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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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FILE:

[REDACTED]

Office: CALIFORNIA SERVICE CENTER

Date: JUN 08 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 APPLICANT: SELF-REPRESENTED

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).

A handwritten signature in black ink that reads "Michael Shumway".

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the waiver application that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record contains a G-28, Notice of Entry of Appearance, in which the applicant recognized a Florida attorney as his counsel. In a letter dated April 10, 2009, however, the applicant stated that he is no longer represented. All representations will be considered, but the decision in this matter will be furnished only to the applicant.

The applicant is a native and citizen of Jamaica, the father of three United States citizen children, and the beneficiary of an approved Form I-130 petition. The director found that the applicant is inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act) for having been convicted of a crime involving moral turpitude. The applicant 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 with children.

The director concluded that the applicant had not demonstrated that denial of the waiver application would result in extreme hardship to a qualifying relative as described in section 212(h) of the Act. The application was denied accordingly.

On appeal, the applicant provided no evidence or argument, but stated that he would submit them within 30 days. **Subsequently, the applicant submitted additional evidence. Although the applicant did not appear to contest the director's determination of inadmissibility, the AAO will review that determination.**

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

(i) In general. – Except as provided in clause (ii), any 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].

(ii) Exception. – Clause (i)(I) shall not apply to an alien who committed only one crime if-

(I) the crime was committed when the alien was under 18 years of age or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the

extent to which the sentence was ultimately executed).

(1) The applicant was arrested, on November 23, 1992, in Hollywood, Florida, and charged with one count of battery on a spouse/cohabitant in violation of section 784.03 of the Florida Statutes (FS). On February 5, 1993, that charge was dropped. [REDACTED]

(2) The applicant was arrested, on April 18, 1996, in Hollywood, Florida, for an attack on his wife, and charged with one count of violating FS § 784.021, aggravated assault; and one count of violating FS § 784.045(1)(A)(2), aggravated battery with a deadly weapon. On June 5, 1997, the applicant pleaded *nolo contendere* to one count of misdemeanor battery in violation of FS § 783.04(1)(B) and one count of attempted aggravated assault with a deadly weapon in violation of FS §§ 777.04 and 784.021. Adjudication of guilt and imposition of sentence were withheld, conditioned upon the applicant serving 20 days confinement, paying a fine, completing a batterer intervention program, and otherwise complying with a two year period of probation. (Case number [REDACTED])

The statutory definition of a conviction in section 101(a)(48)(A) of the Act, which was enacted by section 322 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-628 (“IIRIRA”), provides as follows:

The term “conviction” means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—

(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

(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.

The applicant’s plea and punishment pursuant to his plea of *nolo contendere* in number two, above, therefore constitute a conviction for the purposes of immigration law.

Assault with a deadly weapon is a crime involving moral turpitude. *Matter of Medina*, 15 I&N Dec. 611 (BIA 1976), *aff’d sub nom Medina-Luna v. INS*, 547 F.2d 1171 (7th Cir. 1977). The applicant’s plea to that offense in Florida rendered him punishable, as per FS § 921.0022, by not more than five years of confinement. The record indicates that the applicant was born on August 17, 1952. He was, therefore, over 18 years old at all salient times. The applicant thus does not meet the requirements for an exception as set forth in section 212(a)(2)(A)(ii) of the Act.

The AAO find that because the applicant was convicted of a crime involving moral turpitude when he was over 18 years old and does not qualify for the single petty offense exception, the applicant is inadmissible pursuant to Section 212(a)(2)(A).

The balance of this decision will pertain to whether waiver of that inadmissibility is available and whether the applicant has demonstrated that waiver of that inadmissibility, if available, should be

granted.

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

The Attorney General [now the Secretary of Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraph (A)(i)(I)

(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

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 (BIA1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals set forth a nonexclusive list of 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 has held:

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).

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).

A waiver of inadmissibility under section 212(h) of the Act 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, son, or daughter of the applicant. Hardship to the applicant is not directly relevant under the statute and will be considered only insofar as it results in hardship to a qualifying relative in the application. The applicant's children are the only qualifying relatives in this case. If extreme hardship to a qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996).

In a brief provided with the application for waiver, former counsel noted that the applicant was then 54 years old, and his younger sons were then four and six years old. He stated that the applicant's two younger sons live with the applicant and their mother and that the mother lacks employable skills and works many hours at a minimum wage job. Former counsel stated, "Applicant has essentially been the primary care taker [sic] for his [younger sons]." He further stated that the applicant has not lived in Jamaica since 1991, and if forced to return "there will be little chance of supporting his young boys here in the [United States] or in Jamaica." Former counsel stated that the children's mother will not agree to accompany the applicant to Jamaica, and as such, if the applicant is removed from the United States, they would lose one of their parents whether or not they accompanied the applicant. Former counsel stated that the children's mother "under Florida Law has full custody of the boys and the applicant would not be allowed to take the boys even if he wished to."

To support some of those assertions former counsel provided statements, both dated November 14, 2006, from the applicant and the children's mother.

In his November 14, 2006 declaration the applicant stated that due to his involvement in their lives, his sons are happy and healthy, and that if he is separated from them they would grow up without their father and suffer serious trauma as a result. Finally, the applicant stated that his children need their mother as much as they need him, and that he knows that their mother will never allow him to take them with him to Jamaica.

The children's mother stated that, "Above all having an involved father is the most important part of [the children's] lives," and that "[the children] have a deep connection with their father and they adore him." She further stated, "I would never allow [the applicant] to separate my boys from me," and "If he is forced to return to Jamaica the boys will remain with me." Further still, she stated, "[The applicant's] absence from the boys' lives will terribly hurt and forever damage two innocent lives."

