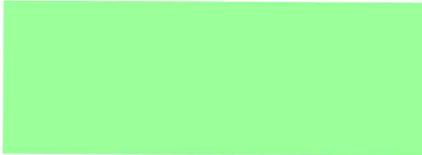




U.S. Citizenship
and Immigration
Services

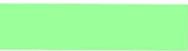
(b)(6)



Date: **AUG 30 2013**

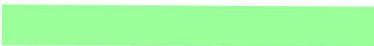
Office: SAN BERNARDINO

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:



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.

Thank you,

A handwritten signature in black ink that reads "Michael Shumway".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Administrative Appeals Office (AAO) previously dismissed the applicant's appeal in a decision dated March 8, 2013. The matter is now before the AAO on motion. The motion will be granted and the previous decision of the AAO will be withdrawn.

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 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's spouse and two children are U.S. citizens and his mother is a lawful permanent resident. He seeks a waiver of inadmissibility in order to reside in the United States.

The Field Office Director, San Bernardino, California, 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 October 14, 2011. The applicant filed a timely appeal with the AAO. In our decision on appeal, we found that the applicant was inadmissible for having been convicted of a crime involving moral turpitude. We also found that the applicant's spouse would suffer extreme hardship if the applicant were removed. However, we concluded that the applicant had failed to demonstrate eligibility for a waiver as a matter of discretion because he had several recent convictions, many of which were alcohol-related, and had submitted no evidence of treatment for his substance abuse problems or proof that he was not a danger to society. Additionally, we noted that the applicant's conviction for felony evading a police officer with wanton disregard for safety in violation of Cal. Vehicle Code § 2800.2(A) was a dangerous crime which rendered him subject to the heightened discretionary standards of 8 C.F.R. § 212.7(d).

On motion, counsel claims that the applicant has met his burden of demonstrating that he merits a waiver in the exercise of discretion. Counsel asserts that the applicant has submitted new evidence on motion to show that he has addressed his alcohol abuse problem and has become rehabilitated, that he is a valued member of his community, and that his family depends on him.

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 establish that the decision was based on an incorrect application of law or Service policy. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record was reviewed and considered in rendering a decision on the motion.

The applicant has submitted on motion new evidence related to his efforts of rehabilitation and his eligibility for a waiver in the exercise of discretion. This evidence includes documentation of his attendance at substance abuse treatment programs, a letter from his pastor and documentation of his participation with his church, letters from his sons' teachers, and additional letters of support from neighbors, friends, and family. Therefore, the AAO will grant the applicant's motion.

(b)(6)

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.

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 section 212(h)(1)(B) waiver of the bar to admission resulting from violation of section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship on the citizen or lawfully resident spouse, parent, son, or daughter of the applicant. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996).

The applicant does not contest our finding that he is inadmissible under section 212(a)(2)(A) of the Act for having been convicted of a crime involving moral turpitude. As noted above, we previously found that the applicant's spouse would face extreme hardship if the waiver application was denied. Therefore, the only issue on motion is whether the applicant has demonstrated that he merits a waiver in the exercise of discretion.

A favorable exercise of discretion is limited in the case of an applicant who has been convicted of a violent or dangerous crime. Specifically, 8 C.F.R. § 212.7(d) states:

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 previously found the applicant's conviction for felony evading a police officer with wanton disregard for safety in violation of Cal. Vehicle Code § 2800.2(A) to be a dangerous crime. On motion, counsel states: "While the Applicant does not concede the California statute of conviction is a 'violent or dangerous crime,' similar statutes in other jurisdictions have been so determined." Although we interpret counsel's statement as an effort to contest our finding that the applicant's conviction is for a dangerous crime, counsel has not specified any legal error or provided any reasoning to support a contrary finding. Therefore, we find that our decision was not in error and that the applicant is subject to the heightened discretionary requirements of 8 C.F.R. § 212.7(d). Accordingly, to demonstrate that he merits a waiver in the exercise of discretion, the applicant must show that "extraordinary circumstances" warrant approval of the waiver. *Id.* 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 in this case, 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." *Id.*

In *Matter of Monreal-Aguinaga*, 23 I&N Dec. 56, 62 (BIA 2001), the Board determined that exceptional and extremely unusual hardship "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 60-61. The Board stated that in assessing exceptional and extremely unusual hardship, it would be useful to consider the factors considered in determining extreme hardship. *Id.* at 63. Those factors include, but are not limited to, a qualifying relative's family ties in the United States and in the country to which he or she would relocate; the conditions in the country in the country of relocation; the financial consequences of departing the United States; and significant medical conditions, especially where appropriate health care services would be unavailable in the country of relocation. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999); *see also Matter of Anderson*, 16 I&N Dec. 596, 597-98 (BIA 1978).

In *Monreal-Aguinaga*, the Board provided additional examples of the hardship factors it deemed relevant for meeting the higher standard of 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 63-64. The Board has also 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.” *Matter of Andazola-Rivas*, 23 I&N Dec. 319, 323 (BIA 2002). Even where an Immigration Judge has found that a respondent’s children “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, the Board has held that such hardships “are simply not substantially different from those that would normally be expected upon removal to a less developed country.” *Id.* at 324.

