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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: FEB 28 2013 Office: TAMPA, FL FILE: [redacted]

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The applicant is a native and a citizen of Jamaica 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)(II), for having committed a controlled substance violation. The applicant is the spouse of a U.S. citizen. He seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States.

The Field Office Director found that the applicant had failed to establish that his inadmissibility under section 212(a)(2)(A)(i)(II) of the Act would result in extreme hardship to a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Decision of the Field Office Director,* dated June 9, 2011.

On appeal, counsel contends that the applicant is not inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Act and, alternately, asserts that the record establishes that the applicant's spouse and stepchildren would suffer extreme hardship if he is not allowed to remain in the United States. *Form I-290B, Notice of Appeal or Motion*, dated June 30, 2011.

The evidence of record includes, but is not limited to counsel's brief; hardship statements from the applicant and his spouse; medical documentation relating to the applicant's spouse's older son; statements in support of the waiver application from friends and family members; a letter indicating the acceptance of the applicant's spouse's older son at a Florida university; a notice of the applicant's spouse's younger son's eligibility for the National Junior Honor Society; a psycho-education treatment certificate issued to the applicant and court records relating to the applicant's arrests and conviction. The entire record was reviewed and all relevant evidence considered in reaching a decision on the appeal.

Section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), 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 –
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> . . . .
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> (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.

In the present case, the record reflects that on July 4, 2006, the applicant was arrested for Possession of Marijuana – Not more than 20 Grams, Florida Statutes § 893.13(6)(b). On July 25, 2006, after admitting to the offense, the applicant entered into a Pre Trial Intervention (PTI) Deferred Prosecution Agreement. He successfully completed the PTI program on September 29, 2006 and, on October 12, 2006, the State of Florida dismissed the charge against him.

On appeal, counsel contends that the applicant's participation in the PTI program cannot be considered a conviction for immigration purposes as the charge against him was ultimately dismissed. He asserts that the applicant's admission to having possessed marijuana was an "acceptance of responsibility" rather than an "admission of criminal culpability" and that, contrary to the Field Office Director's finding, the Board of Immigration Appeals (BIA) in *Matter of Grullon*, 20 I&N Dec. 12 (BIA 1989) has held that a disposition pursuant to Florida's PTI program is not a conviction under the Act. Counsel also contends that there is no evidence that the applicant read the agreement he signed or that it constituted a knowing and voluntary admission of criminal conduct on his part. He further states that there is no indication that the applicant's admission was obtained under the protocol set forth in *Matter of K,* 7 I&N Dec. 897 (BIA 1997) when an admission of criminal conduct is made to an officer of United States Citizenship and Immigration Services (USCIS) or the United States Department of State.

Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines a conviction for immigration purposes as:

> A formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where –
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> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
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> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

In the present case, the record reflects that the applicant signed a Deferred Prosecution Agreement in which he admitted to having violated Florida Statues § 893.13(6)(b) and that he was, thereafter, enrolled in [redacted] (Florida) PTI program, under which he was required to comply with the program designated by a Diversion Supervisor and to seek approval before changing his residence or employment. As the agreement signed by the applicant includes an admission of guilt and the PTI program to which he was assigned imposed restraints on his liberty, we find the applicant to have been convicted of violating Florida Statutes § 893.13(6)(b) for immigration purposes.

Although we acknowledge the holding in *Matter of Grullon* referenced by counsel, the facts of that case are distinguishable, in that the respondent in *Grullon* "never entered a plea to the charges against him." 20 I&N Dec. at 14. We also note counsel's assertions regarding the absence of any evidence establishing that the applicant read the agreement he signed or that it constitutes a knowing and voluntary admission of criminal conduct on his part. Such assertions, however, are appropriately raised with the State of Florida as the AAO has no authority to look behind the agreement that establishes the applicant's conviction in this matter. Further, the requirements imposed by *Matter of K*, which counsel asserts should be applied in this case, relate to the admission of criminal acts by visa applicants and are not relevant to admissions of guilt in judicial proceedings.

In that the record establishes that the applicant has been convicted of violating Florida Statutes §893.13(6)(b), he is inadmissible pursuant to section 212(a)(2)(A)(i)(II) of the Act. However, as his offense involves simple possession of less than 30 grams of marijuana, he is eligible for waiver consideration under section 212(h) of the Act, which provides, in pertinent part:

> (h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of . . . 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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> . . . .
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> (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 . . . .

A waiver of inadmissibility under section 212(h)(1)(B) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, the U.S. citizen or lawfully resident spouse, parent or child of an applicant. The qualifying relatives in this proceeding are the applicant's spouse and stepchildren. Accordingly, hardship to the applicant or other family members will be considered only insofar as it results in hardship to one of these qualifying relatives. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and United States Citizenship and Immigration Services (USCIS) then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296, 301 (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 BIA 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 BIA 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 BIA has also held that the common or typical results of 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. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *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 BIA 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.*

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.*, *Matter of 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). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. *See Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS,* 712 F.2d 401, 403 (9th Cir. 1983)); *but see Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

In support of the hardship claim, the record contains affidavits from the applicant and his spouse. In his October 2007 statement, the applicant asserts that he provides financially for his family, which consists of his spouse and his two stepsons, one of whom is in college. He states that the family's economic situation has been strained for the past year, and that both his and his spouse's incomes are needed to keep their home running, their children clothed and food on the table. He asserts that his spouse would experience a great financial hardship if he is removed from the United States.

