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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

H6

Date: FEB 22 2012 Office: ROME, ITALY FILE: [redacted]

IN RE: [redacted]

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

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,

Michael Shumway

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Rome, Italy. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Nigeria who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having committed crimes involving moral turpitude and 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 more than one year. The applicant is married to a U.S. citizen and has a U.S. citizen child. He seeks a waiver of inadmissibility in order to reside in the United States.

In a decision, dated February 3, 2009, the field office director determined that the applicant was inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act, for having been convicted of crimes involving moral turpitude and under section 212(a)(9)(B)(i)(II) of the Act, for having been unlawfully present in the United States for more than one year. The field office director then found that the applicant had failed to establish that his qualifying relative would suffer extreme hardship as a result of his inadmissibility and denied the application accordingly.

In a Notice of Appeal to the AAO (Form I-290B), dated February 20, 2009, the applicant states that he has a U.S. citizen son, born on February 7, 2009 and that the child suffers from hip dysplasia and requires ongoing medical treatment. Counsel submits a brief and additional evidence on appeal.

The record indicates that the applicant, born on December 25, 1975, entered the United States in 1985 at the age of ten years old. On August 1, 1993, at the age of 17 years old, the applicant filed a fraudulent Application for Asylum or Withholding of Removal (Form I-589) using the name [redacted] This application was administratively closed on April 22, 1997 after the applicant failed to appear for the asylum interview. The AAO notes that on the applicant's Record of Deportable Alien (Form I-213), dated March 4, 1999, the applicant states that he fraudulently completed the asylum application so that he could obtain employment authorization and continue to live and work in the United States.

The record also indicates that on May 6, 1997 the applicant pled guilty to attempted grand theft under Cal. Penal Code § 664/487(a) and was sentenced to 120 days in jail and three years of probation. On December 3, 1998, the applicant pled guilty to conspiracy to commit extortion under Cal. Penal Code §§ 182(a)(1) and 520, and was sentenced to 525 days in jail and five years of probation.

On March 4, 1999, the applicant was served with a Notice to Appear before an Immigration Judge in San Diego, California. On April 7, 1999 the applicant filed an application for adjustment of status (Form I-485). On May 7, 1999, an immigration judge found the applicant removable as an alien who was convicted of an aggravated felony for having been convicted of a crime of violence and a theft crime for which imprisonment is at least one year. On September 2, 1999, an immigration judge denied his Form I-485 and ordered the applicant removed pursuant to section 237(a)(2)(A)(ii) of the Act, as an alien who after entry had been convicted of two crimes involving moral turpitude. The judge noted that the applicant having been convicted of an aggravated felony was irrelevant because the applicant was not a lawful permanent resident. The AAO notes that the immigration judge did

not find that the applicant filed a frivolous asylum application. On February 26, 2000 the applicant departed the United States.

The AAO will first address the applicant's inadmissibility under section 212(a)(9)(B)(i)(II) of the Act.

Section 212(a)(9)(B) 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 indicates that the applicant accrued unlawful presence from April 1, 1997, the date the unlawful presence provisions were enacted until April 7, 1999, the date he filed an adjustment application. The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary] as a period of stay for purposes of determining bars to admission under section 212(a)(9)(B)(i)(I) and (II) of the Act. *See Memorandum on Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act,* dated May 6, 2009. Therefore, the applicant was inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year. Pursuant to section 212(a)(9)(B)(i)(I), the applicant was barred from again seeking admission within ten years of his February 26, 2000 departure. As it has now been over ten years since the applicant's last departure from the United States, the applicant is no longer inadmissible under section 212(a)(9)(B)(II) of the Act.

Although the applicant is no longer inadmissible under section 212(a)(9)(B)(II) of the Act, he is inadmissible under section 212(a)(2)(A)(i)(I) of the Act, for having committed crimes involving moral turpitude and under section 212(a)(6)(C)(i) of the Act, for having attempted to procure an immigration benefit by fraud or a material misrepresentation of a material fact when he filed a fraudulent asylum application in 1993.

