



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

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

MATTER OF R-C-M-

DATE: JAN. 19, 2016

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Applicant, a native and citizen of Mexico, 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.

In a decision, dated October 13, 2014, the Director found the Applicant to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of crimes involving moral turpitude. The Director concluded that the Applicant's convictions for false imprisonment and unlawful sexual intercourse with a minor were violent and dangerous crimes and subjected the Applicant to the heightened discretionary standard of 8 C.F.R. § 212.7(d). The Director found the Applicant had not established that his waiver should be granted as a matter of discretion and denied the application accordingly.

On appeal, the Applicant asserts that a conviction for false imprisonment is not a crime involving moral turpitude and that a conviction for unlawful sexual intercourse with a minor is not a violent or dangerous crime. He asserts that more than 15 years have lapsed since he was convicted of these crimes and he has shown both rehabilitation and extreme hardship to qualifying relatives. He states that if a conviction for unlawful sexual intercourse with a minor is subject to the heightened discretionary standard, he has met that standard and his relatives would suffer exceptional and extremely unusual hardship.

The record includes, but is not limited to: a statement from the Applicant; the Applicant's spouse's statements; teachers' statements; financial records; statements from the Applicant's friends; reports about conditions in Mexico; medical records; and criminal records. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(2)(A) of the Act, 8 U.S.C. § 1182(a)(2)(A), states, in pertinent parts:

(i) In General

Except as provided in clause (ii), any 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, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

(ii) Exception

Clause (i)(I) shall not apply to an alien who committed only one crime if—

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

The Board of Immigration Appeals (the Board) 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.)

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In assessing whether a conviction is a crime involving moral turpitude, we must first “determine what law, or portion of law, was violated.” *Matter of Esfandiary*, 16 I&N Dec. 659, 660 (BIA 1979). We conduct a categorical inquiry for that statutory offense, considering the “inherent nature of the crime as defined by statute and interpreted by the courts,” not the underlying facts of the crime committed. *Matter of Short*, 20 I&N Dec. 136, 137 (BIA 1989); *see also Matter of Louissaint*, 24 I&N Dec. 754, 757 (BIA 2009) (citing *Taylor v. United States*, 495 U.S. 575, 599-600 (1990)). This categorical inquiry focuses on whether moral turpitude necessarily inheres in the minimal conduct for which there is a realistic probability of prosecution under the statute. *See Short, supra; Louissaint, supra; Moncrieffe v. Holder*, 133 S.Ct. 1678, 1684-1685 (2013); *Gonzales v. Duenas-Alvarez*, 127 S.Ct. 815, 822 (2007).

Where a criminal statute does not contain a single, indivisible set of elements, but rather encompasses multiple distinct criminal offenses, “some . . . which involve moral turpitude and some which do not,” we engage in a modified categorical inquiry. *Short, supra*, at 137-138. A statute is divisible only if it lists “potential offense elements in the alternative, render[ing] opaque which element played a part in the defendant’s conviction.” *Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013).

We conduct a modified categorical inquiry by reviewing the record of conviction to determine which offense within the divisible statute was the basis of the conviction, and then determine whether that statutory offense is categorically a crime involving moral turpitude. *See Short, supra*, at 137-38, *see also Descamps, supra*, at 2285-86. The record of conviction is a narrow, specific set of documents which includes the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Louissant, supra*, at 757; *see also Shepard v. U.S.*, 544 U.S. 13, 16 (2005) (finding that the record of conviction is limited to the “charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.”)

On [REDACTED] 1996, the applicant pled guilty to false imprisonment in violation of California Penal Code (CPC) § 236 and unlawful sexual intercourse in violation of CPC § 261.5. The record reflects that both convictions were felony offenses. He received a sentence of 365 days in jail and five years of probation.

At the time of the applicant’s conviction, CPC § 261.5 read, in pertinent part:

- (a) Unlawful sexual intercourse is an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor. For the purposes of this section, a “minor” is a person under the age of 18 years.

....

