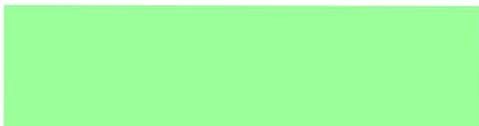




U.S. Citizenship
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Services

(b)(6)



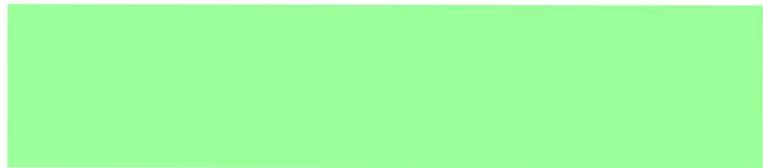
Date: **APR 02 2014** Office: HIALEAH FIELD OFFICE



IN RE: Applicant:

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 (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,

Ron Rosenberg
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of St. Kitts and Nevis who was found 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), based on her conviction for a crime involving moral turpitude. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), based on extreme hardship to her U.S. lawful permanent resident spouse, U.S. citizen children, and lawful permanent resident mother.

The field office director concluded that the hardship that the qualifying relatives would suffer did not rise to the level of extreme as required by the statute. *See Decision of the Field Office Director* dated September 14, 2013.

On appeal counsel for the applicant does not contest the applicant's inadmissibility but asserts in the Notice of Appeal (Form I-290B) that the hardship the applicant's spouse, children, and mother would suffer is extreme. Counsel states that the applicant has a son with autism and she and her husband are the sole caregivers for her mother, who suffers from Alzheimer's disease.

In support of the waiver application counsel submits a brief, documentation about the applicant's son, and country information for St. Kitts and Nevis. The record also contains medical information for the applicant's mother, a statement from her spouse, letters of support from family members, and records concerning the applicant's criminal history in the United States.

The entire record was reviewed and considered in rendering a decision on the appeal.

The AAO will first address the question of whether the applicant is admissible to the United States.

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

(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 Board of Immigration Appeals (Board) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

[M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general....

In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

The record shows that on January 19, 2000, the applicant pled nolo contendere to aggravated battery, a second degree felony, in violation of Florida statutes 784.045 and 775.087. The applicant was ordered to complete two years of probation. For a felony of the second degree the maximum term of imprisonment is not to exceed 15 years. See Fla. Stat. § 775.802.

Fla. Stat. § 784.045 provides:

Aggravated battery.—

- (1)(a) A person commits aggravated battery who, in committing battery:
 1. Intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement; or
 2. Uses a deadly weapon.
- (2) Whoever commits aggravated battery shall be guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Fla. Stat. § 775.087 provides:

Possession or use of weapon; aggravated battery; felony reclassification; minimum sentence.—

- (1) Unless otherwise provided by law, whenever a person is charged with a felony, except a felony in which the use of a weapon or firearm is an essential element, and during the commission of such felony the defendant carries, displays, uses, threatens to use, or attempts to use any weapon or firearm, or during the commission of such felony the defendant commits an aggravated battery, the felony for which the person is charged shall be reclassified as follows:

- (a) In the case of a felony of the first degree, to a life felony.
- (b) In the case of a felony of the second degree, to a felony of the first degree.
- (c) In the case of a felony of the third degree, to a felony of the second degree

The AAO notes that the Eleventh Circuit Court of Appeals has held that aggravated battery, which includes the use of a deadly weapon or results in serious bodily injury, is a crime involving moral turpitude. *See Sosa-Martinez v. U.S. Atty. Gen.*, 420 F.3d 1338, 1342 (11th Cir. 2005). In view of the holding in *Sosa-Martinez* that aggravated battery involves moral turpitude, the AAO finds the applicant inadmissible under section 212(a)(2) of the Act. As counsel has not disputed on appeal that the applicant was convicted of a crime involving moral turpitude, and the record does not show the finding of inadmissibility to be erroneous, we will therefore not disturb the finding of the field office director.

The waiver for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act is found under section 212(h) of the Act. That section provides, in pertinent part:

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

...

- (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 AAO notes that section 212(h) of the Act provides that a waiver of inadmissibility is dependent first upon a showing that the bar to admission imposes an extreme hardship on a qualifying family member. Hardship to the applicant himself is not relevant under the statute and will be considered only insofar as it results in hardship to a qualifying relative.

Once extreme hardship is established, the Secretary 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 which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957). However, the AAO cannot find, based on the facts of this particular case, that the applicant merits a favorable exercise of discretion solely on the balancing of favorable and adverse factors. The applicant has been convicted of "Aggravated Battery," and therefore, the Secretary of Homeland Security will not

favorably exercise discretion in his case except in an extraordinary circumstance. See 8 C.F.R. § 212.7(d).

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 must show that "extraordinary circumstances" warrant approval of the 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.*

The exceptional and extremely unusual hardship standard is more restrictive than the extreme hardship standard. *Cortes-Castillo v. INS*, 997 F.2d 1199, 1204 (7th Cir. 1993). Since the applicant is subject to 8 C.F.R. § 212.7(d), merely showing extreme hardship under section 212(h) of the Act is not sufficient. He must meet the higher standard of exceptional and extremely unusual hardship. Therefore, the AAO will at the outset determine whether the applicant meets this standard.

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.”). The AAO notes that exceptional and extremely unusual hardship to a qualifying relative must be established in the event that he or she accompanies the applicant or in the event that he or she remains in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant’s waiver request.