In regards to the applicant's inadmissibility under section 212(a)(2)(A)(i)(I) of the Act, section 212(a)(2)(A) of the Act states, in pertinent parts:

> (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –

> (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

The Board of Immigration Appeals (Board) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

> [M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general....
>
> In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

In *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. First, in evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a "realistic probability, not a theoretical possibility," that the statute would be applied to reach conduct that does not involve moral turpitude. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). A realistic probability exists where, at the time of the proceeding, an "actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien's own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude." *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

However, if a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, "the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude." 24 I&N Dec. at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage inquiry in which the adjudicator reviews the "record of conviction" to determine if the conviction was based on conduct involving moral turpitude. *Id.* at 698-699, 703-704, 708. The record of conviction consists of documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.* at 698, 704, 708.

If review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. 24 I&N Dec. at 699-704, 708-709. However, this "does not mean that the parties would be free to

present any and all evidence bearing on an alien's conduct leading to the conviction. (citation omitted). The sole purpose of the inquiry is to ascertain the nature of the prior conviction; it is not an invitation to relitigate the conviction itself." *Id.* at 703.

As stated above, the record indicates that on May 6, 1997 the applicant pled guilty to attempted grand theft under Cal. Penal Code § 664/487(a) and was sentenced to 120 days in jail and three years of probation. On December 3, 1998, the applicant pled guilty to conspiracy to commit extortion under Cal. Penal Code §§ 182(a)(1) and 520. He was sentenced to 525 days in jail and five years of probation.

At the time of the applicant's conviction, Cal. Penal Code § 487(a) stated:

> Grand theft is theft committed in any of the following cases:
>
> (a) When the money, labor, or real or personal property taken is of a value exceeding four hundred dollars ($400)…

Cal. Penal Code § 484(a), provided, in pertinent part:

> Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft. . . .

The Ninth Circuit Court of Appeals in *Castillo-Cruz v. Holder* determined that theft under Cal. Penal Code § 484(a) requires the specific intent to deprive the victim of his or her property permanently, and is therefore a crime categorically involving moral turpitude. 581 F.3d 1154, 1160 (9th Cir. 2009). Furthermore, the fact that the applicant was convicted of attempting to commit grand theft does not lessen the depraved nature of the crime. Courts have found that attempted grand theft is a crime involving moral turpitude. *U.S. ex rel. Meyer v. Day*, 54 F.2d 336 (CA2 N.Y. 1931). In view of the holding in *Castillo-Cruz*, we find that the applicant's conviction for attempted grand theft constitutes a crime involving moral turpitude.

At the time of the applicant's conviction, Cal. Penal Code § 518 stated:

> Extortion is the obtaining of property from another, with his consent, or the obtaining of an official act of a public officer, induced by a wrongful use of force or fear, or under color of official right.

The applicant's conviction for conspiracy to commit extortion is also a crime involving moral turpitude. *Matter of F-*, 3 I. & N. Dec. 361 (BIA 1949), Criminal Code of Canada, § 451 (demanding property with menaces). *Matter of G- T-*, 4 I. & N. Dec. 446 (BIA 1951), 18 U.S.C. §

338, 338(a). It is well settled that a conspiracy to commit a certain crime involves moral turpitude if the underlying crime involves moral turpitude. *See Matter of P-*, 5 I. & N. Dec. 444, 446 (BIA 1953). Thus, the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having committed two crimes involving moral turpitude.

Lastly, the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act for having attempted to procure an immigration benefit by fraud or willful misrepresentation on August 1, 1993 when he submitted a fraudulent asylum application in order to gain employment authorization.[1]

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

> (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

The applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act, for having committed crimes involving moral turpitude and under section 212(a)(6)(C)(i) of the Act, for having attempted to procure an immigration benefit by fraud in 1993. He is eligible to apply for waivers of his inadmissibility under section 212(h) and section 212(i) of the Act.

Section 212(h) provides, in pertinent part:

> (h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if -
>
> . . .
>
> (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . .

