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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

[REDACTED]

H6

Date: **NOV 10 2011**

Office: [REDACTED]

FILE: A97 899 872

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Sections 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v)

ON BEHALF OF APPLICANT:

[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Field Office, Albuquerque, New Mexico, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for one year or more and seeking readmission within 10 years of his last departure. He seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen wife and children.

The field office director denied the Form I-601 application for a waiver, finding that the applicant failed to establish extreme hardship to a qualifying relative. *Decision of the Field Office Director*, dated April 3, 2009.

On appeal, counsel for the applicant asserts that the applicant has shown that his wife will suffer extreme hardship should the present waiver application be denied. *Brief from Counsel*, submitted on May 4, 2009.

The record contains, but is not limited to: a brief from counsel; statements from the applicant, as well as the applicant's wife, children, relatives, friends, and acquaintances; documentation on conditions in Mexico, documentation related to the applicant's and his wife's employment, taxes, banking, and expenses; copies of birth records for the applicant's children; an obituary for the applicant's mother-in-law; copies of photographs of the applicant and his family; and documentation relating to the applicant's criminal history. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(9) of the Act provides, in pertinent part:

(B) Aliens Unlawfully Present.-

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

....

(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.

The record shows that the applicant made several attempts to enter the United States without inspection, and he did so successfully on or about February 13, 1996. On August 13, 2004, he filed a Form I-485 application to adjust his status to lawful permanent resident. The applicant departed the

United States after that date and returned pursuant to an advance parole travel document on June 15, 2005. The record shows that the applicant again departed the United States and returned pursuant to an advance parole travel document, and he filed a subsequent Form I-485 application on March 5, 2008 after his first filing was denied on June 29, 2006. The applicant last entered the United States as a parolee on September 11, 2008. Based on these facts, the applicant accrued unlawful presence from April 1, 1997, the date the unlawful presence provisions in the Act took effect, until he filed his first Form I-485 application on August 13, 2004. This period totals over seven years. He now seeks admission as an immigrant pursuant to his present Form I-485 application to adjust his status to lawful permanent resident. He was deemed inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present for more than one year and seeking readmission within 10 years of his last departure. The applicant does not contest his inadmissibility under section 212(a)(9)(B)(i)(II) of the Act on appeal. He requires a waiver under section 212(a)(9)(B)(v) of the Act.

The record contains information regarding the applicant's criminal history. He pled no contest to a charge of fleeing or eluding a police officer under [REDACTED] traffic ordinance for his [REDACTED]. He was arrested and charged with multiple offenses related to a domestic violence incident with his wife for his conduct on [REDACTED], yet all charges were dismissed. Counsel reports that the applicant was arrested on [REDACTED] and charged with battery on a household member, conduct that was separate from that which led to his arrest [REDACTED]. Counsel states that the applicant was given counseling and unsupervised probation for this offense. The record contains documentation to show that the applicant completed a one-year domestic violence program on December 26, 2007 which supports counsel's assertion that he was ordered to complete counseling. However, the record lacks complete documentation regarding the applicant's December 1, 2005 conduct or the resulting legal process.

The field office director did not discuss the applicant's criminal history as a basis for inadmissibility. However, the applicant's reported conviction for an act of domestic violence on December 1, 2005 may render him inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude. If he is so inadmissible, he also requires a waiver under section 212(h) of the Act. If the applicant satisfies the requirements for a waiver under section 212(a)(9)(B)(v) of the Act, he also meets the requirements for a waiver under section 212(h)(1)(B) of the Act. However, due to the lack of complete records regarding the applicant's conviction for an act of domestic violence, the AAO is unable to determine whether he was convicted for a violent or dangerous crime as contemplated by the regulation at 8 C.F.R. § 212.7(d). If so, he must show extraordinary circumstances, such as that denial of his waiver application "would result in exceptional and extremely unusual hardship", in order to establish that discretion may be favorably exercised and his application may be approved under the regulation at 8 C.F.R. § 212.7(d). As this standard is more restrictive than the "extreme hardship" standard found in sections 212(a)(2)(A)(i)(I) and 212(h) of the Act, the AAO will assess whether he meets the requirements of the regulation at 8 C.F.R. § 212.7(d). *See Cortes-Castillo v. INS*, 997 F.2d 1199, 1204 (7th Cir. 1993).