In her May 19, 2009 affidavit, the applicant's spouse states that the applicant has been the support structure for their family for the past several years and that she needs him financially, physically, mentally, emotionally and spiritually. She also indicates that she and the applicant decided a few months ago that she would return to school to obtain a degree in business or marketing and that they have discussed opening their own business, which would require both of them to work.

The applicant's spouse further maintains that the applicant has provided the support her sons have needed, attending their school, church and community activities and that as a strong, caring and compassionate family man, he has helped create her well-rounded and respectable sons. She indicates that her older son, who is in college, has been diagnosed with hypertension, which has prevented him from receiving scholarship benefits and that she and the applicant work tirelessly to provide this child with the opportunity for a better life. The applicant's spouse also states that it has taken both her and the applicant to keep things afloat financially and that the applicant has taken side jobs in order to provide for the family. She contends that it is the applicant's hard work that has allowed her to keep making the mortgage payments on their home. The applicant's spouse also reports that when she had major surgery in 2001, the applicant cared for her, as well as her children and that he has also helped their neighbors, leaving a positive impression on many hearts.

In a May 12, 2009 statement, the applicant's mother-in-law reports that her daughter's marriage to the applicant has been a complete turnaround from her past relationships and that he is a role model for his stepsons. She also states that the applicant assists her and her friends when they need it, and that he is an asset to the community.

In support of the preceding claims, the record contains a medical referral from [redacted] for the applicant's spouse's older son, which states "Refer to cardiologist." Also included in the record is a 2009 bank statement, a past due DirectTV bill from 2008, a 2004 approval notice for food stamps addressed to the applicant's spouse, a 2008 form letter addressed to members of the Summit Church regarding the church's financial needs and a 2007 tax return for the applicant's spouse.

While the AAO notes this evidence, we find it insufficient to establish the hardship claims made by the applicant and his spouse. The most recent information regarding the applicant's spouse income comes from 2007 and the documentation of the family's financial obligations is limited to a single television billing statement from 2008. The medical referral relating to the applicant's older son is acknowledged, but does not establish that he has been diagnosed with hypertension. Neither does the record demonstrate that he is attending college or that the applicant's income is required for him to continue with his education. Accordingly, the AAO is unable to determine the applicant's spouse's financial circumstances and, therefore, the extent of the financial hardship she would experience if the applicant is removed from the United States.

Based on the evidence of record, the applicant has not established that his spouse would suffer extreme hardship if the waiver application is denied and she remains in the United States.

With regard to the hardship that would result from the family's relocation to Jamaica, the applicant states that he and his spouse do not have any desire to live in Jamaica. He asserts that his spouse and children have lived in the United States their entire lives, and that moving away from family and life-long friends would result in hardship. He also contends that the economic situation in Jamaica is "not right for making money" and that relocation would result in economic hardship for the family. The applicant further maintains that he and his spouse intend to adopt their niece and are already supporting her financially. He states that they do not want to take her away from the family she has known all her life.

The record does not support the applicant's claims. While he asserts that his family would suffer financial hardship in Jamaica, we do not find that he has submitted country conditions information on the Jamaican economy or Jamaican unemployment, or any other information that would indicate he and/or his spouse would be unable to obtain employment and support their family upon relocation to Jamaica. Going on record without supporting documentation is not sufficient to meet the applicant's burden of proof in this proceeding. *See 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)). Neither has he provided any documentary evidence to establish the nature or extent of the emotional hardship that his spouse, stepsons and niece would experience if they were separated from family and friends in the United States.

We note that in *Matter of Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001), the BIA found that a 15-year-old child who had lived her entire life in the United States, was completely

integrated into the American lifestyle and was not fluent in Chinese would suffer extreme hardship if she relocated to Taiwan. Here, however, the record does not indicate that the applicant's stepsons would have difficulty adjusting to Jamaican culture based on language or their life-long residence in the United States. We also find no documentary evidence to establish that the applicant and his spouse are in the process of adopting their niece and note that, absent proof of her adoption, she is not a qualifying relative in this proceeding. Accordingly, based on the record before us, the AAO cannot find that relocation would result in extreme hardship for a qualifying relative.

As the record does not establish that the applicant's inadmissibility under section 212(a)(2)(i)(II) of the Act would result in extreme hardship for a qualifying relative, he is not eligible for a waiver under section 212(h) of the Act. Having found the applicant statutorily ineligible for relief, the AAO finds no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for an application for a 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.