

(b)(6)

U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Service  
Office of Administrative Appeals  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

DATE: **MAR 18 2014**

Office: NEWARK

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:  
[REDACTED]

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,

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

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Field Office Director, Newark, New Jersey and a subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on motion. The motion will be granted and the previous decision of the AAO will be affirmed.

The applicant is a native and citizen of El Salvador who was found to be inadmissible to the United States 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. The applicant seeks a waiver of inadmissibility under section 212(h), 8 U.S.C. § 1182(h), in order to remain in the United States with his U.S. citizen spouse and children.

The field office director concluded that the applicant had failed to establish extreme hardship to a qualifying relative in the event of separation. The field office director additionally found that the applicant did not demonstrate he merited a favorable exercise of discretion. The Form I-601, Application for Waiver of Grounds of Inadmissibility (Form I-601), was denied accordingly. *Decision of the Field Office Director*, dated March 4, 2013.

On appeal, the AAO found that the applicant had failed to establish extreme hardship to a qualifying relative in the event of separation. The AAO additionally found that the applicant had failed to demonstrate that he merited a favorable exercise of discretion. The appeal was dismissed. *See Decision of the AAO*, dated October 9, 2013.

In support of the instant motion, counsel submits the following: a brief, a supplemental affidavit from the applicant's spouse, medical documentation pertaining to the applicant's son and mother-in-law, an article regarding the effects of attachment and separation on children, a letter from the applicant's mother-in-law, and financial documentation. The entire record was reviewed and considered in rendering a decision on the appeal.

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.

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.

With respect to the field office director's finding of inadmissibility, on appeal the AAO concurred with the field office director that the applicant was inadmissible under section 212(a)(2)(A)(i)(I) of the Act, for having been convicted of a crime involving moral turpitude. *Supra* at 3-7. Specifically, the record established that on April, 6, 2005, the applicant was convicted in the New Jersey Superior Court of child abuse, abandonment, cruelty, or neglect in violation of New Jersey Stat. Ann. §§ 9:6-1 and 3. He was sentenced to one day in jail, probation for two years, and fined. On motion, the applicant does not contest inadmissibility. The applicant requires a waiver under section 212(h) of the Act.

On motion, counsel contends that the applicant's spouse and children would suffer extreme hardship were they to remain in the United States while the applicant resides abroad. Counsel moreover asserts that the AAO failed to consider the applicant's positive factors, and that despite his immigration and criminal violations he merits a favorable exercise of discretion. *See Brief in Support of Appeal*, dated November 6, 2013.

A waiver of inadmissibility under section 212(h) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or

lawfully resident spouse, parent or child of the applicant. In the present case, the applicant's U.S. citizen spouse and children are the only qualifying relatives. Hardship to the applicant or his mother-in-law can be considered only insofar as it results in hardship to a qualifying relative. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. See *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996).

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). 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. *Id.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. See generally *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator "must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation." *Id.*

The actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. See, e.g., *Matter of Bing Chih Kao and Mei Tsui Lin*, 23

I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. See *Salcido-Salcido v. I.N.S.*, 138 F.3d 1292, 1293 (9th Cir. 1998). (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); but see *Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

On appeal, the AAO found that the applicant's U.S. citizen spouse and children would experience extreme hardship were they to relocate abroad to reside with the applicant as a result of his inadmissibility. *Supra* at 10, 12. As such, this criterion will not be re-addressed on motion.

In regard to remaining in the United States while the applicant relocated abroad, the AAO found that extreme hardship to the applicant's spouse or children had not been established. The AAO found that the record did not contain sufficient evidence to demonstrate that the applicant's spouse would suffer extreme hardship in the event of continued separation. With respect to financial hardship, the record did not contain evidence indicating the applicant's spouse's obligations. Furthermore, there was no evidence demonstrating what the spouse's current living expenses were in light of the fact that she and her children were now living with her mother and father-in-law. In addition, the applicant had failed to establish that he would be unable to provide financial assistance to his family from El Salvador. Nor did the record contain an explanation of why the spouse was unable to resume employment at her sister's restaurant. As for the emotional hardship referenced, while the AAO acknowledged that the applicant's spouse would face difficulties as a result of the applicant's inadmissibility, the evidence of record did not demonstrate that her hardship would rise above the distress normally created when families are separated as a result of inadmissibility or removal. Furthermore, there was insufficient evidence to demonstrate that the applicant's children would experience extreme hardship without the applicant present. *Supra* at 10-12.

On motion, the issues raised by the AAO have not been addressed. To begin, in a supplemental affidavit the applicant's spouse states that she is working a few hours on the weekends at the restaurant her sister owns because she has no one to care for her children during the week. The applicant's spouse further states that her mother is the only one that works in the family. Additionally, the applicant's spouse states that she and the two children stay in the same room and such an arrangement is causing her hardship. See *Supplemental Affidavit of* [REDACTED] dated November 5, 2013. The applicant's spouse has not provided any documentation establishing that her and her mother's income is insufficient to support the family. Nor has it been established that any of the applicant's spouse's five sisters or the applicant's brother would not be able to assist the applicant's spouse with a more comfortable place to live, with financial support or with assistance in caring for the children so the applicant's spouse may work additional hours to support

the family. Nor has counsel established on motion that the applicant would not be able to obtain gainful employment in El Salvador and assist his wife and children financially.

