



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

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

MATTER OF H-U-J-

DATE: MAR. 11, 2016

APPEAL OF NEWARK, NEW JERSEY FIELD OFFICE DECISION

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

The Applicant, a native and citizen of South Korea, seeks a waiver of inadmissibility. *See* Immigration and Nationality Act (INA, or Act) § 212(h), 8 U.S.C. § 1182(h). The Field Office Director, Newark, New Jersey, denied the application. The matter is now before us on appeal. We issued a notice of intent to dismiss the appeal (NOID), to which the Applicant timely responded. The appeal will be sustained.

The Applicant was found to be inadmissible under 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 a crime involving moral turpitude. The Applicant is the beneficiary of an approved Form I-140, Petition for Alien Worker.

On June 30, 2014, the Director denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, finding that the Applicant did not establish extreme hardship to a qualifying relative.

On appeal, the Applicant states he has established that his two qualifying relatives would suffer extreme hardship if his Form I-601 is not approved. On August 3, 2015, we issued a NOID, advising the Applicant that his criminal conviction constituted a violent or dangerous crime and that although he had met the hardship standard under section 212(h) of the Act, he needed to meet the heightened hardship standard at 8 C.F.R. § 212.7(d) to merit a waiver as a matter of discretion. The Applicant timely responded to the NOID, stating that his two U.S. citizen children would suffer exceptional and extremely unusual hardship if he is not granted a waiver of inadmissibility.

In support of the waiver application, the record includes, but is not limited to: letters from the Applicant; biographical information for the Applicant, his spouse, and their children; medical records for the Applicant's daughter and son; copies of bills, a lease, and the Applicant's income tax returns; letters concerning the Applicant's moral character; and documentation concerning the Applicant's criminal and immigration history. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(2)(A)(i)(I) of the Act provides, in pertinent part, that a foreign national convicted of "a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime" is inadmissible.

The Act does not define the term “crime involving moral turpitude.” In *Matter of Perez-Contreras*, the Board of Immigration Appeals (Board) provided:

[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.

20 I&N Dec. 615, 617-18 (BIA 1992) (citations omitted); *see also Matter of Solon*, 24 I&N Dec. 239, 240 (BIA 2007); *Matter of Ajami*, 22 I&N Dec. 949, 950 (BIA 1999); *Keungne v. U.S. Att’y Gen.*, 561 F.3d 1281, 1284 (11th Cir. 2009) (citing *Vuksanovic v. U.S. Att’y Gen.*, 439 F.3d 1308, 1311 (11th Cir. 2006)).

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 Matter of Short, supra; Matter of 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. *Matter of 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)

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(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] 2001, before the Superior Court of New Jersey, [REDACTED] Criminal Division, the Applicant pled guilty to: assault by auto<sup>1</sup>, in violation of New Jersey Statutes Annotated (NJSA) § 2C:12-1(c), a fourth degree felony. For that conviction, the Applicant was sentenced to two years of probation, with random alcohol and drug testing, attendance at AA and NA meetings on a regular basis, gainful employment, and the payment of \$7,500 in restitution to the victim. The applicant also plead guilty, before the same court, to driving while intoxicated, in violation of NJSA § 39:4-50. In regard to that conviction, he was assessed a \$500 fine, plus additional monetary penalties and court costs, and his driver’s license was suspended for ten months.

Only one of the Applicant’s convictions need qualify as a crime involving moral turpitude for the Applicant to be found inadmissible. As such, we will first look to the Applicant’s conviction for assault by auto, in violation of NJSA § 2C:12-1(c), a fourth degree felony, which in 2000 stated that:

c. (1) A person is guilty of assault by auto or vessel when the person drives a vehicle or vessel recklessly and causes either serious bodily injury or bodily injury to another. Assault by auto or vessel is a crime of the fourth degree if serious bodily injury results and is a disorderly persons offense if bodily injury results.

(2) Assault by auto or vessel is a crime of the third degree if the person drives the vehicle while in violation of R.S.39:4-50 or section 2 of P.L.1981, c. 512 (C.39:4-50.4a) and serious bodily injury results and is a crime of the fourth degree if the person drives the vehicle while in violation of R.S.39:4-50 or section 2 of P.L.1981, c. 512 (C.39:4-50.4a) and bodily injury results.

New Jersey law defines “recklessly” as:

(3) *Recklessly.* A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation. “Recklessness,” “with recklessness” or equivalent terms have the same meaning.

