



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **AUG 31 2015**

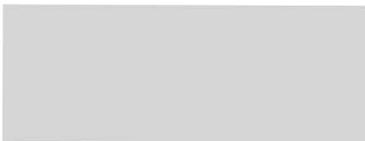
FILE #: [REDACTED]

APPLICATION RECEIPT #: [REDACTED]

IN RE: Applicant: [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:



Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to 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, 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 Bangladesh 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's spouse and two children are U.S. citizens. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h).

The District Director found that the applicant did not establish extreme hardship to a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Decision of the District Director*, dated March 7, 2014.

On appeal the applicant, through counsel, asserts that the Director erred in her analysis of extreme hardship to the applicant's spouse and older child and that she did not properly balance the equities in his case. *Form I-290B, Notice of Appeal or Motion*, dated April 3, 2014. The applicant, through counsel, also asserts that he has not been convicted of a crime involving moral turpitude. *Letter from Counsel*, dated February 13, 2015.

The record includes, but is not limited to, counsel's letter and brief, statements from the applicant and his spouse, medical articles and records, financial records, criminal records, a psychological evaluation and country-conditions information about Bangladesh. The entire record was reviewed and considered in arriving at a 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.

The Board of Immigration Appeals (BIA) stated 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.

The record reflects that the applicant was convicted on [REDACTED], of conspiracy in the fourth degree under New York Penal Code § 105.10(1), and he received a sentence of five years of probation and was fined a mandatory surcharge in the amount of \$155. New York Penal Code § 105.10(1) stated, at the time of the applicant's conviction:

A person is guilty of conspiracy in the fourth degree when, with intent that conduct constituting:

1. a class B or class C felony be performed, he agrees with one or more persons to engage in or cause the performance of such conduct[.]

The January 26, 2000 plea minutes reflect that the applicant pled guilty to assault in the first degree¹ under New York Penal Code § 120.10(1), which read at the time of the applicant's conviction:

A person is guilty of assault in the first degree when:

1. With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument[.]

In a 2013 decision, the Supreme Court held that sentencing courts may not apply the modified categorical approach when the crime of which the defendant was convicted has a single, indivisible set of elements. *Descamps v. United States*, 133 S. Ct. 2276 (2013). The Court noted that the modified categorical approach was developed so that when a statute was divisible and referred to several different crimes, "courts could discover which statutory phrase, contained within a statute listing several different crimes, covered a prior conviction." *Id.* at 2284-85 (quoting *Nijhawan v. Holder*, 557 U.S. 29, 41 (2009) (internal quotation marks omitted)); see also *Johnson v. United States*, 559 U.S. 133, 144 (2010) ("[T]he 'modified categorical approach' that we have approved permits a court to determine which statutory phrase was the basis for the conviction.").

In *Matter of Chairez-Castrejon*, the BIA revisited its method of determining whether a statute is divisible and held that the approach to divisibility applied in *Descamps* also applied in the immigration context. 26 I&N Dec. 349, 352-5 (BIA 2014) (reconsidering *Matter of Lanferman*, 25 I & N Dec. 721 (BIA 2012), and ultimately "withdraw[ing] from that decision to the extent that it is inconsistent with *Descamps*."). The BIA noted that after *Descamps*, a criminal statute is divisible "only if (1) it lists multiple discrete offenses as enumerated alternatives or defines a single offense

¹ The plea minutes reflect that the applicant pled guilty to conspiracy in the fourth degree, and that the underlying conduct constituted a class B or class C felony. The plea minutes reflect that the underlying conduct was an assault, and the only assault statute at the time of the applicant's conviction that was a class B or C felony was assault in the first degree, a class B felony.

by reference to disjunctive sets of ‘elements,’ more than one combination of which could support a conviction; and (2) at least one, but not all, of those listed offenses or combinations of disjunctive elements is a categorical match” to the relevant generic offense. *Id.* at 353. The BIA further explained that for purpose of determining whether a statute is truly divisible, an offense’s elements are those facts about the crime which “[t]he Sixth Amendment contemplates that a jury--not a sentencing court--will find . . . unanimously and beyond a reasonable doubt.” *Id.* at 353 (quoting *Descamps* at 2288 (citing *Richardson v. United States*, 526 U.S. 813, 817 (1999))(footnote omitted). The BIA found that a statute was not divisible merely because it “disjunctively enumerated intent, knowledge, and recklessness as alternative mental states” and further stated that the statute “can be ‘divisible’ into three separate offenses with distinct mens rea only if . . . jury unanimity regarding the mental state” was required. *Id.* at 352-354. As it had not been established that jury unanimity was required, the BIA held that the alternative mens rea were merely alternative “means” of committing the crime rather than alternative “elements” of the offense. *Id.* at 355.