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

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

The AAO notes that the words "violent" and "dangerous" and the phrase "violent or dangerous crimes" are not further defined in the regulation, and the AAO is aware of no precedent decision or other authority containing a definition of these terms as used in 8 C.F.R. § 212.7(d). A similar phrase, "crime of violence," is found in section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F). It provides that a "crime of violence," as defined under 18 U.S.C. § 16, for which the term of imprisonment is at least one year, is an aggravated felony. As such, "crime of violence" is limited to those crimes specifically listed in 18 U.S.C. § 16. It is not a generic term with application to any crime involving violence, as that term may be commonly defined. That the DOJ chose not to use the language of section 101(a)(43)(F) of the Act or 18 U.S.C. § 16 in promulgating 8 C.F.R. § 212.7(d) indicates that "violent or dangerous crimes" and "crime of violence" are not synonymous. The Department of Justice clarified the relationship between these distinct terms in the interim final rule codifying 8 C.F.R. § 212.7(d):

[I]n general, individuals convicted of aggravated felonies would not warrant the Attorney General's use of this discretion. In fact, the proposed regulations stated that even if the applicant can meet the "exceptional and extremely unusual hardship" standard for the exercise of discretion, depending upon the severity of the offense, this might "still be insufficient" to obtain the waiver. See 67 FR at 45407. That language would substantially limit the circumstances under which an individual convicted of an aggravated felony would be granted a waiver as a matter of discretion. Therefore, the Department believes that this language achieves the goal of the commenter while not unduly constraining the Attorney General's discretion to render waiver decisions on a case-by-case basis.

67 Fed. Reg. 78675, 78677-78 (December 26, 2002).

Therefore, the fact that a conviction constitutes an aggravated felony under the Act may be indicative that an alien has also been convicted of a violent or dangerous crime, but it is not dispositive. 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." The AAO interprets the phrase "violent or

dangerous crimes” in accordance with the plain or common meaning of its terms, consistent with any published precedent decisions addressing discretionary denials under 8 C.F.R. § 212.7(d) or the standard originally set forth in *Matter of Jean*.

As the record shows that the applicant may have been convicted of a violent or dangerous crime, we will assess whether “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. 8 C.F.R. § 212.7(d). Finding no evidence of foreign policy, national security, or other extraordinary equities, the AAO 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 AAO notes that the exceptional and extremely unusual hardship standard in cancellation of removal cases is identical to the standard put forth by the Attorney General in *Matter of Jean*, *supra*, and codified at 8 C.F.R. § 212.7(d).

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*, 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.

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 AAO notes that exceptional and

extremely unusual hardship to a qualifying relative must be established in the event that he or she accompanies the applicant or in the event that he or she remains in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

In a statement dated April 22, 2009, the applicant's wife stated that she and the applicant have four children, and that she is not working. She stated that she lost her mother in September 2008, and that her mother was the only person who could assist her with child care. She indicated that she and the applicant have goals for their children that she would be unable to meet without him.

Applicant's wife discussed the circumstances that led to her filing for divorce from the applicant. She stated that she was angry with the applicant, yet they reconciled and she did not follow through with the divorce. She stated that she and the applicant made mistakes, yet they realized they love each other and they want to keep their family together.

In a statement dated February 9, 2009, the applicant's wife described her relationship and history with the applicant, including that she met him when she was 17 years old and they began residing together six months later. They have four children, born [REDACTED]. She described in detail the applicant's participation in his family and care for his children.

The applicant's wife explains that the applicant's father passed away in March of 2005, and that the applicant struggled emotionally which began to cause problems with their marriage. She described the emotional toil on her and her family when the applicant was jailed [REDACTED] and she stated that she gave him another chance when he was released. She stated that the applicant gave her significant emotional support when her mother was diagnosed with cancer, and that he took responsibility for all of their expenses so she could care for her mother. She provided that she continues to suffer psychological difficulty as a result of the death of her mother.

