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

U.S. Citizenship and Immigration Services

H6

[redacted]

Date: JAN 03 2012 Office: GUATEMALA FILE: [redacted]

IN RE: Applicant: [redacted]

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

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Michael Shumway

for Perry Rhew
Chief, Administrative Appeals Office

**DISCUSSION**: The waiver application was denied by the Field Office Director, Guatemala, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Guatemala 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 been convicted of a crime involving moral turpitude (voluntary manslaughter); 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 seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), and section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v). The director concluded that the applicant had established extreme hardship to a qualifying relative, and denied the Application for Waiver of Ground of Excludability (Form I-601) as a matter of discretion.

On appeal, counsel indicates that in 1989 the applicant was convicted under California Penal Code § 192(a) for voluntary manslaughter and received a six-year prison sentence. Counsel states that the applicant was deported from the United States on May 5, 1995. Counsel argues that U.S. Citizenship and Immigration Services (USCIS) erred as a matter of fact and law in finding that the applicant is a threat to society and has not been rehabilitated. Counsel contends that USCIS applied the wrong rehabilitation standard. Citing *Matter of Roberts*, 20 I&N Dec. 294 (BIA 1991), counsel argues that except where a conviction is recent and serious, rehabilitation is not a prerequisite for a waiver. Thus, counsel contends that the applicant need not show rehabilitation to qualify for a waiver since his conviction is not recent. Counsel cites *Yepes-Prado v. INS*, 10 F.3d 1363, 1372 n.19 (9th Cir. 1993) and *Georgiu v. INS*, 90 F.3d 374 (9th Cir. 1994), and states that rehabilitation factors include "the lack of commission of any additional crimes; enrollment in and attendance at rehabilitation programs; statements of remorse; and letters of good character." 90 F.3d 374 at 377. Thus, counsel maintains that even if the applicant had to establish rehabilitation, the applicant has not committed any crimes for 20 years, while incarcerated the applicant attended rehabilitation programs, and the applicant has expressed remorse for his actions. Counsel maintains that the assumption that the applicant is a danger to society because the applicant committed a violent crime is plain error because statistics show recidivism for manslaughter is two percent (relates to vehicular manslaughter only), which is lower than that of other crimes. Counsel indicates that with the applicant's parent's support and love the applicant might live a peaceful existence. Counsel declares that the applicant paid his debt to society in serving his prison sentence.

Counsel contends that USCIS erred in stating that the applicant acted with premeditation. Counsel states that in California the crime of voluntary manslaughter is committed upon "a sudden quarrel or heat of passion," and lacks the elements of malice and premedication, which is required for murder. Counsel states that the applicant has a low intelligence quotient and lacked the mental capacity to premeditate his friend's murder and likely did not fully comprehend that stabbing his friend with a knife would result in his death. Citing *Matter of Roberts, supra*, counsel claims that it was improper for USCIS to go behind the record of conviction to reassess the applicant's ultimate guilt or innocence.

Counsel discusses USCIS's publication regarding the factors to be considered in the adjudication of the Form I-601. Counsel states that the applicant's voluntary manslaughter conviction is the only substantive negative factor. Counsel argues that in examining the nature of the applicant's offense as

a negative factor, USCIS should respect California's criminal justice system and handling of the crime. Counsel contends that a favorable exercise of discretion is warranted in view of the underlying facts of the case, which are the applicant's limited intelligence quotient, the elements of the voluntary manslaughter offense, the presence of extreme hardship, the passage of time since the crime and deportation, the applicant's family members in the United States, and the absence of any bad acts since 1989. Counsel maintains that USCIS failed to balance the favorable and unfavorable factors in the applicant's case.

Lastly, counsel argues that the applicant does not require a waiver for unlawful presence.

