U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF L-A-H-C-

DATE: JULY 25, 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 the ground of inadmissibility for a crime involving moral turpitude. *See* Immigration and Nationality Act (the Act) section 212(h), 8 U.S.C. § 1182(h). A foreign national seeking to be admitted to the United States as an immigrant or to adjust status to lawful permanent residence must be admissible or receive a waiver of inadmissibility. U.S. Citizenship and Immigration Services (USCIS) may grant this discretionary waiver if refusal of admission would result in extreme hardship to a qualifying relative or qualifying relatives.

The Director, Nebraska Service Center, denied the application. The Director concluded that the Applicant had been found inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having committed a crime involving moral turpitude and that his conviction was for a violent or dangerous crime. The Director then determined that the Applicant had not established exceptional and extremely unusual hardship to a qualifying relative, and denied the waiver application as a matter of discretion. The Director had also found the Applicant was inadmissible under section 212(a)(9)(B) of the Act for having accrued unlawful presence in the United States of one year or more and seeking admission within 10 years of the date of his last departure from the United States.

The matter is now before us on appeal. In the appeal, the Applicant submits a brief and claims that the Director erred in concluding that his conviction was for a crime involving moral turpitude, that it was for a violent or dangerous crime, and that he otherwise had not established extreme hardship to his spouse.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

The Applicant is seeking admission as an immigrant and has been found inadmissible for a crime involving moral turpitude, specifically he was convicted of second degree riot. Section 212(a)(2)(A) of the Act, 8 U.S.C. § 1182(a)(2)(A), provides, in pertinent part:

(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. . .

Individuals found inadmissible under section 212(a)(2)(A) of the Act may seeks a waiver of inadmissibility under section 212(h). Section 212(h) of the Act provides, in pertinent part:

> The [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . 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 -
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> > (1)(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 of Homeland Security] 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 of Homeland Security], in his discretion, and pursuant to such terms, conditions and procedures as he may be regulations prescribe, has consented to the alien's applying and reapplying for a visa, for admission to the United States, or adjustment of status.

Section 212(a)(9)(B) of the Act, 8 U.S.C. § 1182(a)(9)(B), provides, in pertinent part:

> (i) In General
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> Any alien (other than an alien lawfully admitted for permanent residence) who—
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> > . . . .
> >
> > (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.
>
> (ii) Construction of Unlawful Presence

> For purposes of this paragraph an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.

Section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), provides that section 212(a)(9)(B)(i) inadmissibility may be waived as a matter of discretion for

> 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.

Decades of case law have contributed to the meaning of extreme hardship. The definition of extreme hardship "is not . . . fixed and inflexible, and the elements to establish extreme hardship are dependent upon the facts and circumstances of each case." *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560, 565 (BIA 1999) (citation omitted). Extreme hardship exists "only in cases of great actual and prospective injury." *Matter of Ngai,* 19 I&N Dec. 245, 246-47 (BIA 1984). An applicant must demonstrate that claimed hardship is realistic and foreseeable. *Id.*; *see also Matter of Shaughnessy,* 12 I&N Dec. 810, 813 (BIA 1968) (finding that the respondent had not demonstrated extreme hardship where there was "no showing of either present hardship or any hardship . . . in the foreseeable future to the respondent's parents by reason of their alleged physical defects"). The common consequences of removal or refusal of admission, which include "economic detriment . . . [,] loss of current employment, the inability to maintain one's standard of living or to pursue a chosen profession, separation from a family member, [and] cultural readjustment," are insufficient alone to constitute extreme hardship. *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996) (citations omitted); *but see Matter of Kao and Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* 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 the qualifying relatives would relocate). Nevertheless, all "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994) (citations omitted). Hardship to the Applicant or others can be considered only insofar as it results in hardship to a qualifying relative. *Matter of Gonzalez Recinas*, 23 I&N Dec. 467, 471 (BIA 2002).

