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U.S. Immigration and Citizenship Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

H2

FILE: [redacted] Office: ATLANTA, GEORGIA Date: FEB 04 2010

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h), 8 U.S.C. § 1182(h), of the Immigration and Nationality Act.

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

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Atlanta, Georgia, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be denied.

The applicant, is a native and citizen of Brazil 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 been convicted of a crime involving a controlled substance in Brazil. The applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h). The director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated January 16, 2007.

On appeal, counsel asserts that the applicant's U.S. citizen wife and daughter would suffer extreme hardship whether they were to remain in the United States without him or to join him to live in Brazil. Counsel states that the applicant's spouse, , does not speak Portuguese, knows little about Brazilian customs or culture, and has no ties to Brazil other than her husband. Counsel claims that the applicant's infant daughter would be left fatherless if he returned to Brazil.

Counsel states that the fear for their daughter's future in Brazil, as it has widespread poverty; a high rate of gang violence, crime, murder, and kidnappings; and serious human rights abuses committed by the Brazilian security forces. Counsel states that the educational system in Brazil is inferior to that of the United States and is the worst in Latin America. Counsel asserts that it would put the applicant's daughter at a disadvantage. Counsel states that it would be difficult for to find employment in Brazil because her education and work experience are in social communications and are unrelated to Brazilian culture. Counsel observes that the gross national income in Brazil for 2005 was $3,460; in the United States it was $43,740. He states that the U.S. Department of State indicates that there is adequate medical care available in major cities in Brazil, but even the best hospitals may not meet the U.S. standards for medical care, sanitation, and facilities. According to counsel, the applicant's family will be economically devastated if he is not allowed to remain in the United States as they would not be able to maintain their current standard of living. Counsel states that the applicant and his wife own their house and that the applicant provides the family's medical, home, and automobile insurance, as well as transportation for his wife and daughter. He states that cannot maintain the house, mortgage, and other expenses without the applicant. Counsel states that the applicant is no longer employed due to revocation of his work authorization, and that in a few months his family will no longer have medical insurance, while his daughter's medical bills continue to mount. Counsel states that earns a gross salary of $600 each week, which is not enough to meet the family's expenses.

Counsel states that the applicant was caught with 1.15 grams of marijuana on February 24, 2002, and that the applicant entered into a deferred prosecution agreement in which he paid a fine in the form of a food donation instead of being prosecuted. He states that the criminal charges were dropped and that the applicant has no criminal conviction for possession of marijuana as he was never prosecuted for the charge, as shown by the criminal background check in Brazil.

The AAO will first address the finding of inadmissibility. Section 212(a) of the Act states in pertinent part:

(2) Criminal and related grounds. —

(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 –

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(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.

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

> The Attorney General may, in his discretion, waive the application of . . . subparagraph (A)(i)(II) . . . insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if – . . . in the case of an immigrant who is 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 that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully permanent resident spouse, parent, son, or daughter of such alien.

Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines "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 –
>
> (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 submitted Civil Police incident report from Brazil reflects that on February 24, 2002, [redacted] had in his Bermuda shorts "approximately 1.15G of a substance with a color and odor similar to marijuana" and "[s]ome Colomi-type cigarette rolling papers." The Nature of Substance Analysis Report states that experts were requested to provide an analysis of the nature of the

following substance: "1.15 of green herb with characteristics similar to Cannabis Sativa (marijuana)," which substance was found in the possession of on February 24, 2002. The report states that the analysis verified the substance as being "a GREEN PLANT SIMILAR TO CANNABIS SATIVA, and based on its characteristics, we identified as being the substance known as MARIJUANA."

On appeal, counsel asserts that the applicant was not convicted of possession of marijuana. He states that the applicant entered into a deferred prosecution agreement and paid a fine in the form of a food donation instead of undergoing prosecution. Counsel states that the applicant was never prosecuted because the criminal charges were dropped, as shown by the document, "Certificate of No Prior Record."

The AAO finds that the record demonstrates that the applicant was convicted of possession of marijuana. As stated above, the Act defines the term "conviction" as "a formal judgment of guilt of the alien entered by a court or ... where ... the alien has entered a plea of guilty or nolo contendere ... and ... the judge has ordered some form of punishment, penalty, or restraint." 8 U.S.C. § 1101(a)(48)(A).

