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

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[redacted]

FILE: [redacted] Office: ATLANTA, GEORGIA Date: MAY 28 2009

IN RE: [redacted]

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

ON BEHALF OF PETITIONER:

[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.

Ellen C. Johnson

John F. Grissom
Acting Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Liberia who was found to be inadmissible to the United States under section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having been convicted of a crime involving a controlled substance (Possession of less than one ounce of marijuana).[1] The applicant is the husband of a U.S. Citizen and the father of two Lawful Permanent Resident daughters and a U.S. Citizen son. He is the beneficiary of an approved Petition for Alien Relative filed by his wife. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with his wife and children.

The district 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 Inadmissibility (Form I-601) accordingly. *See Decision of the District Director,* dated May 19, 2006.

On appeal, counsel asserts that U.S. Citizenship and Immigration Services (USCIS) erred by denying the application because no filing fee was paid and in determining that the applicant had not established extreme hardship to a qualifying relative without requesting any evidence of extreme hardship from the applicant. Counsel states that according to 8 C.F.R. § 245.1(f), no filing fee is required for an application for waiver of grounds of inadmissibility if it is filed concurrently with an application for adjustment of status. *Brief in Support of Appeal* at 5. To support an assertion that USCIS should have issued a Request for Evidence before determining that the application had not established extreme hardship, counsel relies on a memorandum from the USCIS Associate Director for Operation dated February 16, 2005. *Brief in Support of Appeal* at 3-4. Counsel additionally asserts that the applicant's wife and children would suffer extreme hardship if he is removed from the United States, and submitted evidence of hardship including the following: Affidavits from the applicant's wife and former wife, a letter from the physician of the applicant's younger daughter, documents from the applicant's daughter's school concerning her special education program, letters and Emails between the applicant and his son's teachers, a copy of a decision granting the applicant's former wife asylum, documentation on conditions in Liberia, and a letter confirming the applicant's employment as a professor at Kennesaw State University. The entire record was reviewed and considered in arriving at a decision on the appeal.

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

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[1] The AAO notes that the director's decision did not note the actual section of the statute under which he found the applicant inadmissible. The text did state that the applicant was convicted of a crime involving moral turpitude. This would fall under section 212(a)(2)(A)(i)(I) of the Act. However, as the applicant was convicted of a violation of a law involving a controlled substance, the correct section of the Act is 212(a)(2)(A)(i)(II). The error is harmless, however, as the waiver for both grounds is found under section 212(h) of the Act.

(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-

. . .

(II) a violation of (or a 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.

Section 212(h) states in pertinent part:

(h) The Attorney General may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), (D), and (E) or 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 -

(1)(A) [I]t is established to the satisfaction of the Attorney General that-

(i) [T]he 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 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 applicant was convicted of possession of less than one ounce of marijuana for conduct that took place on December 18, 1994, less than fifteen years ago. The amount of marijuana possessed by the applicant was less than 30 grams, and he is therefore eligible to apply for a waiver of inadmissibility pursuant to section 212(h)(1)(B) of the Act. The AAO further notes that the applicant filed his application for a waiver of inadmissibility concurrently with his application for adjustment of status, and the District Director erred in denying the application for failure to pay a filing fee, since pursuant to 8 C.F.R. § 245.1(f) no filing fee is required for waiver applications filed concurrently with an application for adjustment of status.

Section 212(h) of the Act provides that a waiver of the bar to admission resulting from section 212(a)(2)(A)(i)(II) of the Act is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez,* 21 I&N Dec. 296 (BIA 1996).

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. *Id.* at 566. The BIA has further stated:

> 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).

In addition, the Ninth Circuit Court of Appeals has held, "the most important single hardship factor may be the separation of the alien from family living in the United States," and, "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion." *Salcido-Salcido v. INS,* 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted). *See also Cerrillo-Perez v. INS,* 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to the BIA) ("We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.") (citations omitted).

U.S. court decisions have additionally 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, in *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), the BIA 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, in *Perez v. INS,* 96 F.3d 390 (9th Cir. 1996), the court 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. In *Hassan v. INS*, *supra,* the court further held 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. In *Matter of Shaughnessy,* 12 I&N Dec. 810 (BIA 1968), the BIA held that separation of family members and financial difficulties alone do not establish extreme hardship. Moreover, the U.S.

Supreme Court additionally held in *INS v. Jong Ha Wang*, 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

The record reflects that the applicant is a forty-nine year-old native and citizen of Liberia who has resided in the United States since 1999, when he entered as a student, and previously resided in the United States from 1990 to 1999. The record further reflects that the applicant's wife is a forty-nine year-old native and citizen of the United States. The applicant and his wife reside together in Lawrenceville, Georgia, and his three children, two of whom are Lawful Permanent Residents and one of whom is a U.S. Citizen, reside with their mother in Riverdale, Georgia.

