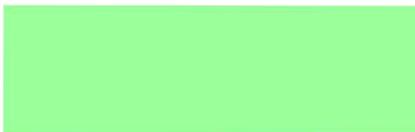




U.S. Citizenship
and Immigration
Services



DATE: MAR 09 2013

Office: MIAMI, FL

FILE:

IN RE:

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 with the field office or service center that originally decided your case by filing a 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

DISCUSSION: The waiver application was denied by the Field Office Director, Miami, Florida and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of the Dominican Republic who was found to be inadmissible to the United States 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 committed a crime involving moral turpitude. The applicant is married to a lawful permanent resident. He seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States.

The Field Office Director concluded that the record did not establish that the bar to the applicant's admission would result in extreme hardship for a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Field Office Director's Decision*, dated May 20, 2011.

On appeal, counsel contends that, as it has been more than 15 years since the applicant was convicted of the offense that bars his admission to the United States, the Field Office Director should have considered his waiver application under section 212(h)(1)(A) of the Act, which does not require the applicant to demonstrate extreme hardship. *Form I-290B, Notice of Appeal or Motion*, dated June 16, 2011; *see also Counsel's Brief*, dated June 15, 2011.

The evidence of record includes, but is not limited to, counsel's briefs; statements from the applicant and his spouse; medical records relating to the applicant's spouse; employment letters for the applicant and his spouse; statements of support from friends of the applicant; documentation of the applicant's and his spouse's financial obligations; 2008 tax records for the applicant and his spouse; and records relating to the applicant's arrests and convictions. The entire record was reviewed and all relevant information considered in reaching a decision on the appeal.

Section 212(a)(2)(A) of the Act states in pertinent part, that:

- (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-
 - (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

The record reflects that on May 26, 1995, the applicant pled guilty to Burglary, Occupied Dwelling, Florida Statutes (FL ST) § 810.02(3)(a), and Petit Theft, FL ST § 812.014(2)(d).¹ On July 13, 1995, the [REDACTED] withheld adjudication in the applicant's

¹ The record also reflects that the applicant was arrested for Burglary, FL ST § 810.02 and Aggravated Battery, FL ST § 784.045 on July 19, 1998 and, was also arrested on August 26, 1998 for a violation of pre-trial release conditions in connection with the burglary charge. However, as counsel notes on appeal, the record also indicates that a jury acquitted the applicant on all three charges on or about September 3, 1999.

case, fined him and sentenced him to two years of probation for each offense, which were to run concurrently.

In *Matter of Louissaint*, 24 I&N Dec. 754 (BIA 2009), the Board of Immigration Appeals (BIA) found that a violation of FL ST § 810.02(3)(a) is categorically a crime involving moral turpitude. Accordingly, the applicant is inadmissible to the United States pursuant to section 212(a)(2)(i)(I) of the Act. He does not contest his inadmissibility on appeal.

Section 212(h) of the Act provides:

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), . . . of subsection (a)(2) . . . if –

(1)(A) [I]t is established to the satisfaction of the Attorney General that–

(i) [T]he 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

The record reflects that the applicant is eligible for waiver consideration under both prongs of section 212(h) of the Act. As the 1995 offense for which the applicant is inadmissible occurred more than 15 years ago, his waiver request may be considered under section 212(h)(1)(A). The applicant also has a U.S. citizen spouse on whom he may base a waiver application under section 212(h)(1)(B) of the Act.

In order to be eligible for a section 212(h)(1)(A) waiver, an applicant must demonstrate that his or her admission to the United States would not be contrary to its national welfare, safety, or security, and that he or she is rehabilitated. A waiver under section 212(h)(1)(B) of the Act requires the applicant to establish extreme hardship to a qualifying relative. Once eligibility is established under section 212(h)(1)(A) or section 212(h)(1)(B), United States Citizenship and Immigration Services (USCIS) then assesses whether an exercise of discretion is warranted. In most discretionary matters, the alien bears the burden of proving eligibility simply by showing equities in the United States that are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

In the present case, however, the AAO cannot find that the exercise of discretion in this matter may be based solely on the balancing of favorable versus adverse factors. The applicant has been convicted of Burglary, Occupied Dwelling, FL ST § 810.02(3)(a), which is not only a crime involving moral turpitude, but also a violent or dangerous crime, triggering the requirements of 8 C.F.R. § 212.7(d), which provides:

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.

