



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF M-A-P-

DATE: MAY 10, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

APPLICATION: FORM I-601, APPLICATION FOR WAIVER OF GROUNDS OF
INADMISSIBILITY

The Applicant, a native and citizen of El Salvador, seeks a waiver of the ground of inadmissibility for unlawful presence and a crime involving moral turpitude. *See* Immigration and Nationality Act (INA, or the Act) sections 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v), and 212(h), 8 U.S.C. § 1182(h). A foreign national seeking to be admitted to the United States as an immigrant or to adjust status to lawful permanent residence must be admissible or receive a waiver of inadmissibility. U.S. Citizenship and Immigration Services (USCIS) may grant this discretionary waiver for unlawful presence if refusal of admission would result in extreme hardship to a qualifying relative or qualifying relatives. USCIS may grant a discretionary waiver for a crime involving moral turpitude because the activities for which the foreign national is inadmissible occurred 15 years prior, if the foreign national's admission would not be contrary to the national welfare, safety, or security of the United States and the foreign national has been rehabilitated.

The Director, Nebraska Service Center, concluded that the Applicant was inadmissible to the United States for unlawful presence in the United States for more than one year and for his conviction for a crime involving moral turpitude. The Director also determined that the Applicant had established extreme hardship to his qualifying relative spouse. Nevertheless, the Director determined that the Applicant committed a violent or dangerous crime and had not established exceptional and extremely unusual hardship. The Director denied the application and subsequent motion to reopen and reconsider. The Applicant appealed the Director's finding. We determined that the Applicant had established that his admission would not be contrary to the national welfare, safety, or security of the United States, and he had been rehabilitated. We further determined that although the Applicant established exceptional and extremely unusual hardship to his spouse upon separation, he had not established it upon relocation to El Salvador and dismissed the appeal.

The matter is now before us on a motion to reopen. In the motion, the Applicant submits additional evidence and claims that his qualifying relative spouse would suffer exceptional and extremely unusual hardship if she were to relocate abroad.

We will grant the motion to reopen and sustain the appeal.

I. LAW

The Applicant is seeking to adjust status to lawful permanent resident and has been found inadmissible for being unlawfully present in the United States for a year or more and for being convicted of crime involving moral turpitude, specifically, for aggravated assault.

A motion to reopen must state 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).

Section 212(a)(9)(B) of the Act, 8 U.S.C. § 1182(a)(9)(B), provides, in pertinent parts:

(i) In General

Any alien (other than an alien lawfully admitted for permanent residence) who—

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 244(e)) prior to the commencement of proceedings under section 235(b)(1) or section 240, and again seeks admission within 3 years of the date of such alien's departure or removal, or

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

(ii) Construction of Unlawful Presence

For purposes of this paragraph an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.

Section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), provides that section 212(a)(9)(B)(i) inadmissibility may be waived as a matter of discretion for

an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established . . . that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

Section 212(a)(2)(A) of the Act, 8 U.S.C. § 1182(a)(2)(A), provides, in pertinent parts:

(i) In General

Except as provided in clause (ii), any 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, or
- (II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

Individuals found inadmissible under section 212(a)(2)(A) of the Act may seek a waiver of inadmissibility under section 212(h). Section 212(h) of the Act provides, in pertinent parts:

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

(1) (A) in the case of any immigrant it is established to the satisfaction of the [Secretary of Homeland Security] 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 of Homeland Security] 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;

(C) the alien is a VAWA self-petitioner; and

(b)(6)

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- (2) The [Secretary of Homeland Security], in his discretion, pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying and reapplying for a visa, for admission to the United States, or adjustment of status.

No waiver shall be provided under this subsection in the case of an alien who has been convicted of (or who has admitted committing acts that constitute) murder or criminal acts involving torture, or an attempt or conspiracy to commit murder or a criminal act involving torture. No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation or proceedings to remove the alien from the United States. . . .

