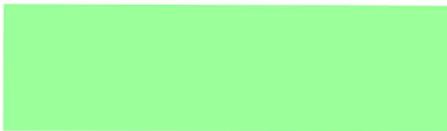




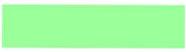
U.S. Citizenship
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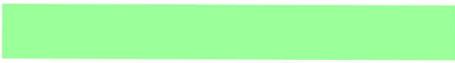


DATE: AUG 26 2014

Office: SANTA ANA

FILE: 

IN RE:

Applicant: 

APPLICATION:

Application for Waiver of Grounds of Inadmissibility pursuant to 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.

Thank you,




Ron Rosenberg

Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Santa Ana, California, denied the waiver application and the Administrative Appeals Office (AAO) dismissed an appeal. The matter is before the AAO on motion. The motion will be granted, the prior AAO decision withdrawn, and the underlying appeal sustained.

The applicant is a native and citizen of Mexico who was found to be 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), for having been convicted of a crime involving moral turpitude (CIMT). He seeks a waiver of inadmissibility under 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 applicant had failed to establish extreme hardship to a qualifying relative and denied the application accordingly. *Decision of Field Office Director*, June 11, 2008. The AAO's decision on appeal also found that the applicant's convictions for assault and kidnapping were for violent crimes, and thus his waiver application was subject to the heightened discretion standard at 8 C.F.R. § 212.7(d). Finding the applicant had failed to meet the heightened standard, we dismissed the appeal. *Decision of AAO*, June 10, 2011. The applicant filed a motion with new evidence claiming to show that his mother would suffer exceptional and extremely unusual hardship if his waiver application were denied. We granted the motion, but found the record evidence insufficient to establish such hardship, and thus affirmed our previous dismissal. *Decision of AAO*, January 2, 2013.

Counsel contended in a second motion that we incorrectly applied section 212(h)(1)(B) of the Act to the applicant's case and asserted the applicant is eligible for a waiver based on rehabilitation under section 212(h)(1)(A) of the Act, but we found the applicant had not shown our previous decision applying the heightened requirements of 8 C.F.R. § 212.7(d) to the applicant's case was in error, and dismissed the second motion. Counsel claimed in a third motion that we failed to consider the cumulative weight of all the evidence and thus erred in finding no showing of exceptional and extremely unusual hardship to a qualifying relative, but we concluded the applicant had again not met his evidentiary burden of showing the requisite hardship. *Decision of AAO*, March 4, 2014.

The applicant has filed a new motion, supported by updated medical information and clarifying the record evidence regarding prior hardship claims. The record includes the applicant's criminal record, supportive statements from the primary victim of his crime and several relatives, a 2006 Certificate of Rehabilitation, and reference letters.

That the applicant was convicted in 1989 of a crime involving moral turpitude (CIMT) for which he is inadmissible and that his convictions were for violent and dangerous crimes subjecting him to the heightened discretion standard of 8 C.F.R. § 212.7(d) are not disputed.

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

Both subsections establish that a waiver depends on a favorable exercise of the Secretary's discretion. *See* section 212(h)(2) of the Act; *see also Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996).

The record reflects that the field office director found the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having committed a CIMT, and the AAO determined assault with a firearm and kidnapping are violent crimes so that he must thus meet the heightened discretionary burden under 8 C.F.R. § 212.7(d) and show that "extraordinary circumstances" warrant approval of the waiver under either section of 212(h)(1) of the Act.

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. *See* 8 C.F.R. § 212.7(d). The record in this case contains no evidence of foreign policy, national security, or other extraordinary equities warranting favorable discretion in this case involving violent crimes.

Again finding no evidence of foreign policy, national security, or other extraordinary equities, we consider whether the applicant clearly demonstrates that his denial of admission as an immigrant would cause exceptional and extremely unusual hardship to a qualifying relative. Therefore, we again review the case law regarding the heightened hardship standard applicable to this case.

In *Matter of Monreal-Aguinaga*, 23 I& N Dec. 56, 62 (BIA 2001), the BIA determined that exceptional and extremely unusual hardship “must be ‘substantially’ beyond the ordinary hardship that would be expected when a close family member leaves this country.” 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 *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. [...] 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 63-64.

The following year in *Matter of Andazola-Rivas*, 23 I&N Dec. 319, 323 (BIA 2002), 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.” The BIA there determined that the hardship did not rise to the level of exceptional and extremely unusual:

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.

The BIA 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.” *Matter of Gonzalez Recinas*, 23 I&N Dec. 467, 470 (BIA 2002). However, the BIA stated, “[w]e 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.

As with the extreme hardship standard, we note that exceptional and extremely unusual hardship to a qualifying relative must be established both in the event that he or she accompanies the applicant and in the event that he or she remains in the United States. However, having

previously found the applicant to have established exceptional or extremely unusual hardship to a qualifying relative from relocation, we consider only whether the applicant has shown such hardship would result from separation.

On motion, the applicant claims to have demonstrated the requisite hardship by showing that his 71-year-old mother is in declining health. Documentation shows her medical conditions include diabetes, hypertension, colorectal cancer, and metastatic lung cancer, and that she depends on the applicant financially, as well as for transportation 3-4 times weekly to and from medical appointments, translation help during her appointments, picking up her groceries and medications, and providing daily care. Supporting evidence includes statements from the applicant, his mother, wife, and brother; medical records and medical information; and a series of 2014 appointment notices for various medical procedures of his mother.

