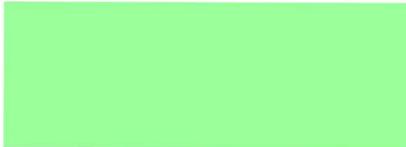




U.S. Citizenship
and Immigration
Services

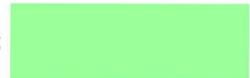
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Date: APR 09 2014

Office: OAKLAND PARK, FLORIDA

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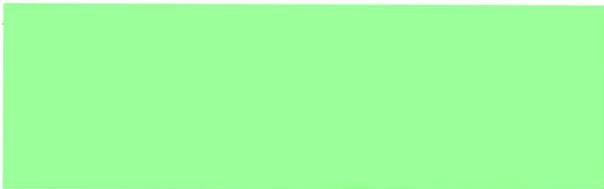


IN RE:



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.

Thank you,

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

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting Field Office Director, Oakland Park, Florida. The acting field office director's decision was appealed to the Administrative Appeals Office (AAO) and the appeal was dismissed. A motion to reopen this appeal was granted and the previous decision of the AAO affirmed. The matter is now before the AAO again on motion. The motion will be granted and the appeal sustained.

The applicant is a native and citizen of Canada who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having committed a crime involving moral turpitude. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with his U.S. citizen spouse.

In a decision, dated November 21, 2011, the acting district director found that the applicant failed to demonstrate that his qualifying relative would suffer extreme hardship as a result of his inadmissibility to the United States. The application was denied accordingly.

In a brief on appeal counsel asserted that the applicant's spouse will suffer extreme hardship as a result of the applicant's inadmissibility and that the acting field office director erred in giving a disproportionate amount of weight to the police report in regards to the applicant's criminal conviction. Counsel submitted additional evidence of hardship on appeal.

In our decision, dated March 7, 2013, we found that the applicant had established that his spouse would suffer extreme hardship as a result of separation, but not as a result of relocating to Canada. The appeal was dismissed accordingly.

On motion, counsel then asserted that our previous decision was based on two incorrect assumptions: that the applicant's spouse had previously worked in Canada and/or overseas and that the applicant's spouse's medical conditions may be treated or controlled while living in Canada. In an effort to rebut these assertions, counsel submitted additional evidence.

In our decision, dated August 30, 2013, we found that the applicant had shown that his spouse would suffer extreme hardship as a result of relocation to Canada and as a result of separation. However, we also found that the applicant's crime, burglary of an occupied dwelling, was a dangerous crime within the meaning of 8 C.F.R. § 212.7(d) and the heightened discretionary standards found in that regulation were applicable in the applicant's case. We found that we could not favorably exercise discretion in the applicant's case because he had failed to establish that his spouse would suffer exceptional and extremely unusual hardship as a result of his inadmissibility. Specifically, we found that the applicant had shown his spouse would suffer exceptional and extremely unusual hardship upon relocation to Canada, but did not meet this heightened standard in regards to separation.

In his current motion, counsel asserts that the applicant's criminal conviction was not violent or dangerous and that the AAO erred in categorizing it as such. Counsel also asserts that the applicant's spouse would suffer exceptional and extremely unusual hardship upon separation because she suffers from significant physical and mental health illnesses. Counsel states that without her husband the

applicant's spouse would no longer be able to function in society and may become a danger to herself or society. With this motion, counsel submits: medical documents for the applicant's spouse, an affidavit from the applicant's wife, prior affidavits from the applicant's wife, criminal documents, news articles, the Florida burglary statute, and case law from the Board of Immigration Appeals (BIA).

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

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 note that we previously found the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude based on his November 18, 2010 conviction for attempted burglary of an occupied dwelling under Florida Statute §810.02(3)(A). Our finding was based on the statutory language of Florida Statute §810.02(3)(A) and the decision in *Matter of Loussaint*, 24 I&N Dec. 754 (BIA 2009). On motion, the applicant does not contest his inadmissibility, so this matter will not be addressed any further.

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

A waiver of inadmissibility under section 212(h) 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 lawfully 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 spouse is the only qualifying relative in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). As noted in our previous decision, we cannot favorably exercise discretion in the applicant's case except in an extraordinary circumstance because he is subject to the heightened discretionary standard of 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). For example, Black’s Law Dictionary, Eighth Edition (2004), defines violent as “[o]f, relating to, or characterized by strong physical force,” “[r]esulting from extreme or intense force,” or “[v]ehemently or passionately threatening,” and dangerous as “perilous; hazardous; unsafe” or “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.

The inclusion of the term “dangerous” further signals that even crimes not marked by actual or physical force against the victim, but that may cause serious harm or are otherwise unsafe or hazardous, also trigger the requirements of 8 C.F.R. § 212.7(d). As stated above, in considering whether a crime is violent or dangerous, we will interpret these terms in accordance with other 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).

At the time of the applicant’s conviction, Florida Statutes defined burglary as entering a dwelling, a structure, or a conveyance with the intent to commit an offense therein. In addition, the applicant was convicted under the subsection of the burglary statute that includes burglary of an occupied dwelling. We find that attempting to enter a person’s home while they are present in the home and with the intent to commit a crime therein is a dangerous crime.

