U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF M-A-P-

DATE: SEPT. 23, 2015

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Applicant, a native and citizen of El Salvador, seeks a waiver of inadmissibility. *See* Immigration and Nationality Act (INA, or the Act) § 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v) and § 212(h), 8 U.S.C. § 1182(h). The Director, Nebraska Service Center, denied the application and also denied a motion to reopen and reconsider. The matter is now before us on appeal. The appeal will be dismissed.

The Director found that the Applicant was convicted of a violent or dangerous crime and that although he established his qualifying relative spouse would experience extreme hardship without him, the Applicant did not establish exceptional and extremely unusual hardship to her. The Director denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly.

On appeal, the Applicant asserts that he did not commit a violent or dangerous crime and even if he did, he has established that his U.S. citizen spouse and children would experience exceptional and extremely unusual hardship.

The record includes, but is not limited to, statements from the Applicant, his spouse, and their daughter; counsel's briefs; social-worker evaluations of the Applicant's spouse and children; financial records; medical records; statements of support; an article on the importance of fathers; and country-conditions information about El Salvador. The entire record was reviewed and considered in arriving at a decision on the appeal.

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

> (B) Aliens Unlawfully Present.-
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> > (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-
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> . . . .

> (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.
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> . . . .
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> (v) Waiver.-The Attorney General [now Secretary of Homeland Security (Secretary)] 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 [Secretary] 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 [Secretary] regarding a waiver under this clause.

The record reflects that Applicant entered the United States without inspection in or around November 1988; he was ordered deported *in absentia* on October 19, 1989; he filed Form I-589, Application for Asylum and Withholding of Removal, on October 19, 1995; the Form I-589 was denied on September 29, 2006; he filed Form I-485, Application to Register Permanent Residence or Adjust Status, on November 17, 2007; an immigration judge found him ineligible for suspension of deportation but granted him voluntary departure on June 26, 2009; the Board of Immigration Appeals (the Board) dismissed his appeal on September 28, 2010, and granted him 30 days to voluntarily depart the United States; and he timely departed the United States on October 22, 2010. His spouse subsequently filed a Form I-130, Petition for Alien Relative, on his behalf that was approved on April 25, 2011. The Applicant accrued unlawful presence from September 29, 2006, the date his Form I-589 was denied, until November 17, 2007, the date he filed Form I-485. The Applicant is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act, for being unlawfully present in the United States for a period of one year or more and seeking readmission within ten years of his departure from the United States. The Applicant does not contest this finding of inadmissibility on 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.

Section 212(h) of the Act provides, in pertinent part, that:

> The [Secretary] may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana . . . .
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> (1) (A) in the case of any immigrant it is established to the satisfaction of the [Secretary] that –
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> (i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,
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> (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
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> (iii) the alien has been rehabilitated; or
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> (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . .; and
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> (2) the [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

The Board of Immigration Appeals (BIA) stated 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.

In a 2013 decision, the Supreme Court held that sentencing courts may not apply the modified categorical approach when the crime of which the defendant was convicted has a single, indivisible set of elements. *Descamps v. United States*, 133 S. Ct. 2276 (2013). The Court noted that the modified categorical approach was developed so that when a statute was divisible and referred to several different crimes, "courts could discover which statutory phrase, contained within a statute listing several different crimes, covered a prior conviction." *Id.* at 2284-85 (quoting *Nijhawan v. Holder*, 557 U.S. 29, 41 (2009) (internal quotation marks omitted)); *see also Johnson v. United States*, 559 U.S. 133, 144 (2010) ("[T]he 'modified categorical approach' that we have approved permits a court to determine which statutory phrase was the basis for the conviction.").

In *Matter of Chairez-Castrejon*, the BIA revisited its method of determining whether a statute is divisible and held that the approach to divisibility applied in *Descamps* also applied in the immigration context. 26 I&N Dec. 349, 352-5 (BIA 2014) (reconsidering *Matter of Lanferman*, 25 I & N Dec. 721 (BIA 2012), and ultimately "withdraw[ing] from that decision to the extent that it is inconsistent with *Descamps.*"). The BIA noted that after *Descamps*, a criminal statute is divisible "only if (1) it lists multiple discrete offenses as enumerated alternatives or defines a single offense by reference to disjunctive sets of 'elements,' more than one combination of which could support a conviction; and (2) at least one, but not all, of those listed offenses or combinations of disjunctive elements is a categorical match" to the relevant generic offense. *Id.* at 353. The BIA further explained that for purpose of determining whether a statute is truly divisible, an offense's elements are those facts about the crime which "[t]he Sixth Amendment contemplates that a jury--not a sentencing court--will find . . . unanimously and beyond a reasonable doubt." *Id.* at 353 (quoting *Descamps* at 2288 (citing *Richardson v. United States*, 526 U.S. 813, 817 (1999)). The BIA found that a statute was not divisible merely because it "disjunctively enumerated intent, knowledge, and recklessness as alternative mental states" and further stated that the statute "can be 'divisible' into three separate offenses with distinct mens rea only if . . . jury unanimity regarding the mental state" was required. *Id.* at 352-354. As it had not been established that jury unanimity was required, the BIA held that the alternative mens rea were merely alternative "means" of committing the crime rather than alternative "elements" of the offense. *Id.* at 355.

