

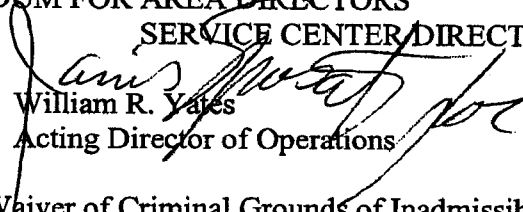
Department of Homeland Security
Bureau of Citizenship and Immigration Services

HQADN 70/23

425 I Street NW
Washington, DC 20536

MAY 27 2003

MEMORANDUM FOR AREA DIRECTORS
SERVICE CENTER DIRECTORS

FROM: 
William R. Yates
Acting Director of Operations

SUBJECT: Waiver of Criminal Grounds of Inadmissibility for Immigrants—Summary of the
December 26, 2002, Interim Rule.

Summary

On December 26, 2002, the Immigration and Naturalization Service (INS) published an interim final rule at 67 FR 78675 amending the regulations at 8 CFR § 212.7(d) concerning the standards for waivers of the criminal grounds of inadmissibility for immigrants under section 212(h) of the Immigration and Nationality Act (Act). This memorandum outlines the standards set forth in the amended regulation. Beginning immediately, Department of Homeland Security/Bureau of Citizenship and Immigration Services (DHS/BCIS) personnel should adjudicate requests for the section 212(h) waiver of criminal grounds of inadmissibility according to this interim regulation.

212(h) Waiver Standards

This interim rule amends 8 CFR § 212.7 to provide a general rule that the DHS/BCIS in general will not exercise discretion in favor of the applicant in section 212(h) waiver cases that involve violent or dangerous crimes except in extraordinary circumstances.

Under the interim rule, to obtain a 212(h) waiver of a ground of inadmissibility found under section 212(a)(2) of the Act, an applicant must meet the eligibility standards of a two-part test. First, the applicant must demonstrate that he or she meets the threshold eligibility criteria to apply for the waiver. To do so, he or she must show that the denial of the alien's application for adjustment or admission and subsequent removal from the United States would result in extreme hardship to one or more of the applicant's qualifying United States citizen or lawful permanent resident family members. Second, after the applicant has met the threshold eligibility test (extreme hardship to a qualifying family member), DHS/BCIS personnel must determine if he or she also satisfies the second part of the test: Are there extraordinary circumstances in the particular case that warrant the exercise of the discretion of the Secretary of the Department of

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Homeland Security to consent to an application or reapplication for a visa, or admission or adjustment of status?

The interim rule gives two examples of extraordinary circumstances:

1. Cases that involve national security or foreign policy considerations, or
2. Cases that clearly demonstrate that the denial of the application for adjustment of status would result in exceptional and extremely unusual hardship.

The phrase “exceptional and extremely unusual hardship” has previously been applied to applicants for cancellation of removal under section 240A(b) of the Act.¹ In Matter of Monreal, 23 I&N Dec. 56 (BIA 2001), the Board of Immigration Appeals (BIA) defined the phrase as “hardship that is substantially beyond that which would ordinarily be expected to result from the alien’s deportation...”. Matter of Monreal contains this discussion of the factors to be weighed and provides several useful examples:

[S]uch factors as the age of a respondent, both at the time of entry and at the time of the application for relief, family ties in the United States and abroad, length of residence in this country, the health of the respondent and qualifying family members, the political and economic conditions of the country of return, the possibility of other means of adjusting status in the United States, the alien’s involvement and position in his or her community here, and his or her immigration history are all proper factors to be considered. ...

[W]e consider the 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... generally will be insufficient in themselves to support a finding of exceptional and extremely unusual hardship.

Id. at 63.

Finally, even when the alien can demonstrate that his or her removal would result in exceptional and extremely unusual hardship, the DHS Secretary retains the discretion to determine that the mere existence of extraordinary circumstances is insufficient to warrant the grant of a waiver, depending on the nature and severity of the underlying offense to be waived. In the supplemental text of the interim regulation, it was noted that, “in general, individuals convicted of aggravated felonies would not warrant the Attorney General’s [or DHS Secretary’s] use of this discretion.” See 67 FR 78675 (December 26, 2002).

¹ In the context of cancellation of removal, the exceptional and extremely unusual hardship must be to one of the alien’s qualifying US citizen or LPR relatives. While section 212(h) determinations of extreme hardship have this same requirement, the AG’s discussion of exceptional and extremely unusual hardship in the Matter of Jean does not contain reference to qualifying relatives; therefore, the exceptional and extremely unusual hardship could be to the qualifying relative or to the applicant.

