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U.S. Citizenship
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Services

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[REDACTED]

FILE:

[REDACTED]

Office: NEW YORK

Date: SEP 01 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:

[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.

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).

Michael Shumway

John F. Grissom
Acting Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Jamaica, the husband of a United States citizen, stepfather of three U.S. citizens, and the beneficiary of an approved Form I-130 petition. The applicant was found to be 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 wife.

The district 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, and denied the application accordingly. On appeal, counsel asserted that the applicant's family would suffer extreme hardship if he is not permitted to remain in the United States.

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 March 8, 1991, in New York, New York, for a violation of section 160.05 of the New York Penal Law (NYPL), third degree robbery; a violation of NYPL 165.40, criminal possession of stolen property in the fifth degree; a violation of NYPL 155.30, fourth degree grand larceny; and a violation of PL 110/135.05, attempted unlawful imprisonment. On April 5, 1991, the applicant was convicted, pursuant to his plea, of the reduced charge of violating NYPL 240.25, first degree harassment. (

(2) The applicant was arrested, on February 18, 1993, in New York, New York, for a violation of NYPL 130.35, first degree rape; a violation of NYPL 135.20, second degree kidnapping; a violation of PL 120.05, assault with intent to cause physical injury; a violation of NYPL 135.10, unlawful imprisonment, and a violation of 265.01, fourth degree criminal possession of a weapon. On April 16, 1993 the applicant was convicted, pursuant to his plea, of the reduced charge of violating NYPL 130.65, first degree sexual abuse. **The applicant was placed on five years probation.**

(3) The applicant was arrested, on November 3, 2005, in New York, New York, for a violation of section 168f of the New York Correction Law, violation of sexual offender registry requirement. On March 7, 2006 the applicant was convicted of that offense, pursuant to his plea of guilty, and placed on conditional discharge for one year.

In a declaration, dated March 23, 2006, the applicant stated that, relying on the advice of his then attorney, he pleaded guilty in 1993 to a sexual assault, although he was not, in fact, guilty. He indicated that he was convicted, pursuant to that plea, and received five years probation. The AAO notes that the applicant stated, in that declaration, "When the police was called to our apartment they tried to arrest me, I fell through the window and ended up in the hospital." [Errors in the original]

Notwithstanding that he now contests his guilt, the applicant concedes that he was convicted, pursuant to his plea, of a sexual assault in number two, above.

NYPL 130.65, the law that the applicant was convicted of violating, states:

A person is guilty of sexual abuse in the first degree when he or she subjects another person to sexual contact:

1. By forcible compulsion; or
2. When the other person is incapable of consent by reason of being physically helpless; or
3. When the other person is less than eleven years old.

Sexual abuse in the first degree is a class D felony.

NYPL 70.00(2)(d) states that the maximum term of imprisonment for conviction of a class D felony is seven years.

A temporary restraining order in the record, dated April 13, 1993, and divorce filed on July 1, 1993 and finalized on July 1, 1994, appear to confirm the applicant's statement that the victim of his crime was his wife at the time.

Sexual abuse in the first degree, as set out above, consists of subjecting another to involuntary

sexual contact. In other jurisdictions, that behavior is termed indecent assault or sexual assault. Indecent assault and sexual assault are crimes involving moral turpitude. *Matter of Z-*, 7 I. & N. Dec. 253 (BIA 1956) and *Matter of Mendez-Morales*, 21 I. & N. Dec. 296 (BIA 1996). The applicant has, therefore, been convicted of a crime involving moral turpitude.

The various documents in the record state consistently that the applicant was born on May 22, 1962. The applicant was therefore over 18 years of age when on the date of the offense in number two, above. The maximum sentence for the crime of which the applicant was convicted is seven years of confinement. The applicant does not qualify for either of the exceptions listed at section 212(a)(2)(A)(i)(I) or (II).

