



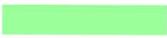
U.S. Citizenship
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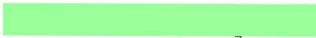
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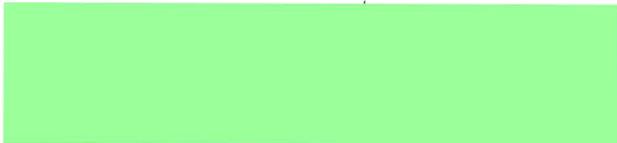
Office: CHICAGO, IL

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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) and section 212(a)(9)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B).

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

DISCUSSION: The waiver application was denied by the Field Office Director, Chicago, Illinois. An appeal of the denial was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on motion. The motion will be granted and the underlying application will remain denied.

The applicant is a native and citizen of Mexico 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 committed a crime involving moral turpitude and pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking readmission within ten years of his last departure from the United States. The applicant seeks a waiver of inadmissibility to reside in the United States with his U.S. citizen spouse and two U.S. citizen daughters.

In a decision, dated October 1, 2009, the field office director concluded that the applicant had failed to establish that his bar to admission would impose hardship that would rise to the level of extreme on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

In an undated Notice of Appeal to the AAO (Form I-290B), counsel stated that the denial of the waiver application was an abuse of the field office director's discretion, that the applicant clearly established extreme hardship, and that the field office director failed to consider all of the evidence. Counsel also asserted that because the applicant entered the United States with a parole document his waiver application should have been granted and cites to *Lemus-Losa v. Holder*, 576 F.3d 752 (7th Cir. 2009) as being relevant to the applicant's case.

The record indicated that the applicant entered the United States without inspection in February 1993. The applicant then departed the United States at some point after August 18, 1998 and reentered with advanced parole on September 8, 1998. Thus, the applicant accrued unlawful presence from April 1, 1997, the date the unlawful presence provisions were enacted until August 18, 1998 or after. In our previous decision we found that as it had been more than ten years since the departure that made the inadmissibility issue arise in the applicant's application, the applicant was no longer inadmissible under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

However, we did find the applicant inadmissible under section 212(a)(2)(A) of the Act for having committed a crime involving moral turpitude. We noted that an application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the field office does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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

(b)(6)

(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.

We found in accordance with *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992) and *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), that the applicant's conviction in 1994 for aggravated assault with a deadly weapon under § 720-5/12-2(A)(1) was a crime involving moral turpitude.

The Board stated in *Matter of Sanudo*, 23 I&N Dec. 968, 971 (BIA 2006), that "assault and battery with a deadly weapon has long been deemed a crime involving moral turpitude . . . because the knowing use or attempted use of deadly force is deemed to be an act of moral depravity that takes the offense outside the "simple assault and battery" category." (citations omitted). Thus, the applicant's conviction is for a crime involving moral turpitude.

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.

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 applicant is inadmissible occurred more than 15 years before the date of the applicant'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).

Since the criminal conviction for which the applicant was found inadmissible occurred more than 15 years ago, the inadmissibility can be waived under section 212(h)(1)(A) of the Act. Section 212(h)(1)(A) of the Act requires that the applicant's admission to the United States not be contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated.

However, we found that even if the applicant were able to satisfy the requirements of section 212(h)(1)(A) of the Act, his waiver application would not be granted as he was not deserving of a favorable exercise of the Secretary's discretion as he was convicted of a violent or dangerous crime and is subject to section 212.7(d) of the Act. For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Matter of Mendez-Morales*, 21 I&N Dec. 296, 299 (BIA 1996). The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

The regulation at 8 C.F.R. § 212.7(d) 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.

Accordingly, the applicant was required to show that "extraordinary circumstances" warrant approval of his waiver. 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, 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" to a qualifying relative. *Id.*

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 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 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 63-4.

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.

23 I&N Dec. at 324.

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.”).

On appeal, the record of hardship included: counsel’s brief, a statement from the applicant, two statements from the applicant’s spouse, and financial documentation.

