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

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: BOSTON Date: DEC 03 2009

IN RE: [redacted]

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

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Boston, Massachusetts, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Jamaica who was found to be inadmissible to the United States. In the decision to deny the Form I-601 application for a waiver, the district director cited the waiver provisions in section 212(h) of the Immigration and Nationality Act (the Act), suggesting that the applicant is inadmissible under section 212(a)(2)(A) of the Act, 8 U.S.C. § 1182(a)(2)(A) due to one or more criminal convictions. It is further noted that the applicant was found inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for seeking to procure a visa, other documentation, or admission into the United States or other benefit provided under the Act by fraud or willful misrepresentation. The applicant seeks a waiver of inadmissibility pursuant to sections 212(h) and 212(i) of the Act, 8 U.S.C. § 1182(h), (i), in order to remain in the United States.

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

> (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

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

> (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant who is the spouse, son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

Section 212(a)(2) of the Act states in pertinent part:

> Criminal and related grounds. —
>
> (A) Conviction of certain crimes. –
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> (i) In general. – Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –
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> (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy

to commit such a crime, or

(II) a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), 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 released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States . . . .

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

> The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana . . . .
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> (1) (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 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 . . .

The district director found the applicant inadmissible under section 212(a)(6)(C)(i) of the Act for seeking to procure admission into the United States by making a willful misrepresentation. The district director based this finding on the applicant's omissions during an interview in connection with his Form I-485 application to adjust his status to permanent resident. In the interview, the applicant failed to reveal his arrest in Philadelphia, Pennsylvania on July 13, 1996, which resulted in four charges including tampering with identification documents, theft by taking, receiving stolen property, and an offense related to credit checks. The applicant was found inadmissible for misrepresentation under section 212(a)(6)(C)(i) of the Act for failing to reveal this arrest.

A willful misrepresentation may only serve as a basis for inadmissibility under section 212(a)(6)(C)(i) of the Act if the applicant would have been inadmissible or ineligible for the benefit sought based on the true facts, or if the misrepresentation cut off a material line of inquiry. *See Matter of S- & B-C-*, 9 I&N Dec. 436 (BIA 1960).

In response to the AAO's request for evidence, the applicant has provided sufficient documentation to show that he was not convicted of any crimes as a result of his arrest on July 13, 1996. As the applicant was not convicted of any of the crimes, the arrest does not serve as a basis for inadmissibility. As a result, the applicant's failure to reveal his arrest was not material to his admissibility or eligibility to adjust his status to permanent resident. It is noted that the applicant's failure to reveal his July 13, 1996 arrest did not cut off a line of inquiry into his criminal background. Specifically, the record reflects that the applicant did reveal arrests that occurred after July 13, 1996, and arrests and convictions that occurred prior to that date, affording the interviewing officer ample opportunity to inquire into the applicant's criminal history.

Based on the foregoing, the record does not support that the applicant made a material misrepresentation or cut of a material line of inquiry. Thus, the applicant is not inadmissible under section 212(a)(6)(C)(i) of the Act for seeking to procure admission into the United States or by fraud or willful misrepresentation, and he does not require a waiver of inadmissibility under section 212(i) of the Act.

On February 8, 1995, the applicant was adjudicated delinquent due to a charge of Assault and Battery under Chapter 265 section 13A of the General Laws of Massachusetts for his conduct on September 28, 1995. As the applicant was age 17 on the date that he committed assault and battery, and he was adjudicated delinquent in subsequent proceedings, his conduct did not result in a conviction for immigration purposes that serves as a basis for inadmissibility. *See Matter of Ramirez-Rivero*, 18 I&N Dec. 135, 137 (BIA 1981), *aff'd In Re Devison-Charles*, 22 I&N Dec. 1362, 1365-66 (BIA 2001). It is further noted that the record does not support that the applicant's conduct that led to a charge for assault and battery constitutes a crime involving moral turpitude. *See Matter of S*, 9 I&N Dec. 688 (BIA 1962).