As for the emotional hardship referenced by the applicant's spouse with respect to her children, the AAO notes that the letter provided from the applicant's child's doctor, [REDACTED], confirms that he has been diagnosed with Asthma and Speech Delay, but the letter fails to establish what specific hardships the applicant's child is experiencing as a direct result of separation from his father. Further, the article provided by counsel on motion regarding the effects of attachment and separation on children is general in nature and does not establish the hardships the applicant's children specifically will experience due to long-term separation from their father. Nor has the applicant's spouse established that having her two children, age one and four years old, sleeping in the same room with her will cause her or her children extreme hardship. The AAO acknowledges the applicant's spouse's contention that she and her children will experience hardship were they to remain in the United States while the applicant relocates abroad, but the record does not establish the severity of this hardship or the effects on their daily lives. It has thus not been established that the applicant's spouse or children would experience extreme hardship were they to remain in the United States while the applicant relocates abroad as a result of his inadmissibility.

We can find extreme hardship warranting a waiver of inadmissibility only where an applicant has demonstrated extreme hardship to a qualifying relative in the scenario of separation *and* the scenario of relocation. A claim that a qualifying relative will relocate and thereby suffer extreme hardship can easily be made for purposes of the waiver even where there is no actual intention to relocate. *Cf. Matter of Ige*, 20 I&N Dec. 880, 886 (BIA 1994). Furthermore, to relocate and suffer extreme hardship, where remaining in the United States and being separated from the applicant would not result in extreme hardship, is a matter of choice and not the result of inadmissibility. *Id.*, also *cf. Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996). As the applicant has not demonstrated extreme hardship from separation, we cannot find that refusal of admission would result in extreme hardship to the qualifying relatives in this case.

On appeal, the AAO further found that even if the applicant demonstrated that a qualifying relative would experience extreme hardship, he did not merit a favorable exercise of discretion. Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996).

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).

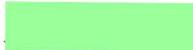
*See Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Id.* at 300. (Citations omitted). 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).

On motion counsel asserts that the applicant has significant positive equities which outweigh his negative factors. Counsel asserts that while the applicant violated the immigration law with respect to his entry, abandoned asylum claims and failed to depart, these violations occurred more than 13 years ago. Further, counsel maintains that while the applicant committed a serious offense, he was only sentenced to two years of probation for a Fourth Degree offense, not a significant period of time, and the applicant did not violate the terms of his probation. Finally, counsel references that the judge found two significant mitigating factors that established that the applicant was not a danger to the community and was deserving of a second chance. *Supra* at 6-7.<sup>1</sup> As noted when the AAO dismissed the appeal, the record does reflect that the applicant has family ties, namely, a U.S. citizen spouse and two children, in the United States. The applicant has moreover demonstrated that he owns an established business in the United States, and that he has resided in the United States since 1990. Furthermore, the applicant has expressed remorse for his actions, indicating that he knows what he did with respect to his criminal conviction was wrong, and that he has never done anything like it since. These positive equities, however, do not outweigh the negative factors in his case. The applicant's acknowledged immigration violations are serious adverse factors, and they span a number of years. The applicant admitted he entered without inspection in May 1990, and six years later, he filed an asylum application which he abandoned when he failed to appear at subsequent removal proceedings. The applicant failed to depart as ordered. The applicant subsequently claimed in his TPS applications that he had never been assigned an alien registration number, and that he had never been ordered removed.

In addition to the applicant's violations of immigration law, the applicant's criminal conduct and conviction constitute significant negative factors. The record of conviction indicates the applicant sexually assaulted a 12 year old girl he was living with. The applicant was convicted in 2005 for this

---

<sup>1</sup> On motion, counsel also states that the "Third Circuit... has explicitly rejected this analysis by the Attorney General. *See Jean Louis v. Attorney General of U.S.*, 582 F.3d 462 (3<sup>rd</sup> Cir. 2009)...." *Supra* at 7. While the AAO noted in its decision to dismiss the appeal that per *Jean-Louis v. Holder*, the Third Circuit Court of Appeals makes a categorical inquiry to determine whether a crime involves moral turpitude, counsel has failed to establish that *Jean-Louis v. Holder* in any way precludes the AAO from reviewing positive and negative factors in determining whether an individual merits a favorable exercise of discretion.



act, only around nine years ago. The applicant admitted in the plea colloquy that he kissed this girl's breasts, knowing that his conduct was wrong.

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. *Id.* at 299. Counsel has not provided any documentation on motion to establish that the applicant warrants a waiver in the exercise of discretion. The positive factors, though significant, fail to overcome the nature and duration of the applicant's serious violations of immigration and criminal law and the recent nature of the applicant's conviction fails to establish genuine rehabilitation. For these reasons, the Field Office Director's decision to deny the waiver as a matter of discretion is affirmed on motion

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 previous decision of the AAO is affirmed.