In *United States v. Davis*, 881 F.2d 973, 976 (11th Cir. 1989), the U.S. Court of Appeals for the Eleventh Circuit (11th Circuit) found a violation of FL ST § 810.02(3) to constitute a "crime of violence" for purposes of U.S. Sentencing Guidelines. 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. While the terms "violent or dangerous crimes" and "crime of violence" are not synonymous, we, nevertheless, 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. 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). Consequently, even were we not to find that the applicant's conviction is for a violent crime, we would find it to be a dangerous crime. Based on our review of the record and the 11th Circuit's reasoning in *Davis*, we conclude that the applicant has been convicted of a violent or dangerous crime for the purposes of 8 C.F.R. § 212.7(d).

The record does not include evidence of foreign policy or national security considerations. Accordingly, the applicant must demonstrate that the denial of the waiver application would result in exceptional and extremely unusual hardship, a more restrictive standard than that of extreme hardship. *Cortes-Castillo v. INS*, 997 F.2d 1199, 1204 (7th Cir. 1993).

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,” but that the applicant need not show that hardship would be unconscionable. *Id.* at 61. The BIA also 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. Accordingly, the AAO will first consider the applicant’s waiver application under the extreme hardship requirement of section 212(h) of the Act. Should the record establish that the hardship resulting from the applicant’s inadmissibility satisfies section 212(h) of the Act, we will proceed with a consideration of whether such hardship also meets the heightened standard imposed on the applicant by 8 C.F.R. § 212.7(d).

Extreme hardship is “not a definable term of fixed and inflexible content or meaning,” but “necessarily depends upon the facts and circumstances peculiar to each case.” *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, the BIA provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). 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. *Id.* 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 exclusive. *Id.* at 566.

The BIA has also held that the common or typical results of removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one’s present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. See generally *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm’r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the BIA has made it clear that “[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists.” *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator “must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation.” *Id.*

The actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. See, e.g., *Matter of Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. See *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); but see *Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

On appeal, counsel does not address what hardships the denial of the waiver application would create for the applicant's spouse, stating instead that the applicant's case should be considered under section 212(h)(1)(A) of the Act, which does not require him to establish extreme hardship. The AAO also finds no claims of hardship in the November 8, 2010 statement the applicant has submitted for the record. While the record does include a November 17, 2010 statement from the applicant's spouse in which she asserts that the applicant is her only family in the United States and that she does not know what she would do without him, she does not further explain this statement. The record also includes three medical reports relating to the applicant's spouse, as well as documentation of the applicant's and his spouse's financial obligations. This evidence is not, however, accompanied by any claim that the applicant's spouse's health or her financial circumstances would result in hardship if the applicant is removed and she remains in the United States.

In the absence of clear assertions from the applicant, the AAO may not speculate as to the hardships created by the denial of the waiver application. Accordingly, we do not find the record to establish that separation would result in any hardships for the applicant's spouse beyond those normally created by the separation of families.

In his brief filed with the Form I-601, counsel asserts that relocation would force the applicant's spouse to live in a country where she has no family and which is currently experiencing economic problems. Counsel also reports that the applicant's spouse suffers from arthritis and labyrinthitis, and contends that these conditions would be difficult to treat in the Dominican Republic. The record, however, does not support counsel's claims.

While the record provides three medical reports, dated February 22, 2006, February 28, 2006, and November 3, 2010, which indicate that the applicant's spouse was seen for dizziness and her weight, it does not demonstrate that she would find it difficult to obtain adequate medical care for these conditions in the Dominican Republic. Neither does it establish that the Dominican Republic is

currently experiencing economic problems. No documentary evidence, e.g., published country conditions materials on the Dominican Republic, has been submitted regarding the status of the country's healthcare system or its economy. Without supporting documentation, the assertions of counsel are not sufficient to meet the burden of proof in these proceedings. The 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, the record fails to establish that relocation to the Dominican Republic would result in extreme hardship for the applicant's spouse.

As the record in the present matter does not establish extreme hardship under section 212(h) of the Act, it also fails to demonstrate that the applicant's inadmissibility would result in exceptional and extremely unusual hardship, the heightened standard of hardship imposed on the applicant by the regulation at 8 C.F.R. § 212.7(d). Therefore, the applicant has not demonstrated eligibility for a favorable exercise of discretion under section 212(h)(2) of the Act.

In that the applicant is not eligible for a favorable exercise of discretion under 8 C.F.R. § 212.7(d), we find no purpose would be served by considering whether the applicant is statutorily eligible for a waiver under section 212(h)(1)(A), as counsel contends on appeal.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In discretionary matters, the applicant bears the full burden of proving his or her eligibility for discretionary relief. *See Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976). Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.