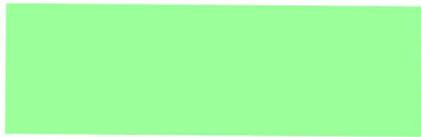


(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Office of Administrative Appeals
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

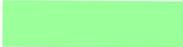


U.S. Citizenship
and Immigration
Services

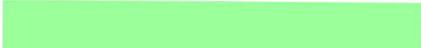


DATE: JUL 24 2013

Office: LAWRENCE, MA

FILE: 

IN RE:

Applicant: 

APPLICATION:

Application for Waiver of Grounds of Inadmissibility pursuant to 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.

Thank you,

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

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Administrative Appeals Office (AAO) previously dismissed the applicant's appeal in a decision dated January 29, 2013. The matter is now before the AAO on motion. The motion will be granted and the prior AAO decision withdrawn.

The applicant is a native and citizen of Nigeria who was found to be inadmissible 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 been convicted of a crime involving moral turpitude. He seeks a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States.

The Field Office Director, Lawrence, Massachusetts, concluded that the applicant had failed to establish extreme hardship to his qualifying relatives and denied the application accordingly. *Decision of Field Office Director*, dated November 18, 2010. The applicant filed a timely appeal to the AAO. In our decision on appeal, we found the applicant to be inadmissible under section 212(a)(2)(A)(i)(I) of the Act. We also found the applicant's convictions for assault and battery to be violent crimes which rendered his application for a waiver subject to the heightened discretion standard of 8 C.F.R. § 212.7(d). Based on a finding that the applicant had failed to meet the heightened standard, we dismissed the appeal. *Decision of AAO*, dated January 29, 2013.

On motion, counsel for the applicant reports that the applicant's qualifying spouse recently died. Counsel asserts that pursuant to section 204(l) of the Act, the death of the qualifying spouse establishes exceptional and extremely unusual hardship to the qualifying spouse as required by 8 C.F.R. § 212.7(d). Additionally, counsel contends that the applicant's daughters are suffering increased hardship due to the death of their mother. Counsel also alleges that the AAO erred in finding that the applicant would have the financial support of his relatives in Nigeria if he were to relocate there. Furthermore, counsel notes that the applicant is Christian and asserts that he would be in danger of religious-based violence in Nigeria. Finally, counsel contends that the applicant merits a favorable exercise of discretion in that he has had no criminal history since 1995, is an active member of his church, pays taxes, has close ties in the United States, and has submitted letters of support from friends and family.

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 applicant has submitted new evidence in support of his motion, so the motion will be granted. The record includes, but is not limited to: the death certificate, obituary, and funeral information of the qualifying spouse; a USCIS Policy Memorandum regarding the adjudication of petitions in light of section 204(l) of the Act; letters from the applicant's daughters; a

Massachusetts Criminal Offender Record Information sheet regarding the applicant; country conditions information; tax records; a newsletter from the applicant's church; letters regarding the applicant's good moral character; a statement from the now-deceased qualifying spouse; a letter from a therapist; and records relating to the applicant's criminal convictions. The entire record was reviewed and considered in rendering a decision on the motion.

The applicant is inadmissible under INA § 212(a)(2)(A)(i)(I) for having been convicted of crimes involving moral turpitude. The applicant does not contest the finding of inadmissibility, nor does he dispute that his convictions for assault and battery constitute violent and dangerous crimes which subject him to the heightened discretionary standard under 8 C.F.R. § 212.7(d). However, counsel asserts that the applicant has met his burden of demonstrating exceptional and extremely unusual hardship and that he has offered additional evidence of his eligibility for a favorable exercise of discretion.

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

Section 212(h)(1)(A) of the Act provides that the Secretary may, in her discretion, waive the application of subparagraph (A)(i)(I) of subsection (a)(2) if 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. An application for admission to the United States is a continuing application, and admissibility is determined on the basis of the facts and the law at the time the application is finally considered. *Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992).