We will first address the finding of inadmissibility for unlawful presence. Inadmissibility for unlawful presence is under section 212(a)(9)(B) of the Act. That section provides, in part:

> (B) Aliens Unlawfully Present
>
> > (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-
> >
> > > (I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . and again seeks admission within 3 years of the date of such alien's departure or removal, or
> > >
> > > (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.
>
> . . . .

USCIS records reflect that the applicant entered the United States as a visitor on a nonimmigrant visa on February 3, 1987 with authorization to remain in the United States for a temporary period, not to exceed six months. On December 9, 1988, the applicant filed an asylum application, which was denied on September 9, 1993. On October 11, 1990, the applicant was convicted of voluntary manslaughter in California, and was sentenced to confinement for six years. On January 31, 1995, the applicant was personally served with an Order to Show Cause and Notice of Hearing dated December 15, 1993. On May 5 1995, an immigration judge ordered that the applicant be deported to Guatemala, and on the same day a warrant of deportation was issued. On May 15, 1995, the applicant was removed from the United States. The unlawful presence provisions went into effect on April 1, 1997. Thus, the applicant is not inadmissible under section 212(a)(9)(B)(i)(II) of the Act as he has not accrued any unlawful presence.

The applicant was found to be inadmissible for having committed a crime involving moral turpitude. 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 . . . 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.)

To determine if a crime involves moral turpitude, the Ninth Circuit Court of Appeals first applies the categorical approach. *Nunez v. Holder*, 594 F.3d 1124, 1129 (9th Cir. 2010) (citing *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 999 (9th Cir.2008). This approach requires analyzing the elements of the crime to determine whether all of the proscribed conduct involves moral turpitude. *Nicanor-Romero, supra* at 999. In *Nicanor-Romero*, the Ninth Circuit states that in making this determination there must be "a realistic probability, not a theoretical possibility, that the statute would be applied to reach conduct that did not involve moral turpitude. *Id.* at 1004 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). A realistic probability can be established by showing that, in at least one other case, which includes the alien's own case, the state courts applied the statute to conduct that did not involve moral turpitude. *Id.* at 1004-05. *See also Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008) (whether an offense categorically involves moral turpitude requires reviewing the criminal statute to determine if there is a "realistic probability, not a theoretical possibility," that the statute would be applied to conduct that is not morally turpitudinous).

The applicant was convicted of voluntary manslaughter in violation of Cal. Penal Code § 192(a) on October 11, 1990. He was convicted and sentenced to serve six years imprisonment, and his term of imprisonment was increased for an additional year because of use of a deadly weapon (a knife) in the commission of the crime.

At the time of the applicant's conviction, Cal. Penal Code § 192(a) stated that "Manslaughter is the unlawful killing of a human being without malice. It is of three kinds . . . Voluntary--upon a sudden quarrel or heat of passion." Voluntary manslaughter is generally held to be a crime involving moral

turpitude with criminal intent being inferred from the voluntary aspect of the crime. *Matter of Chavez-Calderon*, Int. Dec. 3212 (BIA 1993). Thus, we find the offense of which the applicant was convicted, voluntary manslaughter, is a crime categorically involving moral turpitude, rendering the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The applicant was convicted of voluntary manslaughter with a deadly weapon. 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). 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 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, we will use the definition of a crime of violence found in 18 U.S.C. § 16 as guidance in determining whether a crime is a violent crime under 8 C.F.R. § 212.7(d), considering also other common meanings of the terms "violent" and "dangerous". The term "dangerous" is not defined specifically by 18 U.S.C. § 16 or any other relevant statutory provision. Thus, in general, we interpret the terms "violent" and "dangerous" in accordance with their plain or common meanings, and consistent with any rulings found in published precedent decisions addressing discretionary denials under the standard described in 8 C.F.R. § 212.7(d). Decisions to deny waiver applications on the basis of discretion under 8 C.F.R. § 212.7(d) are made on a factual "case-by-case basis." 67 Fed. Reg. at 78677-78.