Section 212(i) of the Act provides that:

> (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, son or daughter of a United States citizen or of an

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[1] An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Field Office does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

> alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

A waiver of inadmissibility under section 212(h) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse, parent, or child of the applicant. A waiver of inadmissibility under section 212(i) of the Act is also dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, but qualifying relatives under section 212(i) of the Act only include the U.S. citizen or lawfully resident spouse or parent of the applicant. Section 212(i) waivers do not include the applicant's U.S. citizen child as a qualifying relative. Thus, to be found admissible and to have both grounds of inadmissibility waived the applicant must show extreme hardship to his U.S. citizen wife. Then, if extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296, 301 (BIA 1996).

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez,* the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). 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. *Id.* 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 exclusive. *Id.* at 566.

The Board has also held that the common or typical results of removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. *See generally Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-J-O-*, 21

I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator "must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation." *Id.*

The actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. *See, e.g.*, *Matter of Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives 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 they would relocate). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. *See Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS,* 712 F.2d 401, 403 (9th Cir. 1983)); *but see Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

The record of hardship includes: counsel's brief; a statement from the applicant's spouse; a psychological assessment for the applicant's spouse; medical documents concerning the applicant's spouse and child; financial documentation, photographs and documentation regarding the applicant's spouse's business in San Diego, California; a statement from the applicant's spouse's parents; letters from the applicant's spouse's grandmothers; a letter from the applicant's spouse's sister; medical documentation for the applicant's mother-in-law; photographs of the applicant, his wife, her family, their newborn son, and of life in Nigeria; documentation showing that the applicant's spouse has been attempting to find employment in Nigeria; and extensive documentation as to country conditions in Nigeria.

In his brief counsel states that the applicant and his spouse have been married since 1997 and have a son, who was born on February 7, 2009. Counsel states that the applicant's son was born with hip dysplasia and a heart arrhythmia. Counsel asserts that the field office director did not give proper weight to the applicant's spouse's and child's medical conditions. He also states that the applicant's spouse owns a business in California and would not be able to find employment or afford medical care in Nigeria. Furthermore, counsel states that the applicant's spouse's parents rely on their daughter for emotional and psychological support and that the applicant's spouse currently lives with her parents.

The record indicates that the applicant is claiming emotional and financial hardship as a result of separation and emotional, medical, and financial hardship as a result of relocation.

The AAO finds that the applicant's spouse would suffer extreme hardship as a result of relocating to Nigeria. The record indicates that the applicant's spouse has significant ties to the United States. She was born and raised in the United States, all of her family lives in the United States, she has

significant student loan debt and other debt in the United States, and she is the owner of a small business in the United States.

In addition, medical documentation submitted indicates that the applicant's spouse and her child require continued medical treatment in the United States. The record indicates through the applicant's spouse's statement and medical documentation that the applicant's son suffers from a heart arrhythmia, congenital hip dysplasia, and a possible milk protein allergy which has not yet been formally diagnosed. In her statement, dated March 14, 2009, the applicant's spouse states that to treat her son's hip dysplasia he must wear a brace twenty-four hours each day. The applicant's spouse states that because of this bracing he will likely be developmentally delayed and he may need surgeries later in childhood. The applicant's spouse states that if his hip dysplasia is left untreated, or if treatment is not successful, her son will have difficulty walking, decreased mobility, bone degeneration, life-long joint pain and osteoarthritis. The applicant's spouse asserts that she is familiar with these symptoms because her mother has the same hip joint disorder and as an adult suffers from these same symptoms. In regards to her son's possible allergy to milk protein, the applicant's spouse expresses her concern over her son's ability to receive the proper care in Nigeria and the availability of the formula he currently drinks. She also states that because they do not yet know the extent of his allergy, receiving an immunization, which would contain cow serum or egg protein, is a risk for her son because it may not be compatible with his immune system. She states that he cannot receive the polio vaccine, which would be of great concern to her if they had to relocate to Nigeria because in Nigeria polio is endemic.

