U. S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: MIAMI, FL Date: APR 06 2011

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 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. The fee for a Form I-290B is currently $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Michael Kumunzy

for Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native of Cuba and a citizen of both Cuba and Spain who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a controlled substance violation. The applicant has a lawful permanent resident mother. He 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.

In a decision, dated March 9, 2010, the Field Office Director finds that the applicant's mother would not experience extreme hardship as a result of the applicant's inadmissibility. The waiver application was denied accordingly.

In a Notice of Appeal to the AAO (Form I-290B), dated April 7, 2010, counsel states that the field office director failed to give proper weight to the entirety of the evidence presented when he concluded that the applicant's mother would not suffer extreme hardship if his waiver application was not granted.

The record indicates that on August 10, 2007 the applicant was arrested and charged with Possession of Marijuana, under 20 grams, in Coral Gables, Florida. On September 20, 2007, adjudication was withheld on the charge and the applicant was made to pay a fine with conditions. The AAO notes that the applicant's criminal record includes three other arrests with none resulting in a conviction. Thus, the applicant is inadmissible under 212(a)(2)(A)(i)(II) of the Act.

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 –
>
> . . . .
>
> (II) A violation (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) of the Act provides, in pertinent part, that:

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

The AAO notes that section 212(h) of the Act provides a waiver for a 212(a)(2)(A)(i)(II) inadmissibility only when an applicant has been convicted of a single offense of simple possession of 30 grams or less of marijuana. As the applicant has been convicted of one offense involving possession of 20 grams or less of marijuana a waiver is available to him under the Act.

A waiver of inadmissibility under section 212(h) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse, parent, son or daughter of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. The applicant's mother is the only qualifying relative in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296, 301 (BIA 1996).

As a qualifying relative is not required to depart the United States as a consequence of an applicant's inadmissibility, two distinct factual scenarios exist should a waiver application be denied: either the qualifying relative will join the applicant to reside abroad or the qualifying relative will remain in the United States. Ascertaining the actual course of action that will be taken is complicated by the fact that an applicant may easily assert a plan for the qualifying relative to relocate abroad or to remain in the United States depending on which scenario presents the greatest prospective hardship, even though no intention exists to carry out the alleged plan in reality. *Cf. Matter of Ige,* 20 I&N Dec. 880, 885 (BIA 1994) (addressing separation of minor child from both parents applying for suspension of deportation). Thus, we interpret the statutory language of the various waiver provisions in section 212 of the Act to require an applicant to establish extreme hardship to his or her qualifying relative(s) under both possible scenarios. To endure the hardship of separation when extreme hardship could be avoided by joining the applicant abroad, or to endure the hardship of relocation when extreme hardship could be avoided by remaining in the United States, is a matter of choice and not the result of removal or inadmissibility. As the Board of Immigration Appeals stated in *Matter of Ige*:

> [W]e consider the critical issue . . . to be whether a child would suffer extreme hardship if he accompanied his parent abroad. If, as in this case, no hardship would ensue, then the fact that the child might face hardship if left in the United States would be the result of parental choice, not the parent's deportation.

Id. See also Matter of Pilch, 21 I&N Dec. 627, 632-33 (BIA 1996).

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez,* the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). The factors include 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.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of deportation, removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of

current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. *See generally Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator "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." *Id.*

We observe that the actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. *See, e.g., In re Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate).

Family separation, for instance, has been found to be a common result of inadmissibility or removal in some cases. *See Matter of Shaughnessy*, 12 I&N Dec. at 813. Nevertheless, family ties are to be considered in analyzing hardship. *See Matter of Cervantes-Gonzalez,* 22 I&N Dec. at 565-66. The question of whether family separation is the ordinary result of inadmissibility or removal may depend on the nature of family relationship considered. For example, in *Matter of Shaughnessy*, the Board considered the scenario of parents being separated from their soon-to-be adult son, finding that this separation would not result in extreme hardship to the parents. *Id.* at 811-12; *see also U.S. v. Arrieta*, 224 F.3d 1076, 1082 (9th Cir. 2000) ("Mr. Arrieta was not a spouse, but a son and brother. It was evident from the record that the effect of the deportation order would be separation rather than relocation."). In *Matter of Cervantes-Gonzalez*, the Board considered the scenario of the respondent's spouse accompanying him to Mexico, finding that she would not experience extreme hardship from losing "physical proximity to her family" in the United States. 22 I&N Dec. at 566-67.

The decision in *Cervantes-Gonzalez* reflects the norm that spouses reside with one another and establish a life together such that separating from one another is likely to result in substantial hardship. It is common for both spouses to relocate abroad if one of them is not allowed to stay in the United States, which typically results in separation from other family members living in the United States. Other decisions reflect the expectation that minor children will remain with their parents, upon whom they usually depend for financial and emotional support. *See, e.g., Matter of Ige*, 20 I&N Dec. at 886 ("[I]t is generally preferable for children to be brought up by their parents."). Therefore, the most important single hardship factor may be separation, particularly

where spouses and minor children are concerned. *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS,* 712 F.2d 401, 403 (9th Cir. 1983)); *Cerrillo-Perez*, 809 F.2d at 1422.

Regardless of the type of family relationship involved, the hardship resulting from family separation is determined based on the actual impact of separation on an applicant, and all hardships must be considered in determining whether the combination of hardships takes the case beyond the consequences ordinarily associated with removal or inadmissibility. *Matter of O-J-O-*, 21 I&N Dec. at 383. Nevertheless, though we require an applicant to show that a qualifying relative would experience extreme hardship both in the event of relocation and in the event of separation, in analyzing the latter scenario, we give considerable, if not predominant, weight to the hardship of separation itself, particularly in cases involving the separation of spouses from one another and/or minor children from a parent. *Salcido-Salcido*, 138 F.3d at 1293.

