



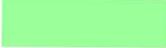
U.S. Citizenship  
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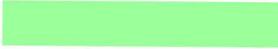
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DATE: **NOV 04 2014**

Office: HIALEAH, FL

FILE: 

IN RE: 

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to 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,

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

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Field Office Director, Hialeah, Florida, and a subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The application is now before the AAO on motion. The motion will be granted and the appeal dismissed.

The applicant is a native and citizen of Jamaica who was found to be inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. He 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 and step-children.

In a decision, dated October 3, 2012, the field office director found that the applicant failed to establish extreme hardship to a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. The field office director also found that the applicant had failed to show that he merited a waiver in the exercise of discretion.

On appeal, counsel contended that the field office erred in finding that the applicant's spouse would not experience extreme hardship if the waiver application were denied. Counsel also alleged that the applicant's conviction occurred over 15 years ago and that he therefore qualifies for a waiver based on rehabilitation.

In a motion, filed on July 15, 2013 and received by the AAO on May 14, 2014, counsel asserts that the applicant has been rehabilitated, that he warrants a favorable exercise of discretion, and that his criminal conviction is not for a violent or dangerous crime. Counsel asks for the applicant's case to be remanded so that the field office can present an argument that the applicant's conviction was for a violent or dangerous crime while then affording the applicant and opportunity to address the matter.

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).

The applicant's motion meets the requirements under 8 C.F.R. § 103.5(a)(2) as the motion includes new evidence of the applicant's rehabilitation.

Section 212(a)(2) of the Act states in pertinent part:

Criminal and related grounds. —

- (A) Conviction of certain crimes. –
  - (i) In general. – Except as provided in clause (ii), any 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 applicant's case arises within the jurisdiction of the Eleventh Circuit Court of Appeals, which has reaffirmed the traditional categorical approach for determining whether a crime involves moral turpitude, declining to follow the framework set forth by the Attorney General in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008). See *Fajardo v. Attorney General*, 659 F.3d 1301, 1310 (11th Cir. 2011). The Eleventh Circuit defines the categorical approach as "looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." 659 F.3d at 1305 (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990)). Where the statutory definition of a crime includes "conduct that would categorically be grounds for removal as well as conduct that would not, then the record of conviction – i.e., the charging document, plea, verdict, and sentence – may also be considered." 659 F.3d at 1305 (citing *Jaggernaut v. U.S. Att'y Gen.*, 432 F.3d 1346, 1354-55 (11th Cir. 2005)).

The record reflects that on June [REDACTED] the applicant was arrested in Florida and charged under Fla. Stat. Ann. § 800.4 for, "Lewd, lascivious, or indecent assault or act upon or in presence of child." The applicant entered a plea of nolo contendere and on August [REDACTED] the court withheld adjudication and placed the applicant on probation for two years. Because the

applicant entered a plea of nolo contendere and the judge placed him on probation, he was convicted for immigration purposes. *See* Section 101(a)(48)(A) of the Act.

At the time of the applicant's conviction in 1993, Fla. Stat. Ann. § 800.4 provided:

Any person who:

- (1) Handles, fondles or makes an assault upon any child under the age of 16 years in a lewd, lascivious, or indecent manner;
- (2) Commits actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sadomasochistic abuse, actual lewd exhibition of the genitals, or any act or conduct which simulates that sexual battery is being or will be committed upon any child under the age of 16 years or forces or entices the child to commit any such act;
- (3) Commits an act defined as sexual battery under s. 794.011(1)(h) upon any child under the age of 16 years; or
- (4) Knowingly commits any lewd or lascivious act in the presence of any child under the age of 16 years,

without committing the crime of sexual battery, commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. Neither the victim's lack of chastity nor the victim's consent is a defense to the crime proscribed by this section.

Counsel does not contest the finding of inadmissibility under section 212(a)(2)(A) of the Act.

The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if -

(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).

The conduct which rendered the applicant inadmissible occurred on June 20, 1993, over 20 years ago. The applicant meets the requirement under section 212(h)(1)(A)(i) of the Act. However, on appeal we determined that the applicant had not met the requirements under sections 212(h)(1)(A)(ii) and (iii) of the Act, which state 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 the applicant establish his rehabilitation. We now find that the record on motion indicates that the applicant has established his admission to the United States would not be contrary to the national welfare, safety, or security of the United States; and that the applicant established his rehabilitation. The record indicates that the applicant's criminal conduct occurred over 20 years ago and he has been involved in no other criminal conduct. The record includes four reference letters stating that the applicant is a valued and trustworthy member of the community. The record also includes a statement from the applicant's spouse indicating the role the applicant plays in her family as father to her four children. She states that he supports her emotionally and financially. Therefore, the record establishes that the applicant has demonstrated eligibility for a waiver based on rehabilitation under section 212(h)(1)(A) of the Act.

