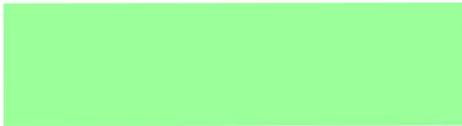




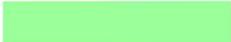
**U.S. Citizenship
and Immigration
Services**

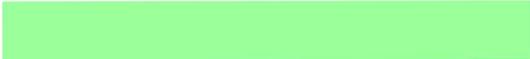
(b)(6)



DATE: JUN 21 2013

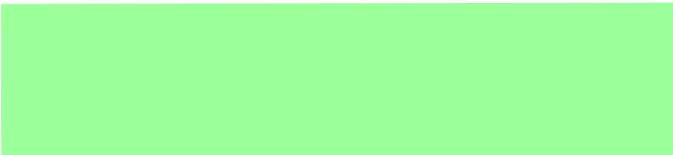
Office: MIAMI

FILE: 

IN RE: Applicant: 

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

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.

Thank you,

A handwritten signature in black ink that reads "Michael Shumway".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Argentina. He was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. The director indicated that the applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), and that he had the burden of demonstrating exceptional and extremely unusual hardship to his qualifying relative because he had been convicted of a violent or dangerous crime. The director concluded that although the applicant had demonstrated that his qualifying spouse would suffer exceptional and extremely unusual hardship if separated from the applicant, the evidence was insufficient to establish that she would suffer such hardship upon relocation to Argentina. The director denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *See Decision of Field Office Director*, dated July 9, 2012.

On appeal, counsel maintains that the applicant's conviction for felony battery in violation of Fla. Stat. Ann. § 784.041 does not constitute a violent or dangerous crime. Counsel also asserts that even if the applicant had been convicted of a violent or dangerous crime, he has demonstrated that his U.S. citizen wife would suffer exceptional and extremely unusual hardship if the waiver application were denied. Finally, counsel contends that the applicant has been rehabilitated and that he merits a favorable exercise of discretion. *Counsel's Brief*.

We will first address the finding of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude.

Section 212(a)(2)(A) of the Act states, in pertinent part:

- (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –
 - (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

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

[M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general

In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

The record reflects that the applicant pled *nolo contendere* to Felony Battery in violation of Fla. Stat. Ann. § 784.041. On July 19, 2006, adjudication of the charge was withheld and the applicant was placed on probation for two years.

The applicant's case arises within the jurisdiction of the Eleventh Circuit Court of Appeals, which has recently reaffirmed the traditional categorical approach for determining whether a crime involves moral turpitude. See *Fajardo v. Attorney General*, 659 F.3d 1303, 1310 (11th Cir. 2011) (finding that the Congress intended the traditional categorical or modified categorical approach to be used to determine whether convictions were for crimes involving moral turpitude and declining to follow the "realistic probability approach" put forth by the Attorney General in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)). In its decision, the Eleventh Circuit defined the categorical approach as "looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." 659 F.3d at 1305 (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990)). The court indicated, however, that where the statutory definition of a crime includes "conduct that would categorically be grounds for removal as well as conduct that would not, then the record of conviction – i.e., the charging document, plea, verdict, and sentence – may also be considered." 659 F.3d at 1305 (citing *Jaggernaut v. U.S. Att'y Gen.*, 432 F.3d 1346, 1354-55 (11th Cir. 2005)).

At the time of the applicant's conviction in 2006, Fla. Stat. Ann. § 784.041 provided:

- (1) A person commits felony battery if he or she:
 - (a) Actually and intentionally touches or strikes another person against the will of the other; and
 - (b) Causes great bodily harm, permanent disability, or permanent disfigurement.
- (2) A person who commits felony battery commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

In *Sosa-Martinez v. U.S. Atty. Gen.*, 420 F.3d 1338, 1342 (11th Cir. 2005), the Court held that any intentional battery that includes as an element of the offense either (1) that it caused great bodily harm, permanent disability, or permanent disfigurement, or (2) involved the use of a deadly weapon, constitutes a crime of moral turpitude. Violation of Fla. Stat. Ann. § 784.041 involves moral turpitude as it has the element of causing great bodily harm, permanent disability,

or permanent disfigurement. Thus, the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act. In his brief on appeal, counsel concedes that the applicant is inadmissible.

