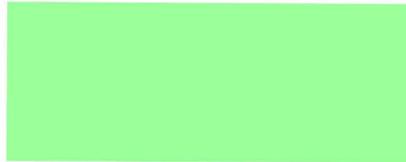




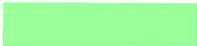
**U.S. Citizenship
and Immigration
Services**

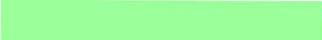
(b)(6)



Date: SEP 05 2014

Office: NEBRASKA SERVICE CENTER

FILE: 

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:

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, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native of the United Kingdom and citizen of Canada who was found to be inadmissible under 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 is applying for a waiver of inadmissibility under 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 child.

The director concluded that the applicant had been convicted of a violent or dangerous crime, and had failed to establish exceptional and extremely unusual hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Director*, dated August 24, 2013.

On appeal counsel for the applicant asserts in the Notice of Appeal (Form I-290B) that the director erred in finding the applicant's convictions are for crimes of moral turpitude and for applying the heightened standard for violent or dangerous crimes. Counsel also asserts that the applicant had established extreme hardship as well as exceptional and extremely unusual hardship to a qualifying relative. With the appeal counsel submits a brief, statements from the applicant and his spouse, copies of conviction and police documentation, articles pertaining to the legal system in the United Kingdom, letters of support for the applicant from family and friends, psychological evaluations of the spouse, letters from medical doctors for the spouse, a statement from the spouse's mother, letters from doctors treating the spouse's mother, a letter from an immigration attorney in Canada, and reports on mental health issues. The entire record was reviewed and considered in rendering this decision.

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 director found the applicant inadmissible under section 212(a)(A)(2)(i)(I) of the Act, for having been convicted of a crime of moral turpitude. The record reflects that in 1981, resulting from a single incident, the applicant was convicted in the United Kingdom of Theft from Vehicle and Taking Conveyance Without Authority under the following sections of the Theft Act 1968.¹

At the time of the applicant's convictions, the Theft Act of 1968 provided:

1 Basic definition of theft

A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it.

7 Theft.

A person guilty of theft shall on conviction on indictment be liable to imprisonment for a term not exceeding seven years.

¹ The record reflects that the applicant was also convicted of an insurance violation stemming from the same incident.

The Board of Immigration Appeals has indicated that a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended. *Matter of Grazley*, 14 I&N Dec. 330, 333 (BIA 1973). As “theft” under the Theft Act of 1968 requires a finding that an individual “dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it,” the applicant’s conviction for theft from a vehicle is a crime involving moral turpitude.

The director further found that the applicant was convicted of a crime involving moral turpitude for his 1991 conviction of inflicting Grievous Bodily Harm upon any other person in violation of Section 20 of the Offences Against the Person Act of 1861. The director further found this conviction to be for a violent and dangerous crime.

Section 20 of the Offences Against the Person Act of 1861 states:

Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanor, and being convicted thereof shall be liable . . . to be kept in penal servitude . . .

Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, [shall be guilty of an offence and liable, on conviction on indictment, to imprisonment for a term not exceeding 7 years.

On appeal counsel concedes that the applicant’s conviction under Section 7 of the Theft Act is a crime involving moral turpitude, however contends that the applicant’s other convictions are not. Counsel contends that the applicant is therefore eligible for a “petty offense” exception, arguing that the applicant’s conviction for theft was tried in Magistrate Court where the maximum penalty is six months imprisonment, a 5,000 pound fine, and community service, or a combination. Counsel states that a seven-year maximum sentence applies only to theft charges tried in the Crown Court, where indictment is possible.

