



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

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF L-M-

DATE: NOV. 3, 2015

APPEAL OF NEBRASKA SERVICE CENTER DECISION

APPLICATION: FORM I-601, APPLICATION FOR WAIVER OF GROUNDS OF
INADMISSIBILITY

The Applicant, a native and citizen of Guyana, seeks a waiver of inadmissibility. *See* Immigration and Nationality Act (the Act) § 212(h), 8 U.S.C. § 1182(h). The Director, Nebraska Service Center, denied the application. The matter is now before us on appeal. The appeal will be dismissed.

The Applicant 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 is the beneficiary of an approved Form I-130, Petition for Alien Relative and seeks a waiver of inadmissibility pursuant to section 212(h) of the Act in order to reside in the United States with his U.S. citizen spouse and daughter.

In a decision dated January 11, 2015, the Director determined that the Applicant's conviction was for a violent or dangerous crime. The Director denied the waiver application as a matter of discretion.

On appeal the Applicant asserts that the Director erred in finding him convicted of a violent or dangerous crime and did not give proper weight to evidence submitted to demonstrate hardship suffered by his family as a result of his removal from the United States. With the appeal the Applicant submits a brief. 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) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-

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(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 record reflects that on August 11, 2000, the Applicant was admitted to the United States as a lawful permanent resident. On [REDACTED] the Applicant was convicted in the Supreme Court of the State of New York, [REDACTED] of Assault in the Second Degree, in violation of section 120.05(1) of the New York Penal Code, for events that took place on [REDACTED]. The Applicant was sentenced to six months imprisonment and five years' probation. On August 13, 2007, the Applicant was placed in removal proceedings. On January 18, 2008, the Applicant was ordered removed from the United States by an immigration judge. The record establishes that the Applicant departed the United States on February 21, 2008.

At the time of the Applicant's conviction New York Penal Code stated:

§ 120.05 Assault in the second degree

A person is guilty of assault in the second 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; or

Assault in the second degree is a class D felony.

Title A. General Purposes, Rules of Construction, and Definitions

Article 10. Definitions

§ 10.00 Definitions of terms of general use in this chapter

10. "Serious physical injury" means physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted

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impairment of health or protracted loss or impairment of the function of any bodily organ.

As the Applicant has not disputed on appeal that his conviction for assault is a crime involving moral turpitude, and the record does not show the finding of inadmissibility to be erroneous, we will therefore not disturb the finding of the Director. The Applicant requires a waiver under section 212(h) of the Act.

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

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

....

(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

A waiver of inadmissibility under section 212(h) 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 Applicant's U.S. citizen spouse and child, born in [REDACTED] are the only qualifying relatives in this case. Hardship to the Applicant can be considered only insofar as it results in hardship to a qualifying relative. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996).

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). 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. *Id.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. *See generally Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator "must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation." *Id.*

The actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. *See, e.g., Matter of Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. *Salcido-Salcido v. I.N.S.*, 138 F.3d 1292, 1293 (9th Cir. 1998) (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *but see Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from Applicant not extreme hardship due to conflicting evidence in the record and because Applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

On appeal the Applicant's spouse contends that she is experiencing emotional and financial hardship as a result of the Applicant's inadmissibility. She maintains that long-term separation from her spouse is causing her emotional hardship. She further asserts that her daughter misses the Applicant very much. The Applicant's spouse also contends that although she is employed, she does not have enough money to afford expensive items her daughter wants, and she cannot afford to travel to Guyana often. Finally, the Applicant references that his daughter has a speech and developmental delay and would benefit from his presence.

We note that the mental health documentation submitted in support of the Applicant's spouse's contention that she is experiencing emotional hardship is from 2012, more than two years before the instant appeal filing. No supporting documentation has been submitted on appeal establishing the emotional hardships the Applicant's spouse is experiencing as a result of her husband's inadmissibility. With respect to the Applicant's daughter's referenced speech and developmental delays, no documentation has been submitted to the record to provide detail regarding the daughter's specific condition, the short and long-term treatment plan, and how her condition requires the Applicant's physical presence in the United States. We acknowledge the contention that the Applicant's spouse and daughter experience emotional hardship due to separation from the Applicant, but the record does not establish the severity of this hardship or the effects on their daily lives.