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Background

Applicants for adjustment of status or admission must demonstrate that they are not inadmissible to the United States under the grounds described in section 212(a) of the Act. Certain individual grounds of inadmissibility may be overcome through waiver provisions set forth in the Act. Except for refugee adjustment applicants under section 209 of the Act, adjustment applicants must make a showing of extreme hardship to be eligible for a waiver under most provisions of section 212 of the Act. The extreme hardship must be to one or more of the applicant's United States citizen or lawful permanent resident family members specified in that provision. Certain aliens who are inadmissible under the criminal grounds of inadmissibility at section 212(a)(2) of the Act are eligible to apply for a waiver under section 212(h) of the Act. The DHS regulations for these waiver provisions now can be found at 8 CFR § 212.7(d).

Discussion

With the exception of refugees adjusting under section 209 of the Act who may obtain a waiver under section 209(c) of the Act, section 212(h) of the Act is the exclusive means of relief when an alien is found inadmissible under section 212(a)(2) of the Act. However, section 212(h) of the Act authorizes a waiver only in limited cases. See INA §§ 212(h)(1)(A)-(C), 8 U.S.C. § 1182 (h)(1)(A)-(C).

One of the bases for establishing eligibility for such a waiver is to demonstrate "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." INA 212(h)(1)(B), 8 U.S.C. 1182(h)(1)(B). However, simply because an alien has established "extreme hardship" under section 212(h)(1)(B), such a determination does not bind the Secretary of the DHS or the Attorney General in exercising his discretion under section 212(h)(2). See *INS v. Yueh-Shaio Yang*, 519 U.S. 26, 30-31 (1996) (in determining whether to waive deportation of aliens deportable for entry fraud, Attorney General could decide not to grant waiver because of the fraud, even though committing entry fraud made alien eligible for waiver; Attorney General could take such conduct into account when deciding whether to grant waiver because the statute "establishes only the alien's *eligibility* for the waiver. Such eligibility in no way limits the considerations that may guide the Attorney General in exercising her discretion to determine who, among those eligible, will be accorded grace.") (emphasis in original).

Therefore, the DHS/BCIS notes that waivers of inadmissibility are granted in the discretion of the Secretary of the DHS or the Attorney General. See INA 212(h)(2), 8 U.S.C. 1182(h)(1)(2). The BIA has held that, in assessing whether an applicant has met the burden that a waiver is warranted in the exercise of discretion, the adjudicator must balance adverse factors evidencing inadmissibility as a lawful permanent resident with the social and humane considerations presented to determine if the grant of relief appears to be in the best interests of

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the United States. Matter of Mendez-Moralez, 21 I&N Dec. 296 (BIA 1996) (involving a waiver under section 212(h)(1)(B) of the Act).

Establishment of extreme hardship and eligibility for a waiver requiring a showing of such hardship does not create an entitlement to the relief sought. Id.; Matter of Cervantes-Gonzalez, 22 I&N Dec. 560 (BIA 1999). Extreme hardship, once established, is but one favorable discretionary factor to be considered. Id., Matter of Mendez-Morales, supra. The DHS/BCIS notes that it will not apply the 8 CFR § 212.7(d) standard of exceptional and extremely unusual hardship to the threshold eligibility requirement of "extreme hardship" in section 212(h)(1)(B) of the Act. Rather, the 8 CFR § 212.7(d) standard governs only the exercise of discretion under section 212(h)(2).

Most recently, in the context of a case involving a waiver of a criminal ground of inadmissibility under section 209(c) of the Act, the Attorney General determined that favorable discretion should not be exercised for waivers involving violent or dangerous individuals, except in extraordinary circumstances. Extraordinary circumstances include situations where the alien has established exceptional and extremely unusual hardship, or situations where there are overriding national security or foreign policy considerations. Nevertheless, depending on the gravity of the underlying offense, the equities presented in such extraordinary circumstances may still be insufficient. Matter of Jean, 23 I&N Dec. 373 (A.G. 2002).

Amended regulation

Paragraph 8 CFR 212.7(d) reads as follows:

§ 212.7 Waiver of certain grounds of inadmissibility.

(d) Criminal grounds of inadmissibility involving violent or dangerous crimes. The Attorney General, 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.