



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

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

In Re: 16796439

Date: FEB. 8, 2022

Motion on Administrative Appeals Office Decision

Form I-601, Application to Waive Inadmissibility Grounds

The Applicant has applied for an immigrant visa and seeks a waiver of inadmissibility under section 212(h) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(h).

The Director of the Nebraska Service Center denied the application, noting that the Applicant was inadmissible under section 212(a)(2)(A)(i) of the Act. The Director also determined that the Applicant's convictions for burglary, unlawful sex with a minor, oral copulation, aggravated assault, and carrying a concealed weapon were for violent or dangerous crimes, thus subjecting him to a heightened discretionary standard. The Director concluded that while the Applicant established extreme hardship to his qualifying relatives, his case did not merit a favorable exercise of discretion. We agreed with the Director and dismissed the Applicant's appeal, concluding that the record did not establish the Applicant merited the waiver in the exercise of discretion because he did not meet his burden of proving exceptional and extremely unusual hardship under 8 C.F.R. § 212.7(d).

The Applicant has filed a motion to reopen that decision. On motion, the Applicant submits a legal brief, personal affidavit, a police investigative report, and documentation from medical providers.

In these proceedings, it is the Applicant's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon review, we will dismiss the motion.

I. MOTION REQUIREMENTS

A motion to reopen must state new facts and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). The regulation at 8 C.F.R. § 103.5(a)(1)(i) limits our authority to reopen to instances where the applicant has shown "proper cause" for that action. Thus, to merit reopening, an applicant must not only meet the formal filing requirements (such as submission of a properly completed Form I-290B, Notice of Appeal or Motion, with the correct fee), but also show proper cause for granting the motion. A motion that does not meet applicable requirements shall be dismissed. *See* 8 C.F.R. § 103.5(a)(4).

II. LAW

A foreign national convicted of (or who admits having committed, or who admits committing acts which constitute the essential elements of) 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(a)(2)(A)(i) of the Act.

Individuals found inadmissible under section 212(a)(2)(A)(i) of the Act may seek a discretionary waiver of inadmissibility under section 212(h) of the Act. Where the activities resulting in inadmissibility occurred more than 15 years before the date of the application, a discretionary waiver is available if admission to the United States would not be contrary to the national welfare, safety, or security of the United States, and the foreign national has been rehabilitated. Section 212(h)(1)(A) of the Act. A discretionary waiver is also available if denial of admission would result in extreme hardship to a United States citizen or lawful permanent resident spouse, parent, son, or daughter. Section 212(h)(1)(B) of the Act. Finally, if a foreign national demonstrates his eligibility under section 212(h)(1)(A) or (B) of the Act, USCIS must then decide whether to exercise its discretion favorably and consent to the foreign national's admission to the United States. Section 212(h)(2) of the Act.

With respect to the discretionary nature of a waiver, the burden is on the Applicant to establish that a waiver of inadmissibility is warranted in the exercise of discretion. *Matter of Mendez-Morales*, 21 I&N 296, 299 (BIA 1996). We must balance the adverse factors evidencing the Applicant's undesirability as a lawful permanent resident with the social and humane considerations presented 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). However, a favorable exercise of discretion is not warranted for foreign nationals who have been convicted of a violent or dangerous crime, except in extraordinary circumstances, such as cases involving national security or foreign policy considerations, or when an applicant "clearly demonstrates that the denial . . . would result in exceptional and extremely unusual hardship." 8 C.F.R. § 212.7(d). Even if the foreign national were able to show the existence of extraordinary circumstances pursuant to 8 C.F.R. § 212.7(d), that alone would not be enough to warrant a favorable exercise of discretion. *See Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002) (providing that depending upon the gravity of the foreign national's underlying criminal offense, a showing of exceptional and extremely unusual hardship might still be insufficient to grant the immigration benefit as a matter of discretion).

III. ANALYSIS

As a preliminary matter, we note that by regulation, the scope of a motion is limited to "the prior decision." 8 C.F.R. § 103.5(a)(1)(i). As noted, a motion to reopen must state new facts, supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). The issue before us is whether the Applicant has submitted new facts to warrant reopening or established that our decision to dismiss his appeal was based on an incorrect application of law or USCIS policy. We incorporate our prior decision by reference and will repeat only certain facts and evidence as necessary to address the Applicant's claims on motion.

On motion, the Applicant contends that our prior decision was erroneous because it stated that he was not a constant target of violence in El Salvador. He provides documentation to establish that his

physical safety is endangered in El Salvador, and that his physical and mental health and well-being, as well as his mother's physical and mental health and well-being continue to be negatively impacted by him living in El Salvador. He argues that the new evidence provided, in addition to the prior evidence considered by us on appeal, together establish that he and his family are suffering exceptional and extremely unusual hardship such that he has established his eligibility under 8 C.F.R. § 212.7(d), and thus that he merits a waiver under section 212(h) of the Act.

