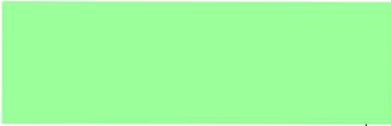




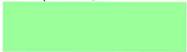
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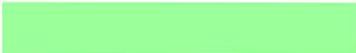


DATE: **FEB 28 2013**

OFFICE: WEST PALM BEACH, FL

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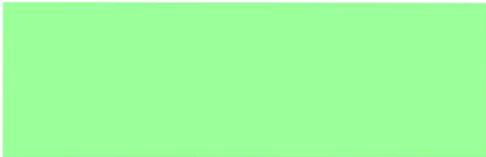
IN RE:

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:

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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

(b)(6)

DISCUSSION: The waiver application was denied by the District Director, West Palm Beach, Florida. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO), and is now before the AAO on a motion to reopen and reconsider. The motion to reopen is granted, but the AAO's prior decision will be affirmed. The application therefore remains denied.

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 crimes 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 reside in the United States with his U.S. citizen mother and adult son.

The director denied the applicant's Form I-601, Application for Waiver of Grounds of Inadmissibility, concluding that the applicant did not meet the requirements for a waiver under section 212(h)(1)(A) or (B) of the Act. *See Decision of District Director*, dated December 17, 2008. The applicant filed a timely appeal to the AAO.

The AAO determined that that the applicant's conviction for aggravated assault constitutes a violent or dangerous crime, rendering him subject to the heightened discretionary standard of 8 C.F.R. § 212.7(d). *See Decision of AAO*, dated June 10, 2011. We found that the applicant had failed to establish exceptional and extremely unusual hardship or other extraordinary circumstances to warrant favorable discretion under this heightened standard, and dismissed the appeal accordingly.

On motion, counsel contends the AAO should reopen and reconsider its prior decision. *See Form I-290B, Notice of Appeal or Motion*, dated July 7, 2011. Counsel contends that the applicant's mother and son would suffer extreme hardship upon separation and relocation and submits additional supporting evidence.

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.

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 –

(b)(6)

- (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:

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 . . . ; and

(2) the Attorney General [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

The record indicates that the applicant was paroled into the United States on October 15, 1980. He seeks adjustment of status under the Cuban Refugee Adjustment Act of 1966. The record discloses that the applicant was convicted on March 5, 1982 of aggravated assault in violation of section 784.021(1)(a) of the Florida Statutes (Fla. Stat.). Based on his conviction, the applicant was found to be inadmissible under 212(a)(2)(A)(i)(I) of the Act, for having been convicted of a crime involving moral turpitude. He does not dispute his inadmissibility.

As noted, in our prior decision, the AAO found that the applicant's conviction was a violent or dangerous crime, and he was therefore required to satisfy the heightened discretionary standard under 8 C.F.R. § 212.7(d). See *Decision of AAO*, dated June 10, 2011 at 4. Section 212.7(d) of Title 8 of the Code of Federal Regulations provides that the Secretary of Homeland Security will

not favorably exercise discretion under section 212(h)(2) of the Act except in extraordinary circumstances, such as those involving national security, foreign policy considerations, or cases where the denial of admission would result in exceptional and extremely unusual hardship. Having found no evidence of foreign policy, national security, or other extraordinary equities, the AAO considered whether the applicant had demonstrated exceptional and extremely hardship, which we noted as more restrictive than the extreme hardship standard of section 212(h) of the Act. The AAO concluded that the applicant had failed to make any claims of hardship with regards to the applicant's son, and therefore, addressed only the hardship claims raised on appeal relating to the applicant's mother. We further concluded that the applicant had failed to demonstrate that the applicant's mother could not receive medical treatment for her medical ailments in Cuba, and that the record contained insufficient evidence of financial, medical, emotional or other hardships upon relocation. Likewise, we found that the record was insufficient in demonstrating exceptional and extremely unusual hardship to the applicant's mother upon separation, should she remain in the United States without the applicant.