II. ANALYSIS

The only issue presented on appeal is whether the Applicant demonstrated exceptional and extremely unusual hardship to his qualifying relative spouse upon relocation to El Salvador. The Applicant does not contest the finding of inadmissibility for being unlawfully present in the United States for a year or more and for being convicted of crime involving moral turpitude.¹

In support of his claim of hardship to his spouse, the Applicant submitted the following evidence. With the Form I-601, the Applicant submitted a statement from himself and his spouse, criminal court documents, medical records, financial records, income tax records, utility invoices, Alcoholics Anonymous meeting notes, a hardship evaluation of the Applicant's spouse and daughter by a licensed clinical social worker, documentation on cholesterol and stress and adolescent behavior.

¹ The record reflects that the Applicant entered the United States without inspection in November 1988. He was ordered deported *in absentia* on [REDACTED], 1989. He filed Form I-589, Application for Asylum and Withholding of Removal, on October 19, 1995. The Form I-589 was denied on September 29, 2006. He filed Form I-485, Application to Register Permanent Residence or Adjust Status, on November 17, 2007. The Immigration Judge found him ineligible for suspension of deportation but granted him voluntary departure on [REDACTED] 2009. The Board of Immigration Appeals dismissed his appeal on September 28, 2010, and granted the Applicant 30 days to voluntarily depart the United States. He timely departed the United States on [REDACTED] 2010. His spouse filed a Form I-130, Petition for Alien Relative, on his behalf that was approved on April 25, 2011. The Applicant accrued unlawful presence from September 29, 2006, the date his Form I-589 was denied, until November 17, 2007, the date he filed Form I-485. He is inadmissible under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of one year or more and seeking readmission within ten years of his departure from the United States. The record further establishes that on [REDACTED] 1993, he was convicted of third-degree aggravated assault under Texas Penal Code § 22.02. The Applicant was sentenced to a six-year deferred adjudication and 300 hours of community service.

On appeal, he submitted a brief. On motion, the Applicant submits a statement from himself and his spouse, medical records, a curfew citation, financial records, and documentation on El Salvador.

Upon review of the record, the evidence in the record, considered cumulatively, does establish that the Applicant's spouse would experience exceptional and extremely unusual hardship if she accompanied him abroad.

The Applicant has established that the bar to his admission would result in exceptional and extremely unusual hardship to his spouse. We now address whether the Applicant merits a waiver of inadmissibility as a matter of discretion. While 8 C.F.R. § 212.7(d) may allow for denial of the waiver as a discretionary matter based solely on the gravity of the applicant's offense, we also engage in a conventional discretionary analysis and "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 this country." *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 300 (BIA 1996).

Here, the favorable factors are the exceptional and extremely unusual hardship to the Applicant's spouse, the length of marriage between the Applicant and his spouse, his three children in the United States, his past residence in the United States for over 25 years, his successful completion of probation, his completion of a domestic violence counseling program, the Applicant's homeownership in the United States, his payment of taxes, the Applicant's frequent attendance at Alcoholics Anonymous meetings before his voluntary departure from the United States, the Applicant's employment while residing in the United States, the passage of 23 years since he committed the crime rendering him inadmissible, his statements of remorse, the support letters from his spouse, and the passage of 28 years since his entry into the United States without inspection. The unfavorable factors are the nature and severity of the Applicant's aggravated assault crime; his assault conviction in 1996; his driving while intoxicated convictions in 1992, 2001, and 2008; his placement in removal proceedings, and his unauthorized stay and employment in the United States. Despite the circumstances of the Applicant's aggravated assault crime, we observe that the crime is punishable up to a prison sentence of 10 years but that the circumstances of the Applicant's offense warranted a considerably lighter deferred-adjudication sentence of 6 years of probation.² In this case, the favorable factors outweigh the adverse factors, such that a favorable exercise of discretion is warranted.

² See section 12.34 of the Texas Penal Code.

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III. CONCLUSION

The Applicant has the burden of proving eligibility for a waiver of inadmissibility. *See* section 291 of the Act, 8 U.S.C. § 1361. The Applicant has met that burden. Accordingly, we grant the motion and sustain the appeal.

ORDER: The motion to reopen is granted and the appeal is sustained.

Cite as *Matter of M-A-P-*, ID# 16283 (AAO May 10, 2016)