The record reflects that the Applicant was convicted on [redacted] 1993, of aggravated assault in violation of Texas Penal Code § 22.02(a)(2), and he received six years of deferred adjudication.

Texas Penal Code § 22.02(a)(2) stated, at the time of the Applicant's conviction:

> (a) A person commits an offense if the person commits assault as defined in Section 22.01 of this code and the person:
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> (1) causes serious bodily injury to another, including the person's spouse;

> (2) threatens with a deadly weapon or threatens to cause bodily injury or causes bodily injury to a member of the Board of Pardons and Paroles or the Texas Board of Criminal Justice, an employee of the pardons and paroles division of the Texas Department of Criminal Justice, . . . a peace officer, or a jailer, guard, or other employee of a municipal or county jail, the institutional division of the Texas Department of Criminal Justice, or a correctional facility . . . , when the person knows or has been informed the person assaulted is a member of the Board of Pardons and Paroles or the Texas Board of Criminal Justice, an employee of the pardons and paroles division . . ., a peace officer, or a jailer, guard, or other employee:
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> > (A) while the member of the Board of Pardons and Paroles or Texas Board of Criminal Justice, employee of the pardons and paroles division . . ., peace officer, jailer, guard, or other employee is lawfully discharging an official duty; or
> >
> > (B) in retaliation for or on account of an exercise of official power or performance of an official duty as a member of the Board of Pardons and Paroles or Texas Board of Criminal Justice, an employee of the pardons and paroles division, . . . a peace officer, or a jailer, guard, or other employee[.]

As the Applicant does not contest his inadmissibility for committing aggravated assault, and the record does not show the determination that this is a crime involving moral turpitude to be in error, we will not disturb the finding of inadmissibility under section 212(a)(2)(A) of the Act.

The record reflects that the Director found that the Applicant's spouse would experience extreme hardship. We will not disturb this finding. As such, the Applicant has met the extreme hardship requirement of sections 212(a)(9)(B)(v) and 212(h)(1)(B) of the Act.

We note that, in the alternative to section 212(h)(1)(B) of the Act, the Applicant may be eligible for a waiver under section 212(h)(1)(A) of the Act. Section 212(h)(1)(A) of the Act provides that the Secretary may, in his discretion, waive the application of subparagraph (A)(i)(I) of subsection (a)(2) if the activities for which an individual is inadmissible occurred more than 15 years before the date of the application for a visa, admission, or adjustment of status. In examining whether the Applicant is eligible for a waiver, we will assess whether he meets the requirements of section 212(h)(1)(A) of the Act. An application for admission to the United States is a continuing application, and admissibility is determined on the basis of the facts and the law at the time the application is finally considered. *Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992) (citations omitted).

Since the activities for which the Applicant is inadmissible occurred more than 15 years ago, the inadmissibility may be waived under section 212(h)(1)(A)(i) of the Act. Section 212(h)(1)(A) of the Act requires that the Applicant's admission to the United States not be contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated.

The record does not reflect that admitting the Applicant would be contrary to the national welfare, safety, or security of the United States per section 212(h)(1)(A)(ii) of the Act. There is no indication that the Applicant has ever relied on the government for financial assistance. In addition, he paid taxes while in the United States. The record reflects that the Applicant has DWI convictions from 1992, 2001 and 2008; an assault conviction from 1996; and the aforementioned aggravated assault conviction from 1993. He has not had legal problems since 2008, and most of his convictions occurred many years ago. There is no indication that the Applicant poses any security issues.