The applicant's convictions for assault and battery occurred in 1995, more than 18 years ago. We found in our previous decision that the applicant had demonstrated that his admission would not be contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated, as required by section 212(h)(1)(A)(ii) and (iii) of the Act. As such, it is unnecessary for the applicant to demonstrate extreme hardship to a qualifying relative.

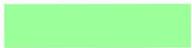
Nevertheless, with respect to the qualifying spouse's death in April 2012 and its impact on the applicant's Form I-601, section 204(l) of the Act, which became effective on October 28, 2009, before the instant appeal was adjudicated, states as follows:

l) Surviving Relative Consideration for Certain Petitions and Applications-

(1) IN GENERAL- An alien described in paragraph (2) who resided in the United States at the time of the death of the qualifying relative and who continues to reside in the United States shall have such petition described in paragraph (2), or an application for adjustment of status to that of a person admitted for lawful permanent residence based upon the family relationship described in paragraph (2), and any related applications, adjudicated notwithstanding the death of the qualifying relative, unless the Secretary of Homeland Security determines, in the unreviewable discretion of the Secretary, that approval would not be in the public interest.

(2) ALIEN DESCRIBED- An alien described in this paragraph is an alien who, immediately prior to the death of his or her qualifying relative, was--

- (A) the beneficiary of a pending or approved petition for classification as an immediate relative (as described in section 201(b)(2)(A)(i));
- (B) the beneficiary of a pending or approved petition for classification under section 203 (a) or (d);
- (C) a derivative beneficiary of a pending or approved petition for classification under section 203(b) (as described in section 203(d));
- (D) the beneficiary of a pending or approved refugee/asylee relative petition under section 207 or 208;
- (E) an alien admitted in 'T' nonimmigrant status as described in section 101(a)(15)(T)(ii) or in 'U'



nonimmigrant status as described in section 01(a)(15)(U)(ii); or

(F) an asylee (as described in section 208(b)(3)).

Pursuant to the USCIS Policy Memorandum issued on December 16, 2010, *Approval of Petitions and Applications after the Death of the Qualifying Relative under New Section 204(l) of the Immigration and Nationality Act* (USCIS Policy Memorandum), the fact that the qualifying relative has died will be “deemed to be the functional equivalent of a finding of extreme hardship”

However, the Policy Memorandum also clarifies that a “qualifying relative” for purposes of section 204(l) of the Act includes “an individual who, immediately before death, was:”

- The petitioner in a family-based immigrant visa petition under section 201(b)(2)(A)(i) or 203(a) of the Act;
- The principal beneficiary in a family-based visa petition case under section 201(b)(2)(A)(i) or 203(a) of the Act;
- The principal beneficiary in an employment-based visa petition case under section 203(b) of the Act;
- The petitioner in a refugee/asylee relative petition under section 207 or 208 of the Act;
- The principal alien admitted as a T or U nonimmigrant; or
- The principal asylee, who was granted asylum under 208 of the Act.

USCIS Policy Memorandum at 2.

The applicant does not qualify for relief under section 204(l) of the Act. The record indicates that he was residing in the United States when his spouse died, he continues to reside in the United States at this time, and he is the beneficiary of an approved family-based visa petition. However, his spouse, who is now deceased, was not the petitioner in the family-based visa petition; the petitioner was his daughter. As a result, the applicant’s eligibility for a family-based visa did not depend on a petition his spouse had filed on his behalf, nor was he a dependent on a petition filed on his spouse’s behalf.

Furthermore, even had the applicant established extreme hardship to his spouse through section 204(l) of the Act, he had already demonstrated statutory eligibility under section 212(h)(1)(A): the issue is whether he has demonstrated that he merits a favorable exercise of discretion. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996). A favorable exercise of discretion is limited in this case because the applicant 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.