The AAO finds that the applicant is inadmissible for his conviction of a crime involving moral turpitude. 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

Section 101(b)(1) includes a stepchild in the definition of child, so long as the stepchild relationship came into being before the stepchild reached 18 years of age. A marriage certificate in the record indicates that the applicant married his present wife on February 14, 1997. Although the applicant's stepchildren's birth certificates are not included in the record as currently constituted before the AAO, reference to various other documents in the record shows that they had not yet reached the age of 18 when their mother married the applicant, and hardship to them will be considered as if they were his natural children.

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, in this case including a stepson and two stepdaughters, 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 wife and his stepchildren 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).

The applicant's March 20, 2006 declaration, mentioned above, does not directly address any hardship that denial of the waiver application would cause to the applicant's wife or to his stepchildren.

The record contains a letter, dated March 23, 2006, from a friend of the applicant's wife. That letter is essentially a character reference for the applicant, and does not directly address any hardship that denial of the waiver application would cause to the applicant's wife or his stepchildren.

The record contains a sworn declaration, dated March 22, 2006, also from the applicant's wife. In it, she stated that her children have all left home but still depend on her and the applicant for financial help. She stated that to lose him would be devastating, that life would not be the same without him, and that the separation would damage them emotionally and spiritually. She did not address the hardship she would suffer any more concretely. Although she stated that her children still depend on her and the applicant for financial help, she did not otherwise detail their finances or provide any pertinent evidence. The record contains no evidence from which the AAO can determine the degree of hardship that removal of the applicant's financial support would occasion to his grown stepchildren.

The record contains another sworn declaration from the applicant's wife, which is dated March 31, 2006. In it, she stated that she makes only \$20,000 per year and her rent is \$600 per month. She stated that she is dependent on her husband's support, and that should her husband be removed

from the United States she and her children will be evicted. She further stated that the prospect of being obliged to live without her husband is overwhelming, and that she believes that she might lapse into depression and be unable to work. She did not further explain any hardship that the applicant's absence would occasion to her children.

The AAO notes that nine days earlier the applicant's wife stated that her children do not live with her. That she immediately subsequently urged that the applicant's removal would cause her and her children to be evicted is an apparent contradiction in her sworn statements.

Doubt cast on any aspect of the applicant's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the application. Further, the applicant must resolve any inconsistencies in the record with independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

The record contains the joint 2003 Form 1040 U.S. Individual Income Tax Return of the applicant and his wife. They declared total income during that year of \$25,904, rounded. A 2003 Form W-2 Wage and Tax Statement shows that the applicant's wife earned \$24,303.55 of that amount. A Schedule C-EZ, Profit or Loss from Business, shows that the applicant earned the remaining \$1,600.

The record contains the joint 2004 Form 1040 U.S. Individual Income Tax Return of the applicant and his wife. They declared total income during that year of \$25,353, rounded. A 2004 W-2 form shows that the applicant's wife earned \$22,853.42 of that amount. A Schedule C-EZ, Profit or Loss from Business, shows that the applicant earned the remaining \$2,500.

The record contains no other evidence of any income the applicant has ever earned in the United States.

The record contains an employment verification letter from the applicant's wife's employer. That letter states that the applicant's wife then earned \$437.10 weekly,¹ which equates to \$22,729.20 annually. The record contains no more recent evidence pertinent to the applicant's wife's income.

The record contains a letter, dated March 22, 2006, from the applicant's stepdaughter.² Although she stated that she cannot imagine a better husband and friend for her mother, who is the applicant's wife, it did not otherwise address whether failure to grant the waiver application would cause the applicant's wife extreme hardship. The applicant's stepdaughter further stated, "I attend

¹ In fact, that letter contains an arithmetic error. It states that the applicant's wife earns \$9.90 per hour, works 37 hours per week, and thereby earns gross income of \$437.10 per week. The actual amount of income to which it attests is, therefore, unclear.