On motion, the Applicant relates that on [REDACTED] 27, 2020, he was assaulted by two men, at a shopping center in El Salvador who questioned him about his tattoos. He was beaten, and the resulting injuries required two days of hospitalization. The Applicant claims that the day he was released from the hospital, he moved to a new home to avoid the gang members that assaulted him, and that he reported the assault to the police. He claims the police discouraged him from pursuing any further investigation into the matter because investigating gangs leads to more problems. The Applicant explains that this assault resulted in head injuries, and that coupled with an earlier assault, his doctor believes he has chronic traumatic encephalopathy (CTE). He reiterates that he has suffered from anxiety and depression since his deportation, and that his mother is in poor health such that she cannot stay with him in El Salvador long-term because she relies on her U.S. based doctors. The Applicant explains that although he has been advised to take medications for his ailments, he does not want to because he fears the side effects from these medications would make him less alert and result in him being harmed again by the gangs. He explains that his mother traveled to El Salvador with the help of a friend to visit him after his assault, but she cannot stay in El Salvador because her health requires frequent doctor's visits in the United States.

The police investigation report corroborates the Applicant's account of a [REDACTED] 2020 assault by gang members. The report notes that the Applicant's problems with gangs began in October 2016, and are on account of the tattoos he has, which the gang interprets as a sign that he is a member of the [REDACTED] gang. The report notes that when the Applicant explains he is not associated with the gang, the members do not believe him, and force him to join them in their illicit activities. The report describes the assault as follows: men on a motorcycle were following him to a commercial center in [REDACTED]. When he parked and exited his car, the individuals were pretending to fix tires, but then they assaulted him, hitting him on the head, and used a gun to threaten that if he did not join them, they would be forced to use the gun to harm him more. The men took off his shirt, and looked at his tattoos. When they realized the tattoos were not gang related, they stopped the assault and left him alone. They told him that even though he was not a part of the gangs, he should move from his area because if they saw him again, they were going to kill him. At that point, he lost consciousness, and did not regain consciousness until he was in an ambulance. The same day he was discharged from the hospital, he moved to a new residence for fear these individuals would harm him again. The Applicant did not authorize the arrest of the individuals because the organization they belong to has contacts all over the country, and connections to politics, thus nothing would come from arresting them.

The medical documentation submitted includes an undated doctor's letter from [REDACTED] confirming that the Applicant has sought treatment several times and that on one occasion, in September 2013, he required several tests to rule out tumors or other abnormalities because he fainted, and he had suffered injuries to his jaw and tooth fractures which resulted in migraine headaches. This doctor recommended a neurosurgeon in Panama to treat his migraines given that the medications he prescribed were not effective at treating them. In another letter, [REDACTED]

confirms that the Applicant has sought psychotherapy for post-traumatic stress disorder, anxiety, irrational ideas, and mild depression. His mental health problems are attributed to his separation from his family. The letter states that he was in a 4-year course of treatment including cognitive behavior therapy, and that he is not a danger or risk to anyone, and that overall, his treatment had been successful at improving his mental health. A letter from [REDACTED] explains that he has sought treatment for anxiety since October 2020 as a result of physical assaults he has experienced since October 2016 that have affected him psychologically.

On motion, the Applicant provides medical documentation about his mother's and maternal uncles' health conditions. We acknowledge his mother's medical record establishes that she suffers from Generalized Anxiety Disorder (GAD), headaches, and Major Depressive Disorder. The letter establishes that her GAD and depression are not controlled due to the Applicant's deportation, and separation from her. We also acknowledge his paternal uncle's medical documentation, which shows he sought treatment because he was weak, and suffers from occasional episodes of confusion. The letter attributes his symptoms of dementia to alcohol dependence withdrawal.

The Applicant's evidence on motion is insufficient to satisfy his burden under 8 C.F.R. § 212.7(d). We acknowledge country conditions in El Salvador, and that crime and corruption are serious issues. *See* CIA World FactBook, El Salvador, <https://www.cia.gov/the-world-factbook/static/42e2b929bae100aa1ae33806de796b98/ES-summary.pdf> (last visited Feb. 8, 2022). In addition, country conditions confirm that gang violence contributes to serious security concerns in El Salvador. *See* Congressional Research Service 2020 Report "El Salvador: Background and U.S. Relations," <https://www.justice.gov/eoir/page/file/1316081/download> (last visited Feb. 8, 2022). Nevertheless, our prior decision carefully examined country conditions affecting the Applicant's ability to work, access medical care for his physical and mental ailments, and ability to remain safe in El Salvador, and the Applicant's new evidence does not show a significant change in country conditions or in his own circumstances such that now he can meet his burden of showing exceptional and extremely unusual hardship.