However, even if the applicant were able to satisfy the requirements of section 212(h)(1)(A) of the Act, his waiver application would not be granted as the record fails to show that he is deserving of a favorable exercise of the Secretary's discretion as he has been convicted of a violent or dangerous crime and is subject to section 212.7(d) of the Act. We may deny an application or petition that fails to comply with the technical requirements of the law even if the field office does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), aff'd, 345 F.3d 683 (9th Cir. 2003). We conduct appellate review on a de novo basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Matter of Mendez-Morales*, 21 I&N Dec. 296, 299 (BIA 1996). The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his

behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

The regulation at 8 C.F.R. § 212.7(d) provides:

The Attorney General [Secretary, Department of Homeland Security], in general, will not favorably exercise discretion under section 212(h)(2) of the Act (8 U.S.C. 1182(h)(2)) to consent to an application or reapplication for a visa, or admission to the United States, or adjustment of status, with respect to immigrant aliens who are inadmissible under section 212(a)(2) of the Act in cases involving violent or dangerous crimes, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of the application for adjustment of status or an immigrant visa or admission as an immigrant would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the alien's underlying criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act.

The AAO notes that the words “violent” and “dangerous” and the phrase “violent or dangerous crimes” are not further defined in the regulation, and 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 acknowledge counsel's assertions regarding the definition of a crime of violence under 18 U.S.C. § 16 and how it does not relate to the applicant's crime. However, 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." 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). 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 Complaint/Arrest Affidavit in the applicant's case indicates that the applicant committed sexual battery on a 10 year old child. Committing sexual battery on a child is a dangerous crime. Physical force may not always be evident in the commission of the crime only because the victim would be unable and/or unwilling to resist given his or her age. However, a crime of this nature results in untold physical and emotional harm to the victim. Therefore, we find that the applicant is subject to 8 C.F.R. § 212.7(d) for being convicted of a 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, 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.*

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-Aguinaga*, 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*, 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 find that although the record indicates that the applicant has established, pursuant to section 212(h)(1)(A) of the Act, that his admission to the United States would not be contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated, the current record does not show that he warrants a favorable exercise of discretion under the heightened discretionary standard of 8 C.F.R. § 212.7(d).

The record of hardship includes: statements from the applicant and his qualifying spouse; a psychological evaluation of the qualifying spouse; financial documentation; and country conditions information.

In a Notice of Intent to Dismiss (NOID), dated September 18, 2014, we stated that in regards to the exercise of discretion, the applicant asserted that his spouse will suffer emotional and financial hardship as a result of his inadmissibility. We asserted that the record did not support a finding that the applicant would suffer exceptional and extremely unusual hardship as a result of the applicant’s inadmissibility. The record did indicate that the applicant’s spouse has a troubled past including: suffering from depression, drug use, and being in abusive relationships. The record indicated that at the age of 25 years old the applicant’s spouse attempted suicide and in 2007, after her husband lost his job and her youngest son went to jail, she had suicide ideations. We sympathized with the difficulties faced by the applicant’s spouse’s past, but stated that the record did not support a finding that the applicant’s presence would relieve these hardships. The record did not indicate that separation would be the cause of the applicant’s spouse suffering exceptional and extremely unusual hardship. The record also failed to indicate that relocation to Jamaica would cause the applicant’s spouse exceptional or extremely unusual hardship. The record included country conditions information stating that violent crime is a problem in Jamaica, but the record did not reflect how individuals in the applicant and his spouse’s positions would adjust to relocation. Finally, we indicated that all of the hardship evidence in the record was submitted in 2012 with documents being dated 4 to 6 years ago.

In the response to our NOID, counsel submits a brief, but no additional hardship evidence. He states that the applicant's spouse's mental state and the likelihood that she would commit suicide as a result of separation from the applicant, as evidenced by the psychological report in the record, establishes that the applicant's spouse would suffer exceptionally and extremely unusual hardship. Counsel states that the fact that the applicant's spouse has not seen a mental health practitioner does not mean that she is not severely mentally ill and in danger of imminent suicide if her husband is removed. A psychological evaluation, dated October 1, 2008, indicates that the applicant's spouse has suffered from mental health issues in the past. The evaluation indicates that she suffered from these issues before she met the applicant and after she and the applicant were together. Other than the evaluation from 2008, the record does not include any other independent, objective evidence regarding the applicant's spouse's mental health and her ability to cope with separation. The applicant's spouse's statement, dated February 9, 2010, largely states that she will suffer from not having the financial support of the applicant. She also states that the applicant pays for her medical bills, prescriptions, and that he makes sure she is not stressed or depressed. Although this statement would indicate that the applicant's spouse would suffer emotional hardship as a result of being separated from the applicant, it does not establish that she would suffer hardship rising to the level of exceptional or extremely unusual hardship. The record does not support the assertions made by counsel that upon separation the applicant's spouse would be likely to commit suicide. Furthermore, the probative value of the psychological evaluation in the record is diminished given that it was completed in 2008 and there has been no other documentation submitted indicating that the applicant's spouse was suffering such severe mental health problems. Finally, counsel's brief also fails to establish that the applicant's spouse would suffer exceptional and extremely unusual hardship as a result of relocation to Jamaica. We find that the current documentation in the record fails to indicate that the applicant's spouse would suffer exceptional or extremely unusual hardship as a result of his inadmissibility. Thus, the applicant has failed to establish that he warrants a favorable exercise of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the motion is granted and the appeal dismissed.

**ORDER:** The motion is granted. The appeal is dismissed.