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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: MAR 15 2013 OFFICE: ST. LOUIS FILE:

IN RE:

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

ON BEHALF OF APPLICANT:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, St. Louis, Missouri, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Turkey 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 a crime involving moral turpitude. The applicant is also 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 more than one year and seeking readmission within 10 years of his last departure. The applicant seeks a waiver of inadmissibility in order to remain in the United States with his U.S. citizen spouse and child.

The Field Office Director concluded that the positive factors in favor of the applicant were outweighed by the negative factors, and denied the application accordingly. *See Decision of the Field Office Director*, dated January 4, 2011.

On appeal, counsel for the applicant asserts the applicant is only inadmissible to the United States for unlawful presence pursuant to section 212(a)(9)(B)(i)(II) of the Act. Counsel further asserts that the field office director failed to properly consider extreme hardship to the applicant's spouse. Counsel contends that the applicant's spouse would suffer financial and emotional hardship upon separation from the applicant and would suffer extreme hardship upon relocation based upon her ties to the United States and the standard of living that she would leave behind.

In support of the waiver application and appeal, the applicant submitted an affidavit, an affidavit from his spouse, identity documents, family photographs, a letter from the applicant's mother, letters of support, medical documentation concerning the applicant's spouse, country conditions reports concerning Turkey, and background documents concerning the loss of a child. The entire record was reviewed and considered in rendering a decision on the appeal.

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 –
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> > (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.
>
> (ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-
>
> > (I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to

> a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or
>
> (II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

The Board of Immigration Appeals (BIA) 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. It is noted that the applicant's convictions arise in the Eight Circuit, which held in *Bobadilla v. Holder*, 679 F.3d 1052 (8th Cir. 2012) that the *Silva-Trevino* methodology is a reasonable statutory interpretation and deserving of deference.

The field office director found the applicant to be inadmissible for having been convicted of crimes involving moral turpitude. The applicant disputes his inadmissibility on this basis, noting that the Board of Immigration Appeals (BIA), in a November 13, 2006 decision, determined that the statute under which the applicant was convicted included a broad spectrum of misconduct that may or may not involve moral turpitude. It is noted that the BIA made this determination in the applicant's case prior to the holding of the Attorney General in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008).

The applicant asserts that since he was only convicted of municipal violations, he has not been convicted for immigration purposes as defined by section 101(a)(48)(A) of the Act. The applicant submitted an unpublished BIA case in support of his assertion that a municipal violation in Missouri is not a conviction because it involves civil matters and does not bar state criminal prosecution. *Fikret Bajric*, (BIA November 30, 2010).

In published decisions, the BIA has previously addressed the issue of whether a municipal violation constitutes a conviction for immigration purposes. In *Matter of Cuellar-Gomez*, 25 I&N Dec. 850 (BIA 2012), the BIA determined that a formal judgment of guilt entered by a Wichita municipal court qualified as a conviction under section 101(a)(48)(A) of the Act, where the judge had the authority to enter judgments of guilt and impose fines or incarceration, the burden of proof was beyond a reasonable doubt, and a judgment of guilt was a valid conviction for calculating a defendant's criminal history under state sentencing laws. *See Matter of Eslamizar*, 23 I&N Dec. 684 (BIA 2004) (finding that a municipal conviction is not a conviction for immigration purposes when the burden of proof was "by a preponderance of the evidence" rather than "beyond a reasonable doubt").

This applicant was convicted of municipal violations under the Joplin, Missouri Code of Ordinances. It is acknowledged that Missouri court cases indicate that violations of municipal

ordinances are civil matters. *See City of Stratford v. Croxdale*, 272 S.W.3d 401 (Mo. Ct. App. 2008). However, proceedings in Joplin municipal court, in function and powers, fit the description of the "genuine criminal proceedings" contemplated by the Board in *Cuellar-Gomez*, 25 I&N Dec. at 852. Like the Wichita municipal court in *Cuellar-Gomez*, Joplin municipal court's judges are imbued with the authority to enter judgments of guilt and impose fines or incarceration. *See* Joplin City Ordinances § 9.01, § 1-5. Convictions in municipal court proceedings are entered only after assistant city attorneys satisfy their burden of proof beyond a reasonable doubt. *See Croxdale*, 272 S.W.3d at 404. Finally, a judgment of guilt in Missouri municipal courts is a valid conviction for determining a defendant's criminal history under state penal laws. *See State v. Severe*, 307 S.W.3d 640 (Mo. banc 2010) (finding that a municipal DWI conviction serves as a prior alcohol-related offense for persistent offender charges unless explicitly disallowed by statute). Accordingly, as the Joplin municipal court is comparable to the Wichita municipal court in *Cuellar-Gomez*, 25 I&N at 3, in the elements deemed relevant by the BIA in determining "genuine criminal proceedings," the AAO finds that the applicant's Joplin municipal court convictions are convictions for immigration purposes.