II. ANALYSIS

The Applicant does not contest the finding of inadmissibility due to having accrued unlawful presence; however he does dispute the finding that he was convicted for a crime involving moral turpitude and that it was a violent or dangerous crime. The Applicant further claims that his U.S. citizen spouse experiences extreme emotional and financial hardship due to separation from him and that she would also experience extreme hardship if she were to relocate to Mexico to reside with him. The record supports a finding of extreme hardship. We find that the Applicant's conviction is for a crime involving moral turpitude and a violent or dangerous crime. Thus the Applicant is

required to show that extraordinary circumstances are present, which includes exceptional or extremely unusual hardship. The evidence in the record, considered both individually and cumulatively, does establish that the Applicant's spouse is experiencing exceptional and extremely unusual hardship. However, the record does not demonstrate that the Applicant merits a waiver as an overall matter of discretion.

A. Inadmissibility

As stated above, the Applicant has been found inadmissible under section 212(a)(2)(A)(i)(I) of the Act for a crime involving moral turpitude. On 2011, in the District Court, Minnesota, the Applicant was convicted of riot second degree, in violation of Minnesota statute, section 609.71. He was sentenced to one year and one day confinement, he served 189 days in a workhouse, and he was fined. At the time of conviction, the statute stated:

> 609.71. Riot
>
> . . . .
>
> Subd. 2. Riot second degree. When three or more persons assembled disturb the public peace by an intentional act or threat of unlawful force or violence to person or property, each participant who is armed with a dangerous weapon or knows that any other participant is armed with a dangerous weapon is guilty of riot second degree and may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than $10,000, or both.

The Applicant contends on appeal that he was not convicted of a crime involving moral turpitude. The Applicant, citing court cases, argues that only a categorical approach is allowed in determining whether his conviction is a crime involving moral turpitude and we must focus only on the elements of the statute. He further contends that second-degree rioting is not categorically a crime involving moral turpitude. The Applicant asserts that the statute is overbroad, that the minimum conduct necessary to violate the statute does not involve more turpitude, and that the statute does not require an intentional act on the part of the individual other than to join the assembly. He also asserts that he did not admit to violent behavior or have a dangerous weapon. The Applicant asserts that even if the statute is divisible, the record of conviction reflects that he only pled guilty to the minimum conduct punishable under the statute.

The Act does not define the term "crime involving moral turpitude." However, the Board of Immigration Appeals provided the following general definition in *Matter of Perez-Contreras*:

> [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. . . .

20 I&N Dec. 615, 617-18 (BIA 1992)(citations omitted). "[N]either the seriousness of the offense nor the severity of the sentence imposed is determinative of whether a crime involves moral turpitude." *Matter of Serna*, 20 I&N Dec. 579, 581 (BIA 1992).

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 engage in a categorical inquiry, considering the "inherent nature of the crime as defined by statute and interpreted by the courts," not the underlying facts of the criminal offense. *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 a divisible statute formed the basis of the conviction, and then determine whether that 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.")

The second degree statute encompasses multiple distinct criminal offenses, "some . . . which involve moral turpitude and some which do not." As such, we will evaluate the Applicant's case under the modified categorical approach. The Amended Complaint, Count Three, states that the Applicant disturbed the public peace by intentionally acting with unlawful force or violence against the victim, and that the Applicant was armed with, and knew other participants were armed with, dangerous weapons. The Applicant asserts that his plea agreement only states that he was with three or more people engaging in violent behavior and he knew that one of them had a weapon. However, the plea agreement also states that he is entering his plea based on Count Three. As such, based on the record of conviction, we find the offense he was convicted of includes the elements stated in Count

Three of the Amended Complaint, which include intentionally acting with unlawful force or violence against a person while armed with a dangerous weapon.

The Board of Immigrations Appeals has determined that assault and battery offenses involve moral turpitude where there is an aggravating factor such as the use of deadly weapon and the intentional infliction of serious bodily injury. *See Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006). In the present case, the Applicant's conviction for second-degree riot involves both intent and the aggravating factor of a dangerous weapon, which the Minnesota statues section 609.02 defines as a device or instrumentality that, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm, which it further defines as bodily injury creating a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm. Based on the elements of the crime committed by the Applicant, we find that the Applicant has been convicted of a crime involving moral turpitude.

The Applicant was also found inadmissible under section 212(a)(9)(B) of the Act for having accrued unlawful presence in the United States of one year or more and seeking admission within 10 years of the date of his last departure from the United States. The record reflects that the Applicant initially entered the United States without inspection on or about August 1, 1998, and remained until leaving on October 16, 2008, with a grant of voluntary departure issued on 2008, by an immigration judge. The Applicant accrued unlawful presence from 2004, his birthday, until his departure in 2008. The record further shows that the Applicant returned to the United States on 2011, when he was paroled at the Texas, Port of Entry for extradition to face criminal charges in Minnesota, and was then removed on August 1, 2012, subject to a removal order issued by an immigration judge on 2012.

