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



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



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FILE: [REDACTED] Office: ATHENS, GREECE Date: JAN 31 2011

IN RE: [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) and under section 212(a)(9)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in black ink that reads "Michael Shumway".

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer in Charge, Athens, Greece. The applicant then filed a motion to reopen, which was also denied. The application is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant, a native and citizen of Israel, 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 committing crimes involving moral turpitude. The applicant was also found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking readmission within ten years of his last departure from the United States. The applicant is the spouse of a U.S. citizen and has a U.S. citizen child. He seeks a waiver of inadmissibility in order to reside in the United States.

In a decision dated May 20, 2008, the officer in charge found that the applicant had failed to establish that his inadmissibility would cause extreme hardship to his U.S. citizen spouse and/or child. In a decision dated August 22, 2008, the officer in charge found that the applicant's motion to reopen had failed to show that his qualifying relatives would suffer extreme hardship as a result of his inadmissibility.

In a Notice of Appeal to the AAO (Form I-290B), counsel states that the officer in charge failed to properly weigh the positive and negative factors in the applicant's case including: financial hardship, emotional hardship, medical/psychological hardship, and the inability to adjust to life in another country. Counsel states that the officer in charge cited to cases from the Board of Immigration Appeals involving cancellation of removal and requiring a higher standard of hardship. He also states that it seems as though the applicant's spouse is being punished for attempting to reside with the applicant in Israel and that her separation from family members in the United States is making it harder for her to continue to live with the applicant in Israel.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

(B) Aliens Unlawfully Present.-

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

....

(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.

The record indicates that the applicant entered the United States with a B2 visitor's visa in November 1998 with an authorized period of stay until May 1999. The applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) on October 8, 2003,

which was denied on March 25, 2005. Despite there not being a final decision on the applicant's Form I-485, the record also indicates that the applicant departed the United States at some point before May 30, 2004, when he appeared in court with his former spouse in Israel.

The AAO notes that the Adjudicator's Field Manual states that as a matter of United States Citizenship and Immigration Services policy there are circumstances where an applicant will not accrue unlawful presence. These policy exceptions are outlined in Chapter 40.9.2(b)(3). Chapter 40.9.2(b)(3) states in pertinent part:

(A) Aliens with Properly Filed Pending Applications for Adjustment of Status or Registry...

Accrual of unlawful presence stops on the date the application is properly filed pursuant to 8 CFR 103 and the regulatory filing requirements governing the particular type of benefit sought.

Note that, if the application is properly filed according to the regulatory requirements, the applicant will not accrue unlawful presence, even if it is ultimately determined that the applicant was not eligible for the benefit in the first place. The accrual of unlawful presence is tolled until the application is denied.

Therefore, the applicant accrued unlawful presence from May 1999, when his authorized stay under his visitor's visa expired until October 8, 2003 when his I-485 was filed. In applying for an immigrant visa, the applicant is seeking admission within ten years of his May 2004 departure from the United States. Therefore, the applicant is inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

Section 212(a)(2) of the Act states:

(A)(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 indicates that on January 23, 2002 the applicant was convicted in Broward County, Florida of assault under Florida Statutes § 784.011, and battery under Florida Statutes § 784.03(1)(b). He was sentenced to one year probation. On May 11, 2006 the applicant was convicted under section 381B of the Israeli Penal Code for assaulting a public officer and was sentenced to 150 hours of community service. The indictment for this case states that on March 9, 2005, the applicant attacked a hospital security guard, hitting him in the face with his fist and knocking him to the floor.

At the time of the applicant's conviction, Florida Statute § 784.011 provided:

(1) An "assault" is an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent.

(2) Whoever commits an assault shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

At the time of the applicant's conviction, Florida Statute § 784.03 provided:

(1)(a) The offense of battery occurs when a person:

1. Actually and intentionally touches or strikes another person against the will of the other; or
2. Intentionally causes bodily harm to another person.

