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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: JAN 08 2014 OFFICE: WEST PALM BEACH

IN RE:

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h)

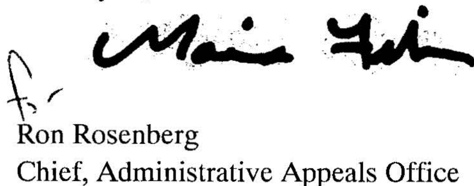
ON BEHALF OF APPLICANT:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (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,



Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The District Director, West Palm Beach, Florida denied the waiver application. A subsequent appeal and motion to reopen and reconsider were dismissed by the Administrative Appeals Office (AAO). This matter is now before the AAO on a second motion to reopen and reconsider. The motion will be granted and the prior decision of the AAO will be affirmed.

The applicant is a native and citizen of Cuba 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 committed a crime involving moral turpitude. The applicant seeks a waiver of inadmissibility in order to remain in the United States with his U.S. citizen mother and son.

The District Director concluded that the applicant does not merit a favorable grant of discretion and denied the application accordingly. *See Decision of the District Director*, dated December 17, 2008. On appeal, the AAO determined that the applicant's conviction of a crime involving moral turpitude was a violent and dangerous crime and the applicant failed to demonstrate exceptional and extremely unusual hardship. The AAO dismissed the appeal accordingly. *See Decision of the AAO*, dated June 10, 2011. On motion, the AAO again determined that the applicant failed to demonstrate exceptional and extremely unusual hardship and affirmed its prior decision. *See Decision of the AAO*, dated February 28, 2013.

On a second motion to reopen and reconsider, counsel for the applicant asserts that the applicant and his mother have suffered additional medical hardships and setbacks. Counsel further asserts that the applicant and his mother have no ties in Cuba and submits additional documentation concerning the inability of the applicant's mother's other relatives to provide her with care.

In support of the motion to reopen and reconsider, the applicant submitted letters from two siblings, a letter from his son, medical documentation, and financial documentation. The entire record was reviewed and considered in rendering a decision on the motion.

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.
>
> (ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-
>
> > (I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years

before the date of the application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

The record reflects that the applicant, on October 15, 1980, was convicted of aggravated assault in violation of section 784.021(1)(a) of the Florida Statutes. The applicant was found to be inadmissible to the United States for committing a crime involving moral turpitude pursuant to section 212(a)(2)(A)(1) of the Act and has not disputed his inadmissibility on appeal or motion.

Section 212(h) of the Act provides, in pertinent part:

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), . . . of subsection (a)(2) . . . if –

(1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General that-

(i) the alien is inadmissible only under subparagraph (D)(i) or (D)(ii) of such subsection or 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 . . . .

As the applicant's convictions took place on October 15, 1980, well over fifteen years prior to the date of the applicant's instant appeal, he is eligible to apply for a waiver pursuant to section 212(h)(1)(A) of the Act. However, the AAO previously determined that even if it were to find

that this applicant has demonstrated rehabilitation pursuant to section 212(h)(1)(A) of the Act, he would still be required to demonstrate that the denial of his application would result in exceptional and extremely unusual hardship. The applicant has been convicted of aggravated assault, a dangerous and violent crime. The applicant has not disputed this determination on motion.

8 C.F.R. § 212.7(d) provides, in pertinent part:

> Criminal grounds of inadmissibility involving dangerous or violent crimes. The Attorney General [Secretary], in general, will not favorably exercise discretion under section 212(h)(2) of the Act . . .in cases involving violent or dangerous crimes, except...in cases in which the 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. . . .

Section 22 of the Offences Against the Person Act provides:

> Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanour, and, being convicted thereof, shall be liable to be imprisoned for a term not exceeding three years, with or without hard labour.

