



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE **MAR 25 2013** Office: LOS ANGELES, CA

FILE: [REDACTED]

IN RE: Applicant: [REDACTED]

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Los Angeles, California. 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, but the decision to dismiss the applicant's appeal will be affirmed on other grounds. The waiver application will remain denied.

The record reflects that the applicant is a native and citizen of Belize 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. The record reflects that the applicant's mother and three children are U.S. citizens. The applicant seeks a waiver of inadmissibility pursuant to 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 mother and children.

The district director found that the applicant failed to establish that extreme hardship would be imposed on his qualifying relatives and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated February 26, 2007. The AAO found that the applicant did not establish extreme hardship to a qualifying relative and dismissed the appeal accordingly. *AAO Decision*, dated June 8, 2009.

On motion, counsel details the hardship that the applicant's qualifying relatives would experience if the waiver applicant is not approved. *Applicant's Motion*, dated August 4, 2009.

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). In support of the motion, counsel has submitted statements from the applicant, the mother of his youngest child and his mother.

As discussed in the AAO's first decision, on March 6, 1995 the applicant was convicted of involuntary manslaughter in violation of California Penal Code § 192(b), and of using a firearm in the commission of a felony or attempted felony, in violation of California Penal Code § 12022.5(a), and he was sentenced to five years imprisonment with three years stayed pending successful completion of the first two years.

As the applicant has not contested his inadmissibility on appeal or motion, and the record does not show that determination to be in error, we will not disturb the finding of inadmissibility under section 212(a)(2)(A) of the Act.

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

(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...or an attempt or conspiracy to commit such a crime...is inadmissible.

Section 212(h) of the Act provides, in pertinent part, that:

The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana

(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.

In examining whether the applicant is eligible for a waiver, the AAO will assess whether he meets the requirements of section 212(h)(1)(A) of the Act. The record reflects that the activity resulting in the applicant's convictions occurred prior to December 25, 1993, the date of his arrest. The AAO notes that an application for admission or adjustment of status is considered 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) (citations omitted). The date of the Form I-485 decision is the date of the final decision, which in this case, must await the AAO's finding regarding the applicant's eligibility for a waiver of inadmissibility. As the activities for which the applicant is inadmissible occurred more than 15 years before the date of his adjustment of status "application," he meets the requirement of section 212(h)(1)(A)(i) of the Act.

The record does not reflect that admitting the applicant would be contrary to the national welfare, safety, or security of the United States per section 212(h)(1)(A)(i) of the Act. The record reflects that the applicant has a history of working in the United States, although the record is not clear as to his current

occupation. There is no indication that the applicant has ever relied on the government for financial assistance. The record reflects that the applicant has not been arrested or been convicted of any crimes since 1995. There is no indication that the applicant is involved with terrorist-related activities or poses other security issues.

The record also shows by a preponderance of the evidence that the applicant has been rehabilitated per section 212(h)(1)(A)(iii) of the Act. The record reflects that the applicant has not been arrested or been convicted of any crimes since 1995. He has been involved in raising his children. The record does not reflect that he has the propensity to engage in further criminal activity. Accordingly, the applicant has shown that he meets the requirement of section 212(h)(1)(A)(iii) of the Act.

Based on the foregoing, the applicant has shown that he is eligible for consideration for a waiver under section 212(h)(1)(A) of the Act.

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.

As stated, on March 6, 1995, the applicant was convicted of involuntary manslaughter. The applicant has been convicted of a violent or dangerous crime pursuant to 8 C.F.R. § 212.7(d). As such, the AAO will assess whether he is entitled to a favorable exercise of discretion under section 212(h)(2) of the Act.

To establish eligibility for a waiver of inadmissibility in the present case, the applicant must show that "extraordinary circumstances" warrant its approval. 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. 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. We note that the regulatory standard of exceptional and extremely unusual hardship found in 8 C.F.R. § 212.7(d) is more restrictive than the extreme hardship standard set forth in section 212(h) of the Act. *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.” However, the applicant need not show that hardship would be unconscionable. *Id.* at 61.

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-Rivás*, 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.

The AAO now turns to a consideration of whether the record establishes experience exceptional and extremely unusual hardship if the applicant's waiver application is denied.

The applicant's mother's medical provider states in a January 26, 2005 letter that she been receiving follow-up care for insulin dependent diabetes mellitus, hypertension, dyslipidemia, osteoporosis, and degenerative joint disease; she has a past history of angina pectoris, status post coronary artery bypass in 1992; her medications include insulin, metformin, benazepril, fluovac and aspirin; and she was assessed with refractive error in both eyes and mild diabetic retinopathy in 2004.

The record reflects that the ages of the applicant's U.S. citizen children are 9, 18 and 24. Counsel states that all of their ties are to the United States; and the mother of the applicant's two older children, [REDACTED] died of cancer in 2003; all of the ties to their mother will be lost if they relocate to Belize and they visit their mother's grave often; [REDACTED] went missing in 2007; [REDACTED] is a good student and all of his friends are in the United States. The applicant makes claims similar to counsel.

