U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Office of Administrative Appeals
20 Massachusetts Ave. NW MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: SEP 19 2013 OFFICE: LOS ANGELES, CA FILE:

IN RE: APPLICANT:

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:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Los Angeles, California, and a subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on the applicant's second motion. The motion will be granted, but the underlying AAO decision will be affirmed.

The record reflects that the applicant is a native and citizen of Mexico who 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 applicant is the spouse of a U.S. citizen and is the beneficiary of an approved Petition for Alien Relative. The applicant seeks a waiver of inadmissibility under section 212(h), 8 U.S.C. § 1182(h), in order to remain in the United States with his U.S. citizen spouse and children.

The Field Office Director concluded that the applicant had failed to establish extreme hardship to a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *See decision of Field Office Director,* June 5, 2009.

On appeal, the AAO found the applicant had a conviction for a violent or dangerous crime, and that he did not demonstrate his spouse would experience exceptional and extremely unusual hardship. *See AAO decision on appeal,* February 24, 2012. The appeal was dismissed. *Id.* The AAO then summarily dismissed a subsequent motion, finding the motion failed to identify any erroneous conclusion of law or statement of fact in the prior decision. *See AAO decision on motion,* December 19, 2012.

On motion, counsel submits a brief in support, medical records, previously submitted adoption paperwork, a 1999 psychological evaluation, documentation of the applicant's marriage, educational records, letters from family, friends, and religious workers, and photographs. In the brief, counsel contends that because the applicant's conviction is more than 15 years old, he is now eligible for a waiver solely on the basis of rehabilitation.

The requirements for a motion to reopen are delineated in 8 C.F.R. § 103.5(a)(2). This regulation states, in pertinent part, that "A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." As the applicant submitted new evidence, the motion to reopen will be granted.

The record includes, but is not limited to, the documents listed above, documentation of birth, marriage, residence, and citizenship, other applications and petitions, financial and medical documents, copies of U.S. income tax returns, a psychological evaluation, documentation of criminal proceedings, and statements from the applicant's family. The entire record was reviewed and considered in rendering a decision on the motion.

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.
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> . . .
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> (II) a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.
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> . . .
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> (ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-
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> > (I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or
> >
> > (II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

The record reflects that on December 1, 1993 the applicant was arrested for assault with a deadly weapon under section 245(a)(1) of the California Penal Code. On June 2, 1997, the judge found the applicant guilty of the charge. Additionally, the judge found the applicant guilty of the special allegation pursuant to section 12022.7 of the California Penal Code. The judge placed the applicant on probation and ordered him to serve 180 days in jail.[1] The applicant does not contest on motion whether he has been convicted of a crime involving moral turpitude. As such, the AAO

[1] The record also reflects that on June 4, 1993 the applicant was arrested and charged with possessing, manufacturing, or selling a dangerous weapon in violation of California Penal Code section 12020(A). The applicant pled guilty to that charge on June 15, 1993. The judge ordered him to serve two years of probation, perform community service, and to pay a fine. In light of the applicant's 1997 conviction for assault with a deadly weapon, the AAO will not determine whether his 1993 conviction qualifies as a crime involving moral turpitude.

affirms he is inadmissible under section 212(a)(2)(A)(i)(I) of the Act, and that he requires a waiver under section 212(h) of the Act.

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

> The Attorney General 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 Attorney General [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 Attorney General [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 Attorney General [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.

In the instant case, the applicant's most recent conviction for a crime involving moral turpitude, assault with a deadly weapon, related to his conduct in December 1993. As his culpable conduct took place more than 15 years ago, he meets the requirement of section 212(h)(1)(A)(i) of the Act. The record does not reflect that admitting the applicant would be contrary to the national welfare, safety, or security of the United States. Section 212(h)(1)(A)(ii) of the Act. While the applicant's conviction is significant and cannot be condoned, the record does not show that he has engaged in further violent behavior after his 1997 conviction, as the applicant does not appear to have

engaged in criminal activity since 1993. The record also does not indicate that the applicant has ever been a public charge in the United States. Accordingly, the applicant has shown that he meets the requirement of section 212(h)(1)(A)(ii) of the Act.

The applicant has moreover shown by a preponderance of the evidence that he has been rehabilitated. Section 212(h)(1)(A)(iii) of the Act. As discussed above, there is no evidence that the applicant has engaged in criminal activity since his most recent misdemeanor conviction in 1997. The record shows that he has conducted himself well since then, providing financial and emotional support for his spouse and two adopted children, and garnering numerous attestations by others to his hard work, good moral character and essential presence in the religious community. The record does not reflect that the applicant has a propensity to engage in further criminal activity. Accordingly, the applicant has demonstrated 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.

