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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: MIAMI, FLORIDA Date: JUL 01 2010

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. section 1182(h)

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew for
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Jamaica. He was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I) for having been convicted of a Crime Involving Moral Turpitude (CIMT). The applicant is married to a U.S. citizen and has two U.S. citizen children. 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.

The District Director concluded that the applicant had failed to establish that he merited a favorable exercise of discretion and did not address whether a qualifying relative would suffer extreme hardship as a result of the applicant's inadmissibility. The District Director denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on January 16, 2008.

On appeal, counsel for the applicant asserts that the District Director failed to consider the impact of hardship on the applicant's qualifying relatives in the aggregate, and that the record establishes the applicant's qualifying relatives will experience extreme hardship if the applicant's waiver application is denied.

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 (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

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

> (h) The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) . . . if -
>
> . . . .
>
> > (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 record indicates that the applicant was convicted of aggravated battery using a deadly weapon, in violation of section 784.045(1)(a)2 of the Florida Statutes, in the Broward County Circuit Court, on February 18, 2004 (case no. 03010031CF10A). Aggravated battery is a felony of the second degree, punishable by a term of imprisonment not to exceed 15 years. Fla. Stat. § 775.082. Battery offenses that necessarily involve the intentional infliction of serious bodily injury on another person, or

the use of a deadly weapon, have been held to involve moral turpitude. *Sosa-Martinez v. U.S. Att'y General*, 420 F.3d 1338 (11th Cir. 2005); *See Nguyen v. Reno*, 211 F.3d 692 (1st Cir. 2000); *Matter of P-*, 7 I&N Dec. 376 (BIA 1956).[1] In that the applicant has been convicted of a Crime Involving Moral Turpitude (CIMT), he is inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I). The applicant does not contest this finding.

Counsel for the applicant asserts on appeal that the District Director erred in her exercise of discretion by first failing to consider the extreme hardship factors impacting the applicant's spouse. The AAO acknowledges counsel's concern and agrees that an application or appeal must first be examined for the presence of extreme hardship to establish statutory eligibility before weighing positive and negative factors in an exercise of discretion.

Counsel also contends that the District Director failed to show that the record of conviction established that the applicant had been convicted of a violent or dangerous crime and was, therefore, required to establish exceptional and extremely unusual hardship under the regulation at 8 C.F.R. § 212.7(d).

In this case, the applicant has been convicted of aggravated battery using a deadly weapon, in violation of Florida Statutes § 784.045(1)(a)2.

Florida Statues § 784.03(1)(a) defines battery as follows:

> Offense of battery occurs when a person:
> 1. Actually and intentionally touches or strikes another person against the will of the other; or
> 2. Intentionally causes bodily harm to another person.

Florida Statutes § 784.045(1)(a)2 defines aggravated battery as follows:

> (1)(a) a person commits aggravated battery who, in committing battery:
> 1. Intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement; or
> 2. Uses a deadly weapon.

A plain reading of the aggravated battery statute, which incorporates the battery statute, establishes that it has as an element the use of physical force against the victim. As such, the AAO finds that a conviction for aggravated battery with a deadly weapon is a violent or dangerous crime and finds that he is subject to the requirements of 8 C.F.R. § 212.7(d).

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[1] The AAO would note that the District Director inappropriately relied on a police report in reaching her decision in this matter. A police report, which is not a part of the record of conviction, may be examined to resolve factual ambiguities under divisible or overly broad statutes pursuant to the holdings in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008). However, reliance on such a document is not appropriate when a crime may be categorically classified as a CIMT, as in the present case.

The regulation at 8 C.F.R. § 212.7(d) establishes the circumstances under which a favorable exercise of discretion is warranted in the case of an applicant convicted of a violent or dangerous crime:

> (d) Criminal grounds of inadmissibility involving violent or dangerous crimes
> The Attorney General [now Secretary of Homeland Security], 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 of 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.

The concept of exceptional and extremely unusual hardship is addressed by the Board of Immigration Appeals (BIA) in *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001), in which the BIA found that many of the factors that are considered in assessing "extreme hardship" should be considered in evaluating "exceptional and extremely unusual hardship." The BIA held, however, that the hardship suffered by the qualifying relative must be "substantially beyond that which would ordinarily be expected to result from the alien's deportation," but need not be "unconscionable." *Id.* At 59-63.

In determining whether the record establishes that a qualifying relative would suffer exceptional and extremely unusual hardship in this matter, the AAO will first examine the record under the extreme hardship standard. If the record establishes that a qualifying relative will suffer extreme hardship, the AAO will then examine the record under the requirements of 8 C.F.R. § 212.7(d).