The applicant states in his waiver application that he pleaded guilty to simple possession of marijuana. The judge accepted the applicant's plea and the proposal of the Public Prosecution Office, which was that the applicant's punishment be in the form of a fine (Article 43, Paragraph I of the Penal Code). The Preliminary Hearing Minutes show that the applicant's fine was to donate R$400.00 in food items to a social entity. The record, therefore, establishes that the applicant was convicted of a crime within the plain meaning of section 101(a)(48)(A) of the Act.

The applicant states in the waiver application that his guilty plea to a small amount of possession of marijuana was expunged by operation of Brazilian law. Expungement of a person's foreign drug-related conviction pursuant to a foreign rehabilitation statute will not prevent a finding of inadmissibility under section 212(a)(2)(A)(i)(II) of the Act, even if he would have been eligible for federal first offender treatment under the provisions of 18 U.S.C. § 3607(a) (1994) had he been prosecuted in the United States. *See Matter of Dillingham*, 21 I&N Dec. 1001 (BIA 1997).

Based upon the documentation in the record, the possession of marijuana conviction renders the applicant inadmissible under section 212(a)(2)(A)(i)(II) of the Act, U.S.C. § 1182(a)(2)(A)(i)(II).

A section 212(h) waiver applies to a controlled substance conviction "in so far as it relates to a single offense of possession of 30 grams or less of marijuana." Because the record of conviction establishes that the applicant's controlled substance conviction involved a single offense of simple possession of 1.15 grams of marijuana, the applicant is eligible to seek a waiver under section 212(h) of the Act.

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) . . . of subsection (a)(2) . . . if -

> (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 section 212(h) waiver of the bar to admission resulting from violation of section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant is not a consideration under the statute and will be considered only to the extent that it results in hardship to a qualifying relative, who in this case are the applicant's U.S. citizen spouse and child. The AAO notes that the record does not demonstrate whether the applicant's mother is a naturalized citizen or lawful permanent resident of the United States. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296 (BIA 1996).

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 (BIA 1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals (Board) set forth a list of non-exclusive factors relevant to determining whether an applicant has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. 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 565-566.

In *Matter of O-J-O-,* 21 I&N Dec. 381, 383 (BIA 1996), the Board stated that the factors to consider in determining whether extreme hardship exists "provide a framework for analysis," and that the "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." It further stated that "the trier of fact must consider the entire range of factors concerning hardship in their totality" and then "determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation." (citing *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994).

Applying the *Cervantes-Gonzalez* factors here, extreme hardship to the applicant's qualifying relatives must be established if they remain in the United States without the applicant, and alternatively, if they joins him to live in Brazil. Qualifying relatives are not required to reside outside of the United States based on the denial of an applicant's waiver request.

In rendering this decision, the AAO has carefully considered all of the evidence contained in the record such as birth certificates, letters, photographs, a marriage certificate, country condition reports and articles for Brazil, wage statements, income tax records, invoices, bank statements, and other documentation.

Counsel states that if the applicant's wife and daughter remained in the United States without him, they would suffer extreme hardship from being unable to maintain their current standard of living, as would not be able to maintain the mortgage and other expenses on her weekly salary. The record shows that earns $468 every week and reflects that the family's monthly household expenses are: mortgage - $991, automobile financing - $245, automobile insurance - $66, utilities - $90, telephone - $178. The record, therefore, fails to establish that income is insufficient to meet her monthly household expenses,

is concerned about separation from her husband and its effect on their daughter. Courts have stated that "the most important single hardship factor may be the separation of the alien from family living in the United States," and also, "[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." *Salcido-Salcido v. INS,* 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted); *Cerrillo-Perez v. INS,* 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to BIA) ("We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.") (citations omitted).

However, courts have found that family separation does not conclusively establish extreme hardship. In *Hassan v. INS,* 927 F.2d 465, 468 (9th Cir. 1991), the Ninth Circuit upheld the finding that deporting the applicant and separating him from his wife and child was not conclusive of extreme hardship as it "was not of such a nature which is unusual or beyond that which would normally be expected from the respondent's bar to admission." (citing *Patel v. INS,* 638 F.2d 1199, 1206 (9th Cir.1980) (severance of ties does not constitute extreme hardship). *Perez v. INS,* 96 F.3d 390, 392 (9th Cir. 1996), states that "[e]xtreme hardship" is hardship that is "unusual or beyond that which would normally be expected" upon deportation and "[t]he common results of deportation or exclusion are insufficient to prove extreme hardship." (citing *Hassan v. INS,* 927 F.2d 465, 468 (9th Cir.1991).

