



U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: JUN 19 2015

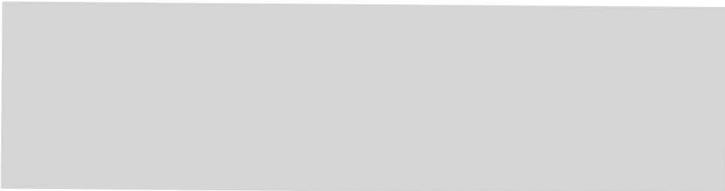
FILE #: [REDACTED]

APPLICATION RECEIPT #: [REDACTED]

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under sections 212(a)(9)(B)(v) and 212(h) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(9)(B)(v) and 1182(h)

ON BEHALF OF APPLICANT:



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

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, Lincoln, Nebraska, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the waiver application will be approved.

The applicant is a native and citizen of Guatemala who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking admission within ten years of her last departure from the United States. She was also found inadmissible to the United States pursuant to section 212(a)(2)(A) of the Act, 8 U.S.C. § 1182(a)(2)(A), for having been convicted of a crime involving moral turpitude. The applicant seeks a waiver of inadmissibility pursuant to sections 212(a)(9)(B)(v) and 212(h) of the Act. The applicant's mother and daughter are U.S. citizens. The applicant seeks waivers of her inadmissibilities in order to reside in the United States with her mother, daughter and family in the United States.

The Director denied the Application for Waiver of Grounds of Inadmissibility (Form I-601), finding that the applicant was convicted of a violent or dangerous crime and that she is not eligible for a waiver because the hardships to her relative are not exceptional and extremely unusual and she also did not show extraordinary circumstances in her case. *Decision of the Director*, dated June 25, 2014.

On appeal, the applicant, through counsel, asserts that the Director incorrectly applied the extraordinary-circumstances standard to the applicant, because he erroneously identified the crime at issue. Moreover, the applicant asserts that the crime for which she was convicted, Criminal Threats, is not an aggravated felony, because a one-year sentence was not imposed. The applicant further asserts that Criminal Threats has been held to categorically constitute a crime involving moral turpitude, and therefore the extreme-hardship standard applies. Counsel also indicates that the applicant could be granted *nunc pro tunc* relief from her conviction for Criminal Threats, and therefore the applicant's conviction could be reduced from a felony to a misdemeanor, and a misdemeanor for this crime would not constitute a violent or dangerous crime.<sup>1</sup>

The record contains, but is not limited to: briefs; criminal records; identification documents for the applicant, her mother, her daughter, and other family members; declarations from the applicant, her mother and her daughter's father; academic certificates and documents for the applicant and her daughter; employment documentation for the applicant and her mother; medical and psychological documentation for the applicant's mother; financial documentation; documents from family and friends concerning the applicant's character; copies of letters from her daughter to the applicant; photographs; and country-condition reports about Guatemala. The entire record was reviewed in rendering a decision on the appeal.

We will first address the finding of inadmissibility of the applicant for unlawful presence under section 212(a)(9) of the Act. Section 212(a)(9) of the Act provides, in pertinent part:

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<sup>1</sup> There is no indication in the record that the applicant's actual conviction was reduced. Nonetheless, the applicant does not contest that she has been convicted of Criminal Threats within the meaning of conviction pursuant to Section 101(a)(48) of the Act.

(B) Aliens Unlawfully Present.-

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

....

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

Section 212(a)(9)(B)(v) of the Act provides for a waiver of section 212(a)(9)(B)(i) inadmissibility as follows:

The Attorney General [now Secretary of the Department of Homeland Security (Secretary)] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established . . . that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

The applicant entered the United States without inspection or admission in December 1993 and returned to Guatemala on May 6, 2010, pursuant to a voluntary departure order dated April 22, 2010. She therefore accrued over one year of unlawful presence between April 1, 1997, and her departure on May 6, 2010.<sup>2</sup> She is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking admission within ten years of her departure from the United States. The applicant does not contest her inadmissibility on this ground.

