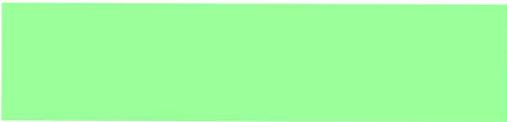




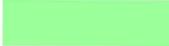
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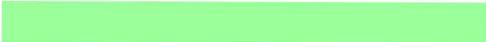


DATE: JUL 24 2013

Office: HIALEAH

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. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

A handwritten signature in cursive script 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 February 8, 2013. The matter is now before the AAO on motion. The motion will be granted and the prior AAO decision will be affirmed.

The applicant is a native and citizen of St. Kitts and Nevis 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 with his U.S. citizen spouse and child.

The field office director, Hialeah, Florida, found that the applicant had failed to establish extreme hardship to a qualifying relative and denied the Form I-601 waiver application accordingly. *Decision of Field Office Director*, dated July 8, 2011. The applicant filed a timely appeal with the AAO alleging that the field office director had erred in finding that his qualifying spouse would not experience extreme hardship if the waiver application were denied. In our decision on appeal, we found the applicant to be inadmissible under section 212(a)(6)(C)(i) of the Act. We also found the applicant's conviction for aggravated assault with a deadly weapon to be a violent and dangerous crime requiring him to prove exceptional and extremely unusual hardship to his qualifying relatives, but that he had failed to make such a showing.

On motion, counsel for the applicant requests that, "given the family's fragile circumstances, the higher more difficult standard of exceptional and unusual hardship not be applied as that is only achievable in the rarest of cases." *Form I-290B*, dated March 8, 2013. Counsel also alleges that the applicant has been rehabilitated and has reconciled with the victim of his aggravated assault, who is his spouse and qualifying relative. Finally, counsel contends that new evidence submitted with the motion will support the applicant's claims of hardship to his qualifying relatives.

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 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, statements from the applicant and his qualifying spouse; a letter from the applicant's mental health counselor; a letter from the applicant's employer; a list of the qualifying spouse's relatives; the qualifying spouse's student loan statements; medical records regarding the applicant, his qualifying spouse, his daughter, and his mother; tax records; a Goodwill Donation Receipt; a statement of the applicant's retirement plan; photographs of the applicant and his family; a letter of support from a public official in [REDACTED] country conditions information; bank statements; and utility and mortgage bills. The entire record was reviewed and considered in rendering a decision on the motion.

The record reflects that on December 5, 2008, the applicant was arrested on several counts of battery and aggravated battery. On May 18, 2009, he was convicted of three counts of misdemeanor battery in the first degree in violation of Fla. Stat. § 784.03, one count of felony battery in the third degree under Fla. Stat. § 784.03, and one count of felony aggravated assault with a deadly weapon in the third degree under Fla. Stat. § 784.021(1)(a). The applicant was sentenced to two years of probation on the latter two counts. The applicant has not contested his inadmissibility under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude. Therefore, the only issue on motion is whether he has met his burden of demonstrating eligibility for a waiver of inadmissibility under section 212(h) of the Act.

A waiver is available to the applicant under INA § 212(h) dependent on his showing that the bar to his admission would impose extreme hardship on a qualifying relative. However, once eligibility for a waiver is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion in favor of the waiver. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996). 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 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 dependent 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 (Dec. 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). 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 the applicant’s conviction for aggravated assault with a deadly weapon under Fla. Stat. § 784.021 is a violent and dangerous crime because it involves knowingly attempting to cause or causing bodily injury to another with a deadly weapon. Therefore, the applicant is subject to the heightened discretionary standard under 8 C.F.R. § 212.7(d) and must show that “extraordinary circumstances” warrant approval of the waiver. On motion, counsel requests that the heightened standard under 8 C.F.R. § 212.7(d) not be applied in the applicant’s case and that he instead be permitted to demonstrate eligibility under the normal “extreme hardship” standard under section 212(h) of the Act. However, counsel does not allege that the applicant’s conviction for aggravated assault with a deadly weapon was not a violent and dangerous crime. Counsel offers no support for his contention that the AAO has the authority to choose, based on humanitarian factors, to apply a standard other than that which 8 C.F.R. § 212.7(d) requires. Therefore, the AAO must determine, based on the new evidence the applicant has submitted, whether he has demonstrated extraordinary circumstances as required by 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 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 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 has 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 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 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 determined that the evidence of 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.”).