Counsel asserts that the applicant's spouse and children would suffer extreme hardship if the applicant is removed from the United States. Counsel submitted information on conditions in Liberia, including a reports from the U.S. Agency on International Development and the United National World Food Programme and a 2006 U.S. State Department Travel Warning. Counsel also submitted a letter granting the applicant's former wife and their children asylum in the United States in 1992 and states that this reflects "the extreme hardship that Respondent's children will suffer as a result of political violence and strife." *See Brief in Support of Appeal* at 6-7. The AAO notes that conditions in Liberia have changed since the appeal was filed and there is no current U.S. State Department Travel Warning or Travel Alert for Liberia. Further, Temporary Protected Status (TPS) designation for Liberia was terminated as of October 1, 2007 due to the end of the civil war and improvement in security conditions there. But although the civil conflict ended in 2003 and conditions had improved, President Bush directed the Department of Homeland Security to extend Deferred Enforced Departure (DED) to qualified Liberians until March 31, 2009 due to "political and economic conditions in the country that justify deferring the enforced departure for 18 months of those individuals who have expiring TPS status." *See* U.S. Department of Homeland Security, *Fact Sheet: Liberians Provided Deferred Enforced Departure (DED),* September 12, 2007. Although DED was scheduled to end for Liberian nationals on March 31, 2009, President Obama determined that there were compelling foreign policy reasons to continue to defer enforced departure from the United States for eligible Liberian nationals for an additional 12 months, through March 31, 2010.

Counsel also submitted documentation concerning economic and social conditions in Liberia as well as access to health care. The USAID Annual Report states that the war in Liberia caused devastation that is "difficult to exaggerate," and "[a]ll national institutions have been destroyed or so neglected that they are completely non-functional." *USAID/Liberia – Annual Report,* dated June 16, 2005, at 3. It further states that over 80% of the population is illiterate and lives below the poverty line, unemployment is estimated at or above 70%, and only 25% of the population has access to safe drinking water. *Id.* A report by the U.N World Food Programme states, "The war . . . left the country's infrastructure in shreds and wiped out health and education systems." *World Food Programme, World Hunger – Liberia*, last updated May 24, 2006.

In her affidavit the applicant's former wife states that the applicant's removal would have "severe negative consequences on the development" of their three children. *Affidavit of* [redacted]

dated June 12, 2006. She further states, "Because of the inadequacy of hospitals and schools, I cannot even consider sending [redacted] and [redacted] to live in Liberia with [redacted] such action would certainly imperil their lives." *Affidavit of* [redacted] Based on the evidence on the record, including information on extremely poor economic conditions and destruction of the country's infrastructure caused by a war that lasted from 1989 to 2003, the AAO concludes that relocating to Liberia would pose numerous hardships for the applicant's children that, when considered in aggregate, would rise to the level of extreme hardship.

In her affidavit the applicant's former wife states that she cannot support her two teenaged children, including a then eighteen year-old daughter who is severely mentally and physically disabled, without the financial support and assistance of the applicant. *Affidavit of* [redacted]. She states that because she must work and provide almost 24-hour care for their daughter [redacted] she is unable to be involved in school and extracurricular activities of their son [redacted]. She states that the applicant attends sports and other activities with their son and is also involved in his academic development by regularly helping with assignments, visiting the school, and communicating with his teachers. She further states that their oldest daughter, who is attending a university on a scholarship, relies on the applicant to provide for living expenses and that all three children will receive medical insurance through the applicant's new position as a college professor. In support of these assertions counsel submitted a letter from the physician of [redacted] stating that she has a history of mental retardation since birth and an Individualized Education Program (IEP) from the Clayton County Public Schools Special Education Program. The IEP states that [redacted] "functions within the profound range of intellectual ability," is nonverbal, and has difficulty using a switch consistently to communicate and eating with a fork and spoon. *IEP Present Level of Performance and Minutes.* It states that she "is totally dependent on others in the self-management/ daily living area" and requires "hand over hand assistance to participate in classroom activities and complete vocational activities." *IEP Present Level of Performance and Minutes.* Counsel also submitted a brief letter from the applicant to one of his son [redacted] teachers and Emails to him from two other teachers. They reflect that the applicant is in communication with his son's teachers over his academic progress and behavior in the classroom.

The AAO notes that no documentation concerning the income or expenses of the applicant's former wife was submitted to support her assertions concerning her inability to support her children without the assistance of the applicant, and no documentation was submitted to establish the amount of child support paid by the applicant. The record does reflect, however, that the applicant's daughter is severely disabled and requires a high level of assistance with daily activities. It appears that the applicant's former wife, as a single mother, would be unable to provide the attention, assistance with academic work, and involvement with extracurricular activities needed by the applicant's son without the support of the applicant. If the applicant were removed from the United States, the resulting economic and emotional hardship to the applicant's children, one of whom has special needs and requires a high level of care, would amount to extreme hardship.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In *Matter of Mendez-Moralez*, 21 I&N Dec. 296 (BIA 1996), the BIA held that

establishing extreme hardship and eligibility for a waiver does not create an entitlement to that relief, and that extreme hardship, once established, is but one favorable discretionary factor to be considered. 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 section 212(h) 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).

The adverse factor in the present case is the applicant's conviction for possession of marijuana. The favorable factors in the present case are the extreme hardship to the applicant's children as well as potential hardship to his wife if she were to relocate to Liberia or be separated from the applicant; the applicant's lack of immigration violations; his over eighteen years of residence in the United States and history of stable employment and studies, including completion of a doctorate degree; his property ties in the United States; and the fact that nearly fifteen years has passed since his one criminal conviction.

The AAO finds that applicant's criminal conviction is serious and cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh this adverse factor, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained. The district director shall continue processing the Application for Adjustment of Status (Form I-485).

ORDER: The appeal is sustained.