The applicant's wife stated that she cannot raise their four children by herself, yet they cannot relocate to Mexico because their lives are in the United States. She noted that all of her children are in school and doing well. She noted that she and the applicant wish to buy a bigger house and to save money for college for their children. She noted that she was raised without a father, and she believes it's very important for her children to have the applicant.

The applicant described his life and relationship with his wife. He explained that his mother-in-law and sister-in-law helped him and his wife with child care. He discussed the period of time around the death of his father in 2005, and he stated that he was depressed and began having difficulty in his marriage. He noted that he and his wife separated for a few months and he was arrested. He stated that he completed a 52-week anger management class which helped him appreciate the impact his behavior can have on his family. He described the period of time when his mother-in-law died, and explained that his wife was affected emotionally. He noted that his mother-in-law provided significant care for their children, and that since her death his wife has been taking care of their children at home. The applicant noted that he operates a business and has three employees which

allows him to meet all of the financial needs of his family. He stated that he has a calm life now and that his bad times are behind him.

The applicant has submitted numerous statements from others in support of his waiver application including from his children, relatives, and acquaintances. They attest to the closeness of his family and his integral role in caring for his wife and children. The applicant's sister-in-law explained that the applicant's mother-in-law's death had a great impact on the applicant's wife due to the fact that she was an important part of their regular routine. She noted that the applicant's wife does not have a babysitter and needs to spend time with her children and the applicant. Numerous individuals attested to the fact that the applicant is the sole source of income for his family.

In a brief submitted on May 4, 2009, counsel asserts that the applicant has shown that his wife will suffer extreme hardship should the present waiver application be denied. Counsel notes that the applicant's wife has resided in the United States for over 20 years, since she was 12 years old, and that she became a citizen in March 2004. Counsel cites poor conditions in Mexico including drug cartel and gang related violence, the difficult economic situation, and public health problems. Counsel asserts that the applicant's wife will suffer significant financial hardship without the applicant's assistance in the United States, in part due to the fact that she no longer has the assistance of her mother for child care. Counsel states that the applicant warrants a favorable exercise of discretion, and that he has changed himself since his arrest and conviction.

Upon review, the applicant has shown that his wife will suffer exceptional and extremely unusual hardship should the present waiver application be denied. The record supports that the applicant is the sole economic provider for his wife and four children under the age of 16. The AAO acknowledges the impact the death of the applicant's mother-in-law has had on his family's childcare situation. While the record shows that the applicant's wife has received some assistance from her sister, there is ample evidence to support that the loss of her mother's assistance resulted in her discontinuing employment and providing full-time care for her children. The applicant has not shown that his family has unusual expenses for two adults and four children, yet it is evident that his wife would face significant financial difficulty without his financial contribution to the household. She worked as a laborer at a rate of \$12.69 per hour as of January 20, 2006. Yet, the record supports that, should she return to full-time work, her income potential and the need for child care would create financial hardship for a family of one adult and four children.

The record supports that the applicant has provided meaningful emotional support for his wife during difficult periods, including the death of her mother. The applicant and his wife have generally shared a close relationship for many years, and it is evident that they have reconciled their differences from around 2005 and 2006. The AAO acknowledges the applicant's wife's explanation of the events surrounding her filing for divorce, and accepts that the applicant and his wife continue to have a close relationship and viable marriage. Thus, the applicant's wife would face significant emotional difficulty should she now become separated from the applicant. It is evident that the applicant's wife would further share in the emotional hardship faced by her children should they lose the applicant's presence in their household. The recent death of the applicant's mother-in-law constitutes an unusual circumstance not commonly experienced by individuals who are facing possible separation from a close spouse.

The applicant's wife has resided in the United States since an early age, for over 20 years, and the applicant has shown that she has significant ties to the United States including four U.S. citizen children and other family members. The record shows that the applicant and his wife own a mobile home in the United States, and they would be unable to reside in it should they relocate to Mexico. The applicant's wife is a native of Mexico, yet her lengthy residence and ties to the United States support that her Mexican heritage would not eliminate the emotional and cultural difficulty of adapting to life in Mexico.

