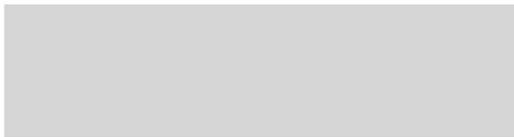




U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: **JUL 02 2015**

FILE #: [REDACTED]  
APPLICATION RECEIPT #: [REDACTED]

IN RE: Applicant: [REDACTED]

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

ON BEHALF OF APPLICANT:

NO REPRESENTATIVE OF RECORD

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page ([www.uscis.gov/i-290b](http://www.uscis.gov/i-290b)) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

A handwritten signature in black ink that reads "Ron Rosenberg".

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of the Philippines who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of crimes involving moral turpitude. The applicant's spouse is a U.S. citizen. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h).

The Director found that the applicant's convictions also were for crimes of violence and dangerous conduct and that he failed to establish exceptional and extremely unusual hardship to a qualifying relative; he therefore denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Decision of the Director*, dated August 20, 2014.

On appeal, the applicant submits documentation related to hardship his spouse would experience if his waiver application is denied. *Attachment to Form I-290B, Notice of Appeal or Motion*, filed September 22, 2014.

The record includes, but is not limited to, statements from the applicant and his spouse, medical records, financial records, criminal records, and psychological evaluations. The entire record was reviewed and considered in arriving at 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 –

(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 (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] 2000, of terroristic threatening in the first degree in violation of Hawaii Revised Statutes § 707-716(1)(d) and of abuse of family or household members in violation of Hawaii Revised Statutes § 709-906, and he received sentences of five years and one year of probation, respectively.

Hawaii Revised Statutes § 707-716(1)(d) stated at the time of the applicant’s conviction:

(1) A person commits the offense of terroristic threatening in the first degree if the person commits terroristic threatening:

...

(d) With the use of a dangerous instrument[.]

As the applicant does not contest his inadmissibility for committing terroristic threatening in the first degree, 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. Therefore, we will not address whether the applicant's second conviction, abuse of family or household members, also would render him inadmissible under section 212(a)(2)(A) of the Act.

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

The Attorney General [now Secretary of the Department of Homeland Security (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 . . . .

(1) (A) in the case of any immigrant it is established to the satisfaction of the [Secretary] that –

- (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,
- (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
- (iii) the alien has been rehabilitated; or

(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

(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.

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 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. 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. The record reflects that the applicant has an offer of employment to work at a medical clinic in the United States. There is no indication that the applicant has ever relied on the government for financial assistance. The record reflects that the applicant has not been arrested in over 15 years. There is no indication that the applicant is involved with terrorist-related activities or poses other security issues.

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 been arrested in over 15 years. 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 is eligible for consideration for a waiver under section 212(h)(1)(A) 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-Morales*, 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 Hawaii Revised Statutes § 707-716(1)(d), which proscribes terroristic threatening with a dangerous instrument, 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 is applicable in this case.

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, we 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.*

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. Therefore, we will at the outset determine whether the applicant meets this standard.

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 relative in this case is the applicant's U.S. citizen spouse.

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 relative upon relocation to the Philippines. The applicant's spouse states that she was born in the United States; she has pride in the United States; her family lives in the United States; she is close with her family; she will suffer a loss of employment; she will be socially isolated; and educational opportunities for their future children are better in the United States. The applicant states that only meager jobs are available in

the Philippines; he could not support his spouse financially; she deserves more than to live in the existing squalid conditions; they want to start a family; and they would have a better future in the United States. The applicant's spouse states that the applicant works as a rice farmer; farmers make about \$25 per week; they would hardly be able to afford daily necessities; they could not retire; and she could not afford to travel to see her family in Hawaii. The applicant's spouse also states that the applicant currently lives with her grandmother and is her caregiver.

The applicant's spouse's medical records reflect that she is under the care of a physician for right wrist tenosynovitis; she had moderate to severe pain of the right wrist when she saw a physician; and she received a cortisone injection. The record reflects that the applicant's spouse had a vaginal biopsy. The record includes a physician's letter stating that the applicant's spouse is being treated for endometriosis, back pain and pelvic pain.

The record reflects that the applicant's spouse, who lived in the Philippines the first nine years of her life, may experience difficulty if she relocated to the Philippines, particularly given her family ties to the United States. However, the record does not include objective evidence to corroborate claims that she would experience financial or medical hardship in the Philippines. The record is not clear about the severity of the applicant's spouse's medical issues. In addition, the record lacks information about the availability of suitable medical care in the Philippines. We find that record lacks sufficient documentary evidence of emotional, financial, medical or other types of hardship that, in their totality, establish that a qualifying relative would experience exceptional and extremely unusual hardship upon relocation to the Philippines.

To address the hardship the applicant's spouse would experience in the United States without the applicant, the applicant submits statements. According to his spouse's statement, they have a great desire for children; she cries at night; she has a poor appetite; she has difficulty sleeping; and she lives in a state of anxiety and depression. The applicant's spouse was seen by a psychiatrist who states that her depression has worsened over the last year; her symptoms include insomnia, fatigue, feelings of guilt and worthlessness, diminished ability to concentrate, loss of appetite, and suicidal ideation in a passive context. She was diagnosed with major depression, chronic, severe, without psychosis. Another psychologist earlier had diagnosed her with major depressive disorder, recurrent, moderate, without psychotic features; and anxiety disorder. The applicant's spouse reports chronic sleep and appetite problems. Lastly, a medical doctor diagnosed her with major depressive episode, recurrent, moderate, without psychotic features. The record includes a list of medications for the applicant's spouse. As mentioned, she is under the care of a physician for right wrist tenosynovitis, endometriosis, back pain and pelvic pain.

The applicant's spouse states that she is unable to attend college due to financial reasons and she has to take off from work without pay for her medical appointments. She states that she has numerous debts and she needs to the applicant to reside in the United States to help pay her debts. The record includes an offer of employment for the applicant upon immigration to the United States from a medical clinic. The record also includes a list of the applicant's spouse's monthly expenses and income with a negative \$253.66 balance; evidence that her rent is \$400 per month; pharmacy receipts; loan and credit-card statements; health insurance statements; a cable payment; and

paystubs. A credit-union letter dated May 14, 2014, indicates that she owes nearly \$29,000 in loans and credit-card payments.

The record reflects that the applicant's spouse is experiencing significant emotional and psychological issues without the applicant. In addition, she has several medical issues. The applicant's spouse also has financial issues that the applicant could help alleviate with upon employment with his prospective employer. Considering the totality of the hardship factors presented, we find that the applicant's spouse would experience exceptional and extremely unusual hardship if she remained in the United States 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 the qualifying relative in this case.

A review of the documentation in the record fails to 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.