The AAO notes that the words "violent" and "dangerous" and the phrase "violent or dangerous crimes" are not further defined in the regulation, and the AAO is aware of no precedent decision or other authority containing a definition of these terms as used in 8 C.F.R. § 212.7(d). A similar phrase, "crime of violence," is found in section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F). It provides that a "crime of violence," as defined under 18 U.S.C. § 16, for which the term of imprisonment is at least one year, is an aggravated felony. As such, "crime of violence" is limited to those crimes specifically listed in 18 U.S.C. § 16. It is not a generic term with application to any crime involving violence, as that term may be commonly defined. Indeed, counsel asserts that the applicant's conviction cannot be deemed a violent and dangerous crime as it does not fit the statutory definition of a crime of violence. However, that the DOJ chose not to use the language of section 101(a)(43)(F) of the Act or 18 U.S.C. § 16 in promulgating 8 C.F.R. § 212.7(d) indicates that "violent or dangerous crimes" and "crime of violence" are not synonymous. The Department of Justice clarified the relationship between these distinct terms in the interim final rule codifying 8 C.F.R. § 212.7(d):

> [I]n general, individuals convicted of aggravated felonies would not warrant the Attorney General's use of this discretion. In fact, the proposed regulations stated that even if the applicant can meet the "exceptional and extremely unusual hardship" standard for the exercise of discretion, depending upon the severity of the offense, this might "still be insufficient" to obtain the waiver. See 67 FR at 45407. That language would substantially limit the circumstances under which an individual convicted of an aggravated felony would be granted a waiver as a matter of discretion. Therefore, the Department believes that this language achieves the goal of the commenter while not unduly constraining the Attorney General's

discretion to render waiver decisions on a case-by-case basis.

67 Fed. Reg. 78675, 78677-78 (December 26, 2002).

Therefore, the fact that a conviction constitutes an aggravated felony under the Act may be indicative that an alien has also been convicted of a violent or dangerous crime, but it is not dispositive. Decisions to deny waiver applications on the basis of discretion under 8 C.F.R. § 212.7(d) are made on a factual "case-by-case basis." The AAO interprets the phrase "violent or dangerous crimes" in accordance with the plain or common meaning of its terms, consistent with any published precedent decisions addressing discretionary denials under 8 C.F.R. § 212.7(d) or the standard originally set forth in *Matter of Jean*. Given the plain language of the statute under which the applicant was convicted, assault with a deadly weapon, the AAO found that the applicant's conviction renders him subject to the heightened discretion 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 is not sufficient. He must meet the higher standard of exceptional and extremely unusual hardship.

The applicant is a 56-year-old native and citizen of Cuba. The applicant's mother is an 82-year-old native of Cuba and citizen of the United States. The applicant's son is a 37-year-old native and citizen of the United States. The applicant resides with his mother in the United States and his son resides in a separate residence in the same city, Florida.

Counsel for the applicant asserts that the applicant's mother is elderly and disabled, and relies upon the applicant for her daily needs. The record contains physicians' letters stating that the applicant's mother suffers from heart disease, high cholesterol, dementia, and diverticulosis. The physicians' letters further state that the applicant drives his mother to her appointments, supervises her medication, and makes most of her medical decisions. The applicant's mother asserts that the applicant takes her to her appointments and church, ensures she does not run out of medication, and is responsible in all household matters.

The applicant contends that he has a sister and two brothers who are not interested in caring for their mother and a son who cannot provide assistance because of his job's travel requirements. The record contains a letter from the applicant's sister, asserting that she is not capable of

providing her mother with care because she suffers from arthritis, high blood pressure and nervous disorder, and has undergone heart surgery. The applicant's sister further asserts that she does not speak English well enough to speak with the applicant's mother's physician. The record also contains a letter from the applicant's sister, [redacted] asserting that she is not capable of caring for her mother because she suffers from fibromyalgia, osteoporosis, spine problems, major depression, and does not speak English. Finally, the record contains a letter from the applicant's son asserting that he is unable to provide care to his grandmother because he is unemployed due to an accident, which caused permanent nerve damage to his lower back. The applicant's son further asserts that he is not very fluent in Spanish.

It is initially noted that the applicant asserts that he has two brothers, including a resident alien residing at the same address as the applicant's son, and there is no information concerning these two individuals. The record also reflects that the applicant, like his sisters and son, suffers from medical ailments. Counsel for the applicant asserts that the applicant is suffering from sleep apnea and has titanium implants in his spinal cord, bone transplants, herniated discs, chronic renal insufficiency, and lymphadenopathy. A physician's letter states that the applicant is severely limited in his ability to engage in daily living activities and has a guarded prognosis. Despite these documented medical limitations, there is no indication that the applicant is incapable of providing assistance to his mother in the form of transportation, decision-making, and translation.

