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



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



H2

Date: **AUG 13 2012** Office: KENDALL, FL 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:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

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

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Cuba 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 a crime involving moral turpitude. The applicant's spouse and two children are U.S. citizens. He seeks a waiver of inadmissibility in order to reside in the United States.

The field office director found 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. *Field Office Director's Decision*, dated July 29, 2010.

On appeal, the applicant states that he is submitting a psychological evaluation of his family as evidence of hardship. *Form I-290*, received August 27, 2010.

The record includes, but is not limited to, the applicant's statements and a psychological evaluation of the applicant's family. The entire record was reviewed and considered in arriving at a decision on the appeal.

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

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

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

(Citations omitted.)

The record reflects that on July 3, 1997 the applicant was convicted of a lewd or lascivious offense committed upon or in the presence of persons less than 16 years of age in violation of Florida Statutes § 800.04, and he received two years of probation. On March 6, 2000, he was sentenced to another year of probation due to violating his probation order. The applicant does not dispute the finding of inadmissibility.

The record reflects that the applicant committed a crime involving moral turpitude, and is inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

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

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if –

(1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [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 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 . . .

In examining whether the applicant is eligible for a waiver, the AAO will assess whether he meets the requirements of section 212(h)(1)(A) of the Act. The record reflects that the activity resulting in the applicant's convictions occurred between August 30, 1996 and August 31, 1996. The AAO notes that an application for admission or adjustment of status is considered 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). As the activities for which the applicant is inadmissible occurred more than 15 years before the date of his adjustment of status "application," he meets the requirement of section 212(h)(1)(A)(i) of the Act.

The record reflects that admitting the applicant would not be contrary to the national welfare, safety, or security of the United States per section 212(h)(1)(A)(i) of the Act. The record reflects that the applicant is working as a car sales representative. There is no indication that the applicant has ever relied on the government for financial assistance. The record reflects that the applicant violated the initial terms of his two-year probation order by failing to complete the MSDO program, failing to pay monetary penalties and leaving the county without his probation officer's consent; he was given an extra year of probation; and he successfully completed the terms of his probation on March 5,

2001. The applicant has not had any other criminal issues. There is no indication that the applicant is involved with terrorist-related activities or poses other national security issues.

The applicant has shown by a preponderance of the evidence that he has been rehabilitated per section 212(h)(1)(A)(iii) of the Act. The applicant has not been arrested nor had any criminal issues since he completed his probation. The record indicates that he spends time with his family. The AAO finds that 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.

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.

As stated, the applicant was convicted of a lewd or lascivious offense committed upon or in the presence of persons less than 16 years of age in violation of Florida Statutes § 800.04. The applicant has been convicted of a violent or dangerous crime pursuant to 8 C.F.R. § 212.7(d). *See Mejia v. Gonzalez*, 499 F.3d 991 (9th Cir. 2007). As such, the AAO will assess whether he is entitled to a favorable exercise of discretion under section 212(h)(2) of the Act.

To establish eligibility for a waiver of inadmissibility in the present case, the applicant must show that "extraordinary circumstances" warrant its approval. 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. 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. We note that 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).

In *Matter of Monreal-Aguinaga*, 23 I& N Dec. 56, 62 (BIA 2001), the 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.

The AAO now turns to a consideration of whether the record establishes that denial of the present waiver application would result in exceptional and extremely unusual hardship. The AAO will consider hardship to the applicant’s spouse and children for the purposes of assessing exceptional and extremely unusual hardship under 8 C.F.R. § 212.7(d).

The applicant’s spouse states in her psychological evaluation that the family is close to their extended family and she is suffering from ovarian fibroids. The psychologist states that the children suffer from asthma. The applicant states that his family has no ties to Cuba; his children’s primary language is English; his younger son has a language disability; his older son is in a magnet school; his children are doing well in school; and his family will be persecuted due to his prior political protests in Cuba. The AAO notes that there is no supporting evidence that the applicant’s spouse has medical issues or that the family would be subject to persecution. There is documentation that the younger has some language issues, although the severity is not clear from the record, and that he takes albuterol as needed. The AAO notes that the applicant’s family members may experience difficulty in Cuba. However, the record does not include sufficient evidence of financial, medical, emotional or other types of hardship, which in their totality, establish that a qualifying relative would experience exceptional and extremely unusual hardship upon relocating to Cuba.

The applicant’s spouse states in her psychological evaluation that the family depends on the applicant for everything, and she is suffering from ovarian fibroids. The psychologist states that the applicant’s spouse’s mood was depressed and anxious and she has difficulty focusing.

The applicant states that the family structure will be broken; his children will experience psychological trauma which will affect their lives and education; he has financially supported the household; it would be hard for his spouse to find employment without experience or a degree; and their children's educational progress will not be possible without him and his spouse.

The psychologist state that the applicant's older child enjoys spending time with the applicant; he reportedly suffers from asthma; the younger child is in a language-impaired program; he reportedly suffers from asthma; his mood was anxious; and both of the children's mental health would be affected if the applicant's immigration situation was revealed.

The AAO notes that the applicant's family members may experience difficulty without the applicant. However, the record does not include sufficient evidence of financial, medical, emotional or other types of hardship, which in their totality, establish that denial of the waiver application would result in exceptional and extremely unusual hardship for his family upon remaining in the United States.

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. In the event that the applicant established exceptional and extremely unusual hardship, the AAO would find that the gravity of the applicant's crime outweighed this and would not find a favorable exercise of discretion was warranted under section 212(h)(2) of the Act based on the record as it currently stands. The record reflects that the applicant's crime was particularly egregious as he was nearly 30 years-old at the time that he engaged in lewd or lascivious behavior with a 13 year-old female relative. There was no mistake of age and no consent. Based on these facts, the AAO would also find that he does not merit an overall exercise of discretion based on the record as it currently stands.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.