

(b)(6)

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



U.S. Citizenship  
and Immigration  
Services

DATE: JAN 02 2013 OFFICE: SANTA ANA, CA

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:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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".

✶ Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Field Office Director, Santa Ana, California. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO), and is now before the AAO on a motion to reconsider. The motion will be granted, and the AAO's June 10, 2011 decision will be affirmed. The application remains denied.

The applicant is a native and citizen of Mexico 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 seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his U.S. citizen wife and lawful permanent resident mother.

The director concluded that the applicant had failed to show that denial of the waiver application would result in extreme hardship to his qualifying relatives, and denied the application accordingly. *See Decision of Field Office Director*, dated June 11, 2008. The applicant filed a timely appeal to the AAO.

The AAO concluded that the applicant's convictions for assault and kidnapping constituted a violent crime, which renders his section 212(h) waiver application subject to the heightened discretion standard of 8 C.F.R. § 212.7(d). *See Decision of AAO*, dated June 10, 2011. The AAO found that the applicant had failed to meet this heightened standard for his waiver application, and dismissed the appeal accordingly.

On motion, counsel requests reconsideration of the AAO's decision based on new evidence and submits that the evidence demonstrates that the applicant has met the heightened standard under 8 C.F.R. § 212.7(d) by showing that his mother would suffer exceptional and extremely unusual hardship if the applicant is not granted a waiver of inadmissibility.

A motion to reconsider must establish that the decision was based on an incorrect application of law or Service policy. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). We note that the applicant does not contend that the AAO incorrectly applied the law or Service policy in its original decision. Nor does he assert that the decision was incorrect based on the evidence of record at the time the decision was rendered. Accordingly, we conclude that the motion does not meet the regulatory requirements for reconsideration.

The AAO's review of the motion indicates, however, that counsel may have more appropriately intended his motion to be considered under 8 C.F.R. § 103.5(a)(2) for reopening. 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). The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record was reviewed and considered in rendering a decision on the motion.

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 . . .; 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.

The applicant is inadmissible under 212(a)(2)(A)(i)(I) of the Act and does not dispute his inadmissibility. He also does not contest that his April 18, 1989 convictions for two counts of assault with a firearm in violation of section 245(a)(2) of the California Penal Code (Cal. Penal Code) and one count of kidnapping under Cal. Penal Code § 207(a) are violent crimes resulting in the application of the heightened standard of 8 C.F.R. § 212.7(d) to his section 212(h) waiver application. On motion, counsel asserts that new facts and supporting evidence meets this higher standard and establishes that the applicant's qualifying relative, his lawful permanent resident mother, would suffer exceptional and extremely unusual hardship upon separation or relocation to Mexico should the applicant's waiver application be denied.

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.

As the applicant concedes the applicability of the 8 C.F.R. § 212.7(d), he must show that "extraordinary circumstances" warrant approval of the waiver under either section 212(h) of the Act. 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.*

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 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 63-64.

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.

We previously found that the applicant had not demonstrated that his spouse and mother would suffer exceptional and extremely unusual hardship. We will now consider whether the applicant has presented new evidence to overcome our previous finding with respect to his lawful permanent mother.<sup>1</sup>

On motion, counsel submits a statement from his mother, her medical records, and documents from her U.S. healthcare provider. The record also includes, but is not limited to, the applicant’s mother’s statement; statement of the applicant’s wife; physician’s letters for the applicant’s mother and wife; medical records for the applicant’s mother; the applicant’s criminal records; applicant’s certificate of rehabilitation; and reference letters.

Counsel asserts that the applicant’s mother will suffer exceptional and extreme hardship upon separation and relocation from the applicant, because of her medical condition. The record contains a letter, dated March 10, 2008, from [REDACTED] indicating that the applicant’s mother suffered from Diabetes Mellitus and Hypertension, which were being controlled with medication. However, medical discharge records from 2009, following the filing of the applicant’s initial appeal, indicate that his mother was later diagnosed with rectal adenocarcinoma and has undergone surgery and radiation therapy to treat the cancer. The applicant’s 69-year-old mother has also provided a detailed statement, dated July 6, 2011, in which she asserts that, aside from the applicant, she has no other family in the United States upon whom she can rely. The applicant’s mother states that she was diagnosed with rectal and colon cancer in February 2009, after which she could no longer work and had to seek medical disability. She states that the applicant takes her to all her appointments, as she cannot drive, and has been present with her at all her chemotherapy and radiation treatments. She states that the applicant picks up her medicines, ensures she has a proper diet as ordered by her doctors, and stays with her after each radiation and chemotherapy session. The applicant’s mother asserts that without the applicant’s support, she would not have survived this period and will not survive in the future.