The Applicant asserts that he attended Alcoholics Anonymous (AA) meetings frequently before his voluntary departure from the United States; he is the cornerstone for his family and source of financial support; and he has never had any issues with drugs. The record includes an AA meetings report for the Applicant from 2009. The Applicant's spouse states that the Applicant has not consumed alcohol since his last arrest, and the Applicant states that he has not had any alcohol since 2008. The record also shows by a preponderance of the evidence that the Applicant has been rehabilitated, per section 212(h)(1)(A)(iii) of the Act. The record reflects that the Applicant has not had legal problems since 2008. The Applicant submits statements of remorse and acknowledges his poor judgment. Accordingly, the Applicant has shown that he meets the requirement of section 212(h)(1)(A)(iii) of the Act. Based on the foregoing, the Applicant has shown that he has satisfied the requirements under section 212(h)(1)(A) of the Act.

Based on the foregoing, the Applicant has shown that he is eligible for consideration for a waiver under sections 212(h)(1)(A) and 212(h)(1)(B) of the Act. Once eligibility for a waiver is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion in favor of the waiver. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296, 301 (BIA 1996). A favorable exercise of discretion is limited in the case of an Applicant who has been convicted of a violent or dangerous crime. Specifically, 8 C.F.R. § 212.7(d) provides:

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

The words "violent" and "dangerous" and the phrase "violent or dangerous crimes" are not further defined in the regulation, and we are 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 Secretary declined to reference section 101(a)(43)(F) of the Act or 18 U.S.C. § 16, or the specific language thereof, in 8 C.F.R. § 212.7(d). Thus, we find that the statutory terms "violent or dangerous crimes" and "crime of violence" are not synonymous and the determination that a crime is a violent or dangerous crime under 8 C.F.R. § 212.7(d) is not dependent on it having been found to be a crime of violence under 18 U.S.C. § 16 or an aggravated felony under section 101(a)(43)(F) of the Act. *See* 67 Fed. Reg. 78675, 78677-78 (December 26, 2002).

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). Black's Law Dictionary, Seventh Edition (1999), defines violent as "of, relating to, or characterized by strong physical force" and dangerous as "likely to cause serious bodily harm." Decisions to deny waiver applications on the basis of discretion under 8 C.F.R. § 212.7(d) are made on a factual "case-by-case basis." 67 Fed. Reg. at 78677-78.

We find that a violation of Texas Penal Code § 22.02(a)(2), which proscribes the use of a deadly weapon during an assault, is a violent and dangerous crime within the meaning of 8 C.F.R. § 212.7(d), and the heightened discretionary standard of that regulation applies in this case.

The Applicant asserts that he is not subject to the heightened hardship standard in 8 C.F.R. § 212.7(d). He asserts that he did not commit an aggravated felony under section 101(a)(43) of the Act, and he therefore did not commit a violent or dangerous crime, as the Fifth Circuit Court of Appeals held in *Jean v. Gonzales*, 452 F.3d 392 (5th Cir. 2006) that the heightened standard does not apply to all aggravated felonies but only those which involve violent criminal acts. We will not address whether the Applicant committed an aggravated felony, as that is not a requirement to find that the Applicant committed a violent and dangerous crime within the meaning of 8 C.F.R. § 212.7(d).

The Applicant must show that "extraordinary circumstances" warrant approval of the waiver. 8 C.F.R. § 212.7(d). Extraordinary circumstances may exist in cases involving national security or foreign policy considerations, or if the denial of the Applicant's admission would result in exceptional and extremely unusual hardship. Id. Finding no evidence of foreign policy, national security, or other extraordinary equities, we would consider whether the Applicant has "clearly demonstrate[d] that the denial of . . . admission as an immigrant would result in exceptional and

extremely unusual hardship" to a qualifying relative. *Id.* The regulatory standard of exceptional and extremely unusual hardship found in 8 C.F.R. § 212.7(d) is more restrictive than the extreme hardship standard set forth in section 212(h) of the Act. *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. Although 8 C.F.R. § 212.7(d) does not specifically state to whom the Applicant must demonstrate exceptional and extremely unusual hardship, we interpret this phrase to be limited to qualifying relatives described under the corresponding waiver provision of section 212(h)(1)(B) of the Act. A waiver of inadmissibility under section 212(h)(1)(B) 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, son or daughter of the Applicant. The qualifying relatives in this case are the Applicant's U.S. citizen spouse and children.

In *Matter of Monreal-Aguinaga*, 23 I& N Dec. 56, 62 (BIA 2001), the Board of Immigration Appeals (BIA) determined that exceptional and extremely unusual hardship in cancellation of removal cases under section 240A(b) of the Act is hardship that "must be 'substantially' beyond the ordinary hardship that would be expected when a close family member leaves this country." However, the applicant need not show that hardship would be unconscionable. *Id.* at 61.