The record contains a Psychological Evaluation prepared by [REDACTED], a Florida Licensed Psychologist. Although that report is undated, it indicates that [REDACTED] interviewed and observed the applicant, his children, and the children's mother on three days for the purpose of determining the likely effect on his two younger children if the applicant is deported. Based on observing the applicant interacting with his younger children, and observing their mother interacting with them, [REDACTED] formed various opinions that he expressed in the report. He stated that the applicant's younger children should be evaluated for ADHD if they develop behavioral problems. He stated that the applicant is the more effective parent and the primary caregiver. He stated that he doubts that the children's mother will effectively manage the challenges associated with single parenting, and voiced his strong opinion that the children would likely experience extreme behavior and emotional problems if they are estranged from their father. He concluded, "It is believed, the likelihood of the children becoming productive members of society would be severely compromised if the father was [sic] separated from the children."

That psychological evaluation report makes clear that the interviews and observations were undertaken specifically for the purpose of producing the report for use in this proceeding. There is

no indication that [REDACTED] conducted therapy with the applicant, or his children, or the children's mother. [REDACTED] did not suggest that any therapy for any family member was then appropriate. [REDACTED] projected that without their father the children would be at greater risk of adjusting poorly to their father's absence and would likely experience extreme emotional and behavioral problems because of their impulsivity, attention, and concentration difficulties. The psychologist also voiced the opinion that the economic and social disadvantages caused by the applicant's absence would "dramatically increase their potential for emotional disorders and behavioral problems."

The AAO acknowledges that the absence of the applicant will result in some hardship to his children, as the applicant appears to provide parental discipline and guidance that is in some respects superior to that provided by their mother. However, the record contains no indication of the alternative living arrangements the applicant's children and their mother anticipate if the applicant leaves the United States and they remain. Whether the mother has friends or family members who are stable, financially and emotionally, and both able and willing to assist the children and their mother financially, or with child care, or with living arrangements, is unknown. Under these circumstances, the psychologist's basis for comparing the present arrangements for the applicant's children with the arrangements that would follow from the applicant's departure is unclear. [REDACTED] conclusion that the children would suffer long-term damage is therefore speculative.

The record contains little indication pertinent to the children's mother's ability to support them. She stated, in her November 14, 2006 declaration, that she makes only \$282 per week. Former counsel stated that she works long hours at a minimum wage job. The record contains no supporting evidence, such as her tax returns, paycheck stubs, or Form W-2, Wage and Tax Statements. In view of this lack of evidence, the AAO is unable to find that the applicant has demonstrated that the children's mother would be unable to support them if he left the United States, even if he were entirely unable to contribute.

Former counsel asserted that Florida law gives full custody to the children's mother, and she is unwilling to permit them to accompany the applicant. However, the record contains no evidence in support of that assertion. Counsel did not brief that issue and offered no authority to support it. Although former counsel stated that the children's mother will not accompany the applicant to Jamaica, the record contains no such statement from her. Therefore, notwithstanding the assertions of counsel, the AAO will examine whether the applicant has demonstrated that they would suffer extreme hardship if they accompanied him.

The only indication that the applicant would be unable to earn a living in Jamaica is former counsel's assertion in the brief. Former counsel indicated that finding employment would be especially difficult because the applicant was then 54 years old. Former counsel's assertions are not evidence and will be accorded no evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). The applicant is a cabinetmaker. The record contains no evidence that he would not find suitable employment in Jamaica. As such, the record does not demonstrate that the applicant would be unable to earn a living in Jamaica and no evidence that his children would suffer economic hardship there.

Further still, if the applicant's children go with him to Jamaica, and would only suffer hardship if

their mother declines to accompany them, then that hardship would be occasioned by her refusal to accommodate the best interests of her children, rather than by the denial of the waiver application.

The applicant has not demonstrated that his children would suffer extreme hardship if they accompanied him 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 children face extreme hardship if the applicant is removed from the United States. Rather, the record does not demonstrate that they will face any greater hardship than the unfortunate, but expected, disruptions, inconveniences, and difficulties arising whenever a parent is removed from the United States.

The record demonstrates that the applicant's family members are concerned about the prospect of the applicant's departure from the United States. Although the depth of concern and anxiety over the applicant's immigration status is neither doubted nor minimized, the fact remains that Congress provided for a waiver of inadmissibility only under limited circumstances.

In nearly every qualifying relationship, whether between husband and wife or parent and child, there is affection and a certain amount of emotional and social interdependence. While, in common parlance, separation or relocation nearly always results in considerable hardship to individuals and families, in specifically limiting the availability of a waiver of inadmissibility to cases of "extreme hardship," Congress made plain that it did not intend that a waiver be granted in every case where a qualifying relationship, and thus the familial and emotional bonds, exists.

Separation from one's spouse or child is, by its very nature, a hardship. The point made in this and prior decisions on this matter, however, is that the law requires that, in order to meet the standard in INA § 212(i), the hardship must be greater than the normal, expected hardship involved in such cases.

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), *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996); *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996) (holding that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship); *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). "[O]nly in cases of great actual or prospective injury . . . will the bar be removed." *Matter of Ngai*, 19 I&N Dec. 245, 246 (BIA 1984). Further, demonstrated financial difficulties alone are generally insufficient to establish extreme hardship.

The U.S. Supreme Court 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 AAO therefore finds that the applicant failed to establish extreme hardship to his U.S. citizen children as required under INA § 212(h), 8 U.S.C. § 1186(h) and that waiver is therefore unavailable. Because the applicant has been found statutorily ineligible, the AAO need not

address whether the applicant merits waiver as a matter of discretion.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval rests with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has not met his burden.

ORDER: The appeal is dismissed.