We acknowledge counsel’s statements regarding the applicant’s conviction not being for a violent or dangerous crime. Counsel states that because the applicant was convicted of attempted burglary and not burglary, his crime cannot be seen as violent or dangerous as the potential for dangerous acts was never realized. We disagree with this analysis. In the applicant’s case, he attempted to open a locked door of a home with the knowledge that someone was occupying the dwelling and with the intent to commit an offense therein. Although the applicant was not able to enter the dwelling, his act of attempting to enter created a very dangerous situation. As stated in *Matter of Loussaint*, by breaking into a dwelling of another for an illicit purpose, the burglar tears away the resident’s justifiable expectation of privacy and personal security and invites a violent defensive response from the resident. 24 I&N Dec. 754, 758-759(BIA 2009). *Matter of Loussaint* goes further to cite the United States Supreme Court which has found, “The main risk of burglary arises not from the simple physical act of wrongfully entering onto another’s property, but rather from the possibility of a face-to-face confrontation between the burglar and a third party—whether an occupant, a police officer, or a bystander—who comes to investigate.” *James v. United States*, 550 U.S. 192, 127 S. Ct. 1586, 1594 (2007) (construing attempted burglary, as defined by Florida Statutes sections 810.02(1) and 777.04(1), as a “violent felony” under a residual provision of the Armed Career Criminal Act, 18 U.S.C. § 924(e)). *Id* at 759. Moreover, *Matter of Loussaint* cites to the United States Court of Appeals for the Eleventh Circuit, in whose jurisdiction the applicant’s case arises, recognizing the

peculiar dangers inherent in residential burglaries such as the one involved in this case. *See United States v. Davis*, 881 F.2d 973, 976 (11th Cir. 1989) (“No one has doubted for decades that residential burglary is a “violent” offense, because of the potential mayhem if burglar encounters resident.” (quoting *United States v. Pinto*, 875 F.2d 143, 144 (7th Cir. 1989)). *Id.* Thus, given the dangerous risk involved in an attempted burglary of an occupied dwelling we disagree with counsel’s assertions and affirm our previous decision.

Moreover, the specific details of the applicant’s case further support our analysis. The probable cause affidavit in the applicant’s case indicates that the applicant attempted to enter the home of the victim at 11:30PM and was wearing no clothing at the time; that he admitted to watching the victim through her residential window for months before committing the burglary; and that he stated he was not sure what he would do to the victim if he had entered her residence.

Counsel also states that the information in the applicant’s probable cause affidavit cannot be relied on as fact and that the police officers who were at the scene of the applicant’s crime were later fired in 2010 for fabricating crime scene details. We note that misconduct in an unrelated case by [REDACTED] the police sergeant who signed the probable cause affidavit in the applicant’s case, is not relevant to our adjudication. This conduct would only be relevant in the event that it caused the applicant’s conviction to be vacated. We do recognize that information in a probable cause affidavit is not relied on to establish inadmissible conduct under section 212(a)(2)(A) of the Act, but in matters of discretion it is appropriate to look to all types of evidence in the record to ascertain whether the applicant warrants a favorable exercise of discretion. Thus, we will look to the probable cause affidavit on discretion. We note that the applicant has provided no documentation to challenge or explain the information contained in the probable cause affidavit.

Finally, in regards to the unpublished BIA decisions cited to by counsel, we note that these decisions are nonprecedent decisions and one of these cases involves the definition of an aggravated felony which is not relevant to our current analysis. Moreover, in *In re Juan Gomez Rosario*, which counsel cites to, the court declined to find that the applicant’s crime was violent or dangerous because the police report, indicating that a knife was used in the commission of the crime, was directly contradictory to the statutory language of the offense the applicant was convicted under. We note that the current applicant was not convicted under the section of the Florida Statutes involving burglaries Florida considers violent or dangerous, but this fact does not mean that the AAO is precluded from conducting our own interpretation of the applicant’s acts based on our interpretation of “violent or dangerous”. We note further that the information contained in the applicant’s probable cause affidavit is not contradictory to the statutory language of the applicant’s conviction. Therefore, for the reasons stated above, we find that the applicant is subject to 8 C.F.R. § 212.7(d) for having committed a dangerous crime.

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 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.

We previously found that the applicant had demonstrated that due to his spouse’s medical condition, she would suffer exceptional and extremely unusual hardship as a result of relocating to Canada. We now find that the applicant has also shown that his spouse will suffer extreme hardship as a result of separation. The record indicates that the applicant’s spouse has been treated for alcoholism, depression, and anxiety for the last five years, seeing a psychotherapist once a week. The record indicates that the applicant is an integral part of his spouse’s sobriety and ability to function in her daily life. The record indicates further that over the past two years, the applicant’s immigration situation and possible separation from the applicant is causing his wife to drink more. The applicant’s spouse states that she feels she may be a danger to others if she is separated from the applicant and that she will completely break down emotionally and physically. She also states that she has no other family members to help care for her in the applicant’s absence. Thus, the applicant has established that his spouse will suffer exceptional and extremely unusual hardship as a result of his inadmissibility. We also find that the applicant warrants the favorable exercise of discretion.

In discretionary matters, the applicant bears the burden of proving eligibility in terms of 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).

In evaluating whether . . . relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

See *Matter of Mendez*, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Id.* at 300. (Citations omitted).

The adverse factors in the present case are the applicant's failure to comply with the terms of the visitor status on which he initially entered the United States in 1997; the applicant's 15 years of illegal residence in the United States; and his conviction for attempted burglary in 2010.

The favorable factors in the applicant's case include: the exceptional and extremely unusual hardship the applicant's wife will suffer if the applicant's waiver is not granted, the lack of any other criminal record outside the 2010 incident, and, as attested to in the record, the applicant's attributes as a loving and supportive spouse. Therefore, we find that the favorable factors in the present matter outweigh the negative factors and will favorably exercise the Secretary's discretion.

In discretionary matters, the applicant bears the full burden of proving his or her eligibility for discretionary relief. See *Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976). Here, the applicant has met that burden. Accordingly, the motion is granted and the appeal sustained.

ORDER: The motion is granted and the appeal sustained.