B. Waiver

The Applicant must demonstrate that denial of the application would result in extreme hardship to a qualifying relative or relatives. In this case, as the Applicant is inadmissible under section 212(a)(9)(B) of the Act for having accrued unlawful presence in the United States and under section 212(a)(2)(A) of the Act for committing a crime involving moral turpitude, and he is seeking a waiver under sections 212(a)(9)(B)(v) and 212(h) of the Act. The qualifying relative is the Applicant's U.S. citizen spouse. The record contains references to hardship the Applicant's child would experience if the waiver application were denied. Although a child is a qualifying relative under section 212(h) of the Act, under section 212(a)(9)(B)(v), children are not deemed to be qualifying relatives. However, although children are not qualifying relatives under this statute, we consider that a child's hardship can be a factor in the determination whether a qualifying relative experiences extreme hardship.

In support of his claim of hardship to his spouse, the Applicant submitted statements from himself and his spouse, medical documents for his spouse, letters from his spouse's psychiatrist, financial documentation, articles about mental health issues, country information for Mexico, civil documents, and letters of support. On appeal, the Applicant submits an attorney brief and cites previously-submitted evidence of hardship to his spouse, including medical records that include psychiatric

treatment, financial histories that include delinquencies, and country information showing a deteriorating economy and lack of medical resources in Mexico. The Applicant asserts that his spouse has difficulty speaking Spanish, so she would be unable to articulate her thoughts in mental health therapy if she were able locate adequate services, and that relocating to Mexico would put their daughter at risk for her safety, health, and education.

In her affidavits, the Applicant's spouse states that she suffers mentally and financially without the Applicant, that her family has a history of depression and other health issues, and that her mental health is declining. The spouse states she had a bad temper as a youth, but that the Applicant calms her and helps her overcome difficulties. She asserts that she is struggling to stay financially above water, lost a job and was unemployed because of her inability to perform under the stress of separation from the Applicant, and was forced to move in with her parents. She states that she has been diagnosed with major depression, general anxiety disorder, and dysthymia, and that she is overweight with a family history of health issues including high cholesterol and high blood pressure. She states that she takes antidepressant medication, sees a psychiatrist, and needs insurance to help pay for this treatment. The spouse contends that she could not continue mental health care in Mexico and that as she is not proficient in Spanish she could not find work to afford health care. She states that she must be consistent with her medication or she could risk being suicidal, and states that she gets migraine headaches that her psychiatrist said are stress related. The spouse states that she finds it difficult to cope with each day, and that she fears for her weight, cholesterol, and blood pressure due to family history. The spouse states that she also fears for her daughter if they were in Mexico and maintains that her daughter wants a relationship with her father, the Applicant, and that the daughter has told teachers that they were planning to visit her father even when they were actually not, causing teachers to be concerned about the daughter's perception of reality.

Letters from the spouse's psychiatrist indicate that the spouse has been treated since 2008; diagnose her with recurrent major depressive disorder, dysthymia, and generalized anxiety disorder; note that her main stressor is the Applicant's immigration situation; and suggest that her condition worsens when there is a setback. The letters state that the spouse is prescribed medications and individual therapy, assert that ongoing separation worsens her mental health with a negative impact on her parenting and employment, and maintain that she has the added stress of raising her daughter as a single parent and financial strain. A letter from a previous employer states that the spouse's stress over the Applicant's immigration issues affected her ability to work and caused her to be released from employment. Medical documentation submitted to the record shows that the Applicant's spouse has had ongoing treatment for forms of depression since at least 2008, and references the spouse suffering depression since she was 15 years of age. Medical records refer to the spouse's above normal weight, headaches, and insomnia, and lists medications which she has been prescribed. The record also includes research reports on mental health conditions.