It is noted that the record contains supporting medical documentation for the applicant's son and his sister [redacted] but does not contain similar documentation for [redacted]. It is also noted that the medical documentation for [redacted] indicates that she suffers from paranoid schizophrenia and has impaired ability to relate to people. However, there is no medical indication that the applicant's other siblings and son would be unable to carry out the duties that the applicant is currently performing for his mother. Further, though the applicant's sister Teresa asserts that she does not speak English well enough to converse with her mother's physician, her letter of submission is cogently written in English, without any indication of translation. The applicant's son also asserts that he is not very fluent in Spanish, but a decision from the Social Security Administration states that the applicant's son was capable of providing translation for his father during a medical examination, as the applicant was unable to communicate in English at the time.

The record does not contain any assertions concerning any hardship the applicant's son would experience upon separation from the applicant.

It is acknowledged that separation from a parent or child nearly always creates a level of hardship for both parties. However, there is insufficient evidence in the record, in the aggregate, to find that the applicant's qualifying relatives would suffer exceptional and extremely unusual hardship upon separation from the applicant.

Counsel for the applicant asserts that the applicant's mother cannot relocate to Cuba because she is a U.S. citizen who cannot afford medical care in Cuba and would also receive a lower standard of care. The record reflects that the applicant's mother is a native of Cuba and it is noted that the U.S. Department of State, in its Country Specific Information for Cuba, dated May 3, 2013, indicates that Cuba does not recognize the U.S. nationality of Cuban-born U.S. citizens.

Accordingly, these individuals are treated as Cuban citizens and there is no indication that the applicant's mother would be unable to receive health care from the government. It is acknowledged that the Country Specific Information states that medical care does not meet U.S. standards, as many health facilities face shortages of medical supplies and bed space. However, it further states that Cuban medical professionals are generally competent. Counsel for the applicant also contends that the lower standard of medical care in Cuba would put the applicant's health in danger so that he could not care for his mother upon her relocation. Counsel's assertions concerning the applicant's health in Cuba are speculative and there is no basis for a determination that the applicant and his mother would be unable to receive adequate medical care for their conditions in Cuba.

As noted previously, it is unclear from the record whether the applicant's mother has any ties in Cuba, consisting of family or property, which could ease her relocation. Further, upon relocation to Cuba, the applicant's mother would leave behind her adult children who reside in the United States, but would continue to be supported by the applicant, her primary caretaker, while residing in Cuba. Although it is acknowledged that the applicant's mother suffers from documented medical ailments and is of advanced age, which could be considered extreme hardship given the country conditions in Cuba and the existence of ties in the United States, the record is not sufficient to demonstrate that the applicant's mother would suffer from hardship that would rise to the higher level of exceptional and extremely unusual hardship.

Counsel for the applicant asserts that the applicant's son cannot relocate to Cuba because he does not speak Spanish, has a new wife, and does not agree with the Cuban form of government. As noted, the applicant's son's prior service as a translator for the applicant in a medical examination indicates his familiarity with Spanish. It is noted that the applicant's son is a native of the United States who is married and states that he owns his home in the United States. Aside from the applicant's son's assertions concerning his fluency in Spanish, the applicant's son makes no further assertions concerning any hardship he would experience upon relocation to Cuba. It is noted that without supporting evidence, the assertions of counsel will not satisfy the applicant's burden of proof. The unsupported assertions of counsel do not constitute evidence. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In this case, the record does not contain sufficient evidence to show that denial of the present waiver application would result in exceptional and extremely unusual hardship for the applicant's mother or son. As the applicant has not established the requisite level of hardship, the applicant has not shown that he qualifies for a favorable exercise of discretion. 8 C.F.R. § 212.7(d).

In proceedings for application for 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, the prior decision of the AAO will be affirmed.

ORDER: The motion to reopen is granted and the prior decision of the AAO is affirmed.