(b) Except as provided in subsection (2), a person who commits battery commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

The AAO notes that simple assault and battery offenses generally do not involve moral turpitude. The AAO finds that the record does not contain evidence showing whether the applicant's Florida convictions were crimes involving moral turpitude or merely simple assault and battery. However, we find that the applicant's conviction in Israel for assaulting a public officer by hitting him in the face was based on conduct that caused bodily injury to an individual deserving of special protection, and is therefore a crime involving moral turpitude. In *Matter of Sanudo*, the Board of Immigration Appeals determined that bodily harm upon individuals deserving of special protection such as a child, domestic partner, or a peace officer, constitutes morally turpitudinous conduct. 23 I. & N. Dec. 968, 972 (BIA 2006). Consequently, this conviction is a crime involving moral turpitude under section 212(a)(2)(A)(i)(I) of the Act. The AAO also notes that the current record does not establish that the applicant's conviction in Israel would qualify for the petty offense exception as no documentation has been submitted to show that the maximum sentence for a conviction under 381B of the Israeli Penal Code does not exceed one year. The AAO also notes that the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361.

Thus, the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act and section 212(a)(9)(B) of the Act with waivers being available for both grounds of inadmissibility .

Section 212(a)(9)(B)(v) of the Act provides for a waiver of section 212(a)(9)(B)(i) inadmissibility as follows:

The Attorney General [now Secretary of Homeland Security] has sole discretion to waive clause (i) in the case of 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(h) of the Act for a waiver of section 212(a)(2)(A)(i)(I) inadmissibility as follows:

(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 . . .

A section 212(a)(9)(B)(v) waiver of the bar to admission resulting from section 212(a)(9)(B)(i)(II) of the Act dependent upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse or parent of the applicant. A section 212(h) waiver of the bar to admission resulting from section 212(a)(2)(A) of the Act is dependent upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse, parent or child of the applicant. Hardship the applicant experiences is not considered in section 212(a)(9)(B)(v) and section 212(h) waiver proceedings. The AAO notes that the applicant has one U.S. citizen child and a U.S. citizen spouse, but because children are not considered qualifying relatives in section 212(a)(9)(B)(v) waiver proceedings, the only hardship to be considered in the current case is the hardship suffered by the applicant's spouse.

Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996). 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's conviction for assaulting a public officer subjects him to the heightened discretionary standard of 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.

The AAO finds that the applicant's conviction for assaulting a public office is a violent crime. In the commission of the crime the applicant hit a hospital security guard in the face with his fist, causing him to fall down. The applicant is subject to the heightened discretionary standard of 8 C.F.R. § 212.7(d).

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 to his qualifying relatives under section 212(h) of the Act, which include his U.S. citizen spouse and child, 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.

The record of hardship contains: a letter from counsel, three statements from the applicant’s spouse, a statement from the applicant’s father-in-law, a letter from a psychiatrist regarding the applicant’s spouse, documentation establishing the applicant’s spouse’s family ties to the United States, a letter showing that the applicant has been performing community service at a food distribution center in Israel for the past three years, and documentation regarding the applicant’s partial ownership of a business in New York City.

In a letter dated June 25, 2008, counsel states that the immigration process that the applicant has had to endure has had a tremendously negative impact on the applicant’s spouse’s emotional and psychological well being. He states that the applicant’s spouse is taking medication prescribed to her by a psychiatrist in Israel. Counsel states that the applicant and his spouse met in 2006 while the applicant’s spouse was traveling in Israel, that the couple married in Cyprus, and that the applicant’s spouse has been living in Israel ever since. Counsel states further that although the applicant’s spouse is a dual national of Israel and the United States she was born and raised in the United States. Counsel states that she is extremely close to her family who, except for her husband and son, all live in the United States. Counsel states further that the applicant’s spouse is dealing with culture shock while living in Israel in that Israelis have been living with instability since 1948, and because of the conflict within Israel between conservative elements and more liberal factions. Counsel states that also contributing to the applicant’s spouse’s anxiety is that she wants to raise her son in the United States where they do not have to be fearful of war and that her spouse is still subject to compulsory military training and service. In addition to the hardships that the applicant’s spouse is experiencing, counsel also states that the applicant owns a restaurant in New York and his spouse owns a home. Counsel states that the financial situation of the applicant and his spouse would be much better in the

United States. Finally, counsel states that the applicant and his spouse plan to stay together, but that should they separate, the applicant's spouse would suffer the same psychological trauma that she is now, which would rise to the level of extreme hardship.

In a statement dated June 27, 2008, the applicant's spouse states that the immigration process for her husband has been a long and arduous process for her family. She states that she loves her husband and wants to stay with him, but living in Israel has been very difficult. She states that although she can speak Hebrew, her vocabulary is unsophisticated and native Israelis can tell she is an outsider, making it hard for her to establish and maintain social relationships. She also states that she cannot read or write in Hebrew. The applicant's spouse expresses hardship over her current living conditions. She states that she, her husband, and her son live in a small apartment with her mother-in-law and that their prospects for finding a larger living space are not very good. The applicant's spouse states that she believes that the applicant's waiver should be granted because her emotional state has deteriorated to a level where she is losing her ability to function as a wife, mother, or social being. She states that she misses her family and worries about her father who is a diabetic.