The record reflects that the applicant was convicted of domestic assault on May 14, 2003 pursuant to Joplin City Ordinance § 82-72. The applicant was also convicted of a count of domestic assault and a second count of assault on the same date and pursuant to the same ordinance, based upon a separate incident.

Joplin City Ordinance § 82-72 provides, in pertinent part:

> A person shall commit the offense of assault if:
>
> (1) He attempts to cause or recklessly causes physical injury to another person; or,
>
> (2) With criminal negligence, as that term is defined in RSMo 562.016, he causes physical injury to another person by means of a deadly weapon; or,
>
> (3) He purposely places another person in apprehension of immediate physical injury; or,
>
> (4) He recklessly engages in conduct which creates a grave risk of death or serious physical injury to another person as that term is defined in RSMo 565.002(b); or,
>
> (5) He knowingly causes physical contact with another person knowing the other person will regard the contact as offensive or provocative.

This section of the statute does not include a penalty for a violation of its provisions. However, the notes for this statute indicate that this section of the ordinance was amended on April 6, 1998. Joplin

City Ordinance section 1-18 provides that in the case of any amendment for which a penalty is not provided, the general penalty shall apply. Section 1-5 indicates that the general penalty for any provision in the code is a fine of 500 dollars, 100 days in jail, or both.

As noted by the BIA, the assault ordinance under which the applicant was convicted punishes both conduct involving and conduct outside of moral turpitude. Simple assault or battery has been found to not involve moral turpitude for purposes of immigration law, even if the intentional infliction of physical injury is an element of the crime. *Matter of Fualaau*, 21 I&N Dec. 475,477 (BIA 1996). This rule does not apply where an assault or battery involved some aggravating dimension, such as the use of a deadly weapon or the infliction of serious injury on persons whom society views as deserving of special protection, such as children, domestic partners or peace officers.

Pursuant to a second-stage *Silva-Trevino* inquiry, the applicant's conviction record does not indicate the subsection of the Joplin City Ordinance assault statute under which he was convicted, but states that the applicant was convicted of two counts of domestic assault. As there is no other statute in the Joplin City Ordinance addressing domestic assault and the assault of a domestic partner would constitute assault upon a person deserving special protection, a review of other pertinent evidence is warranted. Further, a review of the applicant's conviction record does not resolve the issue of whether the applicant was convicted under a subsection involving moral turpitude, which prompts a third-stage *Silva-Trevino* inquiry.

The Joplin police report from the applicant's first assault, taking place on May 6, 2003, states that the applicant was in an argument with his then-spouse, hit her in the face two times, and shoved her down a small flight of stairs. The Joplin police report from the applicant's second assault, taking place on May 8, 2003, states that the applicant and his spouse were in the process of a divorce and arguing about a vehicle in a parking lot. The applicant grabbed his former spouse by the neck and pulled her toward the vehicle. When a security guard attempted to intervene, the applicant attempted to run the guard over with the vehicle and struck her with the car door. Both victims were observed with red marks on their arms.

The evidence in the record pertaining to the applicant's convictions demonstrates that the applicant attempted to inflict physical injury on his domestic partner. He also recklessly engaged in conduct with a grave risk of death or serious physical injury when he attempted to run over a security guard with his vehicle, a dangerous weapon. The BIA has found that an element of reckless conduct must be coupled with an offense of serious bodily harm or the use of a weapon to be deemed a crime involving moral turpitude. *Matter of Fualaau*, 21 I&N Dec. 475, 477 (BIA 1996). The AAO finds, therefore, that the applicant's convictions are for crimes involving moral turpitude and the applicant is inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act.

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

(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.

. . . .