The AAO is mindful of and sympathetic to the emotional hardship that is endured as a result of family separation. The record before the AAO, however, fails to establish that the situation of the applicant's wife or daughter, if they remain in the United States without him, rises to the level of extreme hardship. The record is insufficient to show that the emotional hardship to be endured by the applicant's wife or daughter is unusual or beyond that which is normally to be expected from an applicant's bar to admission. *See Hassan* and *Perez, supra.*

When all of the factors raised are considered collectively, the AAO finds they do not establish extreme hardship to the applicant's spouse or daughter if they were to remain in the United States without the applicant.

Counsel states that the fear for their daughter's future in Brazil due to its poverty, gang violence, crime, and human rights abuses. The submitted U.S. Department of State report conveys that in Brazil "unlawful killings by state police (military and civil) were widespread." U.S. Department of State Bureau of Democracy, Human Rights, and Labor, Country Reports on Human Rights Practices – 2006: Brazil. On page two of the country report, it is stated that on the "Map of Violence 2006" by the Organization for Ibero-American States (OEI) Brazil is listed as number one out of 65 countries in killings by firearms, and number three out of 84 countries for killings by

homicide. The U.S. Department of State Consular Information Sheet dated October 20, 2006, conveys that "[c]rime throughout Brazil has reached very high levels." *Id.* at 2. Roadside robberies and "quicknappings" are common, and victims have been beaten and/or raped. *Id.* Carjacking is on the increase in cities. *Id.* In Sao Paulo there is a high rate of armed robbery of pedestrians at stoplights; armed holdups of pedestrians and motorists by men on motorcycles; and incarcerated drug lords exert their power outside of the jail cells. *Id.* Motorists in Rio de Janerio City "are allowed to treat stoplights as stop signs between the hours of 10 p.m. and 6 a.m. to protect against holdups at intersections." *Id.* In Brasilia and Sao Paulo "quicknappings" and armed robberies and street crimes are becoming commonplace. *Id.*

The documentation described above provides information about conditions in Brazil. However, the applicant has not presented any evidence demonstrating that it is likely that he would live in an impoverished urban area in Brazil where crime is prevalent, or otherwise demonstrated how general conditions would affect his spouse and child specifically.

Counsel states that Brazil has widespread poverty and the applicant's daughter would be disadvantaged by Brazil's educational system as it is inferior to that of the United States and is the worst in Latin America. The document by UNICEF conveys that Brazil has an estimated 170 million inhabitants, with 54 million people living below the poverty line. UNICEF states that 1.1 million children and adolescents aged 12 to 17 are unable to read and write, and 11 percent of children are completing eight years of primary school by age 15. Information from UNICEF shows the gross national income in Brazil for 2005 as $3,460; whereas in the United States it was $43,740.

Although Brazil has problems with its educational system, the applicant has not provided any documentation to show that he would be unable to afford better schooling for his daughter. Furthermore, the AAO notes that the G-325A, Biographic Information reflects that the applicant attended a private college in Brazil from July 1999 to January 2004 and was employed in Brazil while a student.

Counsel states that the U.S. Department of State indicates that even though there is adequate medical care available in major cities in Brazil, even the best hospitals may not meet the standards of medical care, sanitation, and facilities as in the United States. However, the AAO finds that there is no documentation in the record demonstrating that wife or daughter has a serious medical condition for which treatment would be unavailable in Brazil.

Counsel claims that [redacted] does not speak Portuguese and her education and work experience are unrelated to Brazilian culture, which would make it difficult for her to find employment in Brazil. However, counsel submitted no documentation in support of his claim. 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).

In considering the submitted evidence collectively, the AAO finds that it fails to demonstrate that the applicant's daughter and spouse would experience extreme hardship if they joined the applicant to live in Brazil.

The applicant has not demonstrated extreme hardship to his wife and daughter if they were to remain in the United States without him, and if they were to join him to live in Brazil. Consequently, the factors presented in this case fail to constitute extreme hardship to a qualifying family member for purposes of relief under section 212(h) of the Act, 8 U.S.C. § 1182(h).

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. The applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed. The waiver application is denied.