Counsel states that the applicant's mother will suffer exceptional and extremely unusual hardship upon separation from the applicant and the record shows that he has the primary role in helping her manage her medical conditions, monitoring her compliance with dietary and prescription drug regimens, and staying with her after radiation and chemotherapy treatments. There is evidence she was widowed more than 40 years ago, never remarried, and has only two children. Although previously-submitted medical discharge summaries show her initial cancer being treated surgically and by radiation therapy, the updated record shows she developed metastatic lung cancer, has a poor treatment tolerance for chemotherapy, and a poor prognosis. There is evidence to support the qualifying relative's claim that she is totally dependent on the applicant due to medical conditions requiring a high degree of assistance that only the applicant is able to provide. Documentation shows that, besides these serious conditions, the applicant's mother suffers from hearing loss, cognitive deficits, and migraines, and is in chronic pain. Her sons and a family therapist who evaluated her conclude that, without the applicant's daily care, this qualifying relative's deterioration would cause her death. The record reflects that, while Medicare covers most of her medical costs, her monthly social security benefits are only \$280.

We thus find that the hardships examined here go beyond what may be considered "extreme," and rise to the heightened level of exceptional and extremely unusual. The record reflects that the applicant is providing extensive care and support without which his mother would be unable to live outside a clinical setting. Due to a flexible work schedule, he apparently is able to devote hours each day to helping his parent, and she is solely reliant on him. Further, we view evidence regarding the spread of her colorectal cancer, despite treatment, as establishing the gravity of her situation. Due to her advanced age, ill health, and grave prognosis, the evidence demonstrates that she would face hardship "substantially" beyond the ordinary hardship that is expected upon separation if her son and primary caretaker were to leave the country.

The record contains ample evidence that the hardships faced by a qualifying relative, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of exceptional and extremely unusual hardship. *Matter of Monreal-Aguinaga*, 23 I&N Dec. 56, 62 (BIA 2001). The AAO thus finds that the applicant has shown extraordinary circumstances as required under 8 C.F.R. § 212.7(d).

The documentation on record, when considered in its totality, reflects the applicant has established that his mother would suffer exceptional and extremely unusual hardship were the applicant unable to reside in the United States. Accordingly, we find that the situation presented in this application rises to the level of hardship required for a waiver. However, the grant or denial of the waiver does not turn only on the issue of the meaning of “exceptional and extremely unusual hardship.” It also hinges on the discretion of the Secretary and pursuant to such terms, conditions and procedures as he may by regulations prescribe. In discretionary matters, the alien bears the burden of proving eligibility in terms of 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):

In evaluating whether . . . relief is warranted in the exercise of discretion, the factors adverse to the alien 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 and seriousness, and the presence of other evidence indicative of the 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 alien began 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 or service in 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).

See Matter of Mendez-Moralez, 21 I&N Dec. 296, 301 (BIA 1996).

The AAO must then “balance the adverse factors evidencing an alien’s undesirability as a permanent resident with the social and humane considerations presented on the alien’s behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country.” *Id.* at 300. (Citations omitted).

The favorable factors in this matter are the extremely unusual hardships the applicant’s mother will face if the applicant departs to Mexico, regardless of whether she joins the applicant there or remains here; the applicant’s over 40-year residence in the United States starting when he was 11 years old; passage of over 25 years since being sentenced to prison, 23 years since being discharged early for good behavior, and nearly eight years since being deemed rehabilitated by a California court; history of gainful employment and of reporting and paying income taxes; and home ownership. The unfavorable factors in this matter concern the applicant’s 1989 criminal conviction of two counts of assault with a firearm and one count of kidnapping.

It is undisputed that the applicant’s convictions were for aggravated felonies under the Act. Due to the heightened seriousness of his crimes, we carefully examine the circumstances in

determining eligibility for a favorable exercise of the Secretary's discretion. The record reflects that the applicant had previously been romantically involved with the victim, intended to make her reconsider ending their relationship, and used a gun to scare her into doing so. There is evidence that after forcing her into his car at gunpoint, he later stopped the car and let her depart and surrendered to police when they came to arrest him. The record further shows that, accepting responsibility for his actions, he pled guilty, served his sentence without incident, and has had a clean record for over 20 years.

The record contains three statements on the applicant's behalf by the victim of his criminal acts. In 1990, prior to the applicant's release from custody, his estranged girlfriend requested the state court to issue a recommendation against deportation (and the court did make such a recommendation); in 2006, she made another supportive statement, this time confirming she did not oppose issuance of a Certificate of Rehabilitation by the court (which the court did, in fact, issue); and, in 2008, she provided a statement supporting the waiver application. There is evidence that the applicant and his victim have known each other since high school, were girlfriend and boyfriend for four years in their twenties, and are distantly related by marriage (her sister is married to the applicant's uncle).

While noting the seriousness of the applicant's crime, we observe that the passage of time, supportive statements, and forgiveness of the victim indicate that the applicant turned his life in a positive direction during the 25 years since his only criminal act on record. It is in this context that we weigh the positive and negative factors bearing on eligibility for discretionary relief.

The applicant entered the country as a child over 40 years ago with his mother and brother, attended school here, bought a home in 1999, married in 2001, is an active church member and, from all indications, has become a responsible member of the community. While the other two members of his nuclear family have legalized their U.S. immigration status – his mother has been a lawful permanent resident since 1989 and his brother a citizen since 1996 -- the applicant's criminal history has prevented him from normalizing his status. There is evidence his mother began having health issues about 10 years ago. When she was later diagnosed with cancer, the record shows the applicant took the primary role in assuring she received proper care, and, as her health declined, she became totally dependent on the applicant.

Although the applicant's criminal violations are serious, the positive factors in this case outweigh the negative factors. Given the equities involved, a favorable exercise of discretion is warranted. The burden of establishing eligibility for the waiver rests entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden and, accordingly, the prior decision of the AAO will be withdrawn.

ORDER: The motion is granted. The prior decision of the AAO dismissing the appeal is withdrawn and the underlying appeal is sustained.