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U.S. Department of Homeland Security
U.S. Immigration and Citizenship Services
Office of Administrative Appeals MS 2090
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Washington, DC 20529-2090
**U.S. Citizenship
and Immigration
Services**



Htz



Date: **FEB 07 2012** Office: HIALEAH, FLORIDA 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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

fvr Perry Rhew
Chief, Administrative Appeals Office

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

The record reflects that the applicant is a native and citizen of Cuba. 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 crimes 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). The director concluded that the applicant had failed to establish that the applicant was rehabilitated, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On appeal, counsel contends that the director incorrectly applied the law and failed to consider the equities and passage of time since the applicant's conviction. In addition, counsel maintains that the director misstated the applicant's employment history and minimized the applicant's proof of rehabilitation. Counsel states that the applicant established the requirements under section 212(h)(1)(A) of the Act and that the waiver should be granted.

The record reflects that on May 26, 1989 the applicant was arrested for third-degree aggravated assault, misdemeanor battery, and resisting arrest without violence. The judge found the applicant guilty of the offenses and placed him on probation. On January 27, 1990, the applicant was arrested for aggravated assault. On March 7, 1990, the judge found the applicant guilty of third-degree aggravated assault, third-degree criminal mischief, and misdemeanor battery and revoked the applicant's probation. For each offense the applicant was sentenced to imprisonment for three years, which terms were to run concurrently.

The director found the applicant's crimes rendered the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of crimes involving moral turpitude. Although it is not clear that all his offenses are crimes involving moral turpitude, as the applicant has not disputed inadmissibility on appeal, and the record does not show the finding of inadmissibility to be erroneous, we will not disturb the finding of the director.

The applicant was convicted of aggravated battery. 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 aggravated battery is a violent crime. In the instant case, as we find that there are no national security or foreign policy considerations that would warrant a favorable exercise of discretion, we will consider whether denial of admission would result in exceptional and extremely unusual hardship.

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 evidence in this case includes birth certificates, employment records, a marriage certificate, certificates of achievement, social security records, a notice of releaseability dated April 1, 1991, a letter dated May 19, 1992 discharging the applicant after completion of his treatment at the U.S. Public Health Service outplacement program, letters, financial records, U.S. Department of State information about Cuba, and other documentation.

The record shows that the applicant married his U.S. citizen wife on January 15, 1999, and that he has lived with her since 1992. The record reflects that they own their own house, and the mortgage statement indicates that their outstanding principal is \$154,191 and their monthly payment is \$1,748. A social security benefit reflects that the applicant’s wife received social security benefits of \$7,162 in 2006. Counsel conveys that the applicant retired in 2006. Tax records show that the applicant earned gross business income of \$15,734 in 2006, and that the couple had pensions and annuities of \$15,023. Counsel maintains that the applicant has lived in the United States for over 25 years, and that the applicant has been rehabilitated, and does not pose a threat to the safety of persons or property in the United States. Counsel states that the applicant cannot return to Cuba because the applicant left Cuba in 1980 to escape the hardships of living in a communist country and that the applicant could not openly express his opposition to the [REDACTED] so he left the country to avoid persecution. Lastly, the applicant’s stepdaughter conveys that the applicant has always supported her mother, and the undated letter from the applicant’s nephew indicates that the applicant has been a caring husband.

The AAO acknowledges that the applicant and his wife will experience hardship due to separation. However, we find that the applicant has not provided sufficient documentation to demonstrate financial hardship to his wife. Counsel conveys that the applicant retired in 2006, and the submitted financial records of income tax returns and social security benefits relate to 2006. On appeal, the applicant did not submit his most recent financial records, which information is needed to show the couple’s financial situation following the applicant’s retirement in 2006. We find that the record before the AAO is not sufficient to demonstrate that the applicant’s wife will experience financial

hardship, or if so, to what extent, and the record does not reflect emotional hardship that is exceptional and extremely unusual should she remained in the United States without the applicant. We acknowledge that the applicant claims that he left Cuba to avoid persecution due to his opposition to the [REDACTED]. The applicant, however, has not fully described the hardships that his wife would experience if she joined him to live in Cuba. Consequently, we find that the applicant has not established that his wife would experience exceptional and extremely unusual hardship if she joined him to live in Cuba.

In conclusion, the applicant has not demonstrated that the hardships meet the “exceptional and extremely unusual hardship” standard as required in 8 C.F.R. § 212.7(d), and we therefore find that there are not extraordinary circumstances warranting a favorable exercise of discretion in this case.

Even were we to find that the applicant demonstrated “exceptional and extremely unusual hardship” as required in 8 C.F.R. § 212.7(d), we would still deny the application as a matter of discretion in view the applicant’s criminal history, particularly the gravity of the applicant’s underlying aggravated assault (with deadly weapon) crimes. *See* 8 C.F.R. § 212.7(d).

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility rests with the applicant. *See* section 291 of the Act. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed and the waiver application will be denied.

ORDER: The appeal is dismissed.