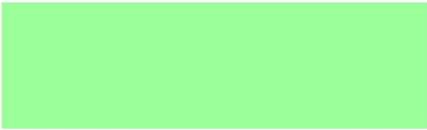


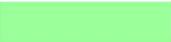
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U.S. Citizenship
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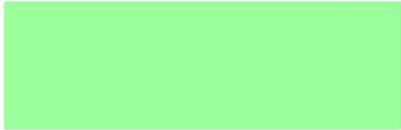
DATE: **AUG 01 2013** Office: HARLINGEN

FILE: 

IN RE: 

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,

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, Harlingen, Texas. An appeal of the denial was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on motion. The motion will be granted and the prior AAO decision will be affirmed.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States under 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 committed a crime involving moral turpitude. The applicant is married to a U.S. citizen and is the father of four U.S. citizens. He seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h) in order to remain in the United States with his spouse and children.

On July 16, 2009, the Field Office Director concluded that the record did not establish that the bar to the applicant's admission would result in extreme hardship to a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. The applicant appealed that decision and the AAO dismissed the applicant's appeal on April 20, 2012 finding that the applicant had been convicted of a violent or dangerous crime and had not established rehabilitation, extreme hardship to a qualifying relative, or exceptional and extremely unusual as a matter of discretion.

On motion, counsel for the applicant submits additional evidence, including documentation regarding the applicant's civil court case and crime victims assistance; psychological and neurological evaluations of the applicant; statements from the applicant and his spouse, letters from pastors, affidavits from friends and acquaintances, custody documentation, and tax returns. Counsel asserts that the applicant has established rehabilitation or in the alternative, extreme hardship to a qualifying relative. Counsel also states that the exceptional and extremely unusual hardship analysis for violent or dangerous crimes should not apply in this case because the applicant has established rehabilitation, but argues in the alternative, that the applicant has established exceptional and extremely unusual hardship.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). We will reopen the matter and address the new evidence. The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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

- (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 record reflects that on April 23, 1992, the applicant pled nolo contendere to aggravated assault under Texas Penal Code § 22.02, a third degree felony for which he was sentenced to six years in prison and fined \$1,000. The court suspended the six-year sentence and placed the applicant on probation for six years.

The Field Office Director found the applicant's conviction for aggravated assault under Texas Penal Code §22.02 to be a conviction for a crime involving moral turpitude. The applicant did not dispute this finding on appeal and has not disputed it on motion.

A waiver of a section 212(a)(2)(A)(i)(I) inadmissibility may be granted under section 212(h) of the Act if:

(1)(A) [I]t is established to the satisfaction of the Attorney General [Secretary of Homeland Security] that-

- (i) [T]he 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

Since the activities that are the basis for the applicant's criminal conviction occurred more than 15 years ago, the applicant is eligible for a waiver under section 212(h)(1)(A) 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.

On motion, counsel states that she requested documentation from the court to indicate that the applicant had completed his probation in relation to his criminal conviction and no such information is available. The AAO notes counsel's statement and the reasoning provided for the lack of documentation regarding the applicant's completion of his criminal sentence. At the same time, we note that without supporting evidence, the assertions of counsel will not satisfy the applicant's burden of proof. The unsupported assertions of counsel do not constitute evidence. *See Matter of*

Obaigbena, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The individuals who submitted statements in support of the applicant indicate that the applicant is a non-violent individual who does his best to assist his family and help the community. The applicant also provided a statement expressing remorse for the actions that led to his criminal conviction and stating that he has made great efforts to never repeat such behavior. The record, however, indicates that the applicant was arrested on January 30, 2011 in [REDACTED] Texas and was charged with driving while intoxicated. There is no certified disposition for this arrest in the record. Also, neither counsel nor the applicant mention the arrest in their statements. Counsel states only that the applicant had not engaged in criminal activity since the actions that led to his conviction in 1991.

