



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

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

MATTER OF B-J-N-

DATE: SEPT. 23, 2015

APPEAL OF DETROIT FIELD OFFICE DECISION

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

The Applicant, a native and citizen of Canada, seeks a waiver of inadmissibility. *See* Immigration and Nationality Act (INA, or the Act) § 212(h), 8 U.S.C. § 1182(h). The Field Office Director, Detroit, Michigan, denied the application. The matter is now before us on appeal. The appeal will be dismissed.

The Field Office Director concluded the Applicant did not establish extreme hardship to a qualifying relative, his U.S. citizen spouse. The Field Office Director also determined the Applicant's convictions included crimes that are "highly egregious in nature" and would not be "consistent with ensuring the security and public safety of the United States." He denied the Applicant's Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly.

On appeal, the Applicant contends that his U.S. citizen spouse will suffer medical and psychological hardship because of his inadmissibility, and she and their children will suffer economic and financial hardship upon separation from him.

Noting that we conduct appellate review on a *de novo* basis,¹ we sent the Applicant a notice of intent to deny (NOID) to inform him of our conclusion that the record reflects he committed a violent or dangerous crime; he therefore needs to show that a qualifying relative would experience exceptional and extremely unusual hardship, instead of extreme hardship, if his Form I-601 were not approved; and he did not establish that a qualifying relative would experience exceptional and extremely unusual hardship.

In response to the NOID, the Applicant asserts that he did not commit a violent or dangerous crime; he therefore does not need to show his qualifying relatives would experience exceptional and extremely unusual hardship; and his U.S. citizen spouse and children would experience extreme hardship if the Form I-601 application is denied.

¹ *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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The record includes, but is not limited to: briefs and correspondence; the Applicant's conviction records; affidavits by the Applicant and his spouse; several statements in support of the Applicant; documents establishing identity and relationships; employment, financial, medical, social worker and psychological documents; Internet articles; photographs; and documents addressing immigration conditions in Canada. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(2)(A) of the Act provides, in relevant part:

(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 (the Board) stated in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992):

[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 shows that the Applicant was convicted on [REDACTED] 2003, of the following crimes in the [REDACTED] Canada:

1. One count of possession of explosives without lawful excuse, pursuant to Canada Criminal Code (CCC) § 82(1), for his conduct on [REDACTED] 2002.
2. One count of arson – disregard for human life, pursuant to CCC § 433(a), for his conduct on [REDACTED] 2002.
3. Two counts of arson – damage to property, pursuant to CCC § 434, for his conduct on [REDACTED] 2002.

The record also shows the Applicant received a conditional sentence to confinement for seven months (concurrent) for each conviction, and he was ordered to perform 100 hours of community service as well as to pay restitution in the amount of \$2,015.

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The record further shows that the Applicant was convicted on [REDACTED] 2005, in [REDACTED] Canada of one count of mischief, pursuant to CCC § 430(1)(C),² for his conduct about [REDACTED] 2004, and he was sentenced to probation for 15 months and to pay a fine in the amount of \$500.

The arson provisions of the CCC at the time of the Applicant's conviction provided, in relevant part:

433. Every person who intentionally or recklessly causes damage by fire or explosion to property, whether or not that person owns the property, is guilty of an indictable offence and liable to imprisonment for life where

(a) the person knows that or is reckless with respect to whether the property is inhabited or occupied;

...

434. Every person who intentionally or recklessly causes damage by fire or explosion to property that is not wholly owned by that person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

For cases arising in the Sixth Circuit, the determination of whether a conviction is a crime involving moral turpitude begins with a categorical inquiry "not whether the actual conduct constitutes a crime involving moral turpitude, but 'whether the full range of conduct encompassed by the statute constitutes a crime of moral turpitude.'" *Serrato-Soto v. Holder*, 570 F.3d 686, 689-90 (6th Cir. 2009) (citing *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1017 (9th Cir. 2005)).

The Board has determined that attempted arson in violation of section 512 of the previous Criminal Code (1947) constituted a crime involving moral turpitude. *See Matter of S-*, 3 I&N Dec. 617 (BIA 1949) ("... arson or attempt to commit arson involves an act committed purposely with an evil intention and constitutes an offence involving moral turpitude."). Section 512 provided,

² At the time of the Applicant's conviction, CCC § 430 provided, in relevant part:

430. (1) Every one commits mischief who willfully

(a) destroys or damages property;

(b) renders property dangerous, useless, inoperative or ineffective;

(c) obstructs, interrupts or interferes with the lawful use, enjoyment or operation of property; or

(d) obstructs, interrupts or interferes with any person in the lawful use, enjoyment or operation of property.

