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



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

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[REDACTED]

FILE: [REDACTED]

Office: MIAMI

Date:

OCT 06 2010

IN RE: Applicant: [REDACTED]

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

ON BEHALF OF PETITIONER:

[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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

*Perry Rhew*  
for

Perry Rhew  
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of New Zealand who was found to be inadmissible to the United States under 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 controlled substance violations. The applicant seeks a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with his U.S. citizen wife and children.

The record reflects that on [REDACTED] the applicant was convicted of possession of cannabis less than 20 grams in violation of section [REDACTED] and possession of drug paraphernalia in violation of [REDACTED]. The district director concluded that the applicant is statutorily ineligible for a waiver of inadmissibility due to his conviction for possession of drug paraphernalia and denied the application accordingly. *Decision of the District Director*, dated February 20, 2008.

On appeal, counsel for the applicant contends that the applicant's conviction for possession of drug paraphernalia was vacated due to a violation of his procedural rights under [REDACTED] law in the underlying criminal proceeding. *Brief from Counsel*, dated July 23, 2010. Counsel asserts that the applicant is eligible for consideration for a waiver of his inadmissibility resulting from his remaining conviction for possession of less than 20 grams of cannabis. *Counsel's Motion for Remand*, undated. Counsel further states that the applicant's two convictions in New Zealand were not for crimes involving moral turpitude, and thus they do not give rise to inadmissibility under section 212(a)(2)(A)(i)(I) of the Act.

The record contains briefs from counsel; documentation in connection with the applicant's criminal convictions; a statement from the applicant's wife; copies of birth records for the applicant's wife and children; copies of tax records for the applicant and his wife; a letter from the applicant's employer, and; a copy of a marriage record for the applicant and his wife. The entire record was reviewed and considered in rendering this decision.

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

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 —

(1) 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:

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 if -

....

(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 . . . .

As noted above, on [REDACTED] the applicant was convicted of possession of cannabis less than 20 grams in violation of section [REDACTED] and possession of drug paraphernalia in violation of [REDACTED]. Counsel for the applicant contends that the applicant's conviction for possession of drug paraphernalia was vacated due to a violation of his procedural rights under [REDACTED] law in the underlying criminal proceeding. *Brief from Counsel* at 2-3. Counsel contends that, as the applicant's conviction for possession of drug paraphernalia was vacated, it may not serve as a basis for inadmissibility. *Id.*

Upon review, the applicant has established that his prior conviction for possession of drug paraphernalia may not serve as a basis for inadmissibility under section 212(a)(2)(A)(i)(II) of the Act. The applicant provided documentation to show that his conviction under Fl. Stat. § 893.147 was vacated on November 4, 2008 due to a violation of his procedural rights under [REDACTED]. Specifically, the County Court in and for [REDACTED] reviewed the record of the applicant's plea of *nolo contendere* to the charge, and determined that the preceding contained a procedural defect, in that the applicant was not properly notified of the possible immigration consequences of the plea, as required under [REDACTED]. *Hearing Transcript for Case # [REDACTED]* dated January 25, 2002.

As correctly noted by counsel, vacating a conviction due to a violation of [REDACTED] is a remedy for a procedural defect in the criminal proceeding, not a rehabilitative

measure or an attempt to alleviate the immigration consequences of the conviction. In *Alim v. Gonzales*, 446 F.3d 1239, 1250-51 (11<sup>th</sup> Cir. 2006), the United States Court of Appeals for the 11th Circuit found that converting the disposition of a case to “nolle prosequi” due to a violation of Fla. R. Crim. P. § 3.172(c)(8) constitutes a remedy to a legal defect in the criminal proceeding, and therefore the underlying plea is no longer a conviction as defined by section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A).

As the applicant's prior conviction for possession of drug paraphernalia no longer constitutes a conviction for immigration purposes, he has a single conviction relating to a controlled substance, namely his conviction for possession of cannabis less than 20 grams. Therefore, he is eligible for consideration for a waiver under section 212(h) of the Act.

It is noted that counsel discusses whether the applicant's previous convictions in New Zealand constitute crimes involving moral turpitude, such that he is inadmissible under section 212(a)(2)(A)(i)(I) of the Act. However, the AAO need not reach an analysis of whether these crimes constitute crimes involving moral turpitude, as the applicant does not dispute his inadmissibility under section 212(a)(2)(A)(i)(II) of the Act. The applicant requires a waiver of inadmissibility under section 212(h) of the Act whether or not he is also inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

A waiver of inadmissibility under section 212(h) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse, parent, son or daughter of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. The applicant's wife and children are the only qualifying relatives in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. See *Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996).