The record also indicates that the applicant has a chronic substance abuse problem. A psychological evaluation of the applicant completed by [REDACTED] Ph.D., of Austin, TX, on December 30, 2011, states that the applicant was admitted to the Rio Grande State Center for evaluation and treatment as a result of his depression, alcohol abuse, and Post Traumatic Stress Disorder (PTSD). Dr. [REDACTED] indicated that the applicant reported that his depression, alcohol abuse, and PTSD are the result of the violent attack that was inflicted on him on August 3, 2009 in Iowa. The psychologist also reported that the applicant appeared in court following the attack and was fined \$1,000, yet there is no documentation in the record regarding any criminal charge(s) against the applicant in 2009 nor is there a certified disposition for this incident.¹ Dr. [REDACTED] also recommended follow-up treatment for the applicant's PTSD, depression, panic disorder with agoraphobia, anxiety, insomnia, and alcohol abuse. There is no indication in the record that the applicant has sought treatment after that recommendation. Although the applicant's arrest for DUI and his substance abuse are distinguishable from the crime for which the applicant was convicted of in 1991, they are relevant to a determination of the applicant's eligibility for a waiver under 212(h)(1)(A) of the Act. As stated, the applicant has not submitted certified dispositions for the stated arrest, and the record shows alcohol abuse with a lack of documentation that the applicant has sought treatment. Based on the information in the record, the AAO does not find that the applicant has met his burden of proof to illustrate that he has been rehabilitated and that his admission to the United States would not be contrary to the national welfare, safety, or security of the United States as required by section 212(h)(1)(A)(ii) and (iii) of the Act.

The applicant is also eligible for a waiver of inadmissibility if he demonstrates that a qualifying relative would suffer extreme hardship if he were not admitted to the United States. A waiver of inadmissibility under section 212(h) 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, or

¹ The AAO notes that the applicant is an alleged victim of a crime, but there is limited documentation of that crime in the record. The record contains a letter from the Department of Justice Crime Victim Assistance Division indicating that the applicant was approved for reimbursement of the expenses that he committed as the result of a crime committed against him. The record also contains the applicant and his family's civil complaint against the alleged assailants and those who allegedly participated in the crime. No police or court records were submitted.

child of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. The applicant has multiple qualifying relatives in this case: his spouse and his U.S. citizen children.

In either case, where the applicant establishes eligibility for a waiver under 212(h)(1)(A) of the Act or where the applicant establishes extreme hardship to a qualifying relative for eligibility under 212(h)(1)(B), the AAO must then assess whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996).

In this case, we cannot favorably exercise discretion in the applicant's case except in extraordinary circumstances. *See* 8 C.F.R. § 212.7(d).

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 applicant has not disputed on motion that his crime is a violent or dangerous crime. Counsel argues on motion that the applicant does not need show "exceptional and extremely unusual hardship" because "the issue is one of discretion," but 8 C.F.R. § 212.7(d) is a discretionary standard. Counsel also asserts that the applicant has shown such hardship to his spouse and children.

As stated in our prior decision, the exceptional and extremely unusual hardship standard is more restrictive than the extreme hardship standard. *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 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.”). The AAO notes that exceptional and extremely unusual hardship to a qualifying relative must be established in the event that he or she relocates with 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 the United States based on the denial of the applicant’s waiver request.

On motion, counsel states that the applicant and his wife have had custody of the applicant’s minor U.S. citizen children since their mother abandoned them and left to Mexico. In support of that statement, the record contains sworn affidavits from the mother of the applicant’s children authorizing the applicant to have custody of those children. The record does not contain a formal court document. The spouse of the applicant states that it would be a case of extreme cruelty for the children to lose their father, as their mother has already abandoned them. She also contends that the applicant would want his children to remain in the United States with her to continue their education, but that separation from their father would be unbearable for them and would not work. However, the record contains very little documentation that the applicant actually has physical custody of all of his minor children and that he provides for them. The most recent letter in the record concerning the applicant’s children and their whereabouts, schooling, and health is an April 29, 2008 statement from Dr. [REDACTED] who states that the applicant’s son [REDACTED] has been under his care since September 2006 for Attention Deficit Hyperactivity Disorder (ADHD) and Mood Disorder. While Dr. [REDACTED]’s statement establishes that the applicant’s son, [REDACTED], was previously being treated for ADHD and Mood Disorder, it does not indicate that the applicant played any role in his son’s treatment or that his presence was required for the success of the treatment. Additionally, there is no follow-up documentation on [REDACTED] condition after April 29, 2008, although the applicant’s spouse stated in her affidavit that the children were traumatized by the attack on their father in 2009. The AAO notes that the applicant and his spouse’s federal income tax returns for