NJSA. § 2C:2-2(b)(3) (2000).

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<sup>1</sup> The judgment of conviction, dated [REDACTED] 2001, states that the Applicant was convicted of “Aggravated Assault”; however the statutory provision cited, NJSA § 2C:12-1(c), corresponds with “Assault by Auto.” The indictment and plea transcript confirm that the statutory provision to which the Applicant pled guilty was assault by auto.

The Applicant does not contest his inadmissibility on appeal, but he challenged the admissibility finding before the Director, stating that: 1) the crime for which he was convicted could be simply a disorderly persons offense if bodily injury results; 2) the statutory section under which he was convicted only requires recklessness and does not rise to the level of the “evil intent” that is a requisite element for a crime involving moral turpitude, citing *Partyka v. Attorney General of U.S.*, 417 F.3d 408, 413 (3d Cir. 2005) and *Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988); 3) the U.S. Court of Appeals for the Third Circuit, under whose jurisdiction this case rests, has found that recklessness alone is insufficient for a crime to constitute a crime of violence, citing *Iran v. Gonzalez*, 414 F.3d 464 (3d Cir. 2005); 4) the U.S. Supreme Court has found that DUI offenses are not crimes of violence, citing *Leocal v. Ashcroft*, 543 U.S. 1 (2004); and 5) that the U.S. Court of Appeals for the Third Circuit found that violation of vehicular homicide statute, which required proof of reckless driving, was not a crime of violence, citing *Oyebanji v. Gonzales*, 418 F.3d 260 (3d Cir. 2005). Further, the Applicant stated that simple DUI offenses do not involve moral turpitude, citing *Matter of Torres-Varela*, 21 I&N Dec. 78 (BIA 2001).

The Applicant is correct that regulatory offenses are not generally considered morally turpitudinous. See generally *Matter of L-V-C-*, 22 I&N Dec. 594 (BIA 1999). In *Matter of Torres-Varela*, the Board noted that simple driving under the influence of alcohol does not constitute a crime involving moral turpitude, as it is a marginal crime that does not include aggravating factors. *Supra*. Thus, the applicant's conviction for driving while intoxicated is not a crimes involving moral turpitude. However, we are looking at the applicant's conviction for assault by auto in the fourth degree in violation of NJSA § 2C:12-1(c).

As a general rule, simple assault or battery is not deemed to involve moral turpitude for purposes of the immigration laws. *Matter of Fualaau*, 21 I&N Dec. 475, 477 (BIA 1996). However, this general rule does not apply where an assault or battery necessarily involved some aggravating dimension, such as the use of a deadly weapon or serious bodily harm. See e.g. *Matter of Danesh*, *supra*, *Matter of Goodalle*, 12 I&N Dec. 106 (BIA 1967), *Matter of S-*, 5 I&N Dec. 668 (BIA 1954), and *Nguyen v. Reno*, 211 F.3d 692 (1st Cir. 2000). Moreover, the determination concerning whether the conviction involves moral turpitude requires an analysis of both the mental state and the level of harm required to complete the offense. *Matter of Solon*, 24 I&N Dec. 239, 241 (BIA 2007) (stating that “as the level of conscious behavior decreases ... more serious resulting harm is required” for a finding of moral turpitude).

Further, the U.S. Court of Appeals for the Third Circuit held in *Knapik v. Ashcroft*, 384 F. 3d 84, 89-90 (3rd Cir. 2004), that moral turpitude can lie in criminally reckless behavior even where the statute does not contain an intent requirement, if aggravating factors exist, such as depraved indifference to human life or consciously creating a grave risk of death or serious harm to a person. The Court indicated further that “[w]ith regard to reckless acts, moral turpitude inheres in the conscious disregard of a substantial and unjustifiable risk of severe harm or death.” *Id.* at n.5. Therefore, while recklessness alone, as the Applicant states, may not involve moral turpitude, recklessness coupled with serious harm may involve moral turpitude. *Id.* In *Partyka v. Attorney General of the U.S.*, also cited by the Applicant, the Third Circuit, considered whether “negligent infliction of