The applicant's spouse also suffers from medical problems that require ongoing treatment that she would not be able to obtain in Nigeria. The applicant's spouse states and documentation in the record shows that the applicant's spouse has had four procedures to remove cancerous lesions from her skin. She states that every time she travels to Nigeria, a country close to the equator, more spots appear on her body. She states that she also suffers from chronic, reoccurring yeast infections that can become so acute they trigger urinary tract infections. She states that every time she travels to Nigeria and takes prophylactic medication for malaria she develops a yeast infection, so she is not able to take the medication anymore and is at a greater risk for malaria. The applicant's spouse also expressed her concern over her severe environmental allergies and how the pollution and dust in Nigeria makes them worse.

Furthermore, the AAO finds that the record is clear that the country conditions in Nigeria would make life extremely difficult for the applicant's spouse and her son given his medical problems and her medical and psychological problems. The record includes documentation showing that the applicant's spouse has attempted, but has been unsuccessful at finding employment in Nigeria. The documentation provided also indicates that Nigeria is a developing country that experiences political instability and violence, that violent crime is a serious problem in the country and that the medical facilities in the country are poor. The record includes numerous U.S. State Department Reports concerning conditions in Nigeria and a police report showing that the applicant and his spouse were robbed at gunpoint in Nigeria. Moreover, the AAO acknowledges that the U.S. State Department has a current traveling warning issued on October 13, 2011 for Nigeria, which supports the statements made by the applicant's spouse regarding violent crime in the country.

The AAO also finds that the applicant's spouse has been experiencing extreme hardship as a result of separation. The applicant's spouse asserts that she is suffering psychologically from the applicant's current situation. She states that she continually suffers from severe bouts of depression, contemplates suicide, and has delusional fantasies about developing a severe illness or being in a horrible accident so that the applicant's waiver would be approved. She states that her family has a history of mental illness in that he mother was diagnosed with an anxiety disorder when she was 39 years old and that other members of her family have suffered from bipolar disorder and depression. The record does include a psychological assessment for the applicant's spouse, dated March 16, 2009 and completed by a [redacted] which stated that the applicant's spouse is clinically anxious and depressed and meets the criteria for a diagnosis of Generalized Anxiety Disorder and Major Depressive Disorder. [redacted] states that the applicant's spouse's depression began after the applicant's deportation. The AAO notes that the applicant and his spouse were married in 1997, the applicant was removed in 2000, and the psychological evaluation indicates that the applicant's spouse has been traveling to Nigeria two times a year to see the applicant.

The record indicates that aside from the emotional hardship separation is causing the applicant's spouse, she is also suffering financially. In her 2009 statement, the applicant's spouse states that when she and the applicant were married they had no debt and had $28,000 saved to buy a home together. She states that since the applicant's removal, every career choice she has made has been wholly driven by the applicant's immigration status. She states that in 1999, in preparation of relocating to Nigeria, she quit her job at the University of California, Irvine, that in 2003, she had to decline a job offer because it would not have allowed her to travel to Nigeria to see the applicant, and in 2004, finally decided to open a business with her sister in San Diego. She states further that since the applicant's removal she has incurred over $100,000 in debt from travel to Nigeria, student loans, phone bills, legal fees, and other costs of living. She states that she spends $1,700 paying just the interest every month on this debt. The applicant's spouse states that it is an extreme burden for her to pay for two households and to be a single parent to her son.

In sum, the medical conditions of the applicant's son and the applicant's spouse, the applicant's spouse's significant financial and familial ties to the United States, and the country conditions in Nigeria make relocating to Nigeria an extreme hardship for the applicant's spouse. Because the applicant has been found inadmissible for fraud, the separation would then likely be permanent. Given the prospect of permanent separation coupled with the psychological hardship the applicant's spouse has been experiencing, the existence of a new child with special needs, as well as the financial problems that the applicant's spouse has been facing, the AAO finds that separation would be and is an extreme hardship for the applicant's spouse.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the applicant bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

In evaluating whether section 212(h)(1)(B) and section 212(i) relief is warranted in the exercise of 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 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).

See Matter of Mendez-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance 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).

The AAO notes that because the applicant's conviction for conspiracy to commit extortion may be considered a violent or dangerous crime, the AAO must discuss whether the applicant is subject to 8 C.F.R. § 212.7(d) and whether he would warrant a waiver in accordance with 8 C.F.R. § 212.7(d).

