

(b)(6)



U.S. Citizenship
and Immigration
Services

DATE: JUL 10 2014

OFFICE: NEW YORK

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

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

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, New York. 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 Jamaica 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 in order to reside in the United States with his U.S. citizen father.

The director found the applicant ineligible for a waiver under section 212(h)(1)(A) of the Act, 8 U.S.C. § 1182(h)(1)(A), because he failed to establish rehabilitation. *See Decision of the District Director*, dated June 22, 2013.

On appeal, counsel contends that the district director failed to consider that the applicant has established that he has been rehabilitated in the more than 15 years since his only conviction. *See Form I-290B, Notice of Appeal or Motion (Form I-290B)*, filed July 23, 2013 and counsel's brief.

On May 1, 2014, we issued a Notice of Intent to Dismiss (NOID) the applicant's appeal of the denial of his waiver application. The applicant was granted thirty (30) days to submit a rebuttal. As of the date of this decision, no response has been received. We will consider the record as complete and will decide this matter based on the evidence in the record.

The record contains, but is not limited to: Form I-290B and counsel's brief; various immigration applications and petitions; the applicant's and his father's statement; letters from the applicant's employers, volunteer organization and church; diplomas and certifications; financial documents; letters from the applicant's father's physicians; passport and identity documents; birth, marriage, divorce and naturalization certificates; and conviction and court documents. 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) 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 shows that the applicant was convicted on [REDACTED], 1996, for the offense of manslaughter in the second degree in violation of New York Penal Law section 125.15-1¹ for his conduct on September 2, 1995. The applicant was sentenced to six months in prison, five years of probation, a driver's license suspension, 100 hours of community service and costs.

At the time of the applicant's conviction, New York Penal Law section 125.15 provided, in pertinent parts:

A person is guilty of manslaughter in the second degree when:

¹ The District Director's decision states that the applicant was convicted under New York Penal Law section 1252.5, which appears to be a typographical error. The applicant's conviction and court documents indicate that he was convicted under New York Penal Law section 125.15.

1. He recklessly causes the death of another person

...

Manslaughter in the second degree is a class C felony.

In assessing whether a conviction is a crime involving moral turpitude, the adjudicator must first “determine what law, or portion of law, was violated.” *Matter of Esfandiary*, 16 I&N Dec. 659, 660 (BIA 1979). The adjudicator engages in a categorical inquiry, considering the “inherent nature of the crime as defined by statute and interpreted by the courts,” not the underlying facts of the criminal offense. *Matter of Short*, 20 I&N Dec. 136, 137 (BIA 1989); *see also Matter of Louissaint*, 24 I&N Dec. 754, 757 (BIA 2009) (citing *Taylor v. United States*, 495 U.S. 575, 599-600 (1990)). If the statute “defines a crime in which turpitude necessarily inheres, then the conviction is for a crime involving moral turpitude.” *Matter of Short*, *supra*, at 137.

In *Matter of Wojtkow*, the Board concluded that a conviction for second degree manslaughter under the New York Penal Law constituted a crime involving moral turpitude. 18 I&N Dec. 111, 112-13 (BIA 1981). The Board looked only to the statute to come to this conclusion. *Id.* at 112. The Board noted that a person is guilty of second degree manslaughter in New York if “he recklessly causes the death of another person.” *Id.* at 112, n.1.

We concur with the director that the applicant committed a crime of moral turpitude, and counsel does not contest this conclusion or the applicant’s inadmissibility under section 212(a)(2)(A)(i)(I) of the Act. The applicant therefore requires a waiver under section 212(h) of the Act.

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

The Attorney General [now Secretary, Department of Homeland Security, “Secretary”] 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 [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 [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 [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.

The applicant was convicted of manslaughter in the second degree because of his conduct on September 2, 1995, according to the police report and court documents. As his culpable conduct took place more than 15 years ago, he meets the requirement of section 212(h)(1)(A)(i) of the Act. Moreover, while the applicant's conviction is significant and cannot be condoned, the record does not show that he has engaged in any violent or dangerous behavior following this incident. The record does not indicate any arrests or criminal activity since his conviction 18 years ago. The record shows that the applicant has been working and paying taxes and does not reflect that he has ever been a public charge in the United States or that he would likely become a public charge if admitted. The record does not establish that admitting the applicant would be contrary to the national welfare, safety, or security of the United States. Accordingly, the applicant has shown that he meets the requirement of section 212(h)(1)(A)(ii) of the Act.

The applicant also has shown by a preponderance of the evidence that he has been rehabilitated. As discussed above, there is no evidence that he has engaged in criminal activity since his only arrest in September 1995. The record shows that the applicant during the last 18 years has consistently been employed, paid taxes, volunteered in his community, sought spiritual guidance through his church, and helped to support his parents financially and emotionally. The record indicates that the applicant has expressed regret and remorse for his criminal conduct of more than 18 years ago. The record does not reflect that the applicant has a propensity to engage in further criminal activity. Accordingly, the applicant has shown that he meets the requirement of section 212(h)(1)(A)(iii) of the Act.

