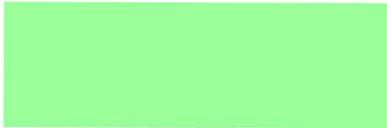




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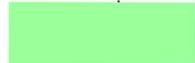


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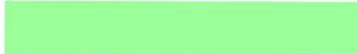
AUG 30 2013

Office: OAKLAND PARK, FLORIDA

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,

f. Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting Field Office Director, Oakland Park, Florida. The field office director's decision was appealed to the Administrative Appeals Office (AAO) and the appeal was dismissed. The matter is now before the AAO on motion. The motion will be granted and the AAO's previous decision affirmed.

The applicant is a native and citizen of Canada 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 committed a crime involving moral turpitude. The applicant 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 U.S. citizen spouse.

In a decision, dated November 21, 2011, the acting district director found that the applicant failed to demonstrate that his qualifying relative would suffer extreme hardship as a result of his inadmissibility to the United States. The application was denied accordingly.

In a brief on appeal counsel asserted that the applicant's spouse will suffer extreme hardship as a result of the applicant's inadmissibility and that the acting field office director erred in giving a disproportionate amount of weight to the police report in regards to the applicant's criminal conviction. Counsel submitted additional evidence of hardship on appeal.

In our decision, dated March 7, 2013, we found that the applicant had established that his spouse would suffer extreme hardship as a result of separation, but not as a result of relocating to Canada. The appeal was dismissed accordingly.

On motion, counsel asserts that our previous decision was based on two incorrect assumptions: that the applicant's spouse had previously worked in Canada and/or overseas and that the applicant's spouse's medical conditions may be treated or controlled while living in Canada. In an effort to rebut these assertions, counsel submits the following additional documentation: an affidavit from the applicant's spouse, a letter from a former professional colleague of the applicant's spouse, an updated letter from the applicant's spouse's physician, an article regarding treatments for the applicant's spouse's medical condition, and articles discussing age discrimination in the workplace.

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.

We note that we previously found the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude based on his November 18, 2010 conviction for attempted burglary of an occupied dwelling under Florida Statute §810.02(3)(A). Our

finding was based on the statutory language of Florida Statute §810.02(3)(A) and the decision in *Matter of Loussaint*, 24 I&N Dec. 754 (BIA 2009). On motion, the applicant does not contest his inadmissibility.

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), (B), . . . of subsection (a)(2) . . . if –

. . . .

(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

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, son or daughter of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. The applicant's spouse is the only qualifying relative in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996).

On appeal, the record of hardship included: a statement from the applicant, medical records for the applicant's spouse, financial documentation, the applicant's spouse's resume, and a psychological evaluation.

As stated above, we found that the applicant had shown that his spouse would suffer extreme hardship as a result of separation, and we will not disturb that finding. However, we did not find that the applicant's spouse would suffer extreme hardship upon relocation to Canada. On appeal, the applicant's spouse stated that she would suffer physical and financial hardship as a result of relocating to Canada. She stated that she started a marketing consultant business in Florida in partnership with a company in New Jersey and would not be able to continue with this work if she moved to Canada. She stated that she would not be able to find employment in Canada and that her asthma, which is triggered by cold weather and allergens, would worsen while living in Canada.

We found that the record on appeal did not fully support the applicant spouse's assertions. The record contained a letter from the applicant's spouse's treating physician at the [REDACTED]. The applicant's spouse's doctor stated that the applicant's spouse's asthma is triggered by cold weather and allergens, that she receives shots for her allergies, manages the cold weather by living in Florida, and has also been treated with prescription inhalers. We found that although the applicant's spouse's physician stated that the applicant's spouse's would be prone to severe asthma attacks in Canada, the letter did not indicate that her asthma could not be treated or

controlled, even in the cold weather, with prescription inhalers or other methods. Furthermore, the record contained no evidence that the applicant's spouse would be unable to find employment in Canada. We acknowledged that the applicant's spouse started a business in Florida in 2010, but the record did not reflect that given her previous employment experience she would suffer financially from the dissolution of this business. We noted that the applicant's spouse's resume indicated that she worked as a high level executive for [REDACTED] in an international or global capacity for 20 years. Moreover, her resume indicated that she had experience working with [REDACTED] in Canada as the Division Manager for Canada Venture Management and the Assistant Production Manager for International Long Distance in Canada and Mexico.

On motion, the applicant's spouse continues to assert that she would face physical and financial hardship as a result of relocating to Canada because of her asthma and her inability to find employment in Canada. In support of these assertions, the applicant's spouse submits an affidavit, a letter from a former professional colleague, an updated letter from her physician, an article regarding treatments for her medical condition, and articles discussing age discrimination in the workplace.

We now find that the applicant has shown that his spouse will suffer extreme hardship as a result of relocation to Canada. The record establishes through medical documentation, the applicant's spouse's most recent affidavit, and the previously submitted psychological evaluation that the applicant's spouse would suffer extreme emotional and physical hardship as a result of relocation. The record establishes that the applicant's spouse suffers from a history of mental illness and addiction to alcohol, which caused her to lose her long and successful career with [REDACTED]. The applicant's spouse indicates that she struggled to start her own Florida-based company and would struggle more if she had to learn a new market in Canada after 10 years of living in Florida. Compounding the applicant's spouse's issues regarding her emotional ability to start a new career and/or business venture are her medical conditions, in particular, her asthma which is triggered by cold weather. Her treating physician states that the applicant's spouse would be prone to severe asthma attacks while living in a cold climate, even when using asthma medication and the only way for her to manage these attacks would be for her to stay indoors during the cold winter months. Thus, we find that the applicant has now shown she will suffer extreme hardship if she were to relocate to Canada.

However, we cannot favorably exercise discretion in the applicant's case except in an extraordinary circumstance because he is subject to the heightened discretionary standard of 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 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 dependant 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.

The AAO finds that burglary of an occupied dwelling is a dangerous crime within the meaning of 8 C.F.R. § 212.7(d), and the heightened discretionary standards found in that regulation are 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, 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. *Id.*

Although 8 C.F.R. § 212.7(d) does not specifically state to whom the applicant must demonstrate exceptional and extremely unusual hardship, the AAO interprets 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.

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.

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 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.

We find that the applicant has demonstrated that due to his spouse's medical condition, she would suffer exceptional and extremely unusual hardship as a result of relocating to Canada. However, the applicant has failed to demonstrate that his spouse would suffer hardship rising to the level of exceptional and extremely unusual upon separation. Although the hardships presented meet the "extreme hardship" standard under section 212(h), "they are not the types of hardship envisioned by Congress when it enacted the significantly higher 'exceptional and extremely unusual hardship' standard." *Andazola-Rivas*, 23 I&N Dec. 319, 324. Therefore, the AAO finds that the applicant has failed to establish that he warrants a favorable exercise of discretion for a waiver of inadmissibility 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 establishing that the application merits approval 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 motion is granted and the AAO's previous decision is affirmed.

ORDER: The AAO's previous decision is affirmed.