In his brief, counsel states that the applicant's conviction for conspiracy to commit extortion is not a violent or dangerous crime. Counsel cites *Rivas-Gomez v. Gonzalez*, 441 F.3d 1072 (9th Cir. 2006) and states that in determining whether a crime is violent or dangerous one must look to the facts of the case and not make a categorical determination based on the statute for which the applicant was convicted. Additionally, counsel states that the field office director erred in assuming that a "crime of violence" is the equivalent of a "violent" or "dangerous" crime. He asserts that in accordance with *Matter of Jean,* 23 I&N Dec. 373 (A.G. 2002), a violent or dangerous crime must involve serious bodily harm causing death or near death injuries to the victim (a defenseless child) through repeated acts of violence.

Counsel states further that the definition of crime of violence under 18 U.S.C. § 16 is not the same definition codified in 8 C.F.R. 212.7(d) so that violent and dangerous are unique terms that should only be applied to acts that are extremely more serious than that described in 18 U.S.C. § 16. He states that the only guidance for what is meant by violent or dangerous can be found in *Matter of Jean*. Lastly, he states that the applicant's sentence was significantly less than the applicant in *Matter of Jean*, another indication that the applicant's crime is not serious enough to be found to be violent or dangerous.

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 field office director did not find that the applicant's conviction for conspiracy to commit extortion was a violent or dangerous crime nor did he apply the standard in 8 C.F.R. § 212.7(d) to the applicant's case. The record indicates that an immigration judge found that the applicant had been convicted of an aggravated felony under the definition of a crime of violence and this finding was determined to be moot by another immigration judge because the applicant was not a lawful permanent resident.

The AAO does note that we agree with counsel in that the words "violent" and "dangerous" and the phrase "violent or dangerous crimes" are not defined in the regulation, however the AAO is not aware of any precedent decisions or other authority containing a definition of these terms as used in 8 C.F.R. § 212.7(d).

As stated by counsel, 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, and as counsel stated, 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 dependant on it having been found to be a crime of violence under 18 U.S.C. § 16 or an aggravated felony under section 101(a)(43)(F) of the Act. *See* 67 Fed. Reg. 78675, 78677-78 (December 26, 2002).

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

Because the applicant's conviction for conspiracy to commit extortion could have been committed with violence or could have been committed without violence and the record is not clear as to

whether violence was involved, the AAO will not make a finding as to whether his conviction is a violent or dangerous crime.

However, the AAO does find that even if the applicant's conviction was for a violent or dangerous crime, the record indicates that the applicant's spouse has established that she would suffer hardship rising to the level of exceptional and extremely unusual hardship as a result of the applicant's inadmissibility. Furthermore, the positive factors in the applicant's case outweigh the adverse factors.

The adverse factors in the present case are the applicant's convictions for attempted grand theft and conspiracy to commit extortion as well as his submitting a fraudulent asylum claim to gain an immigration benefit. The AAO notes that the applicant's case includes mitigating circumstances in regards to these factors, namely the applicant's age at the time these acts were committed. The applicant was 17 years old when he submitted the fraudulent asylum application and was 22 and 23 years old at the time he committed the criminal offenses which led to his convictions. The AAO also notes that the applicant has now been living in Nigeria, a country he first left when he was only ten years old, for over ten years.

The favorable factors in the present case are the applicant's family ties to the United States; hardship to the applicant's family if he were to be denied a waiver of inadmissibility; and the applicant's lack of a criminal record or offense since 1998. In addition, the record includes twelve letters from family and friends attesting to the strength of the applicant's marriage and the applicant's good moral character. The record also includes a letter from the applicant's father-in-law's company stating that the applicant will have a position with the company upon his return to the United States and a letter from the applicant. In his letter, the applicant apologizes for the moral offenses he committed. He states that he is ashamed and remorseful of his actions. He also states that in the years he has been outside the United States he has grown up, become much wiser, more mature, and more humble. Finally, he states that at this time in his life his only desire is to work hard, take care of his family, and prove to his wife that their life can be good again.

The AAO finds that the crimes committed by the applicant are serious in nature and cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.