As the applicant has met all the requirements for section 212(h)(1)(A), he is eligible for a waiver of his criminal conviction. Once eligibility for a waiver is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion in favor of the waiver. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996) (en banc). A favorable exercise of discretion, however, is limited in the case of an applicant who has been convicted of a violent or dangerous crime. Specifically, 8 C.F.R. § 212.7(d) states:

The [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 discretionary standard for violent or dangerous crimes was first articulated by the Attorney General in *Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002). The respondent in *Matter of Jean* was convicted of second-degree manslaughter in New York, like the applicant, in connection with the death of a nineteen-month-old child. The Attorney General noted:

It would not be a prudent exercise of the discretion afforded to me by this provision to grant favorable adjustments of status to violent or dangerous individuals 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 status adjustment would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the alien's underlying criminal offense, such a showing might still be insufficient. From its inception, the United States has always been a nation of immigrants; it is one of our greatest strengths. But aliens arriving at our shores must understand that residency in the United States is a *privilege*, not a *right*. For those aliens, like the respondent, who engage in violent criminal acts during their stay here, this country will not offer its embrace.

23 I&N Dec. at 383-84.

The Attorney General, through his rule making authority, codified the discretionary standard for violent or dangerous crimes set forth in *Matter of Jean* in the regulation at 8 C.F.R. § 212.7(d).

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 at 78677-78.

Nevertheless, we find the definition of a crime of violence found in 18 U.S.C. § 16 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.

The applicant received a negotiated sentence of six months imprisonment with five years of probation, as manslaughter in the second degree is considered a class C felony under New York Penal Law section 125.15. Article 70.00 of New York Penal Law, concerning terms of imprisonment for felonies, provides in pertinent parts:

3. Minimum period of imprisonment. The minimum period of imprisonment under an indeterminate sentence shall be at least one year and shall be fixed as follows:

...

(b) For any other felony, the minimum period shall be fixed by the court and specified in the sentence and shall be not less than one year nor more than one-third of the maximum term imposed.

Because the minimum period of imprisonment under Article 70.00 is at least one year, the applicant’s conviction would be considered an aggravated felony and may be indicative that applicant has also been convicted of a violent or dangerous crime, but it is not dispositive. According to his record of conviction, the applicant was driving twenty miles per hour over the speed limit in an unregistered car with brakes he believed were faulty. The record indicates that he lost control of the car, swerved, and then hit a parked car and two young girls on the sidewalk before he crashed into a wall. The younger girl died while the elder girl suffered several broken bones, lacerations, a four-month hospital stay, and ongoing nightmares. The plain meaning of his ultimate conviction of manslaughter in the second degree of “recklessly caus[ing] the death of another person” connotes by its nature that the crime involved a substantial risk of physical force. We therefore find that a conviction under section 125.15-1 of the New York Penal Law is for a violent and dangerous crime as contemplated by 8 C.F.R. § 212.7(d).

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.*

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.

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, we 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. We note 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.”). 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.

The record reflects that the applicant’s father is a 65-year old native of Jamaica and citizen of the United States since April 1997. His father explains that the applicant is his “tower of strength,” and they formed a special bond when he lived alone with the applicant in his formative years. His father was diagnosed with prostate cancer in 2007 and a recurrence in 2010; he states that his health worsened and he has pain since his car accident at the end of 2012 that has left him unable to work. According to letters from the applicant’s father’s doctors, his father has undergone cancer treatment and received physical therapy for his pain. The applicant’s father states that the applicant is the only child of six who he relies on for financial, emotional and practical support in taking him to the doctor and ensuring he takes his medicine. Although the record contains evidence of the applicant’s income, it lacks documents related to the applicant’s father’s economic circumstances and the financial support the applicant provides his father.

While we recognize that a strong bond exists between the applicant and his father, the evidence in the record is insufficient to establish that the applicant’s father is unable to continue supporting himself in the applicant’s absence or that his separation-related challenges are distinguished from those ordinarily associated with the inadmissibility of a loved one to such a significant degree that they rise to the level of exceptional and extremely unusual hardship. The evidence in the record is thus insufficient to demonstrate that the challenges encountered by the applicant’s father, when considered cumulatively, meet the exceptional and extremely unusual hardship standard.

The applicant’s father does not address the possibility of relocating to Jamaica to be with the applicant, and we are unable to speculate in this regard. As no assertions of relocation-related hardship have been made, we find the evidence insufficient to demonstrate that the applicant’s U.S. citizen father would suffer exceptional and extremely unusual hardship were he to relocate to Jamaica be with the applicant.

The applicant also includes his mother, who he states is a lawful permanent resident of the United States, as a qualifying relative on Form I-601. The record does not include evidence of the applicant’s mother’s immigration status. In order for the applicant’s mother to be considered a qualifying relative, corroborating evidence of her immigration status is required. The applicant also indicates that his mother depends on him to pay her household bills. The record lacks evidence to support this assertion. The record also lacks statements or documents to show

separation or relocation-related hardship to the applicant's mother. As such, we find the evidence insufficient to demonstrate that the applicant's mother is a qualifying relative who would suffer exceptional and extremely unusual hardship, were she to separate from the applicant or relocate to Jamaica to be with the applicant.

We find that the applicant has failed to demonstrate exceptional and extremely unusual hardship to a qualifying relative. As the applicant has not established exceptional and extremely unusual hardship to a qualifying family member, he 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.