The AAO acknowledges that conditions in Mexico are challenging. The applicant's wife and father-in-law were born and [REDACTED] which suggests that the applicant's wife may have the closest ties to that region should she choose to reside in the country. The AAO takes notice that the United States Department of State issued a Travel Warning for Mexico, warning that crime and violence are serious problem and can occur anywhere. *United States Department of State Travel Warning: Mexico*, dated April 22, 2011. Bystanders, including U.S. citizens, have been injured or killed in violent incidents in various parts of the country, especially, but not exclusively in the northern border region, demonstrating the heightened risk of violence throughout Mexico. *Id.* More than a third of all U.S. citizens killed in Mexico in 2010 whose deaths were reported to the U.S. government were killed in the border [REDACTED]. Carjacking and highway robbery are serious problems in many parts of the border region and U.S. citizens have been murdered in such incidents. *Id.* Mexican authorities report that more than 3,100 people were killed [REDACTED] in 2010. *Id.* The applicant's wife faces a risk of crime or violence in Mexico, and it is evident that she would endure additional psychological hardship due to concern for the safety of herself, her children, and the applicant.

Reports support that relocating to Mexico would create financial hardship for the applicant's wife. The applicant presently has consistent employment in the United States that is sufficient to meet his family's needs. The AAO takes notice that economic and employment conditions are generally less favorable in Mexico than they are in the United States, and that the applicant and his wife would face challenges securing new employment. *United States Central Intelligence Agency World Factbook: Mexico*, updated April 21, 2010 (estimating that in 2010 unemployment in Mexico was 5.4 percent, underemployment was as high as 25 percent, and in 2008 more than 47 percent of the population lived under the asset-based poverty line). It is evident that relocating to Mexico with four young children would significantly exacerbate the applicant's wife's financial hardship.

All elements of hardship to the applicant's wife have been considered in aggregate. Based on the foregoing, the applicant has shown that denial of the present waiver application would result in exceptional and extremely unusual hardship to his wife. 8 C.F.R. § 212.7(d).

Additionally, the AAO finds that the gravity of the applicant's offense does not override the extraordinary circumstances in the applicant's case. In determining the gravity of the applicant's offense, the AAO must not only look at the criminal act itself, but also engage in a traditional discretionary analysis and "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.” *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 300 (BIA 1996)(Citations omitted).

The negative factors in this case consist of the following:

The applicant entered the United States without inspection, worked without authorization, and remained for a lengthy period without a legal immigration status. The applicant has been convicted of a crime, and the record shows that he has engaged in domestic violence.

The positive factors in this case include:

The applicant’s U.S. citizen spouse will experience exceptional and extremely unusual hardship should he reside outside the United States. The record does not reflect that the applicant has been convicted a crime since 2005, in approximately six years. The applicant’s four U.S. citizen children will face significant hardship should he reside outside the United States. The applicant has shown a propensity to work and pay taxes, and to support his wife and children. The record supports that the applicant has provided meaningful emotional support to his wife and children, and he has cultivated a close family unit.

The applicant’s acts of domestic violence are troubling and raise serious concerns regarding his character and risk to this family. His prior lack of regard for U.S. immigration law cannot be condoned. However, the AAO observes that the applicant’s criminal and domestic violence activity was limited to a brief period immediately after the death of his father, and the record does not show that he engaged in criminal activity before or after this brief period. The applicant completed a one-year anger management and domestic violence program, and his and his wife’s statements support that the experience was beneficial to him and he has reformed himself. Thus, the benefits of keeping the applicant’s family intact in the United States outweigh the gravity of his prior misconduct, such that a favorable exercise of discretion is warranted.

As the applicant has shown that his wife will suffer “exceptional and extremely unusual hardship” as contemplated by the regulation at 8 C.F.R. § 212.7(d), he has also met the lesser standard of showing that his wife will suffer “extreme hardship”, as required by sections 212(a)(9)(B)(v) and 212(h) of the Act. Accordingly, he has established that he is eligible for waivers under both sections 212(a)(9)(B)(v) and 212(h) of the Act. As discussed above, the applicant has shown that he warrants a favorable exercise of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility rests with the applicant. *See* section 291 of the Act. Here, the applicant has now met that burden. Accordingly, the appeal will be sustained and the waiver application will be approved.

**ORDER:** The appeal is sustained.