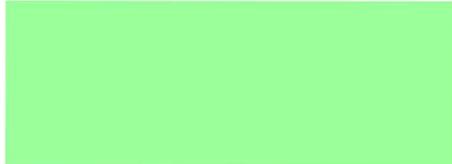


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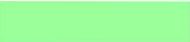


U.S. Citizenship
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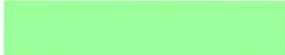


DATE: AUG 26 2014

OFFICE: NEBRASKA SERVICE CENTER

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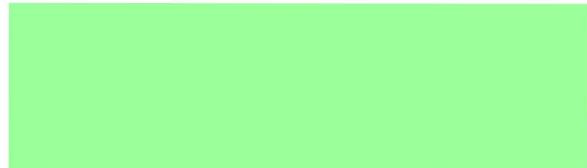
IN RE:

Applicant: 

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:

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, appearing to read "Ron Rosenberg".

f.s.
Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, 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 the Republic of Korea (South Korea) 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 been convicted of 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 reside in the United States with his U.S. citizen spouse.

The director determined that the applicant had been convicted of a violent or dangerous crime, and had failed to establish that exceptional and extremely unusual hardship would be imposed on a qualifying relative. The Application for Waiver of Grounds of Inadmissibility was denied accordingly. *See Decision of the Director*, dated November 21, 2013.

On appeal counsel asserts that it has been more than 15 years since the applicant's conviction making him inadmissible, that he has been rehabilitated, and that USCIS failed to consider all factors in determining hardship. With the appeal counsel submits a brief. The record also contains statements from the applicant and his spouse, a psychological evaluation of the spouse, letters of support for the applicant, certificates for the applicant's education and religious activities, financial documentation, and conviction documents for the applicant. 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 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) a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), 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 record indicates that on [REDACTED] 1995, the applicant was convicted in South Korea of Injury by Rape, in violation of Article 6, Clause 1 and Article 9, Clause 1 of the Law on the Punishment of Sexual Violence and Protection of Victims, and Assault and Confinement, in violation of Article 2, Clauses 1 and 2 of the Law on the Punishment of Violent Acts. Conviction documents show that the applicant participated in the rape and forced confinement of a 13-year-old female and assaults against her and a 17-year-old male. The applicant was sentenced to three years and six months imprisonment.

The applicant does not contest whether he has been convicted of a crime involving moral turpitude, or whether he is inadmissible under section 212(a)(2)(A)(i)(I) of the Act. As neither counsel nor the applicant has disputed on appeal that the acts committed by the applicant 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 director. 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 his discretion, waive the application of subparagraph (A)(i)(I) of subsection (a)(2) if 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. An application for admission to the United States is 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). Since the criminal activity for which the applicant was found inadmissible occurred more than 15 years ago, he is now eligible for a waiver 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.

However, a waiver under section 212(h) is discretionary and the crime involving moral turpitude for which the applicant was convicted is also a “violent or dangerous crime” as contemplated by 8 C.F.R. § 212.7(d). We cannot favorably exercise discretion in the applicant’s case except in an extraordinary circumstance.

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.

We note that the words “violent” and “dangerous” and the phrase “violent or dangerous crimes” are not further defined in the regulation, and we are 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). 67 Fed. Reg. 78675, 78677-78 (December 26, 2002).

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 find the definition of a crime of violence found in 18 U.S.C. § 16 to be useful 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.