- (c) Any person who engages in an act of unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator is guilty of either a misdemeanor or a felony

- (d) Any person over the age of 21 years who engages in an act of unlawful sexual intercourse with a minor who is under 16 years of age is guilty of either a misdemeanor or a felony

Because the record reflects that the Applicant was convicted of a felony under CPC § 261.5, we know that he was convicted under either section § 261.5(c) or (d). As the Applicant does not contest that his conviction under CPC § 261.5 is a crime involving moral turpitude, and the record does not show the determination that this is a crime involving moral turpitude to be in error, we will not disturb the finding of inadmissibility under section 212(a)(2)(A) of the Act.

The Applicant cites to *Turijan v. Holder*, 744 F.3d 617 (9th Cir. 2014) in asserting that felony false imprisonment in violation of California Penal Code (CPC) § 236 is not a crime involving moral turpitude. In *Turijan v. Holder*, the Ninth Circuit concluded that felony false imprisonment under California Penal Code §§ 236 and 237 is not a categorical crime involving moral turpitude because intent to injure, actual injury, or a protected class of victim are not elements required for a conviction and because courts in California have applied the statute to conduct that is not morally turpitudinous—the court concluded that the offense was not a categorical crime involving moral turpitude. *Id.* We agree with the Applicant’s assertion that his conviction for felony false imprisonment is not a crime involving moral turpitude.

The Applicant is therefore inadmissible under section 212(a)(2)(A) of the Act for having committed one crime involving moral turpitude and requires a waiver of this ground of inadmissibility under section 212(h) of the Act.

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

The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana

- (1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that –
 - (i) the alien is inadmissible only under subparagraph (D)(i) or (D)(ii) of such subsection or the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status.
 - (ii) the admission to the United States of such alien would not be contrary to the national

welfare, safety, or security of the United States, and

(iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . . ; and

(2) the [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 Director found that the Applicant established extreme hardship to his spouse and children. We will not disturb that finding. We will next address whether the Applicant is eligible for a favorable exercise discretion under section 212(h)(2) of the Act. The regulation at 8 C.F.R. § 212.7(d) provides:

The Attorney General [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 not aware of any 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). For example, Black’s Law Dictionary, Eighth Edition (2004), defines violent as “[o]f, relating to, or characterized by strong physical force,” “[r]esulting from extreme or intense force,” or “[v]ehemently or passionately threatening,” and dangerous as “perilous; hazardous; unsafe” or “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 inclusion of the term “dangerous” further signals that even crimes not marked by actual or physical force against the victim, but that may cause serious harm or are otherwise unsafe or hazardous, also trigger the requirements of 8 C.F.R. § 212.7(d). As stated above, in considering whether a crime is violent or dangerous, we will interpret these terms in accordance with other 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).

It is the Applicant’s burden to demonstrate that he warrants a favorable exercise of discretion, and the Applicant has not presented facts or controlling legal authority to show that his crime was not a violent or dangerous crime. The case law the Applicant cites, *Valencia v. Gonzalez*, 439 F.3d 1046 (9th Cir. 2006), involves the definition of a “crime of violence” under 18 U.S.C. § 16. As stated above, the statutory term “crime of violence” is not synonymous with “violent or dangerous crimes” in 8 C.F.R. § 212.7(d), and we are not limited by the categorical determinations concerning whether a statutory crime is 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). Furthermore, the case cited by the Applicant specifically dealt with CPC § 261.5(c). In the instant case, the record is not clear as to whether the Applicant was convicted under CPC § 261.5(c) or (d).

The nature of a statutory rape statute indicates that it is dangerous crime. The statute involves a minor, who by definition is not capable of providing his or her full consent to the sexual act. Thus,

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this crime could result in untold emotional and, in some cases physical harm. Furthermore, although Counsel states that the victim's age was [REDACTED] at the time of the crime, the record does not establish her age and the statute indicates that the victim could have been younger than [REDACTED] years old. Therefore, we find that the Applicant is subject to 8 C.F.R. § 212.7(d).