We will next address the applicant's finding of inadmissibility under section 212(a)(2)(A) of the Act, 8 U.S.C. § 1182(a)(2)(A), for having been convicted of a crime involving moral turpitude. Section 212(a)(2)(A)(i)(I) 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.

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<sup>2</sup> In accordance with section 212(a)(9)(B)(iii)(II), the applicant's period of unlawful presence was tolled during the years her asylum application was pending. After the application was denied in 2005, however, the applicant accrued over one year of unlawful presence before her departure in 2010.

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.)

For cases arising in the Ninth Circuit, the determination of whether a crime is a crime involving moral turpitude first requires the categorical inquiry set forth in *Taylor v. United States*, 110 S.Ct. 2143 (1990). See *Nicanor-Romero v. Mukasey*, 523 F.3d 999, 1004 (9th Cir. 2008), *overruled on other grounds by Marmolejo-Campos v. Holder*, 58 F.3d 903, 911 (9th Cir. 2009). The purpose of the categorical approach is to determine whether the full range of conduct encompassed by the statute constitutes a crime of moral turpitude. *Cuevas-Gaspar v. Gonzalez*, 430 F.3d 1013, 1017 (9th Cir. 2005).

On December 15, 2009, the applicant was charged with Aggravated Assault and Criminal Threats in violation of sections 245(a)(1) and 422 of the California Penal Code. The applicant's charge with respect to Criminal Threats was enhanced pursuant to section 12022(b)(1) of the California Penal Code, Personal Use of a Deadly Weapon, for her use of a knife. On [REDACTED] 2010, the applicant pled guilty to Criminal Threats in violation of section 422 of the California Penal Code. The applicant was sentenced to serve 114 days in jail, pay fines and was placed on probation. On [REDACTED] 2010, the applicant's charge for Aggravated Assault and the enhancement, Personal Use of a Deadly Weapon, to the applicant's charge for Criminal Threats were both dismissed.

At the time of the applicant's conviction, section 422 of the California Penal Code stated in part:

Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison.

In *Latter-Singh v. Holder*, 668 F.3d 1156 (9th Cir. 2012), the Ninth Circuit found section 422 of the California Penal Code is categorically a crime involving moral turpitude. The record reflects that on [REDACTED] 2010, the applicant was convicted of Criminal Threats in violation of section 422 of the California Penal Code. The applicant was sentenced to serve 114 days in jail and pay fines; she also was placed on probation. As the applicant has not contested her inadmissibility for committing a crime involving moral turpitude on appeal, and the record does not show that determination to be in error, we will not disturb the finding of inadmissibility under section 212(a)(2)(A) of the Act.

While the applicant does not contest her inadmissibility on appeal, she believes that the Director erroneously found her crime to be a violent or dangerous crime. Specifically, the applicant asserts the Director mistakenly found she was convicted of Aggravated Assault and of Criminal Threats with the enhancement for Personal Use of a Deadly Weapon; she also asserts that Criminal Threats alone is not a violent or dangerous crime. After a thorough review of the criminal documentation, as stated above, we find that the applicant was convicted for Criminal Threats under section 422 of the California Penal Code; we also find that the count charging her with Aggravated Assault and the enhancement to Personal Use of a Deadly Weapon was dismissed. As such, we will next examine whether section 422 of the California Penal Code represents a crime involving moral turpitude that is also violent or dangerous.

The waiver for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act is found under section 212(h) of the Act. That section provides, in pertinent part:

(h) The [Secretary] 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 [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

(ii) 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 . . .

(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.

A section 212(h) waiver of the bar to admission resulting from a violation of section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant is not a consideration under the statute and will be considered only to the extent that it results in hardship to a qualifying relative. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996).

Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *Id.* In most discretionary matters, the alien bears the burden of proving eligibility simply by showing equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957). However, we cannot find, based on the facts of this particular case, that the applicant merits a favorable exercise of discretion solely on the balancing of favorable and adverse factors. According to the Director, the applicant's conviction indicates that she is subject to the heightened discretion standard of 8 C.F.R. § 212.7(d).