Regarding his 1991 conviction for inflicting Grievous Bodily Harm, the applicant states in his affidavit that it resulted from an argument with his live-in girlfriend, who kneed him in the groin, to which he reacted by head butting her and breaking her nose. On appeal counsel argues that the applicant was convicted in Magistrate Court, which can only impose a maximum six month prison term, rather than Crown Court and therefore signifies that the applicant’s action was a minor crime. Counsel also states that the applicant was convicted under Section 20 rather than the more-serious Section 18, where it is an indictable offense with a maximum penalty of life imprisonment. Counsel contends that Section 20 punishes individuals who engage in conduct that an ordinary person would have recognized to be somewhat risky, even when the accused was not aware of the risk he was creating, and that this standard equates to “negligence” under U.S. law. Counsel asserts that the applicant was not the aggressor, but rather acted to defend himself, for which he was only fined.

Counsel concludes that since this section criminalizes negligent conduct that results in unanticipated serious injury it was brought before the magistrate as a minor offense and does not involve moral turpitude.

We note that in the instance of assault, it may or may not involve moral turpitude. See *Matter of Danesh*, 19 I&N Dec. 669, 670 (BIA 1988). The BIA has stated that offenses characterized as “simple assaults” are generally not considered to be crimes involving moral turpitude. See *Matter of Perez-Contreras*, supra; *Matter of Short*, 20 I&N Dec. 136, 139 (BIA 1989). In addition, the BIA has recognized that not all crimes involving the injurious touching of another person reflect moral depravity on the part of the offender. See *Matter of Sanudo*, 23 I&N Dec. 968, 971 (BIA 2006). However, the Board determined that assault and battery offenses involve moral turpitude where there is an aggravating factor such as the use of deadly weapon, the intentional infliction of serious bodily injury, and bodily harm upon individuals deserving of special protection such as a child, domestic partner, or a peace officer. See *In re Sanudo*, 23 I&N Dec. 968 (BIA 2006).

A finding of moral turpitude may also involve “an assessment of both the state of mind and the level of harm required to complete the offense.” *Matter of Solon*, 24 I&N Dec. 239, 242 (BIA 2007). Crimes committed intentionally or knowingly with the specific intent to inflict a particular harm, and with a resulting meaningful level of harm, constitute crimes involving moral turpitude, but “as the level of conscious behavior decreases, i.e., from intentional to reckless conduct, more serious resulting harm is required” for a finding of moral turpitude. *Id.* “[W]here no conscious behavior is required, there can be no finding of moral turpitude, regardless of the resulting harm.” *Id.*; see also *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992) (finding that third-degree assault under section 9A.36.031(1)(f) of the Revised Code of Washington is not a crime involving moral turpitude because neither intent nor recklessness is required for a conviction); *Matter of Fualaau*, 21 I&N Dec. at 478 (third-degree assault in Hawaii, an offense that involves recklessly causing bodily injury to another person, is not a crime involving moral turpitude); *Matter of P-*, 3 I&N Dec. 5, 8-9 (BIA 1947) (finding that assault without a deadly weapon but with the intent to cause great bodily harm is a crime involving moral turpitude).

In *Matter of Solon* the BIA cites its decision in *Matter of Fualaau*, where the alien was convicted of third-degree assault in Hawaii after pleading guilty to reckless infliction of bodily injury, and the Board concluded that a reckless state of mind must be coupled with an offense involving the infliction of serious bodily injury in order for the assault to be a crime involving moral turpitude.

In *Matter of Perez-Contreras* the BIA cites two cases where it found moral turpitude present in criminally reckless conduct. *Matter of Wojtkow*, 18 I&N Dec. 111 (BIA 1981) (defining reckless conduct as the awareness of and conscious disregard of a substantial and unjustifiable risk); *Matter of Medina*, 15 I&N Dec. 611 (BIA 1976), affd, 547 F.2d 1171 (7th Cir. 1 977) (defining reckless conduct as the conscious disregard of a substantial and unjustifiable risk). The Board stated that “while reckless conduct may not evince an intent to cause a particular harm, it does reflect a willingness to disregard the risks inherent in the conduct.” *Matter of Medina*, supra, at 614.

