant or in the event that he or she remains in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant’s waiver request. All hardship factors should be considered in the aggregate when assessing exceptional and extremely unusual hardship. See *Matter of Monreal-Aguinaga*, 23 I&N Dec. 56, 64 (BIA 2001).

As stated, exceptional and extremely unusual hardship to a qualifying relative must be established in the event that he or she accompanies the applicant or in the event that he or she remains in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant’s waiver request. The next issue to be addressed is whether the applicant’s qualifying relatives would suffer exceptional and extremely unusual hardship if they remained in the United States separated from him.

The AAO acknowledges that the applicant’s spouse and three children will experience emotional hardship if they remain in the United States without the applicant. This case arises in the Ninth Circuit. In *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998), the Ninth Circuit Court of Appeals, referring to the separation of an alien from qualifying relatives, held that “the most important single hardship factor may be the separation of the alien from family living in the United States,” and that “[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion.” (Citations omitted).

Similarly, in *United States v. Arrieta*, the Ninth Circuit assessed the factors to be considered in a section 212(h) waiver and stated:

Of particular importance is the evidence Mr. Arrieta produced of the effect that separation from him would have on his immediate family members, as to whom he provided essential emotional and other non-economic familial support. We have previously explained that “preservation of family unity” may be a central

factor in an extreme hardship determination. *See* Cerrillo-Perez v. INS, 809 F.2d 1419, 1423 (9th Cir.1987). We based this determination not only on the United States' international human rights commitments, but on "[t]he importance and centrality of the family in American life [which] is firmly established both in our traditions and in our jurisprudence." *Id.* Unlike in *Arce-Hernandez*, where we explained that it was not clear whether the alien's family would accompany him back to Mexico, (and did not consider the issue of family separation or emotional and other non-economic familial support,) in this case Mr. Arrieta has documented that his deportation would deprive his family of various forms of non-economic familial support and that it would disrupt family unity.

224 F.3d 1076, 1082 (9th Cir. 2000).

Whereas inadmissibility for unlawful presence under section 212(a)(9) of the Act, 8 U.S.C. § 1182(a)(9), is temporary, and inadmissibility for crimes involving moral turpitude that are not violent or dangerous can be waived under the 212(h)(1)(A) standard after 15 years, inadmissibility for violent or dangerous crimes involving moral turpitude is permanent. Therefore, the applicant's qualifying family members face the prospect of permanent separation from the applicant, a scenario generally resulting in extreme hardship.

The question to now be addressed is whether the applicant's qualifying family members would suffer hardship that is not only extreme, but is hardship that is "substantially" beyond the ordinary hardship that would be expected when a close family member leaves this country." 23 I& N Dec. 56, 62 (BIA 2001).

On appeal the applicant submitted a declaration from his lawful permanent resident spouse along with multiple medical records and statements about her physical and mental health. In her statement the applicant's spouse states that the applicant takes her to medical appointments. A statement from the spouse's medical doctor indicates he has treated her since 2007 and lists multiple medical issues over a span of five years, which include depression, anxiety, fatigue and numerous physical ailments. Submitted on appeal are medical records from 2005 with handwritten notes and laboratory results and medical documentation from 2006 that indicates diagnoses for depression, panic disorder, and pain disorder associated with general medical conditions and psychological factors. Medical records from 2007 show the applicant's spouse indicated neck pain and abdominal pain. Further records document medical visits from 2009 through 2012 for flu, back pain, insomnia, depression, and stress.

The AAO finds that the record fails to establish that hardship to the applicant's spouse would rise substantially beyond the common results of removal or inadmissibility to the level of exceptional and extremely unusual hardship. Medical documentation shows that the applicant's spouse has multiple physical ailments and psychological disorders, but the record does not provide an explanation in plain language from the treating physician of the severity of any condition and a description of any treatment or family assistance needed, or describe the exact nature of any psychological disorders. Evidence in the record is insufficient to establish that without the applicant's presence in the United States his spouse would be unable to obtain physical and

emotional support, particularly given that other family members are living in the vicinity. Further, the record contains no assertion or documentation to support that the applicant's spouse would suffer financial hardship without the applicant's physical presence in the United States.

With respect to the applicant's spouse relocating abroad to reside with the applicant due to his inadmissibility, the AAO notes this criteria has not been addressed.

The record also reflects that the applicant has two U.S. citizen adult children and another lawful permanent resident adult child. Statements from two of the applicant's children note that the applicant is a good person who has been in the United States a long time, that he has health problems, and that he would have difficulty living in Mexico because of his age and having no relatives there. However, the record contains no statements or documentation showing any hardship that the qualifying relatives would experience either due to separation from the applicant or if they were relocate abroad to reside with the applicant due to his inadmissibility. The AAO finds the evidence insufficient to demonstrate that the applicant's children would suffer exceptional and extremely unusual hardship either due to separation from the applicant or if they were relocate abroad to reside with the applicant.

Accordingly, the AAO finds that the applicant failed to demonstrate that the hardships his spouse or children would face if they remain in the U.S., or if they relocate to Mexico, rise substantially beyond the common results of removal or inadmissibility to the level of exceptional and extremely unusual hardship. Accordingly, the applicant did not demonstrate that he merits a favorable exercise of discretion under 8 C.F.R. § 212.7(d), and 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.