As a qualifying relative is not required to depart the United States as a consequence of an applicant's inadmissibility, two distinct factual scenarios exist should a waiver application be denied: either the qualifying relative will join the applicant to reside abroad or the qualifying relative will remain in the United States. Ascertaining the actual course of action that will be taken is complicated by the fact that an applicant may easily assert a plan for the qualifying relative to relocate abroad or to remain in the United States depending on which scenario presents the greatest prospective hardship, even though no intention exists to carry out the alleged plan in reality. Cf. *Matter of Ige*, 20 I&N Dec. 880, 885 (BIA 1994) (addressing separation of minor child from both parents applying for suspension of deportation). Thus, we interpret the statutory language of the various waiver provisions in section 212 of the Act to require an applicant to establish extreme hardship to his or her qualifying relative(s) under both possible scenarios. To endure the hardship of separation when extreme hardship could be avoided by joining the applicant abroad, or to endure the hardship of relocation when extreme hardship could be avoided by remaining in the United States, is a matter of choice and not the result of removal or inadmissibility. As the Board of Immigration Appeals stated in *Matter of Ige*:

[W]e consider the critical issue . . . to be whether a child would suffer extreme hardship if he accompanied his parent abroad. If, as in this case, no hardship would ensue, then the fact that the child might face hardship if left in the United States would be the result of parental choice, not the parent's deportation.

*Id.* See also *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (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 Board 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 Board 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 Board has also held that the common or typical results of deportation, 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. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *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 Board 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.*

We observe that 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., In re 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).

Family separation, for instance, has been found to be a common result of inadmissibility or removal in some cases. *See Matter of Shaughnessy*, 12 I&N Dec. at 813. Nevertheless, family ties are to be considered in analyzing hardship. *See Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 565-66. The question of whether family separation is the ordinary result of inadmissibility or removal may depend on the nature of family relationship considered. For example, in *Matter of Shaughnessy*, the Board considered the scenario of parents being separated from their soon-to-be adult son, finding that this separation would not result in extreme hardship to the parents. *Id.* at 811-12; *see also U.S. v. Arrieta*, 224 F.3d 1076, 1082 (9th Cir. 2000) (“Mr. Arrieta was not a spouse, but a son and brother. It was evident from the record that the effect of the deportation order would be separation rather than relocation.”). In *Matter of Cervantes-Gonzalez*, the Board considered the scenario of the respondent’s spouse accompanying him to Mexico, finding that she would not experience extreme hardship from losing “physical proximity to her family” in the United States. 22 I&N Dec. at 566-67.

The decision in *Cervantes-Gonzalez* reflects the norm that spouses reside with one another and establish a life together such that separating from one another is likely to result in substantial hardship. It is common for both spouses to relocate abroad if one of them is not allowed to stay in the United States, which typically results in separation from other family members living in the United States. Other decisions reflect the expectation that minor children will remain with their parents, upon whom they usually depend for financial and emotional support. *See, e.g., Matter of Ige*, 20 I&N Dec. at 886 (“[I]t is generally preferable for children to be brought up by their parents.”). Therefore, the most important single hardship factor may be separation, particularly where spouses and minor children are concerned. *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *Cerrillo-Perez*, 809 F.2d at 1422.

Regardless of the type of family relationship involved, the hardship resulting from family separation is determined based on the actual impact of separation on an applicant, and all hardships must be considered in determining whether the combination of hardships takes the case beyond the consequences ordinarily associated with removal or inadmissibility. *Matter of O-J-O-*, 21 I&N Dec. at 383. Nevertheless, though we require an applicant to show that a qualifying relative would experience extreme hardship both in the event of relocation and in the event of separation, in analyzing the latter scenario, we give considerable, if not predominant, weight to the hardship of separation itself, particularly in cases involving the separation of spouses from one another and/or minor children from a parent. *Salcido-Salcido*, 138 F.3d at 1293.