We have recognized that assault and battery offenses may appropriately be classified as crimes of moral turpitude if they necessarily involved aggravating factors that significantly increased their culpability. The Board found that "(A)ssault and battery offenses that necessarily involved the intentional infliction of serious bodily injury on another have been held to involve moral turpitude because such intentionally injurious conduct reflects a level of immorality that is greater than that associated with a simple offensive touching. *Sosa-Martinez v. U.S. Att'y Gen.*, supra; *Nguyen v. Reno*, 211 F.3d 692, 695 (1st Cir. 2000); *Matter of P-*, 7 I&N Dec. 376, 377 (BIA 1956).

In British courts grievous bodily harm has been determined to mean "really serious bodily harm" *DPP v Smith* [1961] AC 290 House of Lords; *R v Cunningham* [1957] 2 QB 396 Court of Appeal; *R v Brown* [1993] 2 All ER 75 House of Lords; and *R v Brown and Stratton* [1997] EWCA Crim 2255 Court of Appeal.²

In *R v Cunningham* [1957] 2 QB 396 Court of Appeal held:

Malicious means either 1) An actual intention to do the particular kind of harm that in fact was done; or (2) recklessness as to whether such harm should occur or not (i.e., the accused has foreseen that the particular kind of harm might be done and yet has gone on to take the risk of it).

In *R v Savage* [1991] 94 Cr App R 193 the British House of Lords held that it was not necessary to demonstrate the defendant had the mens rea in relation to level of harm inflicted. It was sufficient that they intended or could foresee that some physical harm will result. Therefore in order to establish an offence under section 20 the prosecution must prove either the defendant intended or that he actually foresaw that his act would cause harm. The word 'maliciously' does import upon the part of the person who unlawfully inflicts the wound or other grievous bodily harm an awareness that his act may have the consequence of causing some physical harm to some other person.

In the present case, on appeal counsel asserted that this section of law under which the applicant was convicted criminalizes negligent conduct that results in unanticipated serious injury. However, the applicant's conviction required that he intended or actually foresaw that his action might cause

² The Crown Prosecution Service provides guidance, in part:

An offence contrary to section 20 should be reserved for those wounds considered to be really serious (thus equating the offence with the infliction of grievous, or serious, bodily harm under the other part of the section).

Grievous bodily harm means really serious bodily harm. It is for the jury to decide whether the harm is really serious. However, examples of what would usually amount to really serious harm include:

injury resulting in permanent disability, loss of sensory function or visible disfigurement;

broken or displaced limbs or bones, including fractured skull, compound fractures, broken cheek bone, jaw, ribs, etc;

http://www.cps.gov.uk/legal/l_to_o/offences_against_the_person/#a15

physical harm. In accordance with the case law noted above, we find that the applicant's conviction involved recklessness and intentional conduct, and that it required he was aware of substantial risk resulting from his actions. Thus, in accordance with the above we find that for the applicant's conviction for inflicting Grievous Bodily Harm to constitute a crime involving moral turpitude as it required that he intended, or actually foresaw, that the act might cause physical harm to some person and it resulted in serious bodily harm.

Accordingly, the director correctly determined that the applicant is inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act for having been convicted of crimes involving moral turpitude. As the applicant has been convicted of two crimes involving moral turpitude, theft and inflicting grievous bodily harm, the petty offense exception under section 212(a)(2)(A) of the Act does not apply. Therefore the applicant requires a waiver under section 212(h) of the Act.

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

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 her 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, even if the applicant establishes that he meets the requirements of section 212(h)(1)(A), we cannot favorably exercise discretion in the applicant's case except in an extraordinary circumstance. *See* 8 C.F.R. § 212.7(d).

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

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

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). 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). 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.

We find that the crime for which the applicant was convicted, which requires that he foresaw some physical harm to some person and inflicted grievous bodily harm, to be a violent and dangerous crime within the meaning of 8 C.F.R. § 212.7(d), and the heightened discretionary standards found in that regulation are applicable in this case. 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. In this case the record reflects that the applicant has a U.S. citizen spouse and child.