However, in *Matter of Gonzalez Recinas*, the Board 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—including her “heavy financial and familial burden . . . the lack of support from her children’s father, [her U.S.] citizen children’s unfamiliarity with the Spanish language, the lawful residence in this country of all of [her] immediate family, and the concomitant lack of family in Mexico”—cumulatively amounted to exceptional and extremely unusual hardship to her qualifying relatives. *Id.* at 472. The Board emphasized that the case was “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 in this case. *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.”).

On motion, counsel asserts that the applicant’s spouse, children, and mother depend on the applicant and that they would suffer exceptional and extremely unusual hardship if the applicant were removed. Counsel states that the applicant’s lawful permanent resident mother is legally disabled due to shoulder problems, carpal tunnel syndrome, and severe anemia and that she relies on the applicant for “comfort and care.” *Counsel’s Brief*.

(b)(6)

As noted in our decision on appeal, the record demonstrates that the applicant's spouse is being treated for migraine headaches which are chronic and sometimes debilitating. *See Letter from [REDACTED] MD*, dated March 28, 2013. More specifically, the medical records show that the applicant's spouse suffers from severe migraine headaches, some of which last all day, for 20 days per month. The migraines are accompanied by nausea, vomiting, phonophobia, photophobia, and dizziness. *See Office Visit Report, [REDACTED] N.P.*, dated June 1, 2011. Her doctor also notes that her migraines can be triggered by "intense emotional stress." *See Letter from [REDACTED] MD*. The applicant's spouse also experiences anxiety and depression symptoms which interfere with her ability to sleep. Also, she has expressed concerns about the applicant's safety if he were removed to Mexico.

We find the applicant's spouse's serious medical and psychological issues, particularly the fact that she suffers from severe migraine headaches on most days while also experiencing anxiety and depression, to be a significant hardship factor in this case. If the applicant's spouse were to relocate to Mexico, the treatment plan her doctors have established for her would be interrupted and she would be placed under additional emotional stress, likely resulting in increased trouble with migraines. As we noted in our decision on appeal, relocation to Mexico would also separate the applicant's spouse from her family in the United States. Additionally, she would be forced to raise her three young U.S. citizen children in a foreign country, creating further stress. If the applicant's spouse were to remain in the United States without the applicant, she would likely struggle to care for her children on the 20 days per month that she experiences severe and sometime debilitating migraines.

The AAO finds that the applicant's spouse's medical and psychological conditions, her close family ties in the United States and lack thereof in Mexico, the difficulties she would face in raising her children in Mexico or in caring for them alone in the United States, and the emotional difficulties that relocation or separation would cause for her, when considered in the aggregate, would result in hardship that is "substantially beyond the ordinary hardship that would be expected when a close family member leaves this country." *Monreal-Aguinaga*, 23 I&N Dec. at 62 (quotation omitted). Therefore, we conclude that the applicant has demonstrated that a denial of his waiver application would result in exceptional or extremely unusual hardship, as required by 8 C.F.R. § 212.7(d).

Furthermore, the AAO finds that the gravity of the applicant's offense does not in this case override the extraordinary circumstances discussed. In determining the gravity of the applicant's offense, the AAO must not only look at the criminal act itself, but also engage in a traditional discretionary analysis and "balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Matter of Mendez-Moralez*, 21 I&N Dec. at 300.

In addition to exceptional and extremely unusual hardship to the applicant's spouse, other favorable factors in this case include hardship to his three U.S. citizen children and his lawful permanent resident mother. The records show that two of the applicant's sons are struggling

academically. The teachers of two of the applicant's sons note that the applicant has participated in his sons' education and that his continued presence and support is recommended. Two of the applicant's sons have also submitted letters describing their close relationships with the applicant and their need for his support. Furthermore, the applicant's mother has indicated that the applicant assists her in managing her health problems.

The evidence also demonstrates that the applicant regularly attended Alcoholics Anonymous meetings between [REDACTED] and [REDACTED] and that he enrolled in a Drinking Driver Program through the [REDACTED] Department of Motor Vehicles on [REDACTED] 2013. There is no evidence that he has been engaged in criminal activity or the abuse of alcohol since 2008. The record also establishes that the applicant has been active in his church and has completed a leadership course. Additionally, the record contains several letters of recommendation indicating that the applicant is a valued member of his community, that he is a hardworking and responsible person who cares for his family, that he has overcome his substance abuse issues and learned from his mistakes, and that he is not known to drink alcohol.

The adverse factors in the present case are the applicant's entry without inspection, unauthorized employment, and criminal and alcohol abuse issues. However, in light of the evidence submitted on motion, the AAO finds that the applicant has established that he is rehabilitated, does not present a danger to society, is a valued member of his community, and provides important support to his family. When considered in the aggregate, these factors outweigh the adverse factors in the applicant's case. Therefore, we find that the applicant has demonstrated that he merits a waiver in the exercise of discretion.

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 been met. Accordingly, the motion is granted, the prior decision of the AAO is withdrawn, and the underlying appeal is sustained.

ORDER: The prior AAO decision is withdrawn and the underlying appeal is sustained.