2011 list three of the applicant's children as dependents; however, no other documentation was provided regarding the children's school or health. Although the applicant's spouse's assertions are relevant and have been taken into consideration, little weight can be afforded them in the absence of supporting evidence. See *Matter of Kwan*, 14 I&N Dec. 175 (BIA 1972) ("Information in an affidavit should not be disregarded simply because it appears to be hearsay; in administrative proceedings, that fact merely affects the weight to be afforded it."). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Similarly, without supporting evidence, the assertions of counsel will not satisfy the applicant's burden of proof. The unsupported assertions of counsel do not constitute evidence. See *Matter of Obaighbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Although the applicant's spouse indicates that the applicant is "helping in every way he can," she did not provide further detail as to the assistance he provides to her or his children. The record indicates that the applicant's spouse has been the primary breadwinner for the family. Additionally, the record indicates that the applicant has not worked at all since he was the victim of a crime in 2009. Although the AAO notes the applicant's medical and mental health condition as set forth in the neurological and psychological evaluations in the record, the record does not make clear how the applicant contributes to his family or will contribute to his family in the future. Also, the record indicates that the applicant can no longer work as a farm laborer due to his condition, but there is no indication that he cannot obtain other employment. The record indicates that the applicant previously had employment as a waiter. As noted above, the record indicates that the applicant is suffering from a substance abuse problem and there is no documentation to illustrate that he has sought treatment for his condition. Without further documentary evidence to support the preceding claims of hardship, the AAO is unable to find that separation from the applicant would result in extreme or exceptionally unusual hardship for his spouse or children.

In her September 26, 2009 statement, the applicant's spouse also asserts that she and the applicant's children would experience hardship if they relocate to Mexico. She contends that moving to Mexico would force the applicant's children to drop out of school, denying them the U.S. education they deserve, as well as the opportunity to make something of themselves. The applicant's spouse further maintains that as the applicant's children were born in the United States, they would not be allowed to attend school in Mexico. Denying the applicant's sons the education they deserve, she states, would be a case of extreme cruelty.

The applicant's spouse also maintains that if the waiver application is denied, she would have to quit her job and move to Mexico with the applicant, where she would not receive the same salary she is paid in the United States. She further points to the violence prevalent in Mexico and asserts that if the family relocates, they would live in fear. The applicant's spouse states that the applicant's children have never visited Mexico because they are afraid that something will happen to them.

The AAO also acknowledges the applicant's spouse's claims regarding the violence in Mexico and notes that the U.S. Department of State has issued a travel warning for U.S. citizens regarding the significant increase in drug-related violence across Mexico. The warning, most recently updated on November 20, 2012, specifically advises U.S. citizens to defer nonessential travel to the State of Tamaulipas. The travel warning also indicates that gun battles between rival Transnational Criminal Organizations or with Mexican authorities have taken place in many parts of Mexico, but especially in the area of the Mexico-United States border. This documentation is relevant to the hardship determination; however, in and of itself it does not establish exceptional and extremely unusual hardship. It will be considered in the aggregate with the other documentation in the record.

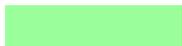
The applicant's spouse indicates that she would not receive the same salary that she receives in the United States were she to relocate to Mexico; however, there is no support for that statement in the record. The record indicates that the applicant's spouse has been the primary breadwinner for the family and works as a "monitor." There is no indication in the record of what the applicant's spouse's earning potential and expenses would be in Mexico. Additionally, there is no record of the applicant's spouse's family ties in the United States beyond the applicant and her stepchildren. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

In regards to the relocation of the applicant's children to Mexico, the BIA has previously found that a 15-year-old child who had lived her entire life in the United States, was completely integrated into the American lifestyle and was not fluent in Chinese would suffer extreme hardship if she relocated to Taiwan. *Matter of Kao and Lin*, 23 I&N Dec. 45 (BIA 2001). The BIA concluded that uprooting the child at her stage of education and social development and requiring her to survive in a Chinese-only environment would be such a significant disruption that it would constitute extreme hardship. The BIA, having found extreme hardship to be established for the 15-year-old, determined that it was unnecessary to consider whether relocation to Taiwan would also constitute extreme hardship for her younger siblings. In the case at hand, however, there is no documentation that the applicant's children are presently attending school in the United States or that their education would be disrupted significantly if they were to relocate to Mexico. There is also no support for the applicant's spouse's statement that the children would not be able to attend school in Mexico. It is the applicant's burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361.

As the record does not also establish that the applicant's inadmissibility would result in exceptional and extremely unusual hardship to his spouse or his children, we find that the applicant has also failed to establish that the AAO should have found, or that the new evidence establishes, that the applicant warrants a favorable exercise of discretion under section 212(h) of the Act.

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. After a careful review of the record, the AAO finds that in the present motion, the applicant has not met this burden. Accordingly, the motion is granted, but the prior AAO decision is affirmed.

(b)(6)



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NON-PRECEDENT DECISION

ORDER: The prior AAO decision is affirmed.