[REDACTED] states that he visits his mother's grave often; he misses his mother; he would feel like he is losing her again if he went to Belize; he wants to go to college; all of his friends are in the United States; he does not know anyone in Belize; and he would miss [REDACTED]

[REDACTED] mother's death certificate reflects that she died of cervical carcinoma with metastasis on December 21, 2003.

The record does not include supporting documentary evidence that [REDACTED] is missing. The AAO notes that applicant's mother's medical conditions. The most recent medical records before the AAO are from

2005 and the record is not clear as to the current severity of her problems or of the state of medical care in Belize. The record reflects that the applicant's mother and children would experience difficulty in Belize. However, the record does not include sufficient evidence of financial, medical, emotional or other types of hardship, which in their totality, establish that a qualifying relative would experience exceptional and extremely unusual hardship upon relocating to Belize.

Counsel states that the applicant is the financial provider for his children; the mother of the applicant's two older children, [REDACTED] died of cancer in 2003 and that the mother of the youngest child, [REDACTED] has no legal status. Counsel states that [REDACTED] has a very strong relationship with the applicant and that [REDACTED] went missing in 2007; these children have already suffered the loss of their mother; the applicant provided a loving home for the children; [REDACTED] would have no home to return to and she will need a lot of help to overcome what she went through; and [REDACTED] mother relies on the applicant to provide for them. The applicant makes claims similar to counsel. He also states that he makes \$4,800 per month in construction

The applicant's girlfriend states that [REDACTED] is very close to the applicant; her work is not steady and she and their daughter rely on the applicant to support them; and the applicant is a good father and their daughter will feel abandoned.

The applicant's son states that he is close to the applicant and loves him.

Counsel states that the applicant's mother lives with him; she is very ill and has suffered a heart attack; she has fainting spells and falls down for no reason; she gave herself medication without the applicant's supervision, it was the wrong amount and she ended up in the clinic with heart palpitations; ended up in the clinic with heart palpitations; she has diabetes, hypertension, dyslipidemia, osteoporosis, eye problems and degenerative joint disease; she takes many medications and requires the applicant's assistance; none of the applicant's siblings have tried to help her; she does not drive or have health insurance; her spouse is elderly and ill; the applicant takes her around to her appointments and help pay for her medication and treatment; her medication is several hundred dollars a month which he pays for; he pays for \$100 medical appointments; he paid for her bypass surgery, which was about \$30,000; she could not visit him in Belize due to health and financial reasons; and she may lose her ability to pay for her healthcare. The applicant states that his mother has lived with him for eight years, she is very ill, and she does not see well and cannot drive.

The applicant's mother states that she cannot stay with the mother of [REDACTED] if the applicant leaves as [REDACTED] mother is not married to the applicant and it would be strange; she and her spouse would have no place to stay; her other children have not helped her; she had a heart attack in 2002 and bypass surgery; she takes several medications; she has attacks where her heart stops racing, her body sometimes shakes without stopping, and she has pain in her chest; she has to go to the doctor every two months, sometimes more; the applicant checks on her to make sure she is alright and that she takes her medication properly; her vision is blurry and she cannot drive; she cries for long periods of time; the applicant cooks for her as she has to be careful what she eats; she cannot stand for long periods of time and cannot lift heavy things; and her other children have health problems.

As mentioned, the applicant's mother's medical provider states in a January 26, 2005 letter that she been receiving follow-up care for insulin dependent diabetes mellitus, hypertension, dyslipidemia, osteoporosis, and degenerative joint disease; she has a past history of angina pectoris, status post coronary artery bypass in 1992; her medications include insulin, metformin, benazepril, fluovac and aspirin; and she was assessed with refractive error in both eyes and mild diabetic retinopathy in 2004.

The record reflects that the applicant's children would be separated from their father. The AAO notes that the mother of [REDACTED] is deceased. The record is not clear as to whether Ryan resides with the applicant and is financially dependent on him. The AAO notes that the applicant is the caretaker for his mother. Although the current state of her medical condition is not clear, the record indicates that she has medical issues. The record does not include supporting documentary evidence of the claimed financial support he provides her. However, considering the hardship factors presented, and the normal result of separation, the AAO finds the applicant's mother and two younger children would experience exceptional and extremely unusual hardship upon remaining in the United States. The record does not include sufficient evidence to not make this finding for [REDACTED]

A review of the documentation in the record fails to establish the existence of exceptional and extremely unusual hardship to a qualifying relative. As such, the applicant does not warrant a favorable exercise of discretion under section 212(h)(2) of the Act, and the AAO need not generally weigh positive discretionary factors against negative discretionary factors. The AAO notes, however, that such a discretionary analysis would require the applicant's criminal documents to determine the underlying facts of his involuntary manslaughter conviction.

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. While statutory eligibility for a waiver of inadmissibility has been established, the applicant has not met his burden of demonstrating that he should be granted a waiver of inadmissibility as a matter of discretion. Accordingly, the prior decision dismissing the appeal is affirmed.

ORDER: The prior AAO decision dismissing the appeal is affirmed. The application remains denied.