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U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: ATLANTA, GA Date: JUN 25 2009

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under sections 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h), and 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v)

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).

Ellen C. Johnson

John F. Grissom
Acting Chief, Administrative Appeals Office

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

The applicant, a native and citizen of Jamaica, was found 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 crimes involving moral turpitude. The AAO notes that the applicant also appears to be inadmissible under section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year. The applicant sought a waiver of inadmissibility in order to remain in the United States with her U.S. citizen spouse and child, born in December 2007.

The acting district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Form I-601, Application for Waiver of Ground of Excludability (Form I-601) accordingly. *Decision of the Acting District Director,* dated May 21, 2007.

In support of the appeal, counsel for the applicant submit a brief, dated September 13, 2007, and referenced exhibits. In addition, on March 12, 2008, counsel for the applicant submitted evidence of the applicant's child's U.S. birth and medical documentation relating to the applicant. The entire record was reviewed and considered in rendering this decision.

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

> (A)(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, or

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

> The Attorney General [now Secretary, 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 if--
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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 (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 . . .

Section 212(a)(9)(B) of the Act provides, in pertinent part:

> (B) Aliens Unlawfully Present.-
>
> (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-
>
> (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.
>
> . . . .
>
> (v) Waiver. – The Attorney General [now Secretary of Homeland Security (Secretary)] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or 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 such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

Regarding the acting district director's finding of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act, for having been convicted of multiple crimes involving moral turpitude, the record establishes that the applicant was convicted, in March 2004, of Theft by Shoplifting[1], based on a July 2003 incident, and of Theft by Taking[2], based on a November 2003 incident. The acting district director correctly found the applicant to be inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Act, for having been convicted of multiple crimes of moral turpitude. On appeal, the applicant does not contest this finding of inadmissibility.

Regarding the AAO's finding that the applicant is also inadmissible under 212(a)(9)(B)(II) of the Act, the record indicates that the applicant entered the United States with a valid B1/B2 nonimmigrant visa on June 19, 2002, with permission to remain until July 18, 2002. The applicant remained beyond the period of authorized stay and the record contains no evidence establishing that she obtained an extension of stay. In April 2004, the applicant filed the Form I-485, Application to Register Permanent Residence or Adjust Status (Form I-485). In September 2004, the applicant was

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[1] The incident occurred at Dillard's in Lithonia, Georgia. *See Plea/Other Disposition,* dated March 5, 2004.

[2] The incident occurred at Marshall's in Stone Mountain, Georgia. *See Plea,* dated March 5, 2004.

issued the Form I-512, Authorization for Parole of an Alien into the United States (Form I-512) and subsequently used the advance parole authorization to depart and re-enter the United States, thereby triggering the unlawful presence bars.

The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary] as an authorized period of stay for purposes of determining bars to admission under section 212 (a)(9)(B)(i)(I) and (II) of the Act. *See Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act,* dated May 6, 2009. As such, the applicant accrued unlawful presence from July 19, 2002, upon expiration of her nonimmigrant stay, until April 2004, the date of her proper filing of the Form I-485. Thus, the applicant is inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year.

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 alien has established extreme hardship to a qualifying relative. 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. The BIA held in *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (citations omitted) that:

> 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.

The record contains references to the hardship that the applicant's U.S. citizen child would suffer if the applicant's waiver of inadmissibility is not granted. Section 212(a)(9)(B)(v) of the Act provides that a waiver under section 212(a)(9)(B)(i)(II) of the Act is applicable solely where the applicant establishes extreme hardship to his or her citizen or lawfully resident spouse or parent. Unlike waivers under section 212(h) of the Act, section 212(a)(9)(B)(v) does not mention extreme hardship to a United States citizen or lawful permanent resident child. Nor is extreme hardship to the applicant herself a permissible consideration under the statute. Though the applicant requires a waiver under section 212(h) of the Act, which would consider hardship to her child, she must also be granted a waiver under section 212(a)(9)(B)(v) which has more restrictive requirements. If she is

unable to establish eligibility under section 212(a)(9)(B)(v), no purpose would be served in examining her eligibility for a waiver under section 212(h). Therefore, hardship to her child will only be examined except as it may affect her spouse.

The applicant's spouse contends that he will suffer emotional, physical and financial hardship if his spouse is removed from the United States. In a declaration he asserts that he will suffer emotional hardship due to the long and close relationship he has with his spouse. He also notes that his U.S. citizen child would have to relocate to Jamaica were the applicant removed, as he is unable to care for the child due to his work schedule and the prohibitive costs of day care, and that such a separation would cause him extreme emotional hardship. In addition, the applicant's spouse notes that he has severe back problems and when he is unable to move, he becomes completely reliant on the applicant. He further notes that he suffers from bouts of depression and needs his wife's support. Finally, the applicant's spouse notes that he relies heavily on his spouse's income and without said income, he would suffer financial hardship and an inability to survive on just his salary. *Affidavit of* dated July 27, 2007.