In a statement dated November 11, 2007 the applicant's spouse states that she and her family are having great financial difficulties in Israel and that every day is a financial battle. In a statement dated December 20, 2006 the applicant's spouse states that she and her son are living in New York trying to manage the restaurant she and her husband own, which is their only source of income. She states that both of them must be in New York so that the business can run successfully. She also expresses fears of having to turn to the welfare system to raise her son. The record also contains a statement from the applicant's father-in-law, submitted with the initial waiver application which states that he and his wife are raising three other children, two which have not yet gone to college. He states that they try to help their daughter and son-in-law as much as they can financially, but they are struggling as they have other children to support and a business of their own. He states that the applicant's spouse comes to New York when she can to work on running their restaurant, but that it is difficult traveling back and forth with a baby.

In a psychological assessment dated June 19, 2008, a [REDACTED] states that the applicant's spouse reports suffering from the symptoms of depression. He prescribes the applicant's spouse medication and recommends that she follow-up with continued psychiatric care and psychotherapy.

The AAO notes that the record includes documentation to show that the applicant's spouse's immediate family members are U.S. citizens and reside in New York. The record also includes documentation to show that the applicant shares partial ownership of a restaurant in New York City.

The AAO finds that the applicant has not demonstrated that the evidence in the record in the aggregate shows that the hardships of relocation or separation produce a "truly exceptional situation" that would meet the exceptional and extremely unusual hardship standard. *See Matter of Monreal-Aguinaga*, 23 I&N Dec. 56 at 62. The record does not include documentation to establish the family's financial difficulties nor does it include country information on conditions in Israel. Furthermore, the AAO acknowledges that the applicant's spouse is suffering emotionally, but the current record does not support a finding that this hardship rises to the level of exceptional and extremely unusual. The psychological evaluation, being completed after a one and a half hour

interview, does not indicate an established doctor-patient relationship nor does the record indicate that the applicant's spouse is following-up on any of the doctor's treatment recommendations, thus diminishing the weight we give the evaluation as an accurate diagnosis of the applicant's spouse's mental health status. Accordingly, the hardships to the applicant's spouse that arise from the applicant's inadmissibility do not meet the heightened hardship standard set forth in 8 C.F.R. § 212.7(d).

Moreover, the AAO would like to briefly discuss other factors in the applicant's case, which in the event of his establishing exceptional and extremely unusual hardship to a qualifying relative should be considered and addressed. The record contains an Order of Protection from January 10, 2005, which was ordered in the [REDACTED] of New York against the applicant in protection of his former spouse. An affidavit from the applicant's former spouse is included in the petition for an order of protection. In this affidavit the applicant's former spouse states that the applicant, who is living in Israel, has an identical twin brother, [REDACTED] and that the applicant has used his twin brother's identification to enter the United States. She also states that the applicant had threatened to hurt her for not sponsoring his lawful permanent residence in the United States. The affidavit states that two prior orders of protection were filed against the applicant in Tel Aviv, Israel. The affidavit also describes a history of violent behavior by the applicant including: physical fights with his then spouse, which involved pushing, spitting, and strangling; violent threats of death against his then spouse; and an arrest in Florida for throwing a brick at a man's head.

In favor of the applicant, the record includes a letter from the [REDACTED] Institute, dated June 19, 2008, and stating that the applicant has been a volunteer for the institute's food distribution center for the past three years and has been very responsible and very courteous throughout this period. However, the AAO must note that diminishing this volunteer work is the fact that after the applicant's May 2006 conviction for assaulting a peace officer in Israel, the court ordered him to serve 150 hours of community service distributing food at the [REDACTED] Institute. The AAO notes that the record is not clear as to whether the applicant volunteered at the institute before his conviction, if the dates on the letter from the institute are incorrect, and/or if the applicant has gone above and beyond his order of community service in volunteering for the institute. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence and any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

As stated above, the applicant failed to demonstrate that he merits a favorable exercise of discretion under 8 C.F.R. § 212.7(d), and thus the appeal will be dismissed.

ORDER: The appeal is dismissed.