In his statement submitted on motion, the applicant states that his family would endure extreme hardship if he were forced to leave the United States. He asserts that while growing up on the [REDACTED] he “was a selfish and money hungry individual” and that he has had to work hard in the United States to “change [his] dysfunctional habits.” He further contends that during the five years since his convictions, he has had “a terrible sense of regret” but has “turned [his] life around and has chosen to be a good and loving husband and father.” He asserts that the love and patience of his spouse and daughter have allowed him to become a better person and to “find other productive means to channel [his] feelings.” Additionally, he notes that he is the primary provider for his family. The applicant also states that he supports his mother, who is elderly and ill, and that he will be unable to assist her if he must leave the United States. He alleges that his mother has become depressed by the possibility that the applicant will be removed.

Medical records regarding the qualifying spouse show that she was diagnosed with severe preeclampsia during her pregnancy and that her daughter, now two years old, was delivered prematurely by C-section. The medical records also establish that during her C-section, the qualifying spouse's doctors found that "the bladder, bowel wall, and uterus were all one large mass." The doctors performed surgery on the adhesions and monitored the applicant after surgery. *See Operative Reports, Osceola Regional Medical Center, dated May 11, 2011.*

The qualifying spouse states that her relationship with the applicant has grown and that they are very close. She asserts that she does not want to think about relocating to [REDACTED] with the applicant, but that she would do so if necessary because they are a family. She is concerned about the effect on her daughter's well-being if she is forced to grow up without a father. She cites studies which have shown that "children that have grown up without father figures in their lives are more likely to commit suicide, run away, have behavioral disorders, drop out of school, abuse chemical substance[s] and end up in a prison." The applicant's spouse indicates that the applicant is a good father and that their daughter has positively affected the applicant's life.

The record also contains a list of the qualifying spouse's relatives which shows that her parents, brother, grandparents, aunts, uncles, and nephews reside in the United States. Additionally, the record contains loan statements indicating that the qualifying spouse owes a total of approximately \$66,000 in student loans and that her payments on some loans are overdue.

The applicant's counselor writes that she provided counseling to the applicant for five sessions between September 20, 2011 and January 2, 2012. [REDACTED] dated February 24, 2013. She states that the applicant recently requested to resume his counseling sessions. Furthermore, she asserts that the applicant "followed through on treatment recommendations and worked on applying what he learned in his personal and professional life." *Id.*

The record also contains an undated letter from the applicant's employer, who states that the applicant has worked full time at the [REDACTED] since March 30, 2011. *Letter from Matthew Freeman.* Mr. [REDACTED] states that the applicant is a good employee who "does the work that is asked of him with accuracy and no complaints" and is "one of the most easygoing people and is a pleasure to work with" *Id.* Finally, Mr. [REDACTED] notes that he recently underwent surgery and that the applicant frequently visited him in the hospital. *Id.*

Medical records relating to the applicant show that in February 2013, he underwent surgery to treat a deviated septum, "Turbinate hypertrophy," "Bilateral concha bullosa," and "Recurrent sinusitis." [REDACTED] dated February 19, 2013. Medical records regarding the applicant's daughter document various visits to the doctor for issues including "wheezing," "sores in mouth," an examination of her ear, and routine physical exams. Medical records relating to the applicant's mother, who resides in [REDACTED] indicate that she has a "[b]ony excrescence at the humeral diaphysis level of benign appearance." *Letter,*

[REDACTED] dated July 10, 2009. An estimate for surgical treatment also states that the applicant's mother has been diagnosed with "Nerve root compression with spinal [illegible]." *Q[u]otation*, [REDACTED] dated April 9, 2006.

The applicant has also submitted copies of his tax returns to demonstrate that he and his spouse are working and caring for their daughter. The most recent tax returns submitted establish that the applicant earned approximately \$25,600 in 2012 and that his spouse earned approximately \$12,360 that same year. Additionally, the applicant has submitted a copy of his retirement account statement showing an account balance of \$231.47. Finally, the record contains a receipt indicating that the applicant made a \$2000 donation to [REDACTED]

The AAO finds that the applicant has failed to meet his burden of demonstrating that his qualifying relatives would suffer exceptional and extremely unusual hardship if his waiver application were denied. First, we note that counsel does not claim that the applicant can meet the exceptional and extremely unusual hardship standard. Instead, counsel requests that the AAO apply the "less stringent standard of extreme hardship" and states, "We are confident we can meet this standard if given the opportunity." *Form I-290B*, dated March 1, 2013. However, because the applicant must demonstrate exceptional and extremely unusual hardship to a qualifying relative in order to meet the requirements of 8 C.F.R. § 212.7(d), the AAO will evaluate the evidence he has submitted in light of that standard.