It has not been established that the applicant's spouse will suffer extreme emotional hardship were the applicant to relocate abroad due to her inadmissibility. In addition, it has not been established that the applicant's spouse, a native of Jamaica, is unable to travel abroad to visit the applicant regularly. Moreover, no documentation has been provided from the applicant's spouse's treating physician, outlining his current medical and/or mental health condition, the gravity of the situation, the short and long-term treatment plan and what specific hardships the applicant's spouse will endure due to the applicant's physical absence from the United States.[3] In addition, it has not been established that the applicant's child would be unable to remain in the United States with her father, thereby ameliorating the emotional hardship referenced above. Finally, although the applicant's spouse notes that he would suffer emotional hardship due to the fact that his wife suffers from chronic hypertension that cannot be properly treated in Jamaica, no documentation has been provided to support said assertion. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The AAO recognizes that the applicant's spouse will endure hardship as a result of separation from the applicant. However, his situation, if he remains in the United States, is typical to individuals separated as a result of removal and does not rise to the level of extreme hardship based on the record. U.S. court decisions have repeatedly held that the common results of removal 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

[3] The AAO notes that the only medical documentation provided in relation to the applicant's spouse is a letter with respect to the applicant's spouse's back pain; said letter states that he was under a physician's care for one day and was then able to return to work. *See Certificate to Return to Work from* [redacted], dated September 10, 2007.

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.

As for the financial hardship referenced above, the AAO notes that courts considering the impact of financial detriment on a finding of extreme hardship have repeatedly held that, while it must be considered in the overall determination, "[e]conomic disadvantage alone does not constitute "extreme hardship." *Ramirez-Durazo v. INS,* 794 F.2d 491, 497 (9th Cir. 1986) (holding that "lower standard of living in Mexico and the difficulties of readjustment to that culture and environment . . . simply are not sufficient."); *Shooshtary v. INS,* 39 F.3d 1049 (9th Cir. 1994) (stating, "the extreme hardship requirement . . . was not enacted to insure that the family members of excludable aliens fulfill their dreams or continue in the lives which they currently enjoy. The uprooting of family, the separation from friends, and other normal processes of readjustment to one's home country after having spent a number of years in the United States are not considered extreme, but represent the type of inconvenience and hardship experienced by the families of most aliens in the respondent's circumstances."); *Matter of Shaughnessy,* 12 I&N Dec. 810 (BIA 1968) (holding that separation of family members and financial difficulties alone do not establish extreme hardship); *INS v. Jong Ha Wang,* 450 U.S. 139 (1981) (upholding BIA finding that economic detriment alone is insufficient to establish extreme hardship).

The AAO notes that the applicant's spouse's income in 2004 was $32,221.98, well over the poverty guidelines for 2009. *See Letter from* [redacted] Furthermore, no documentation has been provided to establish the applicant's and her spouse's financial situation, including income, expenses, assets and liabilities, and their financial needs, to establish that without the applicant's continued presence in the United States, her husband's financial hardship would be extreme. Moreover, counsel provides no objective documentation that confirms that the applicant would be unable to find gainful employment in Jamaica that would allow her to assist her spouse in the United States financially should the need arise. While the AAO recognizes that the applicant's spouse may need to make alternate arrangements with respect to his own care, the care of his child and the maintenance of the household due to his wife's inadmissibility, it has not been established that such arrangements would cause him extreme hardship. As such, the record fails to establish that the applicant's spouse's continued care and emotional and financial survival directly correlate to the applicant's physical presence in the United States.

The AAO notes that extreme hardship to a qualifying relative must also be established in the event that he or she relocates with the applicant abroad based on the denial of the applicant's waiver request. The applicant's spouse contends that he would suffer emotional, physical and financial hardship were he to relocate to Jamaica, due to the problematic country conditions, including out of control crime, high unemployment, and substandard health care. The applicant's spouse further

notes that he has developed family ties, friendships and financial ties in the United States and a relocation abroad would cause him extreme hardship. *Letter from* [redacted], dated April 30, 2007.

Although the AAO recognizes that Jamaica has been impacted by crime, the U.S. Department of State has not issued any type of warning against travel to the Jamaica; as such, it has not been established that the applicant's spouse would experience extreme hardship were he and his child to relocate to Jamaica to reside with the applicant. *See Country Specific Information-Jamaica, U.S. Department of State,* dated February 26, 2009. Moreover, although the applicant's spouse contends that he and/or his wife will suffer due to the substandard health care and economy, no corroborating evidence has been provided to document that the applicant and/or her spouse's medical conditions would worsen in Jamaica to an extent that would cause extreme hardship to the applicant's spouse. Finally, no documentation has been provided that confirms that the applicant's spouse, employed long-term as a truck driver in the United States, would be unable to obtain gainful employment in Jamaica, his native country. In addition, the record reflects that the applicant was employed in Jamaica prior to her departure for the United States. It has not been established that she would be unable to find employment upon her return to Jamaica.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that the applicant's U.S. citizen spouse will face extreme hardship if the applicant is unable to reside in the United States. Rather, the record demonstrates that he will face no greater hardship than the unfortunate, but expected, disruptions, inconveniences, and difficulties arising whenever a spouse is removed from the United States and/or refused admission. Although the AAO is not insensitive to the applicant's spouse's situation, the record does not establish that the hardship he would face rises to the level of "extreme" as contemplated by statute and case law. Having found the applicant statutorily ineligible for relief under section 212(a)(9)(B)(v) of the Act, no purpose would be served in discussing whether the applicant is eligible for a waiver under section 212(h) of the Act and/or whether she merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility, 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 appeal will be dismissed.