Counsel asserts that the applicant’s spouse had a troubled relationship with her mother, who is now seriously ill, and that denial of the applicant’s waiver would cause exceptional and unusual harm given the severity of the mental health issues the spouse has experienced. Counsel states that the applicant’s spouse is the only child and that her elderly mother has cancer and other serious health problems. Counsel contends that the spouse has a long history of debilitating mental illness connected partly to her relationship with her mother, who has engaged in behavior suggesting severe mental illness and has alternated between neglecting and possessively controlling the applicant’s spouse throughout her life, continuing today. Counsel asserts that the mother’s illness caused psychological disorders for the applicant’s spouse, including anxiety, depression, and sleep and eating disorders. Counsel asserts that despite the spouse’s relationship with her mother she loves her and cannot leave her alone with her illnesses now that the mother is widowed. Counsel asserts that the spouse needs the applicant’s support to deal with her mother, particularly because the applicant and his spouse have a young child who would be affected by either being separated from his mother or not receiving proper parenting from her. Counsel states that a child’s development is affected by caregivers, and that the applicant needs to be with his spouse to care for their son if she regresses. Counsel asserts that the heavy burdens of being a single mother to her young son while caring for her elderly mother would cause a risk of regression to depression for the applicant’s spouse. In support of her assertions counsel submits reports on depression and the effects on children of psychologically impaired caregivers.

The applicant states that his spouse is terrified of the relationship with her mother, but needs to care for her now that she is a widow and suffering health problems. He states that the mother has a huge amount of control over his spouse, calling many times a day. He states that he intends to handle the

caretaking for the spouse's mother so the spouse can get space from her while fulfilling her duty. He states that without his support his spouse will become unstable.

In the spouse's statement she describes her history of depression, including a year of hospitalization, and her mother's actions that cause her to believe her mother has a mental illness. The spouse describes her psychological difficulties from childhood through teenage years to adulthood, and how her mother has continued to control her life. She states that her father has died and her mother is now living alone with no other living relative to help and that her mother would refuse assisted living. The spouse states that she fears the constant contact with her mother will cause her to lose all the progress she has made and fears for her son and her ability to care for him if she becomes depressed. The spouse states that the applicant gives her strength to assert herself and is a stabilizing force.

A letter from a licensed clinical social worker states that the applicant's spouse has been in psychotherapy since 1999 for severe depression, and was so disabled by depression and anxiety that she had been unable to work until she had undergone years of treatment. The letter indicates that the applicant's spouse has been taking antidepressants for several years, suffers from an eating disorder, and worries excessively. The letter contends that the spouse's mother was emotionally abusive, controlling, and neglectful, and states that the spouse developed severe neck and back pain because of parental neglect resulting in lack of medical care when she was a child. The letter describes the spouse's relationship with her mother as fraught with distressing, conflicting feelings. It states that the mother is still controlling so the applicant's spouse has the feeling she can never evade the "toxic mother's grasp", yet is also "irrationally" fearful of losing touch with her mother. The letter further states that the applicant's spouse feels guilty living away from her mother, but fears that being her caretaker will erode a fragile sense of self-esteem. Without the applicant's support, the letter suggests, the spouse's mental health will be at risk, leading to an inability to function and to care for her young son.

A letter from the spouse's psychiatrist states that she has been under his care since 2007 for a recurring, severe mood disorder. He lists multiple medications prescribed for the applicant's spouse. A chiropractor's letter states that the spouse has lower back pain due to an injury that is exacerbated by stress. Letters from doctors performing lap band surgery on the applicant's spouse state that although initially successful, it has now dilated and the applicant's spouse could regain weight. A letter from a primary care doctor confirms that the applicant's spouse has a long history of depression and anxiety and needs considerable and ongoing support from the applicant and their son.

