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

U.S. Citizenship and Immigration Services

H2

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: DEC 23 2009

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. section 1182(a)(2)(A)(i)(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.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, California Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Cuba who was found to be inadmissible to the United States under 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 a crime involving moral turpitude. The applicant is the son of lawful permanent residents, the spouse of a lawful permanent resident and the father of two United States citizen children. He seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), so that he may reside in the United States with his spouse and children.

The Director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601) on May 17, 2008.

On appeal, counsel asserts that the applicant has established that his spouse and children will suffer extreme hardship if the applicant is excluded.

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

> (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 . . . or an attempt or conspiracy to commit such a crime . . . is inadmissible.

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) . . . 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 . . .

The record reflects that, on March 23, 2005, the applicant pled guilty to one count of robbery/strongarm under Florida Statutes § 812.131 in the Dade County Circuit Court, Dade County, Florida. Robbery is a Crime Involving Moral Turpitude (CIMT). *Matter of Romandia-Herreros*, 11 I. & N. Dec. 772 (BIA 1966); *Matter of Carballe*, 19 I. & N. Dec. 357 (BIA 1986) (Florida Statute). Accordingly, the applicant is inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a CIMT. The applicant does not contest this finding.

A waiver of inadmissibility under section 212(h) is dependent upon a showing that the bar to admission imposes an extreme hardship on a qualifying relative, *i.e.,* the U.S. citizen or lawfully resident spouse, parent or child of the applicant. Hardship to the applicant is not directly relevant to the determination of extreme hardship under the statute and will be considered only insofar as it results in hardship to a qualifying relative in the application. The applicant's lawful permanent resident parents and spouse, and his U.S. citizen children are all qualifying relatives for the purposes of this proceeding. If extreme hardship to a qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted.

The concept of extreme hardship to a qualifying relative "is not . . . fixed and inflexible," and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560, 565 (BIA 1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals set forth a list of non-exclusive factors relevant to determining whether an applicant has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. These factors include, with respect to the qualifying relative, the presence of family ties to U.S. citizens or lawful permanent residents in the United States, family ties outside the United States, country conditions where the qualifying relative would relocate and family ties in that country, the financial impact of departure, and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 566.

> 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 AAO notes that any evaluation of extreme hardship to a qualifying relative should discuss the impacts on that qualifying relative whether he or she relocates with the applicant or 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.

The record includes, but is not limited to, counsel's brief; statements from the applicant, his spouse and parents; criminal records and court documents for the applicant; photographs of the applicant, his spouse and their children; a statement from [redacted] asserting that the applicant's spouse has Major Depressive Disorder; statements from [redacted] and [redacted] stating that the applicant's daughter was born with aortic coarctation, underwent reparative surgery, and needs to be followed closely; and medical records for the applicant's daughter pertaining to her cardiac condition.

The entire record was reviewed and all relevant evidence considered in rendering this decision.

On appeal, counsel for the applicant asserts that the applicant's spouse is suffering from Major Depressive Disorder and that the applicant's younger child has a heart condition, and that the applicant's exclusion would result in extreme hardship to both. She also states that the applicant has a close knit relationship with his family, most of whom reside in the United States, and that merely by separating the applicant and his family they will suffer extreme hardship.

The applicant's spouse asserts that she is depressed, unable to sleep, concentrate or adequately perform her duties as a mother. She further asserts that the applicant is a good father and her children need the applicant to support them and provide assistance in the event her younger daughter has additional cardiac procedures.

Counsel states that the applicant's spouse is suffering from Major Depressive Disorder, and makes assertions about the neurological sources of depression and its psychosomatic symptoms, which are not supported by the record. The record contains a brief statement from [redacted] dated June 11, 2008, in support of counsel's assertion that the applicant's spouse is suffering from Major Depressive Disorder. In his statement, [redacted] indicates that the applicant's spouse had a psychiatric evaluation and was diagnosed with Major Depressive Disorder, Recurrent, Severe without Psychotic Features. He reports that he has recommended the applicant's spouse attend monthly sessions of individual psychotherapy and has prescribed Cymbalta and Tofranil.

Although the input of any mental health professional is respected and valuable, the AAO does not find the single, brief statement prepared by [redacted] to be sufficiently probative to establish that the applicant's spouse is suffering from Major Depressive Disorder. [redacted] fails to indicate who performed the evaluation of the applicant's spouse, under what circumstances it was performed, what findings led to the diagnosis of depression and over what period of time and through what methods these findings were reached. Moreover, [redacted] fails to indicate what effect, if any, the applicant's removal would have on his spouse or what impacts the applicant's spouse might experience if she were to relocate with the applicant. Without such information, the AAO finds the evaluation of the applicant's spouse to be of diminished value to a determination of extreme hardship.

The record contains numerous medical documents indicating that the applicant's younger child was born with aortic coarctation and underwent reparative surgery shortly after her birth. Her pediatrician, [redacted], states that the applicant's younger child needs close cardiac follow-

up care and may need additional procedures in the future for her cardiac anomaly. A pediatric cardiologist who examined the applicant's younger child, [redacted] indicates that she is following a stable course following aortic coarctation repair, has mild aortic recoarctation and mild aortic stenosis, and should return for further evaluation in six months. Although the AAO, as previously noted, does not find the psychological evaluation submitted for the record to establish that the applicant's spouse would experience extreme emotional hardship in the applicant's absence, it acknowledges the difficulties and stress associated with being a single parent who must care for and support a child who has recently undergone surgery for a potentially life-threatening cardiac problem and who faces the possibility of recurrence. The AAO notes that the pediatric cardiologist who examined the applicant's younger child found her to have mild aortic recoarctation and aortic stenosis, and to require continued evaluation. When the impact of her younger daughter's medical problems is considered in combination with the normal hardships that would be created for the applicant's spouse by the applicant's removal, the AAO concludes that she would experience extreme hardship if the applicant were removed and she remained in the United States.

As previously discussed, a determination of extreme hardship should include a consideration of the impacts of relocation on the applicant's qualifying relative. Counsel for the applicant asserts that the applicant's spouse and daughter would not be able to relocate with the applicant due to inadequate health care in Cuba and an inability to find gainful employment there. The record does not contain sufficient documentary evidence to support counsel's assertions. However, the AAO notes that the applicant's younger daughter has a cardiac condition that requires continuing care, which is currently provided by doctors who are familiar with her previous medical problems and the treatment she has received for those problems. It finds, therefore, that having to remove her younger daughter from her established health care program and seek new medical assistance outside the United States would, when added to the normal disruptions and difficulties of moving to another country, constitute an extreme hardship for the applicant's spouse if she were to relocate with the applicant.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States, which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

> In evaluating whether . . . relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other

evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

See Matter of Mendez-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf 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).

In this case the negative factor is the applicant's conviction for a serious crime. The factors weighing on behalf of a favorable exercise of discretion include the presence of the applicant's spouse, children and parents in the United States; the medical condition of the applicant's youngest child and the extreme hardship to the applicant's spouse if his waiver application is not approved. Although the applicant's crime is a serious one, the AAO finds that the favorable factors outweigh the unfavorable factors in this case. The AAO therefore finds that the applicant qualifies for a 212(h) waiver of his inadmissibility pursuant to 212(a)(2)(A)(i)(I) of the Act.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval rests with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met his burden and the appeal will be sustained.

ORDER: The appeal is sustained.