In this case we find the applicant’s conviction for injury by rape and forced confinement of a 13-year-old female and assault against her and a 17-year-old male to be for a violent and dangerous crime. 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, we will consider whether the applicant has “clearly demonstrate[d] that the denial of . . . admission as an immigrant would result in exceptional and extremely unusual hardship” to a qualifying relative. *Id.*

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

The BIA stated that in assessing exceptional and extremely unusual hardship, it would be useful to view the factors considered in determining extreme hardship. *Id.* at 63. In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999), the BIA provided a list of factors it deemed relevant in determining whether an alien has established the lower standard of extreme hardship. The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative’s family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative’s ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. The BIA added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not an exclusive list. *Id.*

In *Monreal*, the BIA provided additional examples of the hardship factors it deemed relevant for establishing exceptional and extremely unusual hardship:

[T]he ages, health, and circumstances of qualifying lawful permanent resident and United States citizen relatives. For example, an applicant who has elderly parents in this country who are solely dependent upon him for support might well have a strong case. Another strong applicant might have a qualifying child with very serious health issues, or compelling special needs in school. A lower standard of living or adverse country conditions in the country of return are factors to consider only insofar as they may affect a qualifying relative, but generally will be insufficient in themselves to support a finding of exceptional and extremely unusual hardship. As with extreme

hardship, all hardship factors should be considered in the aggregate when assessing exceptional and extremely unusual hardship.

23 I&N Dec. at 63-4.

In the precedent decision issued the following year, *Matter of Andazola-Rivas*, the BIA noted that, “the relative level of hardship a person might suffer cannot be considered entirely in a vacuum. It must necessarily be assessed, at least in part, by comparing it to the hardship others might face.” 23 I&N Dec. 319, 323 (BIA 2002). The issue presented in *Andazola-Rivas* was whether the Immigration Judge correctly applied the exceptional and extremely unusual hardship standard in a cancellation of removal case when he concluded that such hardship to the respondent’s minor children was demonstrated by evidence that they “would suffer hardship of an emotional, academic and financial nature,” and would “face complete upheaval in their lives and hardship that could conceivably ruin their lives.” *Id.* at 321 (internal quotations omitted). The BIA viewed the evidence of hardship in the respondent’s case and determined that the hardship presented by the respondent did not rise to the level of exceptional and extremely unusual. The BIA noted:

While almost every case will present some particular hardship, the fact pattern presented here is, in fact, a common one, and the hardships the respondent has outlined are simply not substantially different from those that would normally be expected upon removal to a less developed country. Although the hardships presented here might have been adequate to meet the former “extreme hardship” standard for suspension of deportation, we find that they are not the types of hardship envisioned by Congress when it enacted the significantly higher “exceptional and extremely unusual hardship” standard.

23 I&N Dec. at 324.

However, the BIA in *Matter of Gonzalez Recinas*, a precedent decision issued the same year as *Andazola-Rivas*, clarified that “the hardship standard is not so restrictive that only a handful of applicants, such as those who have a qualifying relative with a serious medical condition, will qualify for relief.” 23 I&N Dec. 467, 470 (BIA 2002). The BIA found that the hardship factors presented by the respondent cumulatively amounted to exceptional and extremely unusual hardship to her qualifying relatives. The BIA noted that these factors included her heavy financial and familial burden, lack of support from her children’s father, her U.S. citizen children’s unfamiliarity with the Spanish language, lawful residence of her immediate family, and the concomitant lack of family in Mexico. 23 I&N Dec. at 472. The BIA stated, “We consider this case to be on the outer limit of the narrow spectrum of cases in which the exceptional and extremely unusual hardship standard will be met.” *Id.* at 470.

An analysis under *Monreal-Aguinaga* and *Andazola-Rivas* is appropriate. See *Gonzalez Recinas*, 23 I&N Dec. at 469 (“While any hardship case ultimately succeeds or fails on its own merits and on the particular facts presented, *Matter of Andazola* and *Matter of Monreal* are the starting points for any analysis of exceptional and extremely unusual hardship.”). We note 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.

Although 8 C.F.R. § 212.7(d) does not specifically state to whom the applicant must demonstrate exceptional and extremely unusual hardship, we interpret this phrase to be limited to qualifying relatives described under the corresponding waiver provision of section 212(h)(1)(B) of the Act. A waiver of inadmissibility under section 212(h)(1)(B) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse, parent, son or daughter of the applicant.