On February 8, 1995, the applicant was adjudicated delinquent due to a charge of Possession of a Class D substance (marijuana) under chapter 94C section 34 of the Massachusetts Controlled Substances Act for his conduct on September 15, 1994. As the applicant was age 16 on the date that he committed the act that led to the charge, and he was adjudicated delinquent in subsequent proceedings, his conduct did not result in a conviction for immigration purposes. *See Matter of Ramirez-Rivero* at 137. However, in the court's disposition, it stated that "[The applicant] admits to sufficient facts and after full hearing, [the] Court finds sufficient facts." *Record of Conviction*, entry in record dated February 8, 1995. The court sentenced the applicant to one year of probation, a "Victim/witness fee," or in lieu of monies to perform 26 hours of community service. *Id.* at 2. Thus, the record shows that the applicant admitted to having committed, or admitted committing acts which constitute the essential elements of, the conduct proscribed by chapter 94C section 34 of the Massachusetts Controlled Substances Act. As chapter 94C section 34 of the Massachusetts Controlled Substances Act is a law relating to a controlled substance, the applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act.

Counsel asserts that the applicant's conduct that led to his charge under chapter 94C section 34 of the Massachusetts Controlled Substances Act falls under the exception found in section 212(a)(2)(A)(ii)(I) of the Act, as the applicant was under 18 years of age. However, while section 212(a)(2)(A)(ii)(I) of the Act provides an exception to inadmissibility under section 212(a)(2)(A)(i)(I), it does not provide an exception to inadmissibility under section 212(a)(2)(A)(i)(II) of the Act. Thus, the applicant requires a waiver of his inadmissibility under section 212(a)(2)(A)(i)(II) of the Act as provided in section 212(h) of the Act.

In order to qualify for a waiver of inadmissibility under section 212(a)(2)(A)(i)(II) of the Act, the applicant must establish that his offense under chapter 94C section 34 of the Massachusetts Controlled Substances Act "relates to a single offense of simple possession of 30 grams or less of marijuana." Section 212(h) of the Act.

On June 1, 2009, the AAO issued correspondence requesting the applicant to submit official documentation to show the amount of marijuana that was the subject of his charge under chapter 94C section 34 of the Massachusetts Controlled Substances Act. In response, the applicant submits a police report from the Boston Police Department that reflects that the applicant was found with "[four] plastic bags containing a green leafy substance believed to be marijuana." *Boston Police Incident Report*, dated September 15, 1994. Counsel asserts that "[t]here was no drug analysis on this matter completed." *Counsel's Response to AAO Request for Evidence*, at 2, dated August 14, 2009. Counsel indicates that the applicant alleged that he possessed less than one-half ounce of marijuana for his personal use. *Id.* Counsel further notes that the Commonwealth of Massachusetts amended the applicant's initial charge to the lesser possession offense under chapter 94C section 34 of the Massachusetts Controlled Substances Act which serves as evidence that the applicant possessed less than 30 grams of marijuana. *Id.* at 3.

Upon review, chapter 94C section 34 of the Massachusetts Controlled Substances Act does not denote an amount of marijuana that is criminalized under the section, thus it does not serve to show the amount of marijuana the applicant possessed. The AAO has considered the facts discussed by counsel. However, the record does not contain sufficient documentation to show by a preponderance of the evidence the amount of marijuana the applicant possessed for which he was charged under chapter 94C section 34 of the Massachusetts Controlled Substances Act. Thus, the applicant has not shown that he possessed 30 grams or less of marijuana, such that he is eligible for consideration for a waiver of inadmissibility under section 212(h) of the Act.

The AAO further finds that, even if the applicant had established eligibility for consideration for a waiver, he has failed to show that he meets the requirements of section 212(h) of the Act. Section 212(h)(1)(B) of the Act provides that a waiver of inadmissibility is dependent first upon a showing that the bar to admission imposes an extreme hardship on a qualifying family member. Hardship the applicant experiences due to his inadmissibility is not a basis for a waiver under section 212(h) of the Act; the only relevant hardship in the present case is hardship suffered by the applicant's U.S. citizen mother and children. *Id.* If extreme hardship is established, the Secretary then assesses whether an exercise of discretion is warranted. Section 212(h) of the Act.

In *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560 (BIA 1999) the Board of Immigration Appeals (BIA) provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship. These factors included 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.

Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation. *Matter of O-J-O-,* 21 I&N Dec. 381, 383 (BIA 1996)(citations omitted).

The applicant's mother stated that the applicant will experience hardship should he relocate to Jamaica, as all of his immediate family members reside in the United States and he is unfamiliar with Jamaica. *Statement from the Applicant's Mother*, dated September 14, 2006. The applicant's mother asserted that she would suffer a great deal of anxiety and stress knowing that the applicant had to face this hardship. *Id.* at 1.