² Although she refers to the applicant as her father, the AAO notes that the record shows that the applicant is her stepfather.

school and work full[-]time[.] [I]t is hard on me and I receive help from my father.” The applicant’s stepdaughter apparently means that she receives financial assistance from the applicant. She did not, however, provide evidence of, or even allege, the extent of that financial assistance or the degree of hardship that its absence would cause her.

Again, although the statements by the applicant and his family members are relevant and have been taken into consideration, they are insufficient to sustain the applicant’s burden of proof. *See Matter of Soffici and Matter of Treasure Craft of California, supra.*

The record contains a letter, dated March 22, 2006, from the applicant’s stepson. That letter is essentially a character reference, but also states, “[The applicant] is there for me morally and financially,” and that for the applicant to be removed to Jamaica would be devastating for the entire family. The applicant’s stepson did not otherwise address any hardship that denial of the application would cause to the applicant’s wife, or to himself, or to his siblings. Although the applicant’s stepson appeared to indicate that the applicant provides him with financial assistance, he did not provide evidence of, or even allege, the extent of that financial assistance, the state of his personal finances, or the degree of hardship that the absence of the applicant’s financial assistance would cause him.

The applicant’s stepchildren, although they allege, or at least imply, that they rely on him financially, have provided no evidence of the extent of his assistance or of their need for it. Further, the record contains no evidence that the applicant has ever earned any substantial income in the United States. Under these circumstances, the AAO cannot find that the loss of his income would occasion hardship to the applicant’s wife or his stepchildren which, even when considered together with the other hardship factors in this case, would rise to the level of extreme hardship.

The record contains a report, dated July 16, 2006, from a licensed clinical social worker. indicated that her report was based on a single interview of the applicant and his wife. In relating the story of the applicant’s arrest for sexually assaulting his wife, stated, apparently based on the applicant’s own report, “The police came and [the applicant] said that in the police’s pursuit of him, he fell down six flights of stairs.” The AAO notes that this version of events was apparently based on the applicant’s statements to , and differs somewhat from the version the applicant related in his March 23, 2006 declaration, in which he stated that he fell out of a window.

Although the discrepancy between whether, during his flight from the police, the applicant fell out of a window, or whether he fell down six flights of stairs,³ is not directly relevant to any material issue in this matter, it demonstrates either that the applicant’s version of events can vary from one telling to another, or that reporting is inaccurate. In either event, the credibility of the evidence is diminished.

Again, doubt cast on any aspect of the applicant’s proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the application. Further, the

³ Falling down six flights of stairs, in any configuration of stairs with which the AAO is familiar or can imagine, would likely entail five sharp turns. This seems an improbable event.

applicant must resolve any inconsistencies in the record with independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

further stated that the applicant's wife stated that she worries constantly about the possibility of the applicant's removal and feels that losing the applicant would be too painful to endure, that she and the applicant are trying to have children and she would feel terrible if they were unable, that she is afraid that she would be unable to function if the applicant were removed to Jamaica and she remained in the United States without him, that she has been anxious and having trouble concentrating and was therefore obliged to withdraw from college classes she was taking, that she is suffering from insomnia, and that a doctor recommended that she take Paxil for her depression but that she declined that treatment.

further stated that the applicant's wife made references to killing herself if the applicant is taken from her, and that the applicant's wife would become very depressed if the applicant were removed to Jamaica and she were obliged to live without him. did not address the possibility of the applicant's wife returning to Jamaica, the country where she was born, to be with the applicant. did not address any hardship that the applicant's removal to Jamaica would cause to his stepchildren.

The input of any mental health professional is respected and valuable. Much of the information contained in report, however, is her retelling of what the applicant and his wife told her. That repetition of the applicant's and applicant's wife's statements does not lend them any additional credibility.

Further, the submitted report is based on a single interview of the applicant and the applicant's wife. The record fails to reflect an ongoing relationship with the applicant's wife or any history of treatment for the disorders allegedly suffered by the applicant's wife, other than the assertion that a doctor offered to treat her with Paxil, which she refused.