Counsel cites to *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013) in asserting that a conviction under New York Penal Code § 105.10(1) is not categorically a crime involving moral turpitude, as the minimum conduct of committing a class B or C felony includes other acts that would not constitute a crime involving moral turpitude.

In the present matter the applicant’s conviction for conspiracy in the fourth degree is not categorically a crime involving moral turpitude, because the statute includes intent to commit a class B felony or class C felony, which includes crimes not involving moral turpitude. It is thus necessary to determine whether the statute is divisible into separate offenses with distinct *mentes reae*, or whether intent to commit a class B felony or class C felony are merely alternative means of committing the offense. To do so, we turn to the New York Criminal Jury Instructions. Specifically, to prove the crime of conspiracy in the fourth degree, the jury instructions state, in pertinent part:

1. That on or about (*date*), in the County of (*county*), the defendant, (*defendant’s name*), agreed with one or more persons to engage in or cause the performance of conduct constituting the class B [*or class C*] felony of (*specify object felony*);
2. That the defendant did so with the intent that such conduct be performed; and
3. That the defendant, or one of the persons with whom he/she agreed to engage in or cause the performance of such conduct, committed [*the*] [*at least one*] alleged overt act in furtherance of the conspiracy.

The jury instructions reflect that statute is divisible into separate offenses with distinct *mentes reae*. The first instruction involves the specification of the individual underlying crime that was committed, and requires the jury to make a finding of the individual, specific crime. It does not instruct the jury that it can find an individual guilty of conspiracy in the fourth degree if the accused commits any class B or class C felony. Therefore, we will address the applicant’s crime under the modified categorical approach. As mentioned, the applicant pled guilty to assault in the first degree

In *Matter of Solon*, the BIA addressed whether a lesser offense of assault in the third degree, a class A misdemeanor, is a crime involving moral turpitude. 24 I&N Dec. 239 (BIA 2007). The individual in *Matter of Solon* was convicted of a violation of New York Penal Law § 120.00(1), which provides that a person is guilty of assault in the third degree when, “[w]ith intent to cause physical injury to another person, he causes such injury to such person or to a third person.” 24 I&N Dec. at 243. The BIA concluded that:

[A] conviction for assault in the third degree under section 120.00(1) of the New York Penal Law requires, at a minimum, (1) that the offender acts with the conscious objective to cause another person impairment of physical condition or substantial pain of a kind meaningfully greater than mere offensive touching, and (2) that such impairment of physical condition or substantial pain actually results. Thus, a conviction under this statute requires, at a minimum, intentionally injurious conduct that reflects a level of depravity or immorality appreciably greater than that associated with the crime at issue in *Matter of Sanudo*, *supra*, at 971-72 (stating that the minimal conduct necessary for a battery conviction under section 242 of the California Penal Code was in the nature of a simple battery). Accordingly, we conclude that a conviction under section 120.00(1) of the New York Penal Law is a conviction for a crime involving moral turpitude.

24 I&N Dec. at 245.

A conviction for a violation of New York Penal Code § 120.10(1) similarly requires intent to cause injury and further involves the aggravating factor of a deadly weapon or a dangerous instrument. *See Matter of Medina*, 15 I. & N. Dec. 611, 614 (BIA 1976)(stating “assault with a deadly weapon is generally deemed to be a crime involving moral turpitude.”). Therefore, we find assault in the first degree in violation of New York Penal Law § 120.10(1) is categorically a crime involving moral turpitude, and the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

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

The Attorney General [now Secretary of the 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.

In examining whether the applicant is eligible for a waiver, we will assess whether he meets the requirements of section 212(h)(1)(A) of the Act. The record reflects that the activity resulting in the applicant's convictions occurred prior to [REDACTED] the date of his conviction. We note that an application for admission or adjustment of status is considered 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) (citations omitted). The adjustment of status decision must await our finding regarding the applicant's eligibility for a waiver of inadmissibility. As the activities for which the applicant is inadmissible occurred more than 15 years before the date of his adjustment of status "application," he is eligible for waiver consideration under section 212(h)(1)(A)(i) of the Act.

The record does not reflect that admitting the applicant would be contrary to the national welfare, safety, or security of the United States per section 212(h)(1)(A)(ii) of the Act. The record reflects that the applicant is working as a manager of a donut shop. There is no indication that the applicant has ever relied on the government for financial assistance. The record reflects that the applicant has not been arrested in over 15 years. There is no indication that the applicant poses any security concerns.

The record also shows by a preponderance of the evidence that the applicant has been rehabilitated per section 212(h)(1)(A)(iii) of the Act. The record reflects that the applicant has not been arrested in over 15 years. The record includes letters from a co-worker, a friend, and family members attesting to the applicant's good moral character and his involvement with his family. The record includes evidence that he has supported veterans and a senior services center. Accordingly, the applicant has shown that he meets the requirement of section 212(h)(1)(A)(iii) of the Act.