On appeal counsel asserts that the applicant has a son who was diagnosed as falling within the autism spectrum and placed in an educational program designed for children with special needs. Counsel contends that if the son remains in the United States, the absence of his mother would be an enormous change that might impact his disability, and if he relocated to St. Kitts there is an issue regarding the availability of treatment and medication for autism. Counsel states that country information for St. Kitts shows medical care is limited and that providers expect immediate cash payment. Counsel asserts that if the family relocates to St. Kitts, the spouse and children would have no legal status, the applicant’s spouse would sacrifice his lawful permanent resident status in the United States, and the children would have acculturation issues and fall behind in education. Counsel states that the applicant’s mother is a lawful permanent resident with medical issues, including Alzheimer’s disease, and that the applicant and her spouse provide 24-hour-a-day care because the applicant’s brother and sister are unable to provide assistance. Counsel asserts that if the applicant were unable to provide direct care her mother would need either professional home care that is prohibitively expensive or institutionalization. Counsel further asserts that the applicant is employed full time and that her income is necessary for the family, and that she is unlikely to find employment in St. Kitts to support her children at the same level as in the past.

The AAO recognizes that a strong bond exists between the applicant, her spouse and children, and her mother, and that her removal would result in emotional challenges and some reduction in

income to the applicant's spouse and family. However, the evidence in the record is insufficient to demonstrate that any of the applicant's qualifying relatives would be unable to support each other emotionally and financially in her absence, or that the challenges they would face are distinguished from those ordinarily associated with a loved one's inadmissibility or removal to such a significant degree that they rise to the level of exceptional and extremely unusual hardship.

A 2010 Department of Psychological Services Multi-Disciplinary report for Miami-Dade County Public Schools shows that the applicant's son falls within the "possible-to-very likely" spectrum for autism. The report shows he was referred for evaluation by teacher's request while in kindergarten due to behavioral concerns including inattentiveness, distractibility, and excessive activity levels. The report showed the applicant's son at a low level of performance, not achieving adequately for his age or grade level. A 2013 Individual Educational Plan (IEP) indicates that he is in a program for Specific Learning Disabled and had difficulty organizing tasks and activities, but was able to travel independently from class to class and locate offices without assistance. The plan also indicates the son has limited language skills and often will not answer questions, but also talks excessively at times when he wishes, so the evaluator commented that his communication appeared to be "a conscious choice to not answer and not any kind of disability." These reports do not support that hardship to the applicant's son due to her inadmissibility would rise to the level of exceptional and extremely unusual.

Counsel asserts the applicant's mother has advanced stage Alzheimer's disease. Medical documentation submitted to the record includes a note from a medical doctor stating that he has been treating the mother, but does not mention Alzheimer's disease or any other specific medical issue. The record also contains lab reports, but no explanation of the exact nature and severity of any condition or description of any treatment or family assistance needed. Counsel and the applicant's spouse state that only the applicant and her spouse are available to care for the mother. The record contains a statement from the applicant's brother asserting that he is unable to help the mother because his job requires travel, but the statement contains no further detail about the frequency of this travel to support a claim that he is unable to provide care for his mother. The applicant's sister states that she is unable to care for the mother because her working hours will not permit it, she takes night classes, and her husband can be called to out of town for weeks at a time. She provided no details of her or her husband's jobs to support that they are unavailable to provide care for the mother. Documentation in the record does not establish that the applicant's siblings are unable to provide personal or financial assistance for their mother.

Counsel asserts that the applicant's income is necessary. The applicant's spouse contends that the applicant takes care of the home, pays some of the bills, buys food and clothes for the children, and takes them to the doctor. He also states that without her income they will lose their house. Other than a social security statement of earnings for the applicant, however, no documentation been submitted establishing the spouse's current income, expenses, assets, and liabilities or overall financial situation to establish that without the applicant's physical presence in the United States the applicant's spouse or children will experience financial hardship. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the

burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The AAO acknowledges that separation from the applicant may cause various difficulties for her spouse, children, and mother. However, we find the evidence in the record insufficient to demonstrate that the challenges encountered by the qualifying relatives, when considered cumulatively, meet the exceptional and extremely unusual hardship standard.

Addressing relocation, counsel asserts that the applicant's spouse and children would have no legal status in St. Kitts, but the record contains no documentation establishing that the applicant's family would be unable to obtain legal status. Counsel asserts there is a lack of available treatment and medication for autism, but country information submitted to the record only indicates medical care is limited. Counsel also asserts that the children would have acculturation problems. However as these are the types of challenges ordinarily associated with relocation the AAO finds the evidence insufficient to demonstrate that any of the qualifying relatives would suffer exceptional and extremely unusual hardship were they to relocate to St. Kitts to be with the applicant.

As for the applicant's gainful employment, no documentation has been provided establishing that the applicant and the applicant's spouse would be unable to obtain gainful employment in St. Kitts. The record contains a news account about workers laid off in St. Kitts and general information about regional GDP levels and travel information about the country, but otherwise no documentary evidence addressing employment there to show that either the applicant or his spouse would be unable to secure employment.

The AAO acknowledges that the applicant's spouse, children, and mother would experience various difficulties in the event they choose to relocate to St. Kitts to be with the applicant. However, we find the evidence in the record insufficient to demonstrate that the challenges asserted, when considered cumulatively, meet the exceptional and extremely unusual hardship standard.

The record has, therefore, failed to demonstrate that the challenges the applicant's spouse, children, and mother will face rise to the level of exceptional and extremely unusual hardship. Accordingly, the AAO finds that the applicant has failed to demonstrate exceptional and extremely unusual hardship to a qualifying relative. Accordingly, the applicant does not warrant a favorable exercise of discretion and the appeal will be dismissed.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.