The applicant contends that his felony battery conviction does not constitute a violent or dangerous crime. 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 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).

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 felony battery under Fla. Stat. Ann § 784.041 is a violent crime because it involves causing great bodily harm, permanent disability, or permanent disfigurement. 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” to a qualifying relative. *Id.*

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. *Monreal-Aguinaga* 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 U.S. 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 63-64.

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.

Id. 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. *Id.* 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 evidence in this case includes, but is not limited to, statements from the applicant and his spouse; letters from the applicant’s mother-in-law, sister, friends, and coworkers; financial records; medical records relating to the qualifying spouse; a psychological evaluation of the qualifying spouse; divorce and custody records; and medical and special education records relating to the qualifying spouse’s son.

The qualifying spouse claims that she and her children will suffer hardship if the waiver application is denied. She states that the family is close and that the applicant takes care of her and her children. She indicates that her son from a previous marriage, [REDACTED] has speech delays and behavioral problems but that those conditions have improved due to the applicant’s positive influence in [REDACTED] life. She also notes that she and the applicant have a baby daughter, [REDACTED]. The qualifying spouse feels that it is important for her family to stay together so that her children can benefit from the presence of both parents. Also, she contends that she cannot work due to the fact that she recently had a baby, so the applicant provides for the family financially. She states that she and her children will not be able to afford to visit the applicant in Argentina, and that they will only be able to speak with him occasionally due to the high cost of long-distance phone calls. Furthermore, she indicates that since her pregnancy she has had diabetes, which can worsen with stress, and that the applicant pays for her diabetes medication. She also states that she is suffering from postpartum depression, which she believes is linked to her stress about the applicant’s immigration situation.

Additionally, the qualifying spouse asserts that she and her children would experience hardship if they were to relocate to Argentina with the applicant. She notes that she shares custody of [REDACTED] with her ex-husband, who will not allow [REDACTED] to reside outside the United States. She also states that her mother has diabetes and her step-father has depression, so she does not want to move away from them. Also, the qualifying spouse fears that the applicant would be unable to provide the same “quality of life” for [REDACTED] in Argentina that he is able to provide in the United States.

In his written statement, the applicant claims that he and his family are very close. He states that his involvement in his stepson [REDACTED] life has “almost cured” the boy’s behavioral and speech problems. He also fears that if he were deported, [REDACTED] would be raised by a single mother and would never see him again. The applicant also notes that his qualifying spouse suffers from depression related to his immigration situation, and that she has diabetes which has been difficult to manage.

The applicant also states that he supports his family financially because his spouse does not work. He states that he earns approximately \$3,500 per month and that the family’s basic monthly living expenses total approximately \$3,750, not including payments toward credit card

debt and the children's additional needs. He fears that his spouse would be unable to afford the family's basic living expenses on her own.

The applicant's mother-in-law confirms that the applicant and his family are very close. She also states that he supports his family emotionally and financially. She states that the qualifying spouse is unable to work, so the applicant manages the finances and handles all household responsibilities. *See Statement of* [REDACTED]. Additionally, the applicant's sister reiterates that the applicant and his spouse "have a loving and stable relationship and commitment to one another." *See Statement of* [REDACTED]. She states that the applicant is a father figure to his step-son, [REDACTED] and that he is "a very caring and responsible parent" to his daughter. *Id.* She fears that if the applicant were forced to leave the United States, "this would cause psychological trauma, financial stress, and deteriorate a very loving family." *Id.*

In an evaluation of the qualifying spouse, [REDACTED] states that the qualifying spouse "has a strong bond with her husband" and that she "already has some symptoms of depression due to her concern about her husband's immigration status." *See Letter from* [REDACTED] dated August 25, 2009. Furthermore, [REDACTED] indicates that "it is likely that [the qualifying spouse's] mental condition would deteriorate into clinical depression if her husband was deported." *Id.*

The qualifying spouse's doctor indicates that the qualifying spouse is on medication for diabetes and that she also suffers from depression. *See Letter from* [REDACTED], dated October 15, 2009. The doctor also states that the qualifying spouse must attend regular checkups to manage her health conditions. *See Letter from* [REDACTED], dated October 26, 2009.