We have previously found, and the applicant does not contest, that his convictions for assault and battery are violent crimes. Therefore, he must meet the heightened discretionary burden under 8 C.F.R. § 212.7(d) and must show that “extraordinary circumstances” warrant approval of the waiver under either section 212(h) of the Act. 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. 8 C.F.R. § 212.7(d). The record contains no evidence of foreign policy, national security, or other extraordinary equities. Therefore, the AAO must 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.*

The AAO disagrees with counsel's assertion that the USCIS Policy Memorandum “specifically states that the death of a qualifying relative would establish either extreme hardship or exceptional and extremely unusual hardship, depending on what was required in the particular situation” *Counsel's Brief*. The USCIS Policy Memorandum states that death of a qualifying relative establishes extreme hardship. *USCIS Policy Memorandum* at 11. However, it also notes that:

[T]he finding of extreme hardship merely *permits*, and never *compels* a favorable exercise of discretion. That is, as with any other waiver case, a waiver application decided in light of 204(l) requires the weighing of all favorable factors against any adverse factors. Extreme hardship is just one positive factor to be weighed. The inadmissibility ground sought to be waived is, itself, an adverse factor. For example, inadmissibility based on a conviction for a violent or dangerous crime requires proof of exceptional or extremely unusual hardship, or some other extraordinary circumstance, in order for a waiver application to be approved.

Id. (citations omitted) (emphasis in original).

As the Policy Memorandum explains, a conviction for a violent crime means that the applicant must demonstrate exceptional and extremely unusual hardship pursuant to 8 C.F.R. § 212.7(d), which is a separate discretionary requirement, regardless of any showing of extreme hardship. *Id.* The death of a qualifying relative can establish extreme hardship under section 204(l) of the Act but cannot establish that the applicant merits a favorable exercise of discretion.

In *Matter of Monreal-Aguinaga*, 23 I&N Dec. 56, 62 (BIA 2001), the Board determined that exceptional and extremely unusual hardship in cancellation of removal cases under section 240A(b) of the Act is hardship that “must be ‘substantially’ beyond the ordinary hardship that would be expected when a close family member leaves this country.” However, the applicant need not show that hardship would be unconscionable. *Id.* at 61. The AAO notes that the exceptional and extremely unusual hardship standard in cancellation of removal cases is identical to the standard put forth by the Attorney General in *Matter of Jean*, *supra*, and codified at 8 C.F.R. § 212.7(d).

The Board stated that in assessing exceptional and extremely unusual hardship, it would be useful to view the factors considered in determining extreme hardship. *Id.* at 63. In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999), the Board provided a list of factors it deemed relevant in determining whether an alien has established the lower standard of extreme hardship. The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative’s family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative’s ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not an exclusive list. *Id.*

We note that in *Monreal*, the Board provided additional examples of the hardship factors it deemed relevant for establishing exceptional and extremely unusual hardship:

[T]he ages, health, and circumstances of qualifying lawful permanent resident and United States citizen relatives. For example, an applicant who has elderly parents in this country who are solely dependent upon him for support might well have a strong case. Another strong applicant might have a qualifying child with very serious health issues, or compelling special needs in school. A lower standard of living or adverse country conditions in the country of return are factors to consider only insofar as they may affect a qualifying relative, but generally will be insufficient in themselves to support a finding of exceptional and extremely unusual hardship. As with extreme hardship, all hardship factors should be considered in the aggregate when assessing exceptional and extremely unusual hardship.

23 I&N Dec. at 63-64.

In the precedent decision issued the following year, *Matter of Andazola-Rivas*, the Board noted that “the relative level of hardship a person might suffer cannot be considered entirely in a vacuum. It must necessarily be assessed, at least in part, by comparing it to the hardship others might face.” 23 I&N Dec. 319, 323 (BIA 2002). The issue presented in *Andazola-Rivas* was whether the Immigration Judge correctly applied the exceptional and extremely unusual hardship standard in a cancellation of removal case when he concluded that such hardship to the respondent’s minor children was demonstrated by evidence that they “would suffer hardship of an emotional, academic and financial nature,” and would “face complete upheaval in their lives and hardship that could conceivably ruin their lives.” *Id.* at 321 (internal quotations omitted). The Board viewed the evidence of hardship in the respondent’s case and determined that the hardship presented by the respondent did not rise to the level of exceptional and extremely unusual. The Board noted:

While almost every case will present some particular hardship, the fact pattern presented here is, in fact, a common one, and the hardships the respondent has outlined are simply not substantially different from those that would normally be expected upon removal to a less developed country. Although the hardships presented here might have been adequate to meet the former “extreme hardship” standard for suspension of deportation, we find that they are not the types of hardship envisioned by Congress when it enacted the significantly higher “exceptional and extremely unusual hardship” standard.