Accordingly, the Applicant must show that "extraordinary circumstances" warrant approval of the waiver. 8 C.F.R. § 212.7(d). Extraordinary circumstances may exist in cases involving national security or foreign policy considerations, or if the denial of the applicant's admission would result in exceptional and extremely unusual hardship. *Id.* Finding no evidence of foreign policy, national security, or other extraordinary equities, we will consider whether the applicant has "clearly demonstrate[d] that the denial of . . . admission as an immigrant would result in exceptional and extremely unusual hardship" to a qualifying relative. *Id.*

In *Matter of Monreal-Aguinaga*, 23 I& N Dec. 56, 62 (BIA 2001), the BIA determined that exceptional and extremely unusual hardship in cancellation of removal cases under section 240A(b) of the Act is hardship that "must be 'substantially' beyond the ordinary hardship that would be expected when a close family member leaves this country." However, the applicant need not show that hardship would be unconscionable. *Id.* at 61

The BIA stated that in assessing exceptional and extremely unusual hardship, it would be useful to view the factors considered in determining extreme hardship. *Id.* at 63. In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999), the BIA provided a list of factors it deemed relevant in determining whether an alien has established the lower standard of extreme hardship. The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. The BIA added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not an exclusive list. *Id.*

In *Monreal-Aguinaga*, 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.

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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.”).

The record indicates that the Applicant and his spouse have three children, [REDACTED] years old. The Applicant’s spouse states that she cannot relocate to Mexico because the violence in Mexico

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causes her to fear for her life and the lives of her children. The record establishes through statements from the Applicant's spouse and friends that the Applicant is residing in [REDACTED]. News articles and a U.S. Department of State Travel Warning indicate that safety in [REDACTED] is a concern. In addition, the record indicates that the Applicant's children have not resided outside the United States and have been attending school in the United States. We acknowledge that relocation to Mexico would be difficult for the Applicant and his family. However, the record does not show that this hardship would rise to the level of exceptional and extremely unusual hardship upon relocation.

In addition, the current record does not indicate that the family would suffer exceptional or extremely unusual hardship as a result of separation. The Applicant's qualifying spouse states that she married her husband in 1999, but she and her husband have been living apart for more than 10 years. She states that she and their children visit the Applicant whenever they can, but it is dangerous and expensive. She states that her youngest child saw a therapist who told her that her daughter was experiencing fear due to separation from her father and that her other children also miss the Applicant. The Applicant's spouse states that she works as a homemaker and earns approximately \$600 bi-weekly. She states she is in debt and is under both emotional and financial stress. She states that she is also responsible for caring for her 84-year-old grandfather who is ill.

The record includes several letters from friends and family of the Applicant detailing the hardship that his spouse and children are experiencing without him. A letter from their daughter's teacher states that she is in a counseling group because the Applicant's absence brings her sadness and she is being affected emotionally and academically. Another daughter's counselor states that she has had negative changes in her behavior, she breaks down crying, deeply misses the Applicant, is sad and depressed, and her academic success has been affected. The record includes evidence that the Applicant's spouse has asthma and receives nebulizer treatments as needed. The record includes numerous bills for the Applicant's spouse. We recognize that the Applicant's spouse and children are experiencing hardship as a result of separation, but the current record does not establish exceptional and extremely unusual hardship to a qualifying relative upon separation.

We find that the current documentation in the record fails to indicate that the Applicant's family would suffer exceptional or extremely unusual hardship as a result of his inadmissibility. 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. However, we note that without supporting documentary evidence of the underlying facts of the Applicant's convictions, we would not be able to favorably exercise our discretion.

The Applicant has the burden of proving eligibility for a waiver of inadmissibility. *See* section 291 of the Act, 8 U.S.C. § 1361. The Applicant has not met that burden. Accordingly, we dismiss the appeal.

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ORDER: The appeal is dismissed.

Cite as *Matter of R-C-M-*, ID# 12100 (AAO Jan. 19, 2016)