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 U.S. citizen spouse and children are the qualifying relatives.[2] If extreme hardship to a qualifying relative is established, the Secretary then assesses whether a favorable 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

[2] The record indicates that the applicant's father is in the United States. However, as the record does not establish the applicant's father's immigration status in the United States, he will not be considered a qualifying relative in this proceeding.

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, a brief from counsel; statements from the applicant's spouse; a statement from the applicant's father; a psychological profile of the applicant's spouse offered by [redacted], Ph.D.; a copy of the Jamaica overview published by the U.S. Agency for International Development; a copy of a Congressional Research Service report, Jamaica: Political and Economic Conditions and U.S. Relations; a copy of the Background Note on Jamaica, published by the U.S. Department of State; copies of birth certificates for the applicant, his spouse and his children; letters of employment verification for the applicant and his spouse; pay stubs, tax returns, utilities, bills and other documentation; copy of a rental lease agreement; and court records pertaining to the applicant's convictions.

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

Counsel for the applicant asserts on appeal that the applicant's spouse had a traumatic childhood, and that the applicant's potential removal has had a significant impact on the applicant's spouse's mental health. He contends that it is the applicant's spouse's relationship to the applicant that holds her life together and keeps her from suffering a major depressive breakdown. In support of counsel claims, the record contains a psychological evaluation of the applicant's spouse conducted by Dr. [redacted] who diagnoses the applicant's spouse with major depression with anxiety.

Although the input of any mental health professional is respected and valuable, the AAO notes that the submitted letter is based on a single interview between the applicant's spouse and the psychologist. The record fails to reflect an ongoing relationship between a mental health professional and the applicant's spouse or any history of treatment for the major depression with anxiety suffered by the applicant's spouse. Moreover, the conclusions reached in the submitted evaluation, being based on a single interview, do not reflect the insight and elaboration

commensurate with an established relationship with a psychologist, diminishing the evaluation's value to a determination of extreme hardship.

The record does not articulate a credible basis of economic hardship on the applicant's spouse as a result of the applicant's inadmissiblity. The record contains documentation indicating the applicant's spouse is employed, and there is little evidence indicating that she has ever been financially dependent on the applicant. While the applicant's spouse may understandably wish to have the applicant present to provide financial or physical support in the raising of their two children, these are the common impacts of having a family member exluded. The AAO also notes that although hardships to the applicant's children are relevant in these proceedings, the record fails to document any impacts on them beyond the typical hardships created by separation. *See Perez v. INS,* 96 F.3d 390 (9th Cir. 1996)(reasoning 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.). Therefore, the record does not establish, either individually or in the aggregate, that the applicant's qualifying relatives will experience extreme hardship based on the applicant's inadmissibility if they remain 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 relatives. In the present case, prior counsel has asserted that the applicant's spouse would experience extreme hardship if she relocated to Jamaica based on the current conditions there and her lack of family ties. Prior counsel also states that the applicant and his spouse have no home or property in Jamaica and are unlikely to find employment. Prior counsel has also noted the hardships of relocation on the applicant's children who would move to a country rife with violence and instability, an inferior educational system and disease.

The record contains country conditions materials, such as a copy of a 2000 United States Agency for International Development regional overview of Jamaica, a Congressional Research Service Report on Jamaica and a U.S. State Department Background Note on Jamaica. The country conditions materials provide an overview of Jamaica's national economy and political situation. While the AAO recognizes that the quality of life in Jamaica may not equal that of the United States, it does not find that the conditions in Jamaica are such that they would result in an extreme impact on the applicant's qualifying relatives. There is insufficient evidence to support the characterization that the applicant's qualifying relatives fall into the category of unemployed, that they would be victims of crime, or that they would not have access to educational and health care facilities. The country conditions materials submitted are too general to be sufficiently probative of specific hardship on the applicant's spouse and children.

As discussed above, the applicant has failed to establish that a qualifying relative will experience extreme hardship if he is removed from the United States. As such, it is not necessary to reach an analysis of the applicant's discretionary waiver under the heightened standard of § 212.7(d).

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 spouse and children face extreme hardship if the applicant is refused admission. U.S. court decisions have repeatedly held that the common results of removal or inadmissibility are insufficient to prove extreme hardship. *See Hassan v. INS,* 927 F.2d 465, 468 (9th Cir. 1991). 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. The AAO therefore finds that the applicant has failed to establish extreme hardship to his U.S. citizen spouse and children as required under section 212(h) of the Act. 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 for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility rests with the applicant. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.