23 I&N Dec. at 324.

However, the Board in *Matter of Gonzalez Recinas*, a precedent decision issued the same year as *Andazola-Rivas*, clarified that “the hardship standard is not so restrictive that only a handful of applicants, such as those who have a qualifying relative with a serious medical condition, will qualify for relief.” 23 I&N Dec. 467, 470 (BIA 2002). The Board found that the hardship factors presented by the respondent cumulatively amounted to exceptional and extremely unusual hardship to her qualifying relatives. The Board noted that these factors included her heavy financial and familial burden, lack of support from her children’s father, her U.S. citizen children’s unfamiliarity with the Spanish language, lawful residence of her immediate family, and the concomitant lack of family in Mexico. 23 I&N Dec. at 472. The Board stated, “We consider this case to be on the outer limit of the narrow spectrum of cases in which the exceptional and extremely unusual hardship standard will be met.” *Id.* at 470.

An analysis under *Monreal-Aguinaga* and *Andazola-Rivas* is appropriate. *See Gonzalez Recinas*, 23 I&N Dec. at 469 (“While any hardship case ultimately succeeds or fails on its own merits and on the particular facts presented, *Matter of Andazola* and *Matter of Monreal* are the starting points for any analysis of exceptional and extremely unusual hardship.”).

The applicant's eldest daughter, [REDACTED] writes that the applicant has always provided her with important emotional support, especially during the recent death of her mother. She notes that she is an active duty officer in the Navy and has been stationed in Florida since 2011, so she was unable to care for her mother during her illness but was comforted by the fact that the applicant was fulfilling that responsibility. [REDACTED] states that since her mother's death, "life has seemed completely meaningless" at times but that the applicant has provided her with comfort and support. She also notes that her assignment with the Navy limits her ability to take leave to visit her family, but that her sister and the applicant have been able to visit her at her duty station. She fears that she would be unable to have visits with the applicant if he were living in Nigeria, particularly because of the security situation in that country. Finally, she notes that military deployments can be difficult and that the hope of returning home to her family is a major motivating factor which would be eliminated if the applicant were removed. [REDACTED] acknowledges that the applicant has made mistakes but states that he is a good father to her. She states that she would be "devastated" if the applicant were forced to leave the United States and that such a result would be "no less destructive . . . than [her] mom's death." See *Letter from [REDACTED]* dated February 2013.

The applicant's youngest daughter, [REDACTED] states in an undated letter that she would be devastated if the applicant were removed. She asserts that the applicant has always provided her with emotional and financial support. Additionally, she states that she has suffered significant loss in the past few years, particularly the loss of her mother to bladder cancer in 2012. [REDACTED] notes that the applicant cared for her mother, who was very ill and frail, could barely eat, and required frequent emergency visits to the hospital. Additionally, the applicant supported the family financially and paid the qualifying spouse's medical bills after the qualifying spouse became unable to work. [REDACTED] asserts that she contemplated suicide after the death of her brother and that the applicant helped her through subsequent panic and anxiety. She states that she now suffers from panic and anxiety due to her mother's death and that the removal of the applicant would result in additional loss and trauma for her. Finally, [REDACTED] contends that Nigeria is a dangerous country and that if the applicant were there, "it would be too much" for her. A newsletter from the applicant's church notes that he is scheduled to teach a course for church members on financial planning and stability. [REDACTED], dated January 6, 2013.