The AAO observes, however, that the applicant’s mother makes no reference to her older son, [REDACTED] and whether or not he is able and willing to provide for her in the absence of the applicant. The administrative file indicates that [REDACTED] is a U.S. citizen, and had previously filed a Form I-130, Petition for Alien Relative, on behalf of the applicant, which had

---

<sup>1</sup> As the applicant motion seeks only reconsideration of the AAO’s finding with respect to the applicant’s mother, the prior determination that the applicant had not shown exceptional and extremely unusual hardship to his U.S. citizen wife remains undisturbed.

been approved. There is also no letter of explanation or corroboration by the applicant. We further note that it appears that the applicant's mother is still independent and does not reside with the applicant. Although the record does not contain financial records for the applicant's mother, it does not indicate that she is financially dependent on the applicant, as she receives health coverage and Medicare benefits, as well as social security benefits, to cover the costs of her medical treatment and living expenses in the United States.

Having carefully considered the evidence of record, we find that although the hardships illustrated here may be considered "extreme," the applicant has failed to demonstrate that they rise to the heightened level of exceptional and extremely unusual. Although we give considerable weight to factors here such as the applicant's mother's advanced age and ill health, we do not find that the applicant has established that his mother is solely reliant on him. *See generally, Matter of Monreal*, 23 I&N Dec. at 63-64. While we recognize that the applicant's mother has serious health concerns and that she wishes for the applicant's physical and emotional support, we find the record lacking in evidence that would demonstrate that the hardship she would face hardship "substantially" beyond the ordinary hardship that is expected upon separation.

We also consider whether the applicant's mother would suffer exceptional and extremely unusual hardship upon relocation to Mexico if the waiver application is denied. The applicant's mother contends that after nearly four decades in the United States, she and the applicant have no family or property in Mexico that would be of assistance in relocating there. She also notes that having worked for nearly 40 years in the United States, she has a health plan and Medicare coverage to meet her medical and living expenses. She states that she would lose this coverage, as well as her social security benefits if she moved to Mexico. The applicant's mother states that she does not have the ability to pay for the medicines and medical treatment she would require there. Moreover, in relocating, the applicant's mother would lose her current healthcare providers who are familiar with her medical history and needs. When the normal hardships of relocation and those created by the applicant's mother's medical conditions are considered in the aggregate, the AAO finds the applicant to have established that relocation would result in exceptional and extremely unusual hardship to his mother upon relocation to Mexico.

However, as with extreme hardship, we will find exceptional and extremely unusual hardship warranting a waiver of inadmissibility only where an applicant has demonstrated such 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 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. at 886. Furthermore, to relocate and suffer exceptional and extremely unusual hardship, where remaining the United States and being separated from the applicant would not result in exceptional and extremely unusual hardship is a matter of choice and not the result of inadmissibility. *Matter of Ige*, 20 I&N Dec. at 886.; *also cf. Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996). As the applicant has not demonstrated exceptional and extremely unusual hardship from separation, we will not find that refusal of admission would result in extraordinary circumstance of exceptional and extremely unusual hardship.

(b)(6)

Page 8

In this case, the record does not contain sufficient evidence to show that the hardships faced by the qualifying relative, considered in the aggregate, would 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. at 62. The AAO therefore finds that the applicant has failed to show extraordinary circumstances as required under 8 C.F.R. § 212.7(d). Accordingly, he did not demonstrate that he merits a favorable exercise of discretion.

In proceedings for a waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, although the motion to reopen has been granted to consider new evidence submitted, the AAO's June 10, 2011 decision will be affirmed. The application remains denied.

**ORDER:** The prior decision of the AAO is affirmed. The application remains denied.