The AAO finds that voluntary manslaughter with a dangerous weapon is a violent crime. In the instant case, as we find that there are not national security or foreign policy considerations that would warrant a favorable exercise of discretion, the applicant must, in addition to the statutory requirement of proving extreme hardship, demonstrate that denial of admission would result in exceptional and extremely unusual hardship to a qualifying relative.

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 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 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 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 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.*

We note that 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.").

The director determined that the applicant established that the bars to his admission would result in extreme hardship to his qualifying relative parents. The director stated that the applicant's father was involved in an automobile accident in 1994 and has facial and head disfigurement, vision problems, multiple spinal injuries, and permanent pain from the neurological damage, and has diabetes. The director conveyed that the applicant's mother has diabetes and hypertension and facial paralysis resulting from two strokes in 1995 and 1996. But the director concluded that the negative factor of the felony voluntary manslaughter conviction failed to establish the applicant's reformation or rehabilitation.

We find that the applicant has not demonstrated that his parents would experience exceptional and

extremely unusual hardship if the waiver is denied. The record reflects that the applicant has been under psychiatric treatment since 1995 for major depression and is unable to work due to his condition. Thus, the applicant's parents would not be financially dependent on him. The applicant's parents express in their letters their remorse for their son's crime, stating that they should have offered more support to him as a child. However, this does not demonstrate the exceptional and extremely unusual hardship they will experience if the waiver is denied.

Counsel's arguments on appeal pertain to the applicant's rehabilitation. Counsel cites *Matter of Roberts* and contends that the applicant need not show rehabilitation to qualify for a waiver since his conviction is not recent. However, in *Matter of Roberts*, the Board states that applicants who have a criminal record "will ordinarily be required to present evidence of rehabilitation before relief is granted as a matter of discretion," and that with regard to convicted aliens rehabilitation is a significant discretionary factor. 20 I&N Dec. 294 at 299. The Board emphasized that the nature of the underlying crime must be examined in determining the degree of equities that are required to overcome the crime, and that in some cases the seriousness of the crime may still not be overcome by the equities demonstrated. *Id.*

Counsel argues that the applicant has attended rehabilitation programs and expressed remorse for his actions. The record before the AAO reflects that the applicant has not been arrested or convicted of any crimes since he committed voluntary manslaughter on September 9, 1989. But the applicant has not submitted any evidence of his completion of rehabilitation programs, and has not provided any statement expressing remorse for his actions. The record contains no letters attesting to the applicant's good character.

Counsel argues that even though the applicant committed a violent crime the applicant is not a danger to society because statistics show that recidivism for vehicular manslaughter is two percent. But counsel has not demonstrated that recidivism for the crime of vehicular manslaughter is applicable to voluntary manslaughter generally. Moreover, counsel has not provided a copy of the statistics for vehicular manslaughter.

Counsel states that the applicant is 42 years old and has an intelligence quotient below 70 and the equivalent of a third grade education. Counsel indicates that the applicant came to the United States at a young age with his family. Counsel conveys that the applicant left home at a young age due to arguments with his father, and that the applicant's father refused to allow the applicant to return home. Counsel indicates that the applicant had severe depression and used controlled substances due to the rejection. Counsel states that when the applicant was 21 years old the applicant's friend provoked the applicant into an argument in which the applicant lost self-control and stabbed his friend with a knife. Counsel indicates that with the applicant's parent's support and love the applicant might live a peaceful existence. Counsel declares that the applicant paid his debt to society in serving his prison sentence.

Even were we to find that the applicant has established exceptional and extremely unusual hardship to his parents, in view of the gravity of the alien's underlying criminal offense (stabbing his roommate multiple times with a deadly weapon, a butcher knife, due to a quarrel), we find that a showing of extraordinary circumstances is not sufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act.

In discretionary matters, the applicant bears the full burden of proving his or her eligibility for discretionary relief. *See Matter of Ducret,* 15 I&N Dec. 620 (BIA 1976). Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.