The conclusions reached in the submitted report, being based on a single self-reporting interview, do not reflect the insight and elaboration commensurate with an established relationship with a mental health professional, thereby rendering findings speculative and diminishing the report's value in determining extreme hardship.

Further, the AAO notes that because the applicant's wife was born during January of 1963, her ability to bear additional children may not hinge on the decision in this matter.

In a brief submitted in support of the appeal, counsel argued that denial of the waiver application in the instant case would cause extreme hardship to the applicant's wife. He also stated that if the entire family relocated to Jamaica, the entire family would be unemployed and "[t]he financial impact would be total and devastating." Further, counsel argued that the purpose of waiver is to preserve families.

The record contains no evidence to support counsel's assessments of the employment

opportunities available to the applicant, the applicant's wife, and the applicant's wife's children in Jamaica. The assertions of counsel are not evidence and thus are not entitled to any 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). Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof.

The applicant's wife was born in Jamaica, but has chosen to live in the United States. As such, for her to relocate to Jamaica would cause her some hardship. The record does not contain any evidence, however, that any financial, emotional, or physical hardship, or any other type of hardship she might endure as a result, would rise to the level of extreme hardship. Similarly, although the applicant's stepchildren may, or may not, have been born in the United States, the record contains no evidence that relocating in Jamaica would cause them extreme hardship, and no argument pertinent to the hardship it would cause, other than their abstract and unsupported assertions or implications that they rely on the applicant financially, and counsel's unsupported assertion that the entire family would be unable to obtain employment in Jamaica.

The record does not demonstrate that the applicant's wife and his stepchildren, if they were to relocate to Jamaica, would suffer hardship which rises to the level of extreme hardship.

In the event that the applicant is obliged to leave and his wife and/or children choose to remain in the United States, this, too, would necessarily occasion some hardship to them, based on their loss of his potential income and his company.

Most of the letters submitted, however, fail to directly and concretely address hardship that would result to the applicant's wife or stepchildren in the event that he is removed to Jamaica and they remain. Instead of detailing the financial, medical, emotional, physical hardships, and the other types of hardship that might result, those letters merely state, essentially, that the applicant and his wife love each other and want to remain together, and that to be separated would cause them emotional harm.

Those items of evidence that do address hardship to the applicant's wife and/or stepchildren include the applicant's wife's March 31, 2006 declaration, which, in addressing the financial hardship that would ensue, contradicted the applicant's wife's March 20, 2006 declaration, thus damaging her credibility; and the report from [REDACTED], the licensed clinical social worker, whose conclusions are not accorded great evidentiary value for the reasons given above. Further, two of the applicant's stepchildren asserted or implied that they receive financial assistance from the applicant, but without concrete detail or supporting evidence.

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 wife or stepchildren face extreme hardship if the applicant is refused admission. Rather, the record suggests that they will face no greater hardship than the unfortunate, but expected, disruptions, inconveniences, and difficulties arising whenever a spouse or parent is removed from the United States.

Further, in the brief on appeal, counsel stated that the applicant's wife's children were four, six, and eight when the applicant and his current wife met and started dating during 1989. They would

now be roughly 24, 26, and 28 years old. Further still, the applicant's wife stated, on one occasion, that her children have left home, that two have children of their own and are working, and that the other child is in the Navy. Their ages and relative independence further attenuates the hardship they would experience because of the applicant's removal.

Further still, 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 record demonstrates that the applicant has very loving and devoted family members who are extremely 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, exist.

Although the function of waivers of inadmissibility is to preserve family unity in some cases, counsel's citing this function does not exempt the applicant from his burden of showing that failure to approve the waiver application would result in extreme hardship to his qualifying relatives. 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).

The AAO therefore finds that the applicant failed to establish extreme hardship to his U.S. citizen wife 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.