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U.S. Citizenship  
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FILE:

Office: MIAMI

Date:

**SEP 25 2009**

IN RE:

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).

John F. Grissom  
Acting Chief, Administrative Appeals Office

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

The applicant, [REDACTED] is a native and citizen of Haiti. He 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), as an alien who has been convicted of a crime involving a controlled substance. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to return to the United States to join his U.S. lawful permanent resident mother, [REDACTED]

The District Director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, his U.S. lawful permanent resident mother, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On appeal, the applicant asserts that he has never been convicted of a crime. The applicant states that he has been arrested on four different occasions which did not end in state prison sentences because in all four cases he was with friends who turned out to be criminals. The applicant notes that he has submitted official court documents with his Application to Adjust Status (Form I-485) to prove his case.

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

- (A) Conviction of certain crimes. –
  - (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 –
    - (II) a violation of (or 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.

The record reflects that on January 24, 2003, the applicant was arrested in Miami-Dade County, Florida, and charged with possession of 2 grams of marijuana in violation of section 893.13 of the Florida Statutes. On January 25, 2003, the applicant pled guilty to this offense in the Circuit Court of the Eleventh Judicial Circuit of Florida ([REDACTED]). The court found him guilty of the offense, withheld adjudication of guilt, ordered him to pay a fine, and granted him credit for time served (CTS).

Section 101(a)(48) provides:

- (A) 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.

In *Matter of Cabrera*, the Board of Immigration Appeals (BIA) found an alien to have been convicted within the definition of section 101(a)(48)(A) of the Act in a case where the alien entered a plea of nolo contendere to a charge of possession of a controlled substance in violation of the Florida Statutes, the adjudication of guilt was withheld, and the alien was assessed a total of \$458 in costs and surcharges. 24 I&N Dec. 459 (BIA 2008). The BIA held, “the imposition of costs and surcharges in the criminal sentencing context constitutes a form of ‘punishment’ or ‘penalty’ for purposes of establishing that an alien has suffered a ‘conviction’ within the meaning of section 101(a)(48)(A) of the Act.” 24 I&N Dec. 459, 462. In the instant case, the record reflects that the applicant pled guilty, the court withheld the adjudication of guilt, and the applicant was ordered to pay a fine. Therefore, the applicant’s arrest for possession of marijuana resulted in a conviction under section 101(a)(48)(A) of the Act. Accordingly, the AAO affirms the director’s determination that the applicant is inadmissible pursuant to section 212(a)(2)(A)(i)(II) of the Act for having been convicted of possession of a controlled substance.

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

- (h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), (D), and (E) or subsection (a)(2) and 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 . . . .

. . . .

- (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 212(h) of the Act provides that a waiver of inadmissibility is dependent first upon a showing that the bar to admission imposes an extreme hardship on a qualifying family member. The qualifying family member in this case is the applicant's mother, a U.S. lawful permanent resident. 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).

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999), the BIA provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 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. 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 an exclusive list. *See id.*

Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation. *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996). (Citations omitted).

The AAO notes that in *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998), the Ninth Circuit Court of Appeals held that, "the most important single hardship factor may be the separation of the alien from family living in the United States", and that, "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion." (Citations omitted). Although the present case did not arise in the Ninth Circuit, separation of family will be given appropriate weight in the assessment of hardship factors.

The AAO notes further, however, that U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). For example, in *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), the BIA held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), the Court defined "extreme hardship" as hardship that was unusual or beyond that which would normally be expected upon deportation. The Court emphasized that the common results of deportation are insufficient to prove extreme hardship. Moreover, 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.

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.

As evidence of extreme hardship, the applicant furnished a letter from his mother, dated April 20, 2007. The applicant's mother states that she has no close family in Haiti. She states that she feels anything might happen to the applicant in Haiti because she does not have anyone to provide him a job, food, shelter, or a livable situation. The applicant's mother states that she is the applicant's caretaker and if the applicant returned to Haiti he would be living on the streets. She states that the applicant's deportation would be extremely hard on the applicant's father who lives in Brooklyn, New York. She notes that the applicant has been residing in Miami, Florida since he was eight years old.

The AAO notes first that the hardship described by the applicant's mother relates primarily to the hardship the applicant would suffer if he is denied admission to the United States. Hardship the alien himself experiences upon refusal of admission is irrelevant to section 212(h) waiver proceedings. The only relevant hardship in this particular case is hardship to the applicant's mother. Second, the applicant's mother, who has described herself as the applicant's caretaker, has indicated that she worries something might happen to the applicant in Haiti because she does not have anyone to provide him a job, food, shelter, or a livable situation. However, the record does not reflect that she would be unable to send remittances or otherwise provide financially for the applicant in Haiti. Nor does the record reflect that she would be unable to visit the applicant in Haiti to assist him with finding employment and housing. Finally, the applicant has not demonstrated that his father is a qualifying family member for whom a finding of extreme hardship would be relevant to these proceedings. In denying the application, the director noted that no extreme hardship letter or evidence of lawful permanent residence status or citizenship in the United States was submitted from the applicant's father. The applicant failed to provide such documentation on appeal.

The AAO acknowledges that the applicant's mother will experience emotional hardship if she remains in the United States without her son, but the applicant has failed to demonstrate that this hardship, when combined with other hardship factors, will be extreme. The AAO recognizes the significance of family separation as a hardship factor, but concludes that the hardship described by the applicant and his mother, and as demonstrated by the evidence in the record, is the common result of removal or inadmissibility and does not rise to the level of extreme hardship. U.S. court decisions have repeatedly held that the common results of removal or inadmissibility are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). In addition, *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined extreme hardship as hardship that was unusual or beyond that which would normally be expected upon deportation.

Finally, the applicant's mother has indicated that she will remain in the United States if the applicant voluntarily departs or is removed from the United States. She has not asserted or submitted evidence to demonstrate that she would suffer extreme hardship in Haiti if she relocated there. Accordingly, the AAO cannot determine that the applicant's mother would suffer extreme hardship if she relocated to Haiti.

In this case, the record does not contain sufficient evidence to show that the hardships faced by the applicant's mother, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship. 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.