The spouse's mother writes that her husband died leaving her now completely alone and that she has been diagnosed with cancer and has a broken foot that is not healing. She states that the applicant's spouse is her only child, and that having her family here would be "a light at the end of the darkest tunnel." Letters from medical professionals treating the spouse's mother describe her health issues as including breast cancer, degenerative arthritis, chronic respiratory problems, glaucoma and cataracts, irregular heartbeat, and a broken foot that causes struggles with activities. The letters

indicate that the spouse's mother needs emotional and physical assistance, but that a nursing home would not be good for her.

Neither counsel nor the applicant has asserted or submitted documentation to establish any financial hardship due to separation.

We find that given the spouse's history of severe mental health issues, the support she has received from the applicant and their son, and her sense of obligation to care for her mother, that were she to be separated from the applicant to provide such care for her mother, she would experience hardship rising to the level of exceptional and extremely unusual. The record establishes that the applicant's spouse has struggled most of her life with mental health issues. The record further reflects that her elderly mother has numerous health issues for which she requires care and emotional support, and as the applicant is the only child with no other family members available she is primarily responsible for her mother's care. The psychological reports on the record indicate that returning the applicant's spouse to a situation with her mother that had contributed to her mental health issues while being without the support of the applicant could cause her to regress into depression and affect her ability to care for her young son, who could then also suffer hardship. We thus find that the record establishes that the hardships related to separation presented in this case would rise to the level of exceptional and extremely unusual hardship.

In regard to relocating abroad to reside with the applicant as a result of his inadmissibility, counsel asserts that the applicant's spouse is unable to bring her mother to Canada due to immigration restrictions and the unavailability of Medicare. Counsel submits a report on Medicare coverage outside the United States. One physician's letter states that the mother should not move to Canada because it will disrupt her medical treatment, increase stress level, and compromise her health. A Canadian immigration attorney states that there is no way to immigrate now for the spouse's mother, given her medical condition.³

Considering the spouse's history of mental health issues, her sense of obligation as the only child to care for her mother, and the likely challenges bringing her elderly mother to Canada for the spouse to provide care, we find the record establishes that the relocation of the applicant's spouse would cause exceptional and extremely unusual hardship. Therefore we find that the record shows the applicant has established that his spouse will experience exceptional and extremely unusual hardship if his waiver application is denied.

Additionally, we find that the gravity of the applicant's offense does not outweigh the positive factors in the applicant's case. We also find that the traditional discretionary analysis demonstrates that the applicant warrants a favorable exercise of discretion. This analysis entails "balance[ing] the adverse factors evidencing an alien's undesirability as a permanent resident with the social and

³ According to Citizenship and Immigration Canada, an applicant for immigration to Canada could be inadmissible for health grounds if their condition is likely to endanger public health or public safety, or cause excessive demands on health or social services.

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." *Matter of Mendez-Morales*, 21 I&N Dec. 296, 300 (BIA 1996) (citations omitted).

The record shows that the convictions for which the applicant was found inadmissible were for actions that occurred well-over 15 years ago, with convictions occurring in 1981 and 1991. The record does not reflect that admitting the applicant would be contrary to the national welfare, safety, or security of the United States. The applicant has also shown by a preponderance of the evidence that he has been rehabilitated. Since immigrating to Canada from the United Kingdom in the mid-1990s the applicant has been gainfully employed and the record does not reflect that he has been involved in any criminal activity since his 1991 conviction. The record shows that the applicant has served on the board of the directors of the tenant co-op complex where he lives and voluntarily provides various management duties there. The record contains letters of support from former employers and colleagues as well as from family members, his former spouse, and his son from his previous marriage and whom the applicant raised as a single parent.

The unfavorable factors presented in the application are the applicant's convictions in 1981 and 1991 for crimes involving moral turpitude, but we note that these convictions and the activities that led to the convictions took place more than 20 years ago and the applicant has not been charged with any crimes since. The favorable factors presented by the applicant are the exceptional and extremely unusual hardship to his United States citizen spouse and hardship to his child, both of whom depend on him; a history of gainful employment; letters of support; and a lack of any other criminal convictions since 1991.

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 been met.

ORDER: The appeal is sustained.