On motion, counsel reasserts that the applicant meets the rehabilitation and extreme hardship requirements of sections 212(h)(1)(A) and (B) of the Act respectively. As we have previously stated, even if the applicant satisfied the requirements of 212(h)(1)(A) or (B) of the Act by showing rehabilitation or extreme hardship to qualifying relatives, his waiver application must be denied in the exercise of discretion, unless he satisfies the heightened discretionary standard of 8 C.F.R. § 212.7(d) by demonstrating exceptional and extremely unusual hardship or other extraordinary circumstances. Counsel does not address whether the applicant meets this heightened standard, upon submission of the additional evidence proffered with the instant motion, or dispute its applicability to the applicant's case.

As our review of this case does not show our prior determination and analysis to be in error as to the applicability of the heightened discretionary standard of 8 C.F.R. § 212.7(d) to the applicant's case, and the applicant has not set forth any legal argument on motion contesting the applicability of this regulatory section, the AAO will not disturb our prior determination. We will now consider whether the applicant has presented new evidence to overcome our previous finding that the applicant had failed to demonstrate exceptional and extremely unusual hardship to his U.S. citizen mother to merit favorable discretion under 8 C.F.R. § 212.7(d).

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 63-64.

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.

Id. at 324.

(b)(6)

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.

On motion, counsel submits new evidence, namely statements from the applicant’s son and siblings; an updated medical letter from the applicant’s doctor; letters from the applicant’s mother’s doctors; and a document addressing healthcare facilities in Cuba. The record of evidence also includes, but is not limited to, counsel’s statement; the applicant’s statement; statement of the applicant’s mother; the applicant’s medical records; the applicant’s social security disability records; and the applicant’s criminal records.

Counsel asserts that the record demonstrates that the applicant has met his burden in demonstrating the hardship to his mother upon separation. The record contains letters from Dr. [REDACTED] indicating that they treat the applicant’s mother, [REDACTED] for several health conditions, including hypertensive heart disease, hyperlipidemia, diverticulosis, and early dementia. They indicate that due to Ms. [REDACTED] dementia, the applicant makes most of the medical decisions on her behalf, in addition to supervising her medications and transporting her to her medical appointments. The applicant, in his January 6, 2009 statement, asserts that his mother lives with him and requires his assistance with everything, including reminding her to eat and take her medications. He asserts that his sister, Teresa, is recovering from heart surgery and is not well enough to take care of their mother. The applicant also states that his remaining sister and two brothers, with whom he has no contact, are not concerned about caring for their mother. In addition, he asserts that his adult son cannot take of the applicant’s mother because he has a job where he travels often. The applicant’s mother

states that the applicant takes care of her because she is disabled and is responsible for all the household matters. *See Statement of Blanca Beaton-Perez*, dated October 30, 2008.

On motion, the applicant now submits two statements from his thirty-six-year-old son and brief letters from his two sisters in support of the separation claim. The applicant's son, in his statements of June 27, 2011 and July 11, 2011, explains that he is currently unemployed and unable to provide for his paternal grandmother due to financial and health reasons. The applicant's sister, [REDACTED] in a letter dated July 11, 2011, also briefly indicates that she is unable to care for her mother due to her own health conditions, which include open-heart surgery, arthritis, high blood pressure, and other ailments, and because she is unable to speak English to communicate with doctors. The record does not contain evidence of her medical ailments. *See AAO Decision*, dated June 10, 2011, at 7 (noting lack of evidence documenting the applicant's sister's medical ailments). She also asserts that the applicant's mother is unable to travel by airplane or boat due to her condition, but does not identify the specific medical condition to which she refers. We also observe that the applicant's doctors do not reference such a travel restriction in any of their letters contained in the record. Ms. [REDACTED] also states that the applicant is the one who takes care of their mother and the only one in the family able to do so. The record also contains a letter from the applicant's other sister [REDACTED] who also states that she is unable to take care of her mother due to her medical conditions and inability to speak English. She too indicates that the applicant is the only one who takes care of their mother and is capable of doing so. We note that neither sister indicate whether their medical ailments restrict them in their ability to work or provide for themselves or their family. We also note that, like both his sisters, the applicant himself is also unable to communicate in English and is suffering from numerous health conditions that have led to a finding of disability by the Social Security Administration, Office of Hearings and Appeals. *See Decision of Administrative Law Judge, John J. Mulrooney II*.