The AAO finds that the applicant has demonstrated that his eldest U.S. citizen daughter, [REDACTED] would experience exceptional and extremely unusual hardship if she were to relocate to Nigeria. The U.S. Department of State warns that U.S. citizens should avoid all travel to the Nigerian states of Adamawa, Borno, and Yobedue due to states of emergency in those states. Additionally, the Department of State recommends that U.S. citizens avoid non-essential travel to 18 other states, all northern Nigerian states, and the Gulf of Guinea. The Department of State notes that kidnappings, suicide bombings, and attacks by extremist groups are common in Nigeria and that the violence may extend to the middle and southern states of the country. *U.S. Department of State, Travel Warning: Nigeria*, dated June 3, 2013. Additionally, the record demonstrates that [REDACTED] is an officer in the U.S. Navy. Her commitment to the Navy would prevent her from relocating to Nigeria at this time. Furthermore, [REDACTED] was born in the

United States and has personal and professional ties to this country. Although she resided in Nigeria for approximately six years as a child, she returned to the United States in 1998. Adjustment to life in Nigeria, particularly in light of the current safety concerns in that country, would likely be very difficult for her.

The AAO also finds that [REDACTED] would face exceptional and extremely unusual hardship if separated from the applicant. [REDACTED] has recently experienced significant emotional trauma due to the death of her mother, who died from cancer at age 47. [REDACTED] states that she relies on the applicant for emotional support, particularly since the death of her mother. The record also indicates that the applicant's son, [REDACTED] was killed in a car accident in Nigeria in 1998. [REDACTED] has expressed that the deaths of her mother and brother have been very difficult and that the applicant's removal to Nigeria would constitute another major loss for her. A letter from a therapist who has treated the family also indicates that [REDACTED]'s death and previous separations of the family created long-lasting emotional difficulties for [REDACTED]. See *Letter from [REDACTED] Ph.D.*, dated June 3, 2009. Furthermore, the record indicates that the applicant is Christian and is an active member of his church. Country conditions information in the record shows that extremist groups have targeted Christians through attacks on churches in Nigeria. See *CNN, Boko Haram offshoot claims responsibility in Nigeria kidnapping*; *BBC News, Nigeria Profile*, dated January 16, 2013; *U.S. Department of State, Travel Warning: Nigeria*, dated June 3, 2013. Finally, [REDACTED]'s role in the U.S. Navy would likely prevent her from traveling to Nigeria to visit the applicant, due to safety concerns for U.S. government employees in Nigeria as well as her limited ability to take leave. The AAO finds that the emotional hardship [REDACTED] would suffer on separation from the applicant would be heightened due to the recent death of her mother, the history of loss and separation within her family, the risk to the applicant as a Christian in Nigeria, and the limited ability for visitation in Nigeria. In the aggregate, these factors would create exceptional and extremely unusual hardship to [REDACTED] if the applicant were removed.

The AAO may therefore consider the applicant for a favorable exercise of discretion, but must also "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. 296, 300 (BIA 1996) (citations omitted).

The adverse factors in the present case are the applicant's convictions for assault and battery, which occurred in 1995. The favorable factors are the exceptional and extremely unusual hardship to his daughter, the fact that he has demonstrated his rehabilitation in the 18 years since his convictions, the fact that he has resided in the United States since 1983, his family and professional ties in this country, the fact that he has paid taxes, his active role in his church, and his lack of a criminal record since 2007.¹ The record also contains letters of support from the applicant's friends indicating that he is a hardworking person of good moral character.

¹ The applicant received probation in 2007 for operating a motor vehicle with a suspended license.

The AAO finds that the crimes the applicant committed are serious in nature and cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factors such that a favorable exercise of discretion is warranted. Therefore, the applicant has established his eligibility for a waiver under section 212(h) of the Act.

In proceedings for application for waiver of grounds of inadmissibility under sections 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. In the present case, the applicant has now met that burden. Accordingly, the motion is granted, the prior AAO decision is withdrawn, and the underlying appeal is sustained.

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