The mother of the applicant's son attested that the applicant has been in his son's life since birth. *Statement from the Mother of the Applicant's Son*, dated August 29, 2006. She provided that the applicant has not missed one of his son's birthdays or favorite holidays. *Id.* at 1. She explained that the applicant provides material support for his son, as well as attends parental meetings. *Id.* She stated that the applicant is the only positive male role model in his son's life. *Id.* She asserted that the applicant's son will be devastated if the applicant is compelled to depart the United States. *Id.*

The mother of the applicant's daughter stated that the applicant has a good relationship with his daughter, and that his daughter would suffer significant emotional hardship should she be unable to see the applicant on a regular basis. *Statement from the Applicant's Daughter's Mother*, undated.

The applicant provided a letter from another woman who indicated that she was pregnant with the applicant's third child. She subsequently issued a statement indicating that the applicant has taken good care of her son, and that the applicant has helped her while she has been going to school. Yet, the applicant has not submitted a birth certificate to show that he in fact has a third U.S. citizen child.

The applicant provided a copy of his 2008 Internal Revenue Service (IRS) Form 1040A U.S. Individual Income Tax Return that reflects that he claimed his daughter as a dependent for the year. The form reports that he earned $9,445 and received $3,400 in the form of public assistance due to unemployment.

Upon review, the applicant has not shown that his mother or children will suffer extreme hardship should he be prohibited from remaining in the United States. It is noted that the record contains

explanations of hardships to the applicant. As provided above, hardship the applicant experiences due to his inadmissibility is not a basis for a waiver under section 212(h) of the Act; the only relevant hardship in the present case is hardship suffered by the applicant's U.S. citizen mother and children. Section 212(h)(1)(B) of the Act.

The applicant has not asserted or shown that his mother or children would experience extreme hardship should they relocate to Jamaica with him. The applicant bears the burden of showing that a qualifying relative will experience extreme hardship should he depart the United States. *See* section 291 of the Act, 8 U.S.C. § 1361. In the absence of clear assertions by the applicant, the AAO may not speculate as to hardships his family members would face. As the applicant has not shown that his mother or children would endure hardship in Jamaica, and that they are otherwise unable to join him abroad, he has not established that denial of the present waiver application "would result in extreme hardship" to a qualifying relative. Section 212(h)(1)(B) of the Act.

The applicant has not shown that his U.S. citizen children will experience extreme hardship should he depart the United States and they remain. The applicant provided statements from the mothers of his two U.S. citizen children who explain that the applicant has a good relationship with his children and that they would endure emotional hardship if they do not see him often. While the AAO acknowledges that the separation of a child from a parent involves considerable emotional consequences, the applicant has not distinguished his children's hardship from that which is commonly expected when family members are separated due to inadmissibility. It is noted that the applicant does not reside with his children.

U.S. court decisions have held that the common results of deportation or exclusion are insufficient to prove extreme hardship. *See Hassan v. INS,* 927 F.2d 465, 468 (9th Cir. 1991). For example, *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In addition, *Perez v. INS,* 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined "extreme hardship" as hardship that was unusual or beyond that which would normally be expected upon deportation. *Hassan v. INS, supra,* held further that the uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported.

The mothers of the applicant's children state that the applicant provides material support for the children. However, the applicant has not submitted evidence that he supports his son financially. The applicant claimed his daughter as a dependent on his 2008 federal income tax return, yet the applicant does not reside with his daughter and he did not indicate the level of economic contribution he provides. The applicant has not stated the income of the mothers of his children, thus he has not shown that his children have unmet economic need. The record reflects that the applicant earned $9,445 and received $3,400 in the form of public assistance due to unemployment in 2008, which suggests that his children would not be compelled to forego significant financial support should the applicant depart the United States.

Based on the forgoing, the applicant has not shown that his children would suffer extreme hardship should he be compelled to depart the United States and they remain.

The applicant has not shown that his mother would experience extreme hardship should he depart the United States. The applicant's mother indicated that she would worry about the applicant in Jamaica and she would endure emotional hardship due to his circumstances. Yet, the applicant has not shown that his mother would suffer unusual hardship, or that her emotional challenges would rise to the level of extreme hardship. The applicant has not indicated that his mother would endure any other forms of hardship should he depart. Thus, the applicant has not shown that his mother would experience extreme hardship should the present waiver application be denied.

All elements of hardship to the applicant's mother and children have been considered individually and in aggregate. Based on the foregoing, the applicant has not shown that denial of the present waiver application would result in extreme hardship to his mother or children. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings regarding a waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.