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Attempt arson.— Everyone is guilty of an indictable offence and liable to five years' imprisonment who wilfully attempts to set fire to anything mentioned in the last preceding section, or who wilfully sets fire to any substance so situated that he knows that anything mentioned in the last preceding section is likely to catch fire therefrom.

Id. at 617-18. The Board noted the interpretation of the Canadian courts in distinguishing a “willful” act from a “reckless” or “negligent” act as related to the arson provisions of the previous CCC:

‘Wilfully means not merely to commit an act voluntarily, but to commit it purposely with an evil intention, or, in other words, it means to do so deliberately, intentionally, and corruptly, and without any justifiable excuse.’ If the act which causes the burning is accidental and not intentional, no conviction for arson can be had. It is noted that a reckless or negligent causing of fire is punishable not as arson under section 511 or 512 of the Canadian Criminal Code, but is punishable under a separate section, namely, section 515 of the Canadian Criminal Code.

Id. at 618 (citations omitted).

A plain reading of the versions of sections 433 and 434 of the CCC in effect when the Applicant was convicted shows that the arson provisions could be violated by intentionally or recklessly causing damage to property by fire or explosion. These arson provisions are distinguishable from the 1947 version of the arson statute examined by the Board in *Matter of S-*, *supra*, which required only a willful action. However, the Board has interpreted moral turpitude to include crimes committed recklessly if certain statutory aggravating factors are present such as when an individual consciously disregards a substantial and unjustifiable risk of serious harm or death. See *Matter of Medina*, 15 I&N Dec. 611, 613-614 (BIA 1976), *aff'd sub nom. Medina-Luna v. INA*, 547 F.2d 1171 (7th Cir.1977). In *U.S. v. Fallins*, the Sixth Circuit Court of Appeals held that attempted aggravated arson qualifies as a violent felony under the residual clause of the Armed Career Criminal Act (ACCA), noting, “arson (without the added element of aggravation) causes a serious potential risk of physical injury.” 777 F.3d 296, 300 (2015) (citations omitted).

Based on the foregoing, we conclude the minimum conduct needed for a conviction under section 433 or 434 of the CCC involves moral turpitude, and therefore, find that a violation of either of these sections of the CCC is categorically a crime involving moral turpitude. The Applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The Applicant does not contest this finding of inadmissibility.

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

The Attorney General [now the Secretary 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 if –

- (1) (A) in the case of any immigrant it is established to the satisfaction of the [Secretary] that –

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- (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.

The record reflects the Applicant is the spouse of a U.S. citizen and therefore is eligible to seek a waiver of his 212(a)(2)(A)(i)(I) inadmissibility under section 212(h)(1)(B) of the Act. The record further reflects the Applicant is the father of two U.S. citizen children, and he indicated on his Form I-601 that his spouse and children would suffer extreme hardship because of his inadmissibility.³ Although the Field Office Director's decision only addresses hardship to the Applicant's spouse, the record demonstrates the Applicant also is eligible to seek a waiver of his inadmissibility as the parent of U.S. citizen children under section 212(h)(1)(B) of the Act.

We note that even if the Applicant meets the requirements of section 212(h)(1)(B), the Secretary may not favorably exercise discretion in his case except in extraordinary circumstances, because the record reflects that the Applicant has been convicted of a violent or dangerous crime. *See* 8 C.F.R. § 212.7(d). The discretionary standard for violent or dangerous crimes was first articulated by the Attorney General in *Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002). The respondent in *Matter of Jean* was convicted of second-degree manslaughter in connection with the death of a nineteen-month-old child. The Attorney General noted:

It would not be a prudent exercise of the discretion afforded to me by this provision to grant favorable adjustments of status to violent or dangerous individuals except in

³ The record indicates the Applicant filed his Form I-601 on October 17, 2013. The record also includes evidence of the Applicant's children's births on [REDACTED] and [REDACTED]

extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of status adjustment would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the alien's underlying criminal offense, such a showing might still be insufficient. From its inception, the United States has always been a nation of immigrants; it is one of our greatest strengths. But aliens arriving at our shores must understand that residency in the United States is a *privilege*, not a *right*. For those aliens, like the respondent, who engage in violent criminal acts during their stay here, this country will not offer its embrace.