The medical records the applicant has submitted do not establish that either of his qualifying relatives would suffer exceptional and extremely unusual hardship if the waiver application were denied. While we recognize that the applicant's spouse and daughter suffered serious and potentially fatal health issues at the time of the child's birth, there is no evidence that they continue to experience serious health problems or that either requires ongoing medical treatment. Although the record demonstrates that the qualifying spouse suffered from severe preeclampsia, a potentially fatal condition, during her pregnancy, the medical records indicate that she delivered her baby safely by C-section. Additionally, while the qualifying spouse underwent surgery for adhesions of her bowel, uterus, and bladder, the medical records indicate that her surgery was successful and there is no evidence that she has suffered complications. Similarly, while the applicant's daughter was born prematurely, which could have resulted in long term health complications, the child is now two years old and there is no indication that she suffers from any serious medical or developmental problems.

The AAO notes that many of the medical records relating to the applicant's daughter are handwritten and illegible. However, based on the legible portion of the records, it appears that the applicant's daughter has been treated for minor health problems. While counsel states in his brief that "the child is not, thankfully, seriously ill but is a sickly child that needs constant professional and modern medical attention," the record does not support that claim. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the applicant's burden of proof. 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).

The applicant also claims that his qualifying relatives will suffer financial hardship if he is removed. While the applicant previously claimed to be the sole provider for his family, the most recent tax records submitted show that the qualifying spouse was working in 2012. Furthermore, while the qualifying spouse has large student loan debts, the record lacks evidence regarding the family's monthly expenses to show that she is unable to afford the payments. Also, it is unclear whether the qualifying spouse is working full time or part time or whether she would be able to increase her work hours in order to meet her financial needs. The record also shows that many of the qualifying spouse's close family members live nearby in Florida and it is unclear whether any of them would be able to help support the applicant's spouse and daughter if the applicant were removed. Although the applicant's qualifying relatives may face some financial difficulty in the applicant's absence, the evidence is insufficient to demonstrate that it would rise to the level of exceptional and extremely unusual hardship.

While the qualifying spouse also expresses a concern about her daughter's emotional well-being in the applicant's absence, her concerns are based on statistical evidence regarding the effects on children of growing up in single-parent homes. Generalized studies regarding other children cannot establish that the applicant's daughter in particular would suffer exceptional and extremely unusual hardship if the applicant were removed. Additionally, despite the qualifying spouse's claim that she and the applicant have a very close relationship, there is no evidence that she would suffer emotional difficulties on separation from him that would amount to exceptional and extremely unusual hardship.

The applicant has also failed to show that his qualifying relatives would face exceptional and extremely unusual hardship if they were to relocate to [REDACTED]. While the applicant has claimed that his spouse and daughter would be unable to receive necessary medical care in [REDACTED] the record does not establish that they have health conditions for which they need ongoing treatment. The applicant's claim that he and his qualifying spouse would be unable to earn sufficient income in [REDACTED] is also unsupported by the record. While he also claims that his mother would be unable to assist him and his family there, the medical records relating to his mother are partially illegible and contain medical terms with no explanation of the severity of her health conditions or their effects on her ability to work or help the applicant. Additionally, although the record contains a list of the qualifying spouse's relatives in the United States, separation from her relatives would not, on its own, create exceptional and extremely unusual hardship. Finally, as we noted in our previous decision, the primary language spoken in [REDACTED] is English so adjustment to life in that country may be less difficult for the qualifying spouse. In this case, even when all hardship factors are considered in the aggregate, the evidence is insufficient to establish that the qualifying relatives would experience hardship which is "substantially" beyond the ordinary hardship that would be expected when a close family member leaves this country." *Matter of Monreal-Aguinaga*, 23 I&N Dec. 56, 61 (BIA 2001).

The AAO recognizes that the applicant has submitted a letter of support from his employer, a letter from his counselor, and a receipt indicating that he made a large donation to Goodwill. Those pieces of evidence are relevant to the applicant's moral character and eligibility for a waiver in the exercise of discretion. However, in order to establish that he merits a favorable exercise of discretion, the applicant must show exceptional and extremely unusual hardship if he were removed. 8 C.F.R. § 212.7(d). Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish he is eligible for the benefit sought. The applicant has failed to meet that burden. The applicant's motion to reopen is granted, but the prior AAO decision is affirmed.

ORDER: The prior AAO decision is affirmed.