Financial documents submitted to the record include multiple years of W-2s and tax returns indicating the spouse's annual income is about $21,000 and that the Applicant's annual income, per W-2s for the years 2005 and 2006, was more than $46,000. Other documentation in the record includes credit reports showing the spouse with late payments and delinquencies; late payment and

balance due notices to the spouse for credit and medical payments; bank overdraft notices; and notices from collection agencies. Documentation further shows that she has been declined loans and has applied for reduced-price school meals for her daughter for 2014. A letter from spouse's parents confirms that she has been living with them since 2008.

Country information submitted to the record includes news reports and other accounts showing human rights conditions, violent crime, and poverty levels in Mexico as well as reports indicating a scarcity of mental health services and a lack of government-supported services.

Based on a totality of the circumstances, we find the record establishes that the Applicant's spouse is experiencing extreme hardship resulting from her separation from the Applicant. The record shows that the Applicant's spouse has long-term mental health issues that are exacerbated due to her separation from the Applicant, and that given her financial difficulties and low income, as reflected by evidence in the record, it is reasonable to conclude that she suffers financial hardship without the Applicant's contributions. The record also reflects that the Applicant's spouse was born and raised in the United States. By relocating she would be leaving her community and her mental health services while being unsure of the availability of services in Mexico and being concerned about safety and financial well-being for herself and that of her daughter, whom the record shows was born in [redacted] if the daughter were to accompany her. Accordingly, we find that the circumstances presented in this application rise to the level of extreme hardship.

C. Discretion

A favorable exercise of discretion is limited for applicants who have been convicted of a violent or dangerous crime. Specifically, 8 C.F.R. § 212.7(d), which codified for purposes of section 212(h)(2) of the Act the discretionary standard first applied to section 209(c) waivers by the Attorney General in *Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002), provides:

> The [Secretary 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 or case law. A "crime of violence" is an aggravated felony pursuant to section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F), and as defined at 18 U.S.C. §

16. However, the Attorney General declined to reference either section of law or the definition of "crime of violence" in 8 C.F.R. § 212.7(d). In the interim rule, the Department of Justice noted the while individuals convicted of aggravated felonies generally would not warrant a favorable exercise of discretion, the rule would not contain an explicit connection to avoid "unduly constraining the . . . discretion to render waiver decisions on a case-by-case basis." 67 Fed. Reg. 78675, 78677-78 (Dec. 26, 2002). Pursuant to this discretionary authority, we understand "violent or dangerous crimes" according to plain and common meanings of the terms "violent" and "dangerous." Black's Law Dictionary (9th ed. 2009), for example, defines violent as 1) "[o]f, relating to, or characterized by strong physical force," 2) "[r]esulting from extreme or intense force," or 3) "[v]ehemently or passionately threatening." It defines dangerous as "perilous, hazardous, [or] unsafe," or "likely to cause serious bodily harm." In determining whether a crime is a violent or dangerous crime for purposes of discretion, we are not limited to a categorical inquiry but may consider both the statutory elements and the nature of the actual offense. *See Torres-Valdivias v. Lynch*, 786 F. 3d 1147, 1152 (9th Cir. 2015); *see also Waldron v. Holder*, 688 F.3d 354, 359 (8th Cir. 2012).

The Applicant asserts that the statutory elements do not require proof of injury to the victim, the Applicant did not engage in violent or dangerous conduct, the Applicant's conviction was for a crime less severe than in relevant case law, and the Director erred in relying on the probable cause statement in the complaint. The statute under which the Applicant was convicted requires, "an intentional act or threat of unlawful force or violence to person or property..." In addition, the amended complaint shows that the Applicant's conviction involved unlawful force or violence to a person and that he was armed with a dangerous weapon. Thus we find that the Applicant has been convicted of a violent or dangerous crime.

The Applicant has been convicted of a violent or dangerous crime and therefore 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 in this case, 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." *Id.*

In *Matter of Monreal-Aguinaga*, 23 I&N Dec. 56, 62 (BIA 2001), the Board determined that exceptional and extremely unusual hardship "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 60-61. The Board stated that in assessing exceptional and extremely unusual hardship, it would be useful to consider the factors considered in determining extreme hardship. *Id.* at 63. Those factors include, but are not limited to, a qualifying relative's family ties in the United States and in the country to which he or she would relocate; the conditions in the country in the country of relocation; the financial consequences of departing the United States; and significant medical conditions, especially where appropriate health

care services would be unavailable in the country of relocation. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999); *see also Matter of Anderson*, 16 I&N Dec. 596, 597-98 (BIA 1978).