Based on the foregoing, the applicant has shown that he is eligible for consideration for a waiver under section 212(h)(1)(A) of the Act.

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

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 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 Secretary 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). *Black's Law Dictionary, Seventh Edition* (1999), defines violent as "of, relating to, or characterized by strong physical force" and dangerous as "likely to cause serious bodily harm." Decisions to deny waiver applications on the

basis of discretion under 8 C.F.R. § 212.7(d) are made on a factual “case-by-case basis.” 67 Fed. Reg. at 78677-78.

We find that a violation of New York Penal Law § 120.10(1), which proscribes serious physical injury, is 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.* We note that the regulatory standard of exceptional and extremely unusual hardship found in 8 C.F.R. § 212.7(d) is more restrictive than the extreme hardship standard set forth in section 212(h) of the Act. *Cortes-Castillo v. INS*, 997 F.2d 1199, 1204 (7th Cir. 1993).

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 qualifying relatives in this case include the applicant’s U.S. citizen spouse and two children.

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 63-64.

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.

We now turn to a consideration of whether the record establishes that a qualifying relative would experience exceptional and extremely unusual hardship if the applicant's waiver application is denied. As mentioned, the applicant's spouse and children are qualifying relatives for the purposes of determining exceptional and extremely unusual hardship under 8 C.F.R. § 212.7(d).

First, we will address hardship to the qualifying relatives upon relocation to Bangladesh. Counsel states that the applicant's spouse would not be able to relocate to Bangladesh as she could not afford medical treatment and the country's atmosphere would aggravate her condition. The applicant's spouse states that she had an accident and was diagnosed with herniation and prolapse of multiple discs in the cervical and lumbar region; she takes a prescription pain reliever; and she has not been able to work full-time or lift heavy items. She states that it is painful to do anything for a prolonged period of time; she is in constant, daily pain; and she would not be able to find the medical care and support that she receives in the United States. The applicant's spouse's physical therapist states that the applicant's spouse is receiving physical therapy services due to neck and mid-back pain and muscle weakness with a diagnosis of C6-7 central canal stenosis, t2-7 disc herniation, brachial neuritis, lumbosacral neuritis and sprain of neck and lumbar region; and she has received on and off care since December 5, 2010, due to recurrence or exacerbation of her symptoms. Her physician states that she has been diagnosed with sprain of neck, cervicalgia, brachial neuritis lesion of ulner nerve, lumbosacral neuritis., sprain lumbar region, sprained shoulder or arm, and dizziness and giddiness. The record includes articles on some of her conditions.

The applicant's spouse states that the applicant's family belittles her due to her inability to perform daily tasks and insults her for not being able to care for their children, ages five and eight; she and the applicant are liberal; and her in-laws would expect her to wear a head scarf and behave in a certain way. The applicant's spouse states that her family will have no place to live, and it will be hard for the applicant to obtain a job as he has to take training to practice medicine. The record reflects that the applicant has a medical degree from Bangladesh. She also states that he has chronic obstructive pulmonary disease, and he could not maintain his health in Bangladesh. The applicant states that he has high blood pressure.

Counsel states that the applicant's daughter's medical condition affects the applicant's spouse's medical condition as she knows that she could not obtain medical treatment and medicine for their daughter in Bangladesh. The applicant states that their daughter was diagnosed with Bell 's palsy; her condition has been getting worse; she was diagnosed with asthma and is highly allergic to dust and pollen; and medical treatment is poor in Bangladesh. The record includes an article on Bell 's palsy and asthma. Their daughter's physician states that she is asthmatic and has been on albuterol and Pulmicort; and she has a past history of facial palsy, which has been resolving gradually. The

applicant states that their daughter's health would get worse in Bangladesh and medical treatment is poor there.

The applicant's spouse states that their children do not speak the language; their daughter was sick most of the time she visited Bangladesh, and their son has not been there; their daughter is in the gifted and talented program; and their children do not have the cultural familiarity or wherewithal to live in Bangladesh.

The applicant's spouse states that his spouse and children will face political, cultural, and religious barriers in Bangladesh; there is violence and kidnapping with no protection from the police; and they would be easy targets as they are Americans. She states that their lives in the United States are safe, secure and free from politics and unattainable family pressures. The record includes the 2013 U.S. Department of State Country Reports on Human Rights Practices for Bangladesh, and an article on fake and low standard medicine.