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.

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).<sup>3</sup>

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.

This case arises under the jurisdiction of the Ninth Circuit Court of Appeals. In *Rosales-Rosales v. Ashcroft*, 347 F.3d 714 (9th Cir. 2003), the Ninth Circuit concluded that a conviction for the offense of criminal threats in violation of section 422 of the California Penal Code is a crime of violence under 18 U.S.C. § 16 and an aggravated felony under the Act. The court noted that “§ 422 is an offense ‘that has as an element the ... threatened use of physical force against the person or property of another.’ 18 U.S.C. § 16(a). Therefore § 422 meets the definition of a ‘crime of violence’ as set forth in § 16(a).” 347 F.3d 714, 717. In *Latter-Singh v. Holder*, 668 F.3d 1156 (9th Cir. 2012), the Ninth Circuit found section 422 of the California Penal code is categorically a crime involving moral turpitude, and also found that the BIA acted within its power in imposing a higher standard for a violent or dangerous crime. We find that pursuant to the holding in *Rosales-Rosales*, *Latter-Singh* and the plain language of the statute, section 422 of the California Penal Code is a violent crime, and the heightened discretionary standard of 8 C.F.R. § 212.7(d) is 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.*

The exceptional and extremely unusual hardship standard is more restrictive than the extreme hardship standard. *Cortes-Castillo v. INS*, 997 F.2d 1199, 1204 (7th Cir. 1993). Since the applicant is subject to 8 C.F.R. § 212.7(d), merely showing extreme hardship to her qualifying relatives under section 212(h) of the Act is not sufficient. Establishing that the applicant meets the higher standard of exceptional and extremely unusual hardship to her qualifying parent, in this case the applicant’s mother, will also satisfy the requirements for a waiver of inadmissibility under sections 212(h) and 212(a)(9)(B).

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<sup>3</sup> Although the applicant may be correct that her conviction for Criminal Threats is not an aggravated felony conviction, because a one-year sentence was not imposed, this does not preclude finding Criminal Threats to be a violent or dangerous crime.

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 notes 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.

On appeal, the applicant's mother asserts in her declaration that she is the only person taking care of her granddaughter, the applicant's daughter. She states that she is responsible for her granddaughter on a daily basis and that her granddaughter's father only visits sometimes. According to the qualifying parent's psychological evaluation, this situation is creating stress for her. The applicant's mother states that she is experiencing emotional hardships watching her granddaughter growing up without the applicant and worrying about the applicant's own safety in Guatemala. The record also reflects that the applicant's mother is experiencing medical issues stemming from her diabetes and that the stress of her situation is also compromising her autoimmune system. She also indicates that she is struggling financially, and that, without the financial assistance of the applicant, she has been forced to rent out a room in her house so that she can afford to keep her home. She states that she has had to financially support the applicant in Guatemala and that she can only work part-time now, as she cannot leave her granddaughter alone. She also worries about her inability to save for her retirement.

With regard to her emotional hardships due to separation, the applicant's mother is suffering from severe anxiety, depression, sleep deprivation, fatigue, tension and dizziness spells, according to the psychological evaluation. The psychological evaluation also indicates that she has suffered verbal abuse from her granddaughter's father and includes a diagnosis of post-traumatic stress disorder and major depressive disorder as a result of being a victim of verbal abuse and her separation from the applicant.

The applicant's mother's concerns regarding the applicant's safety in Guatemala are corroborated in the record. The U.S. Department of State has reported that Guatemala has one of the highest violent crime rates in Latin America. In 2013, Guatemala reported on average 101 murders a week. See *Guatemala 2014 Safety and Crime Report*, U.S. Department of State Bureau of Diplomatic Security, dated May 14, 2014. The record also confirms that the applicant's parent is suffering from medical issues, including diabetes and severe vision issues, which could result in blindness if left untreated. Further, the record establishes that the qualifying parent is suffering financially without the applicant, who would contribute financially and provide child care to her granddaughter. The record contains evidence of numerous remittances to support the assertion that the qualifying parent financially supports the applicant in Guatemala. In addition, the record contains financial documentation, including the qualifying parent's tax documentation and evidence of expenses, demonstrating her financial situation.