The applicant’s spouse claimed extreme emotional and psychological hardship for her and her daughters as a result of the applicant’s inadmissibility. She claimed she would suffer extreme emotional hardship as a result of being separated from the applicant and that she and her daughters

would live in fear if they relocate to Mexico where there are kidnappings. The financial documentation in the record indicated that the applicant earned approximately \$541 every week and that the family's health insurance was through his employer. The record also seemed to indicate that this income supported the applicant's family in that their checking account statement showed a balance of approximately \$12,000 and the applicant's spouse had approximately \$6,000 in a money market account. The AAO noted that the record was inconsistent as to whether the applicant's spouse was working or not. Counsel's brief and one of the applicant's spouse's statements indicated that the applicant was the family's sole source of income. However, in her affidavit, dated February 17, 2009, the applicant's spouse stated many times that her emotional distress as a result of being separated from the applicant would be so severe that she would no longer be able to work and would lose her income. The AAO noted that it was incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the applicant submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The AAO found that because the record was inconsistent as to whether the applicant's spouse was able to contribute financially to the household, the AAO could not ascertain the financial hardship that would result from the applicant being separated from his family. Furthermore, we found that the current record did not show how the applicant's spouse and children would suffer emotional hardship that would rise to the level of exceptional and extremely unusual.

In regards to relocation, the AAO also found that the record did not indicate that the applicant's spouse and children would suffer hardship rising to the level of exceptional and extremely unusual. The applicant's waiver application indicated that he was born in Mexico City and although reports showed that Mexico was experiencing narco-related violence, Mexico City was not one of the areas in Mexico experiencing this rise in violence. The U.S. State Department Travel Warning for Mexico indicated that there was no advisory in effect for travel to Mexico City. Moreover, the record did not establish that someone with the applicant's work experience and background could not find employment to support his family in Mexico. The AAO recognized the difficulties of moving children to a country where they have never lived, but found that the record did not establish that adapting to the Mexican culture and the Spanish language would cause exceptional and extremely unusual hardship upon relocation.

Finally, we found that as the applicant had failed to establish that his spouse and/or children would suffer exceptional and extremely unusual hardship as a result of his inadmissibility, he did not demonstrate that he merits a favorable exercise of discretion under 8 C.F.R. § 212.7(d).

On motion, counsel submits additional evidence of hardship, including: a new statement from the applicant, a new statement from the applicant's spouse, a statement from the applicant's child, financial documentation, and medical documentation. We note that counsel's brief on motion fails to acknowledge that the inadmissibility now at issue for the applicant is his inadmissibility under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of committing a crime involving moral turpitude. The brief also fails to acknowledge that the applicant was convicted of a violent crime and is subject to the heightened discretionary standard of 8 C.F.R. § 212.7(d).

In his statement the applicant's spouse states that he supports his wife and children financially and that they own a home in the United States that they would be forced to sell if they moved to Mexico. He states that his spouse would be emotionally devastated if they were separated or if she had to relocate to Mexico. He states that his wife does not read, speak, or write in Spanish, has no ties to Mexico, and would not be able to find employment in Mexico.

The applicant's spouse states that she, her husband, and her daughters are depressed and very saddened about the possibility of separation or relocation. She states that the family will lose its home and health insurance if the applicant is removed.

The applicant's daughter states that she does not want to move to Mexico because her experiences there have been bad. She states that she does not fit in with the culture, she is frightened by the kidnappings and killings, and she does not like the schools. She states further that if the family separates they will suffer because the applicant is their main source of financial and emotional support.

The financial documents submitted indicate similar information as to what was submitted on appeal with the exception of documents showing the applicant and his spouse have an outstanding car loan in the amount of approximately \$9,000.

Medical documentation in the record indicates that the applicant's spouse had gallbladder surgery and the applicant has had problems with his knee. The record does not indicate that the applicant or anyone in his family have ongoing medical issues that would cause them to suffer upon relocation or upon separation.

Again, no documentation has been submitted to support any claims made in regards to condition in Mexico.

We find that the applicant has not shown on motion that his spouse and/or children would suffer exceptional or extremely unusual hardship as a result of his inadmissibility. The record fails to address the deficiencies in the record that were noted by the AAO on appeal.

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. After a careful review of the record, it is concluded that the applicant has failed to establish that a favorable exercise of the Secretary's discretion is warranted. Thus, the motion will be granted, but the underlying application will remain denied.

ORDER: The motion is granted and the underlying motion remains denied.