As for the financial hardship referenced, no documentation has been submitted on appeal establishing the spouse's current income, expenses, assets, and liabilities or her overall financial situation to establish that without the Applicant's physical presence in the United States his spouse experiences financial hardship. The most recent income information in the record is from 2012, more than two years prior to the instant appeal filing. Nor has it been established that the Applicant is unable to assist his family financially while residing abroad. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

We recognize that the Applicant's U.S. citizen spouse and daughter endure some hardship as a result of separation from the Applicant. However, their situation if they remain in the United States is typical to individuals separated as a result of removal and does not rise to the level of extreme hardship based on the record.

In regard to relocating abroad to reside with the Applicant, the spouse contends that Guyana suffers high poverty and unemployment, power outages, water shortages, high inflation, and diseases. She asserts that her daughter suffers asthma and diarrhea in Guyana. The spouse further maintains that she works as a home attendant and if she relocates to Guyana she would lose her job and benefits, thereby causing her and her daughter financial hardship. The Applicant's spouse also notes that she has been a U.S. citizen since 1999, that the United States is her daughter's only home, and that separation from other family members in the United States would be a hardship for her and her daughter.

To begin, the Applicant has not submitted any documentation to establish that his spouse and child would not be able to obtain medical care should the need arise. The information regarding country conditions submitted is general in nature. Nor has the Applicant established that his wife would not be able to obtain gainful employment abroad, or alternatively, that he is unable to support them himself. In addition, although we acknowledge that separation from extended family creates a hardship, evidence in the record does not support that relocating to Guyana and separation from extended family in the United States would create extreme hardship for the Applicant's spouse or his daughter. The record does not establish that the Applicant's wife and child would be unable to return

to the United States to visit family. Based on a totality of the circumstances, we find that the record does not establish that the Applicant's spouse or child, born in Guyana, would experience extreme hardship were they to relocate abroad to reside with the Applicant.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that the Applicant's U.S. citizen spouse and daughter will face extreme hardship if the Applicant is unable to reside in the United States. Rather, the record demonstrates that they face no greater hardship than the unfortunate, but expected disruptions, inconveniences, and difficulties arising whenever a spouse or parent is removed from the United States and/or refused admission. Although we are not insensitive to the situation of the Applicant's spouse and daughter, the record does not establish that the hardship they face rises to the level of "extreme" as contemplated by statute and case law.

We note that even if the Applicant establishes eligibility for a waiver, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion in favor of the waiver. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996). As noted, the Director found that the Applicant has been convicted of a violent or dangerous crime. A favorable exercise of discretion is limited in the case of an applicant who has been convicted of a violent or dangerous crime. Specifically, 8 C.F.R. § 212.7(d) states:

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

The 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. 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). 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 (Dec. 26, 2002).

Nevertheless, we 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.

Although an offense in violation of section 120.05(1) of the New York Penal Code may be committed without physical force actually being used against another, an individual who commits such an offense necessarily disregards the substantial risk that, in the course of committing it, he might be required to intentionally use physical force against his victim. *See James v. United States*, 550 U.S. 192 (2007). Therefore the offense qualifies as a crime of violence under 18 U.S.C. § 16(b). *See Canada v. Gonzales*, 448 F.3d 560, 568-569 (2d Cir. 2006) (stating that an offense is a crime of violence under 18 U.S.C. § 16(b) if it requires intentional conduct and there is an inherent risk that force will be used to commit the crime, even if force will not always be required to commit the crime).

In the present case, as the Applicant has not established extreme hardship to a qualifying family member, it is not necessary at this time to determine whether he has established “exceptional and extremely unusual hardship” to a qualifying relative, a heightened hardship standard required to be met for purposes of favorable discretion. 8 C.F.R. § 212.7(d).

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

ORDER: The appeal is dismissed.

Cite as *Matter of L-M-*, ID# 14062 (AAO Nov. 3, 2015)