With regard to the hardships that the qualifying parent would experience upon relocation, the qualifying parent would be unable to relocate to Guatemala because she takes care of the applicant's daughter, who lives with her. Her granddaughter's father indicates in his declaration that he will not allow his daughter to go to Guatemala. The applicant's daughter has also never lived outside the United States. Although the psychological evaluation indicates that the applicant's daughter's father has full custody, the record establishes that her mother provides daily care to her daughter. Further, the psychological evaluation indicates that the applicant's daughter's father cannot provide a stable living situation for his daughter, as he has not had stable relationships with women and is not currently in good health. As such, the applicant's mother would be unable to leave her daughter with her father. The applicant's mother also indicates in her declaration that she cannot relocate to Guatemala because her whole life is here. The record confirms that she came to the United States over 20 years ago and that her children and grandchildren live lawfully in the United States. Supporting documentation establishes poverty and safety issues in Guatemala, which are significant, and these hardships to the qualifying parent upon relocation will be given considerable weight in an overall assessment of hardship.

We have considered all elements of hardship to the applicant's parent, should she remain in the United States or relocate to Guatemala, in the aggregate. We find that the hardships to the applicant's mother caused by leaving the United States and leaving the applicant's daughter in the care of her father, who has not shown interest in raising her, and leaving her other children and grandchildren, coupled with the safety and financial issues in Guatemala, are "substantially" beyond the ordinary hardships that individuals suffer when they relocate due to a family member's inadmissibility. In addition, the applicant has established that her mother currently suffers emotional, financial and medical hardships living in the United States without her. Therefore, the applicant has established that her mother would experience extreme hardship upon relocation to Guatemala or continued separation from the applicant.

As stated above, the applicant's mother is the primary caregiver for the applicant's daughter and therefore has a heavy familial burden. She also has had limited support in raising her granddaughter, since the applicant has been living in Guatemala and the father is not consistently present in his daughter's life. Her role as caregiver, given her existing medical issues, has created emotional, psychological and financial stress for her. We believe that forcing a grandparent to assume the entire responsibilities as a parent for a child goes substantially beyond the ordinary hardship expected when a close family member leaves the country. In fact, the position in which the applicant's mother has been put in would more closely resemble a complete upheaval in her life,

potentially having severe negative effects on her mental and physical well-being, and consistent with that of the higher standard of exceptional and extremely unusual hardship discussed above. In addition, as also explained herein, the applicant's mother is unable to relocate to Guatemala to be with the applicant due to the constraints put on her by her granddaughter's father, who will not permit his daughter to live in Guatemala. As the applicant's mother feels that her granddaughter's father cannot provide a stable environment for her granddaughter, she would be unable to relocate to Guatemala and leave her granddaughter in a potentially unsafe and unhealthy situation. As it appears that relocating and leaving her granddaughter is not a viable option for the applicant's mother, we similarly find that her hardship constitutes exceptional and extremely unusual hardship. As such, we also find that, based on the aforementioned discussion of hardship to the applicant's parent, the standard of exceptional and extremely unusual hardship has also been met.

We additionally find that the applicant merits a waiver of inadmissibility as an overall matter of discretion. In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y*, 7 I&N Dec. 582 (BIA 1957).

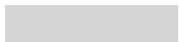
In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

*See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996). We must then, "balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and 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." *Id.* at 300 (citations omitted).

The adverse factors in the present case are the applicant's unlawful presence and criminal conviction in the United States. The favorable factors include the presence of the applicant's U.S. citizen parent, daughter and other family members in the United States, and the extreme hardship to her qualifying mother.

We find that the violations committed by the applicant cannot be condoned. Nevertheless, we find that taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted.

(b)(6)



*NON-PRECEDENT DECISION*

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In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is sustained. The application is approved.