After reviewing the record and the additional evidence submitted on motion, we are unable to fully credit the assertions made by the applicant's son and sisters, regarding their inability to care for the applicant's mother. Although the applicant was not limited in his motion to submitting only the evidence specifically noted by the AAO as examples of evidence lacking, he did not use the opportunity to proffer other evidence to further corroborate the assertions in the letters or the underlying hardship claim. For instance, even though it was noted by the AAO in its prior decision, the applicant failed to provide medical documentation of his sister's health problems, or provide an explanation for why such evidence was not furnished. Additionally, we note that the applicant's son resides at the same address as the applicant, presumably with his wife and the applicant's mother, and thus, appears to be in a position to corroborate the assertions of the applicant and his sisters' about the latter's ability and willingness to care for their mother. *See Form G-28, Notice of Entry of Appearance As Attorney*, dated July 7, 2011. However, his letter makes no reference to the applicant's sisters or their involvement and ability, or lack thereof, in the applicant's mother's life or care.

Having carefully considered the evidence of record, we find that although the hardships illustrated here may be considered "extreme," the applicant has failed to demonstrate that they rise to the

heightened level of exceptional and extremely unusual. Although we give considerable weight to factors here such as the applicant's mother's advanced age and ill health, we find the record lacking in credible evidence that his mother is solely reliant on him. *See generally, Matter of Monreal*, 23 I&N Dec. at 63-64. Moreover, the record is insufficient in demonstrating that the applicant's mother would face other hardship, including financial or emotional hardship, as a result of relocation, that when considered in the aggregate, would be "substantially" beyond the ordinary hardship that is expected upon separation.

We also consider whether the applicant's mother would suffer exceptional and extremely unusual hardship upon relocation to Cuba if the waiver application is denied. On motion, the applicant has proffered only a single page of an undated, multiple page U.S. Department of State report that addresses conditions in Cuba, including availability of medical care, to bolster the relocation claim. We do not find this document to be reliable, and thus, will take administrative notice of the Department of State's most recent report regarding general conditions in Cuba, which indicates that medical care does not meet U.S. standards. *See Bureau of Consular Affairs, U.S. Dep't of State, Country Specific Information: Cuba (April 30, 2012)*. However, this is insufficient to satisfy the applicant's burden to demonstrate exceptional and extremely unusual hardship to his mother. We note that the record does not show that the applicant's mother's conditions cannot be adequately treated in Cuba for her ailments. It is also unclear from the record whether the applicant or his mother have any close relatives or property in Cuba that would make relocation less difficult. Furthermore, while the applicant's mother may lose her ties in the United States and be separated from her remaining adult children should she relocate, the record also indicates that she is a native of Cuba and would continue to have the support of the applicant, who is her primary caretaker. Finally, we observe that although counsel asserts hardship upon relocation, neither the applicant nor his mother even address the possibility that the latter would in fact relocate to Cuba or the possible hardships upon such relocation. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Accordingly, we conclude that the applicant has failed to demonstrate that his mother would suffer exceptional and extremely unusual hardship upon relocation to Cuba.

In this case, the record does not contain sufficient evidence to show that the hardships faced by the qualifying relative, considered in the aggregate, would rise beyond the common results of removal or inadmissibility to the level of exceptional and extremely unusual hardship. *Matter of Monreal-Aguinaga*, 23 I&N Dec. at 62. The AAO therefore finds that the applicant has failed to show extraordinary circumstances as required under 8 C.F.R. § 212.7(d). Accordingly, he did not demonstrate that he merits a favorable exercise of discretion.

In proceedings for a waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, although the motion to reopen has been granted to consider new evidence submitted, the AAO's June 10, 2011 decision will be affirmed. The application remains denied.

(b)(6)

Page 9

ORDER: The prior decision of the AAO is affirmed. The application remains denied.