23 I&N Dec. at 383-84.

The Department of Justice, through its rule-making authority, codified the discretionary standard for violent or dangerous crimes set forth in *Matter of Jean*. 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 Attorney General declined to reference section 101(a)(43)(F) of the Act or 18 U.S.C. § 16, or the specific language thereof, in 8 C.F.R. § 212.7(d). Thus, we find that the statutory terms "violent or dangerous crimes" and "crime of violence" are not synonymous and the determination that a crime is a violent or dangerous crime under 8 C.F.R. § 212.7(d) is not dependent on it having been found to be a crime of violence under 18 U.S.C. § 16 or an aggravated felony under section 101(a)(43)(F) of the Act. *See* 67 Fed. Reg. 78675, 78677-78 (December 26, 2002).

Nevertheless, we will use the definition of a crime of violence found in 18 U.S.C. § 16 as guidance in determining whether a crime is a violent crime under 8 C.F.R. § 212.7(d), considering also other common meanings of the terms “violent” and “dangerous.” The term “dangerous” is not defined specifically by 18 U.S.C. § 16 or any other relevant statutory provision. Thus, in general, we interpret the terms “violent” and “dangerous” in accordance with their plain or common meanings, and consistent with any rulings found in published precedent decisions addressing discretionary denials under the standard described in 8 C.F.R. § 212.7(d). 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.

The ACCA provides for enhanced sentencing for individuals previously convicted of certain crimes, including “violent felonies.” See 18 U.S.C. § 924(e)(2)(B). The ACCA defines “violent felony”, in relevant part, as: “[A]ny crime punishable by imprisonment for a term exceeding one year, ... that ... is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another ...” *Id.* In the matter before us, the Applicant’s convictions include violations of the arson provisions in the CCC, punishable for up to 14 years and for imprisonment for life. See CCC §§ 433(a) and 434. “Arson” is an enumerated “violent felony” under the ACCA. The Applicant asserts that he was not convicted of a violent felony, as defined in the ACCA.

The Applicant asserts that a factual review of the underlying convictions is required to determine if 8 C.F.R. § 212.7(d) is applicable per *Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002). The Applicant explains that he and his friends threw gasoline-filled bottles into a bonfire and an asphalt pad; they went home after the fire burned out; the fire, upon reigniting, burned down a shed door; they did not intend to damage property or place human life at risk of harm; and he only received a conditional sentence of seven months, which he served in the community. The Applicant asserts that his conduct does not rise to the same level as the respondent in *Matter of Jean*, which involved the death of a child after physical abuse; the facts of his case are distinguishable from cases involving robbery, assault, battery, sexual abuse, and manslaughter, which are found to be violent or dangerous crimes; the Applicant did not commit a crime of violence; and the Applicant's conduct did not meet the Black's Law Dictionary definitions of “violent” or of “using physical force.” In addition, the Applicant asserts that the statute under which he was convicted does not contain elements of arson that are mentioned in Black’s Law Dictionary and the Model Penal Code, such as “malicious burning” and “intentional and wrongful.”

The Applicant states his conviction also is not for a “dangerous crime”; that, as the word “dangerous” is defined in Black’s Law Dictionary, a bonfire, an explosion, and an intersection can be dangerous; a driver causing a collision at an intersection has not necessarily committed a dangerous crime; and the Applicant does not meet the definition of a “dangerous criminal,” per Black's Law Dictionary, because he neither committed a violent crime nor used force to try to escape from custody.

This case arises under the U.S. Court of Appeals for the Sixth Circuit. We are unaware of any case law in this circuit which addresses the issues the Applicant raises, and he bears the burden of proof in these proceedings. We note as persuasive case law that *Makir-Marwil v. U.S. Att’y Gen.*, 681 F.3d 1227 (11th Cir. 2012), addressed the issue of whether the particular facts of the conviction should be considered and the court noted, “all *Jean* requires is an adequate consideration of the nature of the [applicant’s] crime.” *Makir-Marwil v. U.S. Att’y Gen.*, 681 F.3d at 1235. As mentioned previously, the record reflects the Applicant was convicted of arson in disregard of human life. A plain reading of this statute requires intentionally or recklessly causing damage by fire or explosion to property where the person knows that, or is reckless with respect to, whether the property is inhabited or occupied. Given the seriousness of this crime, we conclude the record in the instant case requires us to only consider the elements of the Applicant’s underlying offense of arson in disregard of human life in determining whether he committed a violent or dangerous crime and is subject to the heightened discretionary standard of 8 C.F.R. § 212.7(d). In addition, the underlying facts the Applicant describes are not supported with documentary evidence. 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)). Even if we considered the underlying facts, the record does not include sufficient evidence to establish what the actual underlying facts are.