bodily injury on someone know to the defendant to be a law enforcement officer is a crime involving moral turpitude.” In making their holding in that case the court stated acknowledged that crimes committed recklessly may involve moral turpitude, but they found that negligent infliction of bodily injury “lacks this essential culpability requirement.” In *Oyebanji v. Gonzales, supra*, and *Iran v. Gonzalez, supra*, cited by the Applicant, the Third Circuit addresses whether the statute in question is a crime of violence; it was not making a determination concerning moral turpitude, a completely different section of the Act. Further, in *Leocal v. Ashcroft, supra*, cited by the Applicant, the U.S. Supreme Court held that a criminal DUI offense that either lacks a *mens rea* component or requires only a showing of negligence in the operation of a vehicle is not a crime of violence. The Court in *Leocal*, however, specifically noted that it was not addressing whether a crime involving recklessness would qualify. *Supra* at 384. Thus, while regulatory crimes and crimes involving negligence may not generally qualify as crimes involving moral turpitude, recklessness can be a sufficient mental state for moral turpitude purposes for crimes also involving significant harm or aggravating factors. *Matter of Leal*, 26 I&N Dec. 20, 22-23 (BIA 2012); *Matter of Franklin*, 20 I&N Dec. 867, 869-71 (BIA 1994) (finding that a conviction for involuntary manslaughter to be a crime involving moral turpitude because the statute requires “recklessly caus[ing] the death of another person.”); *Matter of Ruiz-Lopez*, 25 I&N Dec. 551, 553-54 (BIA 2011) (a conviction for driving in “wanton or willful disregard for the lives or property of others while attempting to elude a pursuing police vehicle” is a crime involving moral turpitude because “wanton or willful disregard” connoted recklessness); *Matter of Medina*, 15 I&N Dec. 611, 613-14 (BIA 1976) (moral turpitude attached to an Illinois aggravated assault statute that required the use of a deadly weapon and a *mens rea* of recklessness.)

Based solely on the statutory language, NJSA § 2C:12-1(c) is divisible and encompasses conduct that involves moral turpitude and conduct that does not. The record reflects that the Applicant was convicted of this violation in the fourth degree<sup>2</sup>, but we do not know from the judgment whether he was convicted under 2C:12-1(c)(1) or (2). Under section 2 of this section of the statute, an individual may be convicted of assault by auto in the fourth degree if they drive the vehicle while in violation of R.S. 39:4-50 or C.39:4-50.4a (driving while under the influence or refusing to take a chemical test) and bodily injury results, which arguably could not involve moral turpitude. Under section 1, the individual must “drive a vehicle or vessel recklessly” and serious bodily injury results in order for the conviction to be in the fourth degree. Therefore, we cannot find that the offenses described in that section of the statute are categorically crimes involving moral turpitude. Because the statute is divisible, we will therefore review the record of conviction to determine if the applicant’s conviction under these statutes was for morally turpitudinous conduct.

The indictment and plea transcript, which are both part of the record of conviction, indicate that the Applicant was charged as recklessly driving an automobile, causing serious bodily injury.

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<sup>2</sup> Although the Applicant states that his crime is not a crime involving moral turpitude because it was a “disorderly persons offense,” he provides no support for that position. As stated, the judgment of conviction clearly indicates that the Applicant was convicted under NJSA 2C:12-1(c) in the fourth degree, which is not a disorderly persons offense.

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The definition of reckless behavior in New Jersey encompasses conscious disregard of a substantial and unjustifiable risk or a gross deviation from the standard of conduct that a reasonable person would observe. The conscious disregard element meets the requirement for a crime involving moral turpitude, as set forth above. Furthermore, NJSA § 2C:12-1(c)(1) in the fourth degree encompasses the additional aggravating factor of serious bodily injury. As a result, we find that the Applicant's offense of assault by auto did involve moral turpitude.

We will next determine whether the Applicant merits a waiver of inadmissibility under section 212(h) of the Act, which provides, in pertinent part, that:

The Attorney General [now Secretary of Homeland Security (Secretary)] 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 -

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

(i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(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[.]

Because the activities that are the basis for the Applicant's criminal conviction occurred more than 15 years ago, on [REDACTED] 2000, the Applicant is eligible for a waiver under section 212(h)(1)(A) of the Act. Section 212(h)(1)(A) of the Act requires that the Applicant's admission to the United States not be contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated.

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Evidence in the record to establish the Applicant's eligibility under section 212(h)(1)(A)(ii) and (iii) of the Act consists of letters from the Applicant and community members, tax return documents filed by the Applicant, and documentation concerning hardship to the Applicant's U.S. citizen children. Also included is documentation that the Applicant satisfactorily completed his criminal sentence of probation.