In his decision of July 9, 2012, the field office director found that the applicant had demonstrated that his qualifying spouse would suffer exceptional and extremely unusual hardship if separated from the applicant. The AAO will not disturb that finding now.¹ Furthermore, the AAO now finds that the qualifying spouse would suffer exceptional and extremely unusual hardship if she were to relocate to Argentina with the applicant.

The record contains documentation relating to the qualifying spouse's divorce from her ex-husband, [REDACTED], which indicates that she was awarded primary physical custody of her son, [REDACTED]; [REDACTED] was awarded frequent visitation rights. *See Marital Settlement Agreement* at 2-3. The agreement further states, "Neither party may remove the child outside the state of Florida for a period of more than seven (7) consecutive days without the prior written permission of the other parent." *Id.* at 3. Additionally, the record contains a notarized agreement between the qualifying spouse and [REDACTED] indicating that [REDACTED] will not consent to [REDACTED] residing outside Miami-Dade County. *See Agreement Between* [REDACTED] and [REDACTED], dated August 3, 2012. Therefore, if the qualifying spouse were to relocate to Argentina with the applicant, she could become separated from [REDACTED] who is now ten years

¹ The AAO also made such a finding in a decision dated September 21, 2011, in relation to a previous appeal by the applicant.

of age. Furthermore, the record indicates that [REDACTED] has special needs, including a speech and language delay and behavioral problems, and that the qualifying spouse has been active in seeking evaluation and special education services for [REDACTED]. See [REDACTED] dated September 6, 2006; [REDACTED] dated September 14, 2005. If the qualifying spouse were to relocate to Argentina without [REDACTED] she would be unable to attend to her son's special needs.

Additionally, the qualifying spouse requires regular medical care for her diabetes and depression, which began during her pregnancy and have not resolved. Relocation to Argentina would separate the qualifying spouse from her doctor, who has been treating her for several years, and could interrupt her required medical care.

Finally, the qualifying spouse is originally from Chile and may have difficulty adjusting to life in Argentina. She has also resided in the United States for at least 11 years and has many close ties here, including both of her parents. Relocation to Argentina would likely be very difficult for the qualifying spouse. Considering all of these factors in the aggregate, the AAO finds that the qualifying spouse would suffer exceptional and extremely unusual hardship if the waiver application were denied.

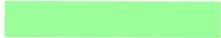
Furthermore, the AAO finds that the gravity of the applicant's offense does not in this case override the extraordinary circumstances discussed. When conducting a discretionary analysis generally, the AAO must "balance the adverse factors evidencing an alien's undesirability as a permanent resident with 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." *Matter of Mendez-Morales*, 21 I&N Dec. 296, 300 (BIA 1996) (citations omitted).

The adverse factor in the present case is the applicant's conviction for felony battery. The favorable factors are the extreme hardship to the applicant's spouse; the financial and emotional support he provides to his young daughter and step-son; the fact that he began residing in the United States in 1993, when he was only 11 years old; his family ties in this country; the fact that he has paid taxes and held steady employment; and his lack of a criminal record since 2006. The record also contains numerous letters of support from the applicant's friends, coworkers, and supervisors indicating that he is a hardworking person of good moral character.

The AAO finds that the crime the applicant committed is serious in nature and cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factors such that a favorable exercise of discretion is warranted. Therefore, the applicant has established his eligibility for a waiver under section 212(h) of the Act.

In proceedings for application for waiver of grounds of inadmissibility under sections 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. Section 291 of the

(b)(6)



Page 10

Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.