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. 8 C.F.R. § 212.7(d). Finding no evidence of foreign policy, national security, or other extraordinary equities, we will consider whether the applicant has “clearly demonstrate[d] that the denial of . . . admission as an immigrant would result in exceptional and extremely unusual hardship” to a qualifying relative. *Id.*

In *Matter of Monreal-Aguinaga*, 23 I&N Dec. 56, 62 (BIA 2001), the Board 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 Board 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 Board 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 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 an exclusive list. *Id.*

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In *Monreal-Aguinaga*, the Board 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 Board 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 Board 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 Board 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 Board 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 Board found that the hardship factors presented by the respondent cumulatively amounted to exceptional and extremely unusual hardship to her qualifying relatives. The Board noted that these factors included her heavy financial and

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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 Board stated, "We consider this case to be on the outer limit of the narrow spectrum of cases in which the exceptional and extremely unusual hardship standard will be met." *Id.* at 470.

An analysis under *Monreal-Aguinaga* and *Andazola-Rivas* is appropriate. See *Gonzalez Recinas*, 23 I&N Dec. at 469 ("While any hardship case ultimately succeeds or fails on its own merits and on the particular facts presented, *Matter of Andazola* and *Matter of Monreal* are the starting points for any analysis of exceptional and extremely unusual hardship."). We note that exceptional and extremely unusual hardship must be established in the event that the Applicant's family members accompany him or in the event that they remain 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.

We will first address hardship if the Applicant's spouse remains in the United States without him. In an affidavit dated October 10, 2013, the Applicant's spouse indicates: her family would not be the same in the Applicant's absence as the Applicant is "the rock" for their family; it would be unimaginable "to be torn apart" from him as they would go through lengths of time without intimacy, which strengthens their marital bond; without him she would be emotionally and mentally "drained," making her more prone to sickness and depression; and her family has a history of depression. To corroborate his spouse's statements concerning her emotional and psychological hardship, the Applicant submits a letter from a licensed social worker dated May 5, 2014, indicating his spouse has been diagnosed with major depression, single episode with anxious distress; and her symptoms include an increased appetite, lack of joy, low energy, poor sleep, sadness, tearfulness, and thoughts of self-harm. The Applicant submits another letter, dated May 18, 2015, from the same social worker stating that she has treated his spouse for the past year; her condition has been exacerbated "to a more serious degree"; she is now clinically depressed; her symptoms include hopelessness, weight loss, and suicidal ideation; and she is on an antidepressant. The Applicant also submits a letter from his spouse's obstetrician dated May 14, 2015, indicating the Applicant's spouse has been under incredible stress for the past three years; she suffered from *hyperemesis gravidarum* during her first pregnancy; she had depression during her second pregnancy; she still suffers from depression and anxiety; and she requires significant medical treatment, including ongoing counseling and antidepressant medication. The Applicant's spouse also provides a detailed statement, dated May 14, 2015, describing the emotional and psychological difficulties she is currently experiencing on account of the Applicant's immigration matters. The Applicant also submits Internet articles by [REDACTED] that generally discuss major depression. Additional documents in the record reflect the Applicant's spouse's medical history, which includes asthma and migraines.

The Applicant states that his spouse's fragile mental health state will be exacerbated due to the significant upheaval in their lives; the stability of the family unit is critical; she needs his emotional, financial and physical support to care for herself and their children; and his spouse will lose her health insurance if he is removed to Canada.

The Applicant's spouse states that she would have to bear the entire burden of their monthly mortgage payment in the Applicant's absence, and she would have to seek fulltime employment at

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her current job or seek employment elsewhere. The Applicant, through counsel, states that his spouse is not currently working; she is an on-call staff member; there is no guarantee how many hours she could work if she returned to work; the Applicant lacks formal education and would have difficulty finding comparable employment in Canada; the median hourly wage for retail trade managers in the [REDACTED] region is approximately \$20,000 less than the Applicant makes in the United States; the cost to maintain two homes would cause financial hardship to the Applicant's spouse and children; the Applicant's spouse would be responsible for raising their children on her own; she would have to return to work and send the children to full-time daycare; and she would be working while dealing with depression, anxious distress, and thoughts of self-harm.

The Applicant submits a spreadsheet, indicating a monthly breakdown of expenses amounting to \$4,090 and an income of \$5,360. The Applicant also submits letters of employment and paystubs, indicating he earns an annual salary of \$60,000 in a managerial capacity, his family receives health insurance and dental benefits through his employer, and his spouse earns an hourly wage of \$24.65 as a registered nurse in a part-time supervisory capacity. The record also includes bank account statements demonstrating monthly expenditures that include a self-identified mortgage averaging about \$1,151 and car insurance totaling about \$313. The record further includes billing statements that include medical bills totaling \$135; credit card statements totaling about \$1,365; home appraisals; and a tax return for 2013, indicating a household income of \$97,734. The Applicant further submits an Internet article from [REDACTED] referencing a 2013 report concerning the high cost of childcare. The record includes information wage estimates for retail trade managers in the [REDACTED] information on the Canadian labor market, and projected family budgets based on where the Applicant and his spouse reside.