The record reflects that the applicant's spouse has significant medical issues. However, it is not clear whether she could receive suitable medical treatment for her issues in Bangladesh. The record reflects that the applicant has a medical degree from Bangladesh, although his job prospects also are not clear from the record. The record does not include supporting documentary evidence to establish the level of financial hardship that the applicant's family would experience in Bangladesh. The applicant's spouse may experience some emotional hardship based on her relationship with her in-laws and from difficulty her children may experience in Bangladesh. The record, however, reflects that the applicant's spouse was born and raised in Bangladesh. The record also reflects that the applicant's children may experience hardship due to language issues, and their daughter may experience hardship due to educational and medical issues. The severity of her asthma and whether she could receive suitable medical treatment for her issues in Bangladesh is not clear from the record. The record reflects that the applicant's spouse and children may experience difficulty in relocating to Bangladesh; however we find that record lacks sufficient documentary evidence of emotional, financial, medical or other types of hardship that, in their totality, establish that a qualifying relative would experience exceptional and extremely unusual hardship upon relocation to Bangladesh.

The applicant's spouse states that she was injured in 2007 when she fell, and this lead to her current medical conditions; she suffers from intense pain and numbness in both hands; she depends on the applicant to help with their children; she relies on pain killers and physical therapy to relieve her pain; stress and physical activity exacerbate her condition; she needs physiotherapy twice a week; and the applicant comforts her when she feels depressed about her severe back pain.

The applicant states that he works until three in the afternoon so that he go home to cook, clean, bathe the children and help their daughter with her homework; and he deals with school-related issues, such as attending parent-teacher conferences. The applicant's spouse states that the applicant cares for her; he cooks for the family and does the household chores; he takes her parents to their doctor appointments; she cannot carry the children due to her back issues; he carries their children and comforts them; and she will be emotionally distraught due to worrying about the applicant's

health, as he has obstructive pulmonary disease and the air pollution in Bangladesh will make it worse.

The psychologist who evaluated the applicant's spouse states that the applicant's spouse is being treated with medication for depression due to her chronic pain; and she reports anxiety, sleep problems, diminished interest in activities, poor appetite, fatigue, diminished ability to think, intermittent panic attacks, and complete dependence on the applicant. The psychologist states that the applicant's spouse's presentation is consistent with major depressive disorder, panic attacks and generalized anxiety disorder.

The applicant's spouse states that she will not be able to maintain a full-time job due to her and their daughter's medical conditions as she will need many sick days; she will have to send money to support the applicant; and she cannot handle the monthly expenses by herself. The applicant states that his spouse cannot financially support herself, their children and her parents without him; their monthly expenses include rent of \$1300, utilities of \$250, credit card debt of \$76,000, and other daily expenses; he earns \$2444 per month as a manager. and his spouse will not be able to earn that much; he will not be able to send money from Bangladesh; and he has been away for 18 years and he will receive minimum pay. The record includes evidence of several bills for the applicant and his spouse. Their 2013 federal tax return reflects an income of \$44,750.

Counsel states that the applicant's daughter is emotionally, financially, and physically dependent on the applicant, as he is the sole financial provider and the only one who can take her to medical appointments; and that the applicant is very involved in her life. The applicant's spouse states that the applicant takes their daughter to the doctor and administers her nebulizer machine. The psychologist states that their daughter exhibits a healthy attachment to both parents, and any change in the family structure can significantly compromise her health and academic potential.

Counsel states that the applicant's son is emotionally, financially, and physically dependent on the applicant as a result of his mother's disabling medical condition. The applicant states that his son is very fond of him.

The record reflects that the applicant's spouse has significant medical issues and she is completely dependent on the applicant. The record reflects that she would experience significant emotional and financial hardship without him. In addition, she would be raising their two young children without him, and he plays a large role in raising them. The record reflects that the applicant is close with their children, their daughter has medical issues, and he would be permanently separated from them. Considering the totality of the hardship factors presented, we find that the applicant's spouse and children would experience exceptional and extremely unusual hardship if they remained in the United States without the applicant.

We can find exceptional and extremely unusual hardship warranting a waiver of inadmissibility only where an applicant has demonstrated exceptional and extremely unusual hardship to a qualifying relative in the scenario of separation *and* the scenario of relocation. A claim that a qualifying relative will remain in the United States and thereby suffer exceptional and extremely unusual

hardship as a consequence of separation can easily be made for purposes of the waiver even where there is no intention to separate in reality. Furthermore, to separate and suffer exceptional and extremely unusual hardship, where relocating abroad with the applicant would not result in exceptional and extremely unusual hardship, is a matter of choice and not the result of inadmissibility. As the applicant has not demonstrated exceptional and extremely unusual hardship from relocation, we cannot find that refusal of admission would result exceptional and extremely unusual hardship to the qualifying relatives in this case.

The documentation in the record does not establish the existence of exceptional and extremely unusual hardship to a qualifying relative. As such, the applicant is not eligible for a favorable exercise of discretion under section 212(h)(2) of the Act. We also find that no purpose would be served in discussing whether he merits an overall 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. *See* Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.