



**U.S. Citizenship
and Immigration
Services**

(b)(6)

DATE: **JUL 24 2013**

Office: SANTA ANA, CA

FILE: [REDACTED]

IN RE:

Applicant: [REDACTED]

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 June 10, 2011. In a subsequent decision, dated January 2, 2013, the AAO granted the applicant's motion to reopen and affirmed its prior denial of the applicant's waiver application. The matter is now before the AAO on motion to reconsider. The motion to reconsider will be dismissed.

The applicant is a native and citizen of Mexico 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 reside in the United States with his U.S. citizen spouse and lawful permanent resident mother.

The director concluded that the applicant had failed to establish extreme hardship to a qualifying relative and denied the application accordingly. *Decision of Field Office Director*, dated June 11, 2008. 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)(6)(C)(i) of the Act. We also found that the applicant's convictions for assault and kidnapping constituted 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 June 10, 2011. The applicant filed a motion to reopen accompanied by new evidence which he alleged demonstrated that his mother would suffer exceptional and extremely unusual hardship if his waiver application were denied. In our decision of January 2, 2013, we granted the applicant's motion to reopen but found that the evidence he had submitted was insufficient to demonstrate exceptional and extremely unusual hardship. Therefore, we concluded that the applicant had failed to meet the heightened discretion standard under 8 C.F.R. § 212.7(d) and affirmed the denial of his application. *Decision of AAO*, dated January 2, 2013.

On motion, counsel for the applicant contends that the AAO incorrectly applied section 212(h)(1)(B) of the Act to the applicant's case when the applicant is eligible for a waiver based on rehabilitation under section 212(h)(1)(A) of the Act. Counsel alleges that the applicant's convictions occurred more than 15 years ago and that he has been rehabilitated, so the AAO should have granted him a waiver under section 212(h)(1)(A) of the Act. Therefore, counsel asserts that the AAO erred in requiring the applicant to establish hardship to a qualifying relative.

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 is inadmissible under INA § 212(a)(2)(A)(i)(I) for having been convicted of a crime involving moral turpitude. On motion, counsel concedes that the applicant was convicted

of a crime involving moral turpitude and that he is inadmissible. Also, the applicant does not dispute that his convictions were for violent and dangerous crimes which subject him to the heightened discretionary standard of 8 C.F.R. § 212.7(d).¹ Finally, in his motion to reconsider, the applicant does not allege that the AAO erred in finding that he failed to show exceptional and extremely unusual hardship if his waiver application were denied. Therefore, the only issue on motion is whether the AAO erred in requiring the applicant to make a showing of exceptional and extremely unusual hardship, rather than simply approving his application on the basis of statutory eligibility under section 212(h)(1)(A) of the Act. The applicant has failed to show that the AAO's previous decision was in error.

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

¹ In the applicant's previous motion to reopen, filed July 14, 2011, counsel wrote, "The Applicant understands that he is not eligible for his Permanent Residency pursuant to having committed a dangerous crime of violence, and because this crime is a Crime Involving Moral Turpitude. . . . At this time, the Applicant is filing evidence that will prove that his LPR mother . . . will suffer exceptional and extremely unusual hardship [if the waiver application is denied]."

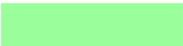
time the application is finally considered. *Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992). Counsel correctly notes that the applicant's April 18, 1989 convictions for two counts of assault with a firearm in violation of Cal. Penal Code § 245(a)(2) and one count of kidnapping in violation of Cal. Penal Code § 207(a) occurred over 15 years ago. Therefore, the applicant is eligible for a waiver based on rehabilitation under section 212(h)(1)(A).

However, to qualify for a waiver under section 212(h)(1)(A), the applicant also must show that he merits a favorable exercise of discretion. *See* section 212(h)(2) of the Act, *see also 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.

We have previously found, and the applicant has conceded, that his convictions for assault with a firearm and kidnapping 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 in this case contains no evidence of foreign policy, national security, or other extraordinary equities. Therefore, the AAO considers whether the applicant has "clearly demonstrate[d] that the denial of . . . admission as an immigrant would result in exceptional and extremely unusual hardship." *Id.* Accordingly, the applicant has not shown that the AAO's previous decision, in which we applied the heightened requirements of 8 C.F.R. § 212.7(d) to the applicant's case due to his conviction for violent crimes, was in error.

The applicant has failed to establish that the AAO's prior decision was based on an incorrect application of law or Service policy. 8 C.F.R. § 103.5(a)(3). As his motion to reconsider does not meet the requirements of a motion, it must be dismissed. 8 C.F.R. § 103.5(a)(4).



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NON-PRECEDENT DECISION

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ORDER: The motion is dismissed.