The Applicant's evidence is insufficient for several reasons. First, he did not provide any medical records to establish he spent two days in the hospital following his [REDACTED] 2020 assault. Furthermore, his affidavit does not explain how he ended up in an ambulance following this assault. For instance, there is no explanation provided to show who called the ambulance. Second, he claims that his doctor believes he has CTE, yet none of the medical documentation provided supports this assertion. As in our prior decision, we acknowledge he experienced a prior assault, and threats, and that the record contains photographic evidence that shows his head injury required stitches, however his assertions of CTE, and other potential neurological disorders without objective medical evidence are insufficient to establish a serious medical ailment. Furthermore, he writes that he has declined the use of medications to treat his ailments because they may make him less alert to gang threats, however, he does not provide sufficient details or objective evidence to understand why he believes that to be true.

Moreover, there are inconsistencies in his account of the [REDACTED] 2020 incident when compared to the narrative provided in the police investigative report. At the outset, we note that the police investigative report appears to have been based entirely on a statement by the Applicant, and it did not include any other witnesses to the assault. The Applicant describes that his tattoos have been noticed

by the gang and that they believe him to be a gang member because of his tattoos. The investigative report however states that once the gang members saw his tattoos were not gang related, they stopped assaulting him. As such, it is not clear if the gang is trying to recruit him, as he has alleged, or if the gang is not interested in him since his tattoos are not gang related, and instead are simply harassing him. Second, the Applicant writes that two men on motorcycles followed him, implying there was more than one motorcycle, whereas the police investigative report notes that the Applicant observed two subjects on one motorcycle following him. Finally, neither the Applicant nor the police investigative report provides pertinent details about how the Applicant managed to get to the hospital, who picked him up from the hospital, who helped him move residences on the same day he was released from the hospital, how he arrived at the police station to report the crime, and other pertinent details about the assault, his hospitalization, and the aftermath of the assault. There is no explanation for these discrepancies and the lack of details provided.

As such, the Applicant has failed to demonstrate, in the totality of the evidence of record, that he and his qualifying relatives will suffer exceptional and extremely unusual hardship if he remains in El Salvador.

On motion, the Applicant argues that under the precedent decision *Matter of Recinas*, 23 I. & N. Dec. 467 (BIA 2002) (*en banc*), he has established exceptional and extremely unusual hardship. We find *Matter of Recinas* inapplicable to the matter at hand for several reasons. First, the hardship claims are significantly different in that the respondent in *Recinas* was a single mother of six minor children, four of whom were U.S. citizens who had never traveled to Mexico, and they did not speak Spanish. Furthermore, in *Recinas* the children were entirely dependent on the respondent and she had no family support in Mexico. Here, the Applicant's children are adults and appear independent. Furthermore, their mother is a U.S. citizen, and capable of providing emotional support. Perhaps most importantly, the context in which the Board found the respondent in *Recinas* established her hardship is highly distinguishable. In *Recinas*, the respondent was seeking relief in the form of cancellation of removal, and she appears to have had no criminal history. By contrast, the Applicant's application for a waiver, requires a heightened hardship standard because of his commission of dangerous or violent crimes, thus precluding us from exercising positive discretion without a showing of exceptional and extremely unusual hardship.

Moreover, and as discussed in our prior decision, the Applicant's criminal convictions and the underlying circumstances surrounding his inadmissibility are significant negative factors that may preclude a favorable exercise of discretion, even if we determined he had met his burden. See *Matter of Jean*, *supra* (even if the existence of extraordinary circumstances pursuant to 8 C.F.R. § 212.7(d) is established, that alone would not be enough to warrant a favorable exercise of discretion). In addition to his conviction for aggravated assault, the Applicant was convicted in 2004 of burglary, unlawful sex with a minor, and oral copulation. The police report states that in 2003, his victim's father found the Applicant, who was 29 years old at the time, in bed with his 15-year-old daughter. He detained the Applicant and called the police. The Applicant admitted to the police that although he was aware the victim was only 15 years old, he had continued to have sexual intercourse with her over the course of the prior year. As noted in our prior decision, the court records state that the Applicant attempted to minimize his culpability by stating the sexual relationship was consensual and the victim's mother condoned their behavior. Thus, even if he had established his hardship burden, which he has not, the

facts surrounding his criminal behavior are such negative factors that they may preclude a favorable exercise of discretion.

IV. CONCLUSION

For the reasons discussed, the evidence provided in support of the motion to reopen does not overcome the grounds underlying our prior decision. The motion to reopen will be dismissed for the above stated reasons.

ORDER: The motion to reopen is dismissed.