Concerning hardship that the Applicant's children may experience, the Applicant's family's general practitioner indicates their eldest child has developed "normally," in part because he is being raised by two parents, and if he were forced to live without the Applicant for an extended period, his emotional and intellectual development could be stunted. The Applicant's family physician states that the children will be at increased risk for anxiety and poor performance in school if they are in a single-parent household. The record includes statements and photographs reflecting the Applicant's positive involvement in the lives of their children.

The record reflects that the Applicant's spouse would experience significant emotional and psychological hardship without the Applicant. In addition, she would experience financial hardship. She would be raising their two children on their own and would experience hardship based on the children's separation from their father. Based on the totality of the evidence, we find that that Applicant's spouse and children, ages three and one, would suffer exceptional and extremely unusual hardship as a result of separation from the Applicant.

Exceptional and extremely unusual hardship must be established in the event that the Applicant's family members accompany him or in the event that they remain in the United States, as qualifying relatives are not required to reside outside of the United States based on the denial of the Applicant's waiver request. The Applicant's spouse states that her family is in west Michigan; her mother, sister, sister-in-law and friends help watch the kids; and there are great schools that they are considering for their children. The Applicant, through counsel, states that his spouse has no ties to

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Canada other than his parents. The social worker states that moving to Canada could have dire consequences as she would be away from her support system in the United States.

The Applicant's spouse indicates that if she were to relocate to Canada to be with the Applicant, their dreams of having more children would be devastated until they were able to receive coverage for healthcare, and they would be forced to find new healthcare professionals, a daycare provider, a home, and a "good community." The Applicant's spouse states she and the Applicant have chosen to live in Michigan, in large part, because of their "church family," and her close friendships; she and the Applicant plan to support her mother; they would be forced to sell their home and property, and it would be difficult to obtain comparable property in Canada; and she would need to obtain certification in Canada to continue practicing as a nurse, which would require her to spend time away from the Applicant and their children. To corroborate his spouse's statements concerning a nursing career in Canada, the Applicant submits an article from the homepage of the [REDACTED], which discusses how to become a nurse in [REDACTED] Canada. The record includes information wage estimates for retail trade managers in the [REDACTED], information on the Canadian labor market and projected family budgets based on where the Applicant and his spouse reside.

The Applicant, through counsel, states the Canada Health Act does not mandate public coverage for psychologist or social worker services outside of hospitals; she will not have access to health care for over two years; it will be difficult to stop seeing her current medical providers in the United States; and the stress and anxiety of moving to a new country will exacerbate her depression. As mentioned, the Applicant's spouse submitted a letter, dated May 18, 2015, from the social worker stating that he has treated her for the past year; she is now clinically depressed; her symptoms include hopelessness, weight loss and suicidal ideation; and she is on an antidepressant. The social worker states that the Applicant's spouse may be forced to leave the United States and her family, and she would decompensate. The Applicant's spouse's obstetrician states that she still suffers from depression and anxiety; she requires significant medical treatment; and she would suffer from moving away from her support group in [REDACTED].

The Applicant also states that the processing time to immigrate to Canada is over two years. The record includes information from the homepage of Citizenship and Immigration Canada, indicating processing times for family-based immigration benefits in Canada.

The record reflects that the Applicant's spouse would experience emotional difficulty due to separation from her family and friends in the United States. The record includes evidence that she has psychiatric issues and would be affected due to separation from her family. However, the record does not establish that her family would be unable to visit her, as they live in Michigan. While the record reflects that she may not be able to permanently immigrate to Canada for two years, it is not clear if she could reside in Canada in a different status prior to receiving permanent status there. The record also demonstrates that the Applicant's spouse would need to undergo a certification process to continue her employment in Canada in the field of nursing and that the Applicant may earn less than he does in the United States. However, the record does not include sufficient evidence to establish the level of financial hardship that his spouse would experience, if any, in Canada. The record lacks sufficient documentary evidence of emotional, financial, or other types of hardship that,

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in their totality, establish that the Applicant's spouse would experience exceptional and extremely hardship upon relocation to Canada.

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 a qualifying relative 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 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 B-J-N-*, ID# 10786 (AAO Sept. 23, 2015)