In *Monreal-Aguinaga*, the Board provided additional examples of the hardship factors it deemed relevant for meeting the higher standard of exceptional and extremely unusual hardship:

> [T]he ages, health, and circumstances of qualifying lawful permanent resident and United States citizen relatives. For example, an applicant who has elderly parents in this country who are solely dependent upon him for support might well have a strong case. Another strong applicant might have a qualifying child with very serious health issues, or compelling special needs in school. A lower standard of living or adverse country conditions in the country of return are factors to consider only insofar as they may affect a qualifying relative, but generally will be insufficient in themselves to support a finding of exceptional and extremely unusual hardship. As with extreme hardship, all hardship factors should be considered in the aggregate when assessing exceptional and extremely unusual hardship.

23 I&N Dec. at 63-64. The Board has also 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." *Matter of Andazola-Rivas*, 23 I&N Dec. 319, 323 (BIA 2002). Even where an Immigration Judge has found that a respondent's children "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, the Board has held that such hardships "are simply not substantially different from those that would normally be expected upon removal to a less developed country." *Id.* at 324.

However, in *Matter of Gonzalez Recinas*, the Board 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—including her "heavy financial and familial burden . . . the lack of support from her children's father, [her U.S.] citizen children's unfamiliarity with the Spanish language, the lawful residence in this country of all of [her] immediate family, and the concomitant lack of family in Mexico"—cumulatively amounted to exceptional and extremely unusual hardship to her qualifying relatives. *Id.* at 472. The Board emphasized that the case was "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.

As noted above, the record establishes that the Applicant's spouse is experiencing extreme hardship. Based on the same evidence, we find that she would suffer exceptional and extremely unusual hardship as a result of the Applicant's inadmissibility. We therefore find that the Applicant has established extraordinary circumstances as required by 8 C.F.R § 212.7(d).

We now consider whether the Applicant merits a waiver of inadmissibility as an overall matter of discretion. The burden is on the Applicant to establish that a waiver of inadmissibility is warranted in the exercise of discretion. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296, 299 (BIA 1996). We must "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). In evaluating whether to favorably exercise 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, recency 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).

Id. at 301 (citations omitted). We must also consider "[t]he underlying significance of the adverse and favorable factors." *Id.* at 302. For example, we assess the "quality" of relationships to family, and "the equity of a marriage and the weight given to any hardship to the spouse is diminished if the parties married after the commencement of [removal] proceedings, with knowledge that the alien might be [removed]." *Id.* (citation omitted).

The positive factors in the Applicant's case include the hardship to his spouse and child if his waiver application is not approved, his gainful employment and payment of taxes while he was in the United States, his general expression of regret for his immigration violations and for breaking the law, and his presenting himself to immigration authorities to be paroled for a criminal hearing involving the charges against him.

The negative factors in the Applicant's case are his criminal conviction, his entry to the United States without inspection, his period of unlawful presence and unauthorized employment, and his order of removal. The record of the Applicant's conviction includes the amended complaint, which reflects that the victim of the crime was attacked by the Applicant and 7 to 9 other individuals after asking them to turn down their loud music. The group hit the victim and kicked him. Some of the members of the group struck the victim with large belt buckles, others hit him with two by fours, and others hit him in the forehead with rocks. The victim stopped moving and a witness stood him up and the group of 8 to 10 individuals followed them and threw rocks at the victim. When the victim was inside the house, the individuals continued to throw rocks at him and he fell unconscious. The victim had multiple facial fractures from this incident. The victim identified the Applicant as

someone who hit him on the side of the head with a rock. We find that the underlying facts of the Applicant's conviction are very serious in nature. The record does not include significant expressions of remorse for his criminal behavior and the harm to the victim. Although there are letters of support for the Applicant, they are not sufficiently detailed and cannot be accorded significant weight in establishing that he is rehabilitated and merits a favorable exercise of discretion.

After reviewing the positive and negative factors, we find that the negative factors outweigh the positive factors. Therefore, we find that the Applicant has not established that he warrants a favorable exercise of discretion.

III. CONCLUSION

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.

ORDER: The appeal is dismissed.

Cite as *Matter of L-A-H-C-,* ID# 16439 (AAO July 25, 2016)