(v) Waiver.-The Attorney General has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

The applicant entered the United States with an F-1 visa on May 8, 2000 and remained in the United States despite a failure to reinstate his F-1 status. The applicant was placed into immigration proceedings and ordered removed by an immigration judge on January 25, 2005. The BIA, on November 13, 2006, acknowledged that the applicant conceded his removability under section 237(a)(1)(B) of the Act. The applicant remained in the United States until he was removed on March 19, 2009. Accordingly, the applicant accrued over one year of unlawful presence in the United States, and he is inadmissible under section 212(a)(9)(B)(i)(II) of the Act. The applicant does not contest his inadmissibility on appeal.

A section 212(h) waiver of the bar to admission resulting from section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse, parent, or child of the applicant. Hardship to the applicant is not considered in section 212(h) waiver proceedings unless it causes hardship to a qualifying relative, in this case the applicant's spouse. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez,* 21 I&N Dec. 296 (BIA 1996). The applicant is also applying for a 212(a)(9)(B)(v) waiver of the bar to admission resulting from section 212(a)(9)(B)(i)(II) of the Act.

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 reflects that the applicant is a 38-year-old native and citizen of Turkey and the applicant's spouse is a 27-year-old native of Uzbekistan and citizen of the United States. The applicant and his spouse are currently residing in St. Louis, Missouri.

Counsel for the applicant asserts that the applicant's spouse cannot be separated from the applicant because their family is grieving and healing after the loss of a child. The record contains a death certificate for one of the applicant's children, dated June 27, 2010. The record also reflects that the applicant was paroled into the United States on February 8, 2010 based upon his son's diagnosis of a rare brain tumor. The applicant's spouse contends that she is constantly thinking about her deceased son, but that she is comforted by the presence of the applicant and could not cope without him. The record contains evidence that the applicant's spouse and the applicant are attending a grief counseling support group. The record also contains a psychological evaluation of the applicant's spouse stating that she is suffering from a moderate to severe episode of major depressive disorder and that her disorder will increase in severity if separated from her husband. The applicant's spouse stated that since the loss of her son, she has felt increasingly depressed. The applicant's spouse also asserts that in the wake of her loss, she needs the applicant to assist her in raising their other child.

The applicant's spouse also asserts that she would also suffer financially in the absence of the applicant. The applicant's spouse contends that she will not be able to pay her household bills on her income alone and that she will be unable to afford to visit the applicant in Turkey. It is noted that the record does not contain information concerning the current income of the applicant's spouse or the applicant. The record also does not contain information concerning the applicant's spouse's household bills. The record contains evidence that the applicant's spouse received governmental assistance while the applicant resided in Turkey, but there is insufficient evidence to demonstrate that she was unable to support herself with this assistance in the absence of the applicant.

The applicant's spouse asserts that she cannot relocate to Turkey to reside with the applicant because she has already been forced to start over in a new country. It is noted that the applicant's spouse is a native of Uzbekistan. Counsel for the applicant asserts that the applicant's spouse arrived in the United States as a refugee at the age on 19, after attempts to resettle in Azerbaijan and Russia. Counsel contends that the applicant's spouse already struggled to acclimate to a new culture and learn a new language upon her arrival in the United States and would face this struggle anew if she relocated to Turkey.

Counsel for the applicant also asserts that the applicant's spouse would leave behind ties in the United States if she relocated to Turkey. The applicant's spouse contends that her son is buried in St. Louis and that she visits his grave regularly. The applicant's spouse also asserts that she is very close with her mother after enduring so much history together. According to the applicant's spouse, she lives next door to her mother, who speaks little English and is highly dependent on the

applicant's spouse to translate, help manage her finances and small business, and take her to her doctor's appointments. The applicant's spouse asserts that she sees her mother every single day and that nobody else could provide this level of care to her mother.

Counsel for the applicant contends that the applicant's spouse would also fear for her safety and medical care if she relocated to Turkey. As noted by counsel, the Department of State Country Specific Information for Turkey, dated January 8, 2013, states that there have been violent attacks throughout Turkey, and there is a continuing threat of terrorist actions and violence against U.S. citizens and interests throughout Turkey. The applicant's spouse states that she suffers from a heart condition called supra-ventricular tachycardia (SVT) for which she had to visit the emergency room when she was pregnant. The record contains medical documentation indicating that the applicant's spouse was seen in the emergency room for rapid heartbeats and shortness of breath. The record indicates that the applicant's spouse currently takes Metroprolol and a recent heart monitor test detected no episodes of SVT.

Considered in the aggregate, the applicant has established that his spouse would face extreme hardship if his waiver request is denied. Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. In discretionary matters, the alien 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). We must "balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country. " *See Matter of Mendez-Moralez,* 21 I&N Dec. 296, 300 (BIA 1996).