On appeal counsel asserts that the applicant's U.S. citizen spouse is his dearest friend and life partner and that it is not possible for her to uproot herself from the United States, where she has lived since 1996, to live in South Korea, where she has no strong family ties because she immigrated to the United States with her family when she was young. Counsel states that the spouse is an accountant who could not find similar career opportunities in South Korea.

A psychiatric evaluation states that the applicant's spouse has major anxiety from her fear of separation. It states that since the applicant and his spouse met in Mexico he has meant everything in her life and that for the first time she could share her burdens with someone. The evaluation states that the applicant's spouse has lost interest in her work and has problems concentrating, which is critical for her job. It also states that she has lost interest in future plans and has a hard time getting out of bed. The evaluation indicates that the spouse has had acrophobia since childhood and is unable to travel by flight, so she is unable to visit the applicant. The evaluation states that the spouse reports headaches, panic attacks, and decreased appetite and that she has stress resulting from the applicant's absence and trauma from her mother's death.

In her declaration the spouse states that if the applicant cannot come to the United States it is an impossible decision for her to uproot from her work, family and permanent domicile here, and that she is unsure of life in South Korea. She states that separation causes heartache, distress, constant pain, and headaches, and that she is losing physical strength. The applicant's spouse states that she does not want to be separated from the applicant because she wants to start a family. She states that she is experiencing emotional and financial hardship from the separation that causes great pain and sleepless nights worrying. She further states that the applicant has dedicated his life to God, so she supports him financially, but maintaining two households is causing a financial drain.

In his declaration the applicant states that he is truly sorry for his criminal act, has worked hard to correct his wrongs, and has found God while repenting his past. He states that his spouse is enduring emotional pain and financial burden because of him.

A letter from a senior pastor of a Methodist Church states that the applicant's spouse is emotionally drained due to separation from the applicant and that it affects her ministry because she does not have the energy to partake in mission programs.

The evidence submitted to the record does not support that the severity of the hardships faced by the applicant's spouse or the effects on her daily life are beyond those hardships normally associated when a spouse is found to be inadmissible. We recognize that the applicant's spouse endures some hardship as a result of long-term separation from the applicant, however her situation does not amount to hardship beyond the common results of inadmissibility based on the record.

The applicant's spouse also asserts financial hardship due to separation from the applicant. Financial documents submitted to the record include the spouse's tax returns, employment records, and wage statements in addition to receipts for regular transfers of funds to South Korea over about a four-year period, some with applicant's name as recipient and some in the name of another person. Receipts submitted to the record also show personal items sent to the applicant in South Korea over about a three-year period. However, the record contains no other documents to show the overall financial situation of the applicant's spouse or to indicate how the applicant's presence in the United States would alleviate the financial difficulty the spouse asserts she is experiencing, whether the applicant intends to work to contribute income to the spouse, or whether she intends to continue to support his religious work. It has also not been established that the applicant is unable to support himself while in South Korea, thereby ameliorating the hardships referenced by the applicant's spouse with respect to having to maintain two households.

We acknowledge that separation from the applicant causes emotional and financial difficulties for his spouse. However, we find the evidence in the record insufficient to demonstrate that the challenges encountered by the spouse, when considered cumulatively, meet the exceptional and extremely unusual hardship standard.

Addressing relocation, the applicant's spouse states that she cannot uproot herself from her life and employment here and that she is unsure of life in South Korea. Counsel asserts that the applicant's spouse would be unable to find comparable employment South Korea. However, the record contains no country information or other objective evidence to show that the applicant would experience hardship were she to relocate to South Korea, her native country.

The record, therefore, fails to demonstrate that the challenges the applicant's spouse faces rise to the level of exceptional and extremely unusual hardship. Accordingly, we find that the applicant has failed to demonstrate exceptional and extremely unusual hardship to a qualifying relative and does not warrant a favorable exercise of discretion.

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.