



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: Office: LOS ANGELES, CA

APR 09 2014

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 (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 application for waiver of inadmissibility was denied by the Field Office 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 and the prior AAO decision will be affirmed.

The applicant is a native and citizen of El Salvador 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 been convicted of crimes involving moral turpitude. The applicant's spouse and children are U.S. citizens. He seeks a waiver of inadmissibility in order to reside in the United States.

The Field Office Director found that the applicant had failed to establish exceptional and extremely unusual hardship to a qualifying relative or that his application involves extraordinary circumstances, such as national security or foreign policy considerations. He denied the Form I-601, Application for Waiver of Grounds of Inadmissibility (Form I-601), accordingly. *Field Office Director's Decision*, dated November 2, 2010. The AAO found that the applicant established exceptional and extremely unusual hardship to his older child, but the gravity of the applicant's crimes outweighs the extraordinary circumstances in the case, specifically, his child's exceptional and extremely unusual extreme hardship. The AAO found that the applicant did not warrant a favorable exercise of discretion under section 212(h)(2) of the Act and an overall favorable exercise of discretion. *AAO Decision*, dated September 14, 2012.

On motion, counsel asserts that the AAO did not consider the most important factor, that the applicant's crime took place 21 years ago. Counsel also asserts that the AAO incorrectly described the criminal events in which the applicant took part; the applicant's criminal file indicates that the applicant's co-defendants, not the applicant, went to the victim's house a few days after the robbery and demanded money; and the applicant did not point a gun at the victim's head during the initial robbery at the liquor store. *Brief in Support of Motion*, dated December 12, 2012.

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). A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

Counsel claims that the facts the AAO cited describing the applicant's robbery conviction are incorrect and the AAO should have considered as a favorable factor the fact that 21 years have passed since the applicant's crimes occurred. His claim asserting factual error is not supported by an affidavit or other documentary evidence. As such, the requirements of a motion to reopen have not been met.

The AAO will grant the motion to reconsider, however, as the applicant has stated a reason for reconsideration per 8 C.F.R. § 103.5(a)(3), specifically, that the AAO should have considered the passage of time as a favorable factor in its discretionary analysis.

The record includes, but is not limited to, letters from the applicant's attorney, the applicant's criminal records, financial documents, and statements from the applicant's spouse and older son. The entire record was reviewed and considered in rendering this decision.

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 record reflects that the applicant was convicted of two counts of robbery in the second degree in violation of California Penal Code § 211 on June 24, 1991, and he was sentenced to nine years and four months in prison. The AAO previously found that the applicant committed two crimes involving moral turpitude and that he is inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Act. The applicant does not contest the finding of inadmissibility.

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

The Attorney General [now Secretary of Homeland Security (Secretary)] 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 [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 [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 [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.

The AAO previously found that the applicant has been rehabilitated and admitting him would not be contrary to the welfare, safety or national security of the United States. Thus he has met the requirements under section 212(h)(1)(A) of the Act. The AAO then considered whether the applicant was eligible for a favorable exercise of discretion under section 212(h)(2) of the Act. The AAO found that the applicant was convicted of violent or dangerous crimes. *See United States v. David H.*, 29 F.3d 489 (9th Cir. 1994).

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

The [Secretary], 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.

The AAO found that the applicant established extraordinary circumstances based on exceptional and extremely unusual hardship to his older child. However, upon considering the gravity of his underlying criminal offenses, the AAO found that the extraordinary circumstances were insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act.

Counsel asserts that the AAO should have favorably exercised its discretion because the applicant's crime took place over 21 years ago, a positive factor that it did not consider when it dismissed his appeal. The AAO can consider the passage of time since the crime was committed in assessing whether the applicant merits a waiver as an overall matter of discretion. Though remoteness of a

crime may be considered a positive factor in the overall discretionary analysis, counsel provides no legal basis for considering it in assessing the crime's gravity.

Additionally, although counsel asserts that the applicant's criminal file indicates that his co-defendants, not the applicant, went to the victim's house a few days after the robbery and demanded money, and the applicant did not point a gun at the victim's head during the initial robbery at the liquor store, these assertions are not supported by the record. The AAO notes that without documentary evidence to support these claims, the assertions of counsel will not satisfy the applicant's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 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). The record includes the applicant's probation officer's report, hearing date August 5, 1991, describing the "elements and relevant circumstances" of the two offenses. This information clearly reflects that the applicant held up a liquor store by pointing a gun at the victim's head and demanded money; and later that month he also went to the victim's family residence, pointed a gun at the victim's head and demanded money from the victim and his spouse. These facts support the AAO's finding concerning the gravity of the applicant's crime.

The AAO will also analyze whether the applicant merits a waiver as an overall matter of discretion. The AAO notes that *Matter of Marin*, 16 I & N Dec. 581 (BIA 1978), involving a section 212(c) waiver, is used in waiver cases as guidance for balancing favorable and unfavorable factors and this cross application of standards is supported by the Board of Immigration Appeals (BIA). In *Matter of Mendez-Moralez*, the BIA, assessing the exercise of discretion under section 212(h) of the Act, stated:

We find this use of *Matter of Marin, supra*, as a general guide to be appropriate. For the most part, it is prudent to avoid cross application, as between different types of relief, of particular principles or standards for the exercise of discretion. *Id.* However, our reference to *Matter of Marin, supra*, is only for the purpose of the approach taken in that case regarding the balancing of favorable and unfavorable factors within the context of the relief being sought under section 212(h)(1)(B) of the Act. *See, e.g., Palmer v. INS*, 4 F.3d 482 (7th Cir.1993) (balancing of discretionary factors under section 212(h)). We find this guidance to be helpful and applicable, given that both forms of relief address the question of whether aliens with criminal records should be admitted to the United States and allowed to reside in this country permanently.

Matter of Mendez-Moralez at 300.

In *Matter of Mendez-Moralez*, in evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the BIA stated that:

The factors adverse to the applicant include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its

nature, recency and seriousness, and the presence of other evidence indicative of an alien's bad character or undesirability as a permanent resident of this country. . . . The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where the alien began his residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value and service to the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends, and responsible community representatives).

Id. at 301 (citation omitted).

The BIA further states that upon review of the record as a whole, a balancing of the equities and adverse matters must be made to determine whether discretion should be favorably exercised. The equities that the applicant for section 212(h)(1)(B) relief must bring forward to establish that he merits a favorable exercise of administrative discretion will depend in each case on the nature and circumstances of the ground of exclusion sought to be waived and on the presence of any additional adverse matters, and as the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence. *Id.* at 301.

The favorable factors include the applicant's U.S. citizen spouse and children, hardship to his family members, filing of tax returns, the passage of time since his crime, and the lack of a criminal record after his conviction on two counts of robbery. The unfavorable factors include the applicant's crimes, the gravity of his crimes, his entry without inspection, his lengthy unauthorized period of stay, and his removal in 1996.

The AAO finds that the favorable factors in the present case do not outweigh the adverse factors, such that a favorable exercise of discretion is not warranted.

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 motion is granted and the prior AAO decision is affirmed.