On appeal, the applicant does not present any evidence regarding hardship his wife or children may suffer should the present waiver application be denied. The applicant's wife previously stated that she met the applicant in August 2000 and she is close with him. *Statement from the Applicant's Wife*, dated October 16, 2007. She indicated that she resides with the applicant and their two

children, presently ages eight and 15. *Id.* at 1. She described the history of her relationship with the applicant, and noted that the applicant has bonded with their older daughter who is her child from a previous relationship. *Id.* She provided that the applicant supports their children, and that he provides their family with a sense of emotional and financial stability. *Id.* She indicated that she and their children will experience extreme hardship if the applicant is compelled to return to New Zealand. *Id.* She stated that she would face difficulty acting as a single parent for their two children, and that their children would lose the opportunity to have their father with them. *Id.*

The applicant's wife indicated that she would suffer hardship should she relocate to New Zealand, as she recently lost her mother to cancer and she does not wish to leave her father. *Id.* at 2. She added that she does not wish for their children to grow up without having their grandfather and other family members close. *Id.*

Upon review, the applicant has not shown that his wife or children will suffer extreme hardship should the present waiver application be denied. The applicant has not shown that his wife or children will endure extreme hardship should they relocate to New Zealand with him to maintain family unity. The applicant's wife expressed that she wishes for her children to remain close to their grandfather and other relatives in the United States. However, separation from one's family members and community is a common consequence when individuals relocate abroad due to the inadmissibility of a parent or spouse. The AAO acknowledges that the applicant's wife wishes to reside close to her father, and that she will endure psychological difficulty should she reside a great distance from him. However, the applicant has not submitted explanation of his wife's relationship with her father, such as her father's current location or the frequency with which they spend time together. Thus, the record lacks adequate information to show the impact relocation would have on the applicant's wife's relationship with her father.

The applicant has not presented evidence or explanation to show that his wife or children will endure other hardships should they relocate to New Zealand, such as financial difficulty. In the absence of clear assertions from the applicant, the AAO may not speculate as to the hardship the applicant's wife or children may endure. In proceedings regarding a waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361.

Considering the stated hardships to the applicant's wife and children in aggregate, the applicant has not shown that they will suffer extreme hardship should they reside in New Zealand.

The applicant has not shown that his wife or children will endure extreme hardship should they remain in the United States without him. The applicant's wife stated that the applicant provides a sense of financial security for their family. Yet, the applicant has not provided sufficient financial documentation to show the circumstances his family would face in his absence. The applicant provided a letter from his employer that indicated that he earned an annual salary of \$52,000 as of November 21, 2006. *Letter from the Applicant's Employer*, dated November 21, 2006. He submitted his wife's 2005 IRS Form 1040A, U.S. Individual Income Tax Return, that reports that she earned \$5,741 for that year. However, the appeal was filed on or about March 25, 2008, and the

applicant has not provided any recent economic information or documentation for his family. Thus, the AAO is unable to determine whether his wife presently works, and if so, what is her income. The applicant has not submitted documentation of his family's expenses, or otherwise shown that they face unusual economic needs. Accordingly, the record lacks sufficient evidence to show that the applicant's family members would endure economic difficulty should he depart the United States and they remain.

The applicant's wife expressed that she and their children will face emotional hardship should they reside apart from the applicant. The AAO acknowledges that family separation often results in significant psychological suffering, and that the applicant's wife and children will endure emotional hardship should they become separated from him. Yet, the applicant has not distinguished his wife's or children's emotional challenges from those commonly experienced when family members reside apart due to inadmissibility.

The applicant's wife stated that she will face hardship should she be compelled to act as a single parent for their two children. It is evident that caring for two children alone involves substantial emotional, physical, and financial challenges. However, the applicant has not shown that his wife's parental responsibilities will elevate her challenges to an extreme level.

All stated elements of hardship to the applicant's wife and children, should they remain in the United States without the applicant, have been considered in aggregate. Based on the foregoing, the applicant has not established that his wife or children will endure extreme hardship should he depart the United States and they remain. Thus, the applicant has not shown by a preponderance of the evidence that denial of the present waiver application "would result in extreme hardship" to his wife or children, as required for a waiver under section 212(h) of the Act. Having found the applicant statutorily ineligible for relief, no purpose would be served by assessing whether he is eligible for a waiver as a matter of discretion.

In the present matter, the applicant has not met his burden to prove that he is eligible for a waiver under section 212(h) of the Act. *See* Section 291 of the Act, 8 U.S.C. § 1361. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.