As discussed by the AAO on appeal, the applicant's conviction for assault with a deadly weapon qualifies as a violent or dangerous crime. This finding is not contested on motion. 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.

Counsel asserts on motion that the applicant may obtain a waiver solely on the basis of rehabilitation. This assertion is incorrect. A waiver under section 212(h) is discretionary and the crime involving moral turpitude for which the applicant was convicted, assault with a deadly weapon, is additionally a "violent or dangerous crime" as contemplated by 8 C.F.R. § 212.7(d). Therefore, although the applicant is eligible for a waiver under section 212(h) of the Act, he must also demonstrate that he merits a favorable exercise of discretion. The record does not indicate that the applicant's case involves national security or foreign policy considerations. Therefore, pursuant to 8 C.F.R. § 212.7(d), the applicant must first show that the denial of his application for adjustment of status would result in exceptional and extremely unusual hardship to a qualifying relative.

In *Matter of Monreal-Aguinaga*, 23 I& N Dec. 56, 62 (BIA 2001), the Board determined that exceptional and extremely unusual hardship in cancellation of removal cases under section 240A(b) of the Act is hardship that "must be 'substantially' beyond the ordinary hardship that would be expected when a close family member leaves this country." However, the applicant need not show that hardship would be unconscionable. *Id.* at 61. The AAO notes that the exceptional and extremely unusual hardship standard in cancellation of removal cases is identical to the standard put forth by the Attorney General in *Matter of Jean*, *supra*, and codified at 8 C.F.R. § 212.7(d).

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

We note that in *Monreal*, the Board provided additional examples of the hardship factors it deemed relevant for establishing exceptional and extremely unusual hardship:

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

23 I&N Dec. at 63-4.

In the precedent decision issued the following year, *Matter of Andazola-Rivas*, the Board noted that, "the relative level of hardship a person might suffer cannot be considered entirely in a vacuum. It must necessarily be assessed, at least in part, by comparing it to the hardship others might face." 23 I&N Dec. 319, 323 (BIA 2002). The issue presented in *Andazola-Rivas* was whether the Immigration Judge correctly applied the exceptional and extremely unusual hardship

standard in a cancellation of removal case when he concluded that such hardship to the respondent's minor children was demonstrated by evidence that they "would suffer hardship of an emotional, academic and financial nature," and would "face complete upheaval in their lives and hardship that could conceivably ruin their lives." *Id.* at 321 (internal quotations omitted). The Board viewed the evidence of hardship in the respondent's case and determined that the hardship presented by the respondent did not rise to the level of exceptional and extremely unusual. The Board noted:

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

23 I&N Dec. at 324.

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

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

The applicant's spouse contends she would experience medical, family-related, and emotional hardship without the applicant. She indicates in her letters that she takes medication for chronic migraines and asthma. Medical records from 2012 are submitted on motion. The spouse adds that she loves the applicant, and is emotionally dependent on him. She further claims that she relies on the applicant to take care of her and her sons when she has migraines. The spouse contends her son Jason has, in addition to asthma and allergic rhinitis, lymphedema praecox, which causes his leg to swell and makes it susceptible to infection. Counsel submits medical records for the son on motion. The psychological evaluation indicates the spouse has depression and anxiety due to the

applicant's immigration issues. Furthermore, the applicant's spouse describes in detail her past physical, sexual, and emotional abuse.

On appeal, the AAO found the applicant's spouse would experience exceptional and extremely unusual hardship on separation. *See AAO Decision,* February 24, 2012. However, on motion the applicant has failed to make assertions or submit additional evidence on the hardship his spouse would experience in the event of relocation to Mexico. As such, the AAO cannot find the applicant has met his burden of proof in demonstrating that his spouse would suffer exceptional and extremely unusual hardship upon relocation.

The applicant has, therefore, failed to demonstrate that the challenges his spouse faces rise to the level of exceptional and extremely unusual hardship. Therefore, the AAO finds that the applicant has failed to demonstrate exceptional and extremely unusual hardship to a qualifying relative. Accordingly, the AAO concludes the applicant does not warrant a favorable exercise of discretion and the appeal will be dismissed.

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. The motion is granted, but the AAO's prior decision is affirmed.

ORDER: The motion is granted, but the AAO's prior decision is affirmed.