An analysis under *Matter of Cervantes-Gonzalez* is appropriate. The AAO notes that extreme hardship to a qualifying relative must be established in the event that he or she accompanies the applicant or in the event that he or she 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 AAO notes that the record of hardship includes: counsel's brief and supplemental brief, an affidavit from the applicant, medical documentation, financial documentation, an affidavit from the applicant's mother, letters and affidavits from other family members in the United States, and articles and human rights reports regarding conditions in Cuba.

In her supplemental brief, counsel states that the applicant's mother is suffering financially and is unemployed. She also states that if the applicant were removed to Cuba his basic human rights would be violated and he would suffer physical and psychological torture. She states that this suffering would also cause hardship for his mother. Counsel states further that the applicant suffers from depression and is undergoing therapy as a result of a head injury he sustained when in a car accident in 2004. Counsel states that his mother fears that if the applicant is removed to Cuba he would not be able to continue his therapy and his mental health condition would deteriorate.

In her brief counsel states that the applicant has been like a substitute father to his two younger siblings since his father and mother divorced eight years ago. She states that he has been assisting his mother in caring for his siblings and also helps his grandmother. Counsel also states that the applicant's youngest brother, who is nine years old, suffers from Attention Deficit Hyperactivity Disorder and Anxiety Disorder. She states that he has been in therapy for two years and is on medication. She states that not having the applicant to help with his youngest brothers needs will cause his mother great stress. Counsel states further that the applicant's mother is concerned about the applicant's emotional and intellectual functioning following a serious accident in 2004. Counsel states that the applicant's mother does not believe he functions as a normal person and is having him evaluated by a psychiatrist and neurologists.

The applicant's mother's affidavit, dated January 25, 2010, supports the statements made by counsel. In addition to the statement of hardship in counsel's brief, the applicant's mother states that while living in Spain the applicant had to quit school to find work as his mother could no longer work as a housekeeper and that he relocated to the United States to work and raise money for the rest of the family to relocate. She states that the applicant has been helping to support her, his grandmother, and

his siblings ever since. Furthermore, the applicant's mother states that she would suffer emotionally if the applicant was removed to Cuba. She states that she fears he would be put into a Cuban jail as he will not be able to find a job and will not be integrated into society. She also states that because of her financial situation she would not be able to visit the applicant in Cuba nor would she be able to send him money.

The AAO notes that a letter from the applicant's cousin and an affidavit from the applicant's grandmother support the statements made by the applicant's mother and counsel.

In an affidavit, dated May 6, 2010, the applicant states that he lives with his mother and two brothers and helps his mother with rent and utility bills. He states that his mother is unemployed and that he suffers from nervous disorders caused by a car accident in 2004. He states further that he is currently receiving psychiatric treatment at Citrus Mental Health Network for Major Depressive Disorder and that his immigration status is contributing to his mental health problems.

Medical documentation submitted indicates that the applicant is seeking treatment from a psychiatrist for depression and that his youngest brother has been receiving treatment for Attention Deficit Hyperactivity Disorder and Anxiety Disorder.

Financial documentation submitted indicates that the applicant is employed earning $148 per week and that his mother receives $172 per week in emergency unemployment compensation. Medical documentation in the record establishes that the applicant is undergoing psychiatric care.

Country condition information submitted as part of the record indicates that civil liberties are extremely restricted in Cuba and that in 2009, a non-profit organization named Freedom House found Cuba to be one of the most repressive countries in the world. In addition, the U.S. Consular Information Sheet states that medical care in Cuba does not meet U.S. standards.

The AAO finds that the record indicates that if the applicant returns to Cuba and is separated from his mother, his mother will suffer emotionally and financially. The applicant's mother will loose the support the applicant has been providing her in helping her to pay her bills and in caring for other members of their family. In addition, the record includes numerous documents detailing the human rights situation in Cuba and makes a connection between the applicant's suffering in Cuba causing his mother emotional hardship. The applicant's medical condition will likely exacerbate the applicant's suffering in Cuba. The record has established through medical documentation that the applicant is suffering from depression and is under the care of a psychiatrist. Again, the applicant's mother expresses concern over what would happen to the applicant in Cuba given his medical problems. Taking these factors together, the AAO finds that the applicant has established that his mother would suffer extreme hardship as a result of separation from the applicant.

The AAO also finds that the applicant's mother would suffer extreme hardship if she were to relocate with the applicant to Cuba. The applicant's mother has two school age children and her mother living in the United States. Taking the applicant's mother's familial ties to the United States together with the country conditions information submitted in regards to Cuba, the AAO finds that it would be extreme hardship for the applicant's mother to relocate to Cuba.

Although the applicant has shown extreme hardship to his mother as a result of separation and as a result of relocation to Cuba, he has not shown that his mother would suffer extreme hardship as a result of relocation to Spain, where he is also a citizen. The applicant has indicated on his waiver application and his Application to Register Permanent Residence or Adjust Status that he is a citizen of both Cuba and Spain. Thus, he must also show that his qualifying relative would suffer extreme hardship as a result of relocating to Spain. The AAO acknowledges that the applicant's mother states in her affidavit that it was hard to find work in Spain, but this factor alone does not amount to extreme hardship. Furthermore, no documentation has been submitted to support these statements. 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 therefore finds that the applicant has failed to establish eligibility for a waiver of inadmissibility 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 establishing that the application merits approval 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.