As the applicant has been convicted of assault in violation of Joplin City Ordinance § 82-72, a dangerous and violent crime, he must also demonstrate that the denial of his application would result in exceptional and extremely unusual hardship.

8 C.F.R. § 212.7(d) provides, in pertinent part:

> Criminal grounds of inadmissibility involving dangerous or violent crimes. The Attorney General [Secretary], in general, will not favorably exercise discretion under section 212(h)(2) of the Act . . .in cases involving violent or dangerous crimes, except...in cases in which the 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. . . .

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*. Given that the applicant's crimes involve actual physical attacks, the AAO finds that the applicant's convictions render him subject to the heightened discretion standard of 8 C.F.R. § 212.7(d).

Accordingly, the applicant must show that "extraordinary circumstances" warrant approval of the waiver. 8 C.F.R. § 212.7(d). Extraordinary circumstances may exist in cases involving national security or foreign policy considerations, or if the denial of the applicant's admission would result in exceptional and extremely unusual hardship. *Id.* Finding no evidence of foreign policy, national security, or other extraordinary equities, 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". *Id.*

The exceptional and extremely unusual hardship standard is more restrictive than the extreme hardship standard. *Cortes-Castillo v. INS*, 997 F.2d 1199, 1204 (7th Cir. 1993). Since the applicant is subject to 8 C.F.R. § 212.7(d), merely showing extreme hardship to his qualifying relatives under section 212(h) of the Act is not sufficient. He must meet the higher standard of exceptional and extremely unusual hardship.

Based upon the evidence submitted,the AAO finds that the applicant has demonstrated that the hardship his spouse would also suffer exceptional and extremely unusual hardship if the

applicant's waiver application were denied. The AAO therefore finds that the applicant has established the requisite level of hardship.

For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Id.* at 299. The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

The AAO notes that *Matter of Marin*, 16 I & N Dec. 581 (BIA 1978), involving a section 212(c) waiver, is used in waiver cases as guidance for balancing favorable and unfavorable factors and this cross application of standards is supported by the Board of Immigration Appeals (BIA). In *Matter of Mendez-Moralez*, the BIA, assessing the exercise of discretion under section 212(h) of the Act, stated:

> We find this use of *Matter of Marin, supra*, as a general guide to be appropriate. For the most part, it is prudent to avoid cross application, as between different types of relief, of particular principles or standards for the exercise of discretion. *Id.* However, our reference to *Matter of Marin, supra,* is only for the purpose of the approach taken in that case regarding the balancing of favorable and unfavorable factors within the context of the relief being sought under section 212(h)(1)(B) of the Act. *See, e.g., Palmer v. INS*, 4 F.3d 482 (7th Cir.1993) (balancing of discretionary factors under section 212(h)). We find this guidance to be helpful and applicable, given that both forms of relief address the question of whether aliens with criminal records should be admitted to the United States and allowed to reside in this country permanently.

Matter of Mendez-Moralez at 300.

In *Matter of Mendez-Moralez*, in evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the BIA stated that:

> The factors adverse to the applicant include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature, recency and seriousness, and the presence of other evidence indicative of an 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 the alien began his 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 and service to the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character

(e.g., affidavits from family, friends, and responsible community representatives). . . .

Id. at 301.

The BIA further states that upon review of the record as a whole, a balancing of the equities and adverse matters must be made to determine whether discretion should be favorably exercised. The equities that the applicant for section 212(h)(1)(B) relief must bring forward to establish that he merits a favorable exercise of administrative discretion will depend in each case on the nature and circumstances of the ground of exclusion sought to be waived and on the presence of any additional adverse matters, and as the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence. *Id.* at 301.

The favorable factors include the exceptional and extremely unusual hardship the applicant's spouse would experience whether she remained in the United States, separated from the applicant, or accompanied the applicant in Turkey, as well as hardship to the applicant's other U.S. citizen and lawful permanent resident relatives. The unfavorable factors in this matter include the applicant's immigration violations including unlawful presence in the United States and his prior criminal record.

Although the applicant's violations of immigration and criminal law cannot be condoned, the positive factors in this case outweigh the negative factors such that a favorable exercise of discretion is warranted. In these proceedings, the burden of establishing eligibility for the waiver rests entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met her burden and the appeal will be sustained.

ORDER: The appeal is sustained.