The BIA stated that in assessing exceptional and extremely unusual hardship, it would be useful to view the factors considered in determining extreme hardship. *Id.* at 63. In *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560, 565-66 (BIA 1999), the BIA provided a list of factors it deemed relevant in determining whether an alien has established the lower standard of extreme hardship. The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. The BIA added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not an exclusive list. *Id.*

In *Monreal*, the BIA provided additional examples of the hardship factors it deemed relevant for establishing exceptional and extremely unusual hardship:

> [T]he ages, health, and circumstances of qualifying lawful permanent resident and United States citizen relatives. For example, an applicant who has elderly parents in this country who are solely dependent upon him for support might well have a strong case. Another strong applicant might have a qualifying child with very serious health issues, or compelling special needs in school. A lower standard of living or adverse country conditions in the country of return are factors to consider only insofar as they may affect a qualifying relative, but generally will be insufficient in themselves to support a finding of exceptional and extremely unusual hardship. As with extreme

> hardship, all hardship factors should be considered in the aggregate when assessing exceptional and extremely unusual hardship.

23 I&N Dec. at 63-4.

In the precedent decision issued the following year, *Matter of Andazola-Rivas*, the BIA noted that, "the relative level of hardship a person might suffer cannot be considered entirely in a vacuum. It must necessarily be assessed, at least in part, by comparing it to the hardship others might face." 23 I&N Dec. 319, 323 (BIA 2002). The issue presented in *Andazola-Rivas* was whether the immigration judge correctly applied the exceptional and extremely unusual hardship standard in a cancellation of removal case when he concluded that such hardship to the respondent's minor children was demonstrated by evidence that they "would suffer hardship of an emotional, academic and financial nature," and would "face complete upheaval in their lives and hardship that could conceivably ruin their lives." *Id.* at 321 (internal quotations omitted). The BIA viewed the evidence of hardship in the respondent's case and determined that the hardship presented by the respondent did not rise to the level of exceptional and extremely unusual. The BIA noted:

> While almost every case will present some particular hardship, the fact pattern presented here is, in fact, a common one, and the hardships the respondent has outlined are simply not substantially different from those that would normally be expected upon removal to a less developed country. Although the hardships presented here might have been adequate to meet the former "extreme hardship" standard for suspension of deportation, we find that they are not the types of hardship envisioned by Congress when it enacted the significantly higher "exceptional and extremely unusual hardship" standard.

23 I&N Dec. at 324.

However, the BIA in *Matter of Gonzalez Recinas*, a precedent decision issued the same year as *Andazola-Rivas*, clarified that "the hardship standard is not so restrictive that only a handful of applicants, such as those who have a qualifying relative with a serious medical condition, will qualify for relief." 23 I&N Dec. 467, 470 (BIA 2002). The BIA found that the hardship factors presented by the respondent cumulatively amounted to exceptional and extremely unusual hardship to her qualifying relatives. The BIA noted that these factors included her heavy financial and familial burden, lack of support from her children's father, her U.S. citizen children's unfamiliarity with the Spanish language, lawful residence of her immediate family, and the concomitant lack of family in Mexico. 23 I&N Dec. at 472. The BIA stated, "We consider this case to be on the outer limit of the narrow spectrum of cases in which the exceptional and extremely unusual hardship standard will be met." *Id.* at 470.

An analysis under *Monreal-Aguinaga* and *Andazola-Rivas* is appropriate. *See Gonzalez Recinas*, 23 I&N Dec. at 469 ("While any hardship case ultimately succeeds or fails on its own merits and on the particular facts presented, *Matter of Andazola* and *Matter of Monreal* are the starting points for any analysis of exceptional and extremely unusual hardship."). Exceptional and extremely unusual

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

First, we will address hardship to the Applicant's qualifying relatives upon relocation to El Salvador. With respect to the financial hardship the Applicant's spouse would experience upon relocation, Counsel states that the Applicant does not have the means to provide his family food, clothing, healthcare and education in El Salvador; and he has not been able to find steady employment in El Salvador. The unsupported assertions of Counsel, however, do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Regarding her medical hardship upon relocation, the Applicant's spouse reported to her social worker that she takes medication for high cholesterol, and she is under the care of a doctor for human papillomavirus. The Applicant refers to U.S. Department of State information in asserting that very few private hospitals have acceptable standards; hospitals require cash up-front; and care for his spouse's high cholesterol or any medical emergency would be either unavailable or unaffordable. The record indicates that the Applicant's spouse had an appointment in 2013 to remove abnormal cervical tissue. The Applicant provides a Wikipedia description of the procedure, which states it can be done in an office setting and usually requires only a local anesthetic.