In view of the record, which shows that the Applicant's only convictions pertain to criminal activities he committed on [REDACTED] 2000; that the Applicant has not been convicted of any other crimes; that the Applicant has had a positive role in the life of his family and the community; and that numerous individuals have attested to the moral character of the Applicant; we find that the Applicant has provided sufficient evidence to demonstrate that his admission to the United States is not contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated, as required by section 212(h)(1)(A)(ii) and (iii) of the Act.

We now consider whether the Applicant merits a waiver of inadmissibility as a 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-Morales*, 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 considering 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).

In this case, due to the violent or dangerous nature of his crime as set forth below, the Applicant also must show that his application for a waiver should be approved as a matter of discretion under the higher standard set forth in 8 C.F.R. § 212.7(d).

The regulation at 8 C.F.R. § 212.7(d) provides:

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

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 a 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).

The term “dangerous” is not defined specifically by 18 U.S.C. § 16 or any other relevant statutory provision. Thus, in general, we interpret the terms “violent” and “dangerous” in accordance with their plain or common meanings, and consistent with any rulings found in published precedent decisions addressing discretionary denials under the standard described in 8 C.F.R. § 212.7(d). Decisions to deny waiver applications on the basis of discretion under 8 C.F.R. § 212.7(d) are made on a factual “case-by-case basis.” 67 Fed. Reg. at 78677-78.

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

The exceptional and extremely unusual hardship standard is more restrictive than the extreme hardship standard. *Cortes-Castillo v. INS*, 997 F.2d 1199, 1204 (7th Cir. 1993). 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 Applicant 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.*

In *Monreal*, 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 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.”).

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The Applicant states that his two U.S. citizen children, ages [redacted] and [redacted] would suffer exceptional and extremely unusual hardship if he is not granted a waiver of inadmissibility and they must relocate to Korea to reside with him. The Applicant states that his children do not speak Korean fluently and they would face significant hardships in Korea as a result of the language barrier, which would in particular affect his [redacted] daughter. He states that the language issues will also create a cultural barrier and result in discrimination against his children in a largely homogenous society, citing the 2014 U.S. Department of State Country Report on Human Rights Practices for the Country of Korea. The record also contains a letter from a psychiatrist concerning the Applicant's daughter's mental health, which states that she is experiencing anxiety as a result of fearing leaving her home, school, and friends and moving to Korea. The record makes clear that the Applicant's two U.S. citizen children, in particular his daughter, would suffer educational and emotional hardships upon relocation to Korea.

In addition, the Applicant states that his children have received ongoing medical care in the United States and would not be able to obtain similar medical care in Korea, as they are foreigners and do not have a resident identification number. The Applicant states that he will have trouble obtaining employment in Korea, citing news articles on the subject of joblessness in Korea, due to competitiveness and his lack of recent job experience and professional networks there, as he has resided in the United States for 24 years. He states that, as a result, he will not be able to afford private care for his son's medical condition in Korea, whereas in the United States his son receives the care that he needs through the State of New Jersey and the [redacted]. The record shows that the Applicant's son suffers from respiratory problems, including acute bronchitis necessitating a nebulizer, since his birth, which resulted in him spending three days in intensive care. After reviewing the evidence of hardship to the Applicant's U.S. citizen children, we find that when the emotional, educational, and medical hardship to the qualifying relatives is considered in the aggregate, it rises to the level of exceptional and extremely unusual hardship.

In this case, the Applicant has established that his admission to the United States would not be contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated. He has also met the heightened requirements of 8 C.F.R. § 212.7(d). We must also find that the Applicant merits a waiver of inadmissibility as a matter of discretion, by balancing the adverse and favorable factors in the Applicant's case. *See Matter of Mendez-Morales*, 21 I&N Dec. at 301.

The favorable factors in this case include the hardship to the Applicant's two U.S. citizen children in the case of relocation to Korea, the contributions of the Applicant to his family and community, and the Applicant's rehabilitation following the commission of the offense that led to his inadmissibility. The unfavorable factor is his commission of a serious crime in the United States. The Applicant has established that the favorable factors in his application outweigh the unfavorable factors. Therefore, a favorable exercise of the Secretary's discretion is warranted.

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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 met that burden. Accordingly, we sustain the appeal.

**ORDER:** The appeal is sustained.

Cite as *Matter of H-U-J-*, ID# 12392 (AAO Mar. 11, 2016)