The Applicant refers to U.S. Department of State reports that detail endemic violent crime throughout El Salvador and state that it has the second highest murder rate in the world. The Applicant's spouse reported to her social worker that her uncle was killed by a gang recently. The Applicant's spouse states that El Salvador has poor safety conditions and fewer educational opportunities. The Applicant's spouse states that their daughter is in college. The record includes country-conditions information related to safety issues. The June 22, 2015, U.S. Department of State travel warning details safety and criminal issues in El Salvador.

With respect to her ties to El Salvador, the Applicant's spouse's Form G-325A, Biographic Information, reflects that her mother resides in El Salvador and her father is deceased.

The record reflects that the Applicant's spouse and children may experience difficulty in El Salvador due to general safety issues and general educational issues for the children. However, the record is not clear as to where they would reside and if that area has safety issues. The record is not clear as to the severity of the Applicant's spouse's medical conditions or of the level of financial hardship she and her children may experience. We find that the record lacks sufficient documentary evidence of emotional, financial, medical, or other types of hardship that, in their totality, establish that the Applicant's qualifying relatives would experience exceptional and extremely unusual hardship upon relocation to El Salvador.

Describing the hardship the Applicant's spouse would experience in the United States without the Applicant, the Applicant's spouse reported to her social worker that she had medical insurance through the Applicant's employer. The social worker evaluations also detail emotional and

psychological hardship his spouse currently is experiencing. The Applicant's spouse reported to the social worker that she has no pleasure in her life; she has difficulty sleeping; she cries once a week; she is called once a month by her son's school for behavior issues; she feels overwhelmed raising their son without the Applicant; the Applicant calls their son daily; and she is worried about the Applicant's safety due to crime in El Salvador. The social worker states that the Applicant's spouse has an inadequate support system in the United States and that she is in the higher range of moderate to marked major depression based on her Zung Self-Rating Depression Scale results.

The Applicant also asserts that his family is experiencing economic hardship. The Applicant's spouse reported her monthly expenses to the social worker; that the Applicant has not found regular work; and that she sends him money. The reported monthly expenses include $80.25 for homeowner's insurance; $163.35 for automobile insurance; $214.07 for electricity; $23.60 for gas; $49.41 for water; $51.74 for cable; $145.24 for food; $31.95 for internet; $258.70 for cell phone; $180 for gasoline; $20 for phone cards; and $100.37 for school taxes. The Applicant asserts that he was the primary earner for the household; the household income was $42,259 in 2010; and the household income decreased to $8,410 in 2011. The record includes several bills for the Applicant and his spouse to corroborate most of the claimed monthly expenses and copies of tax returns reflecting their annual income.

The Applicant asserts that his children, especially his son, are having problems without a father figure. The social worker states, and school records show, that the Applicant's son received family therapy with his mother at his school from August 2011 until January 2012. The Applicant's son's medical records reflect that he has had behavioral problems, and he was assessed with an adjustment disorder with disturbance of conduct. The Applicant's daughter completed the Beck Depression Inventory and was categorized as experiencing severe depression.

The record reflects that the Applicant's spouse and children would experience significant emotional, psychological, and financial hardship without the Applicant. Considering the totality of the hardship factors, we find that the Applicant's spouse and children would experience exceptional and extremely unusual hardship without the Applicant.

We can find exceptional and extremely unusual hardship warranting a waiver of inadmissibility only where an applicant has demonstrated exceptional and extremely unusual hardship to a qualifying relative in the scenario of separation *and* the scenario of relocation. A claim that a qualifying relative will remain in the United States and thereby suffer exceptional and extremely unusual hardship as a consequence of separation can easily be made for purposes of the waiver even where there is no intention to separate in reality. Furthermore, to separate and suffer exceptional and extremely unusual hardship, where relocating abroad with the applicant would not result in exceptional and extremely unusual hardship, is a matter of choice and not the result of inadmissibility. As the Applicant has not demonstrated exceptional and extremely unusual hardship from relocation, we cannot find that refusal of admission would result exceptional and extremely unusual hardship to a qualifying relative in this case.

The documentation in the record does not establish the existence of exceptional and extremely unusual hardship to a qualifying relative. As such, the Applicant is not eligible for a favorable exercise of discretion under section 212(h)(2) of the Act. We also find that no purpose would be served in discussing whether he merits an overall favorable exercise of discretion.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of M-A-P-*, ID# 12051 (AAO Sept. 23, 2015)