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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
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U.S. Citizenship  
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Services

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[REDACTED]

FILE: [REDACTED] Office: NEWARK, NJ Date: JUL 30 2010

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:

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.

Thank you,

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

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Field Office Director, Newark, New Jersey, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Costa Rica 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. The applicant seeks a waiver of inadmissibility pursuant to 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 spouse.

In a decision dated January 23, 2008, the field office director found the applicant inadmissible under section 212(a)(2)(A)(i)(II) of the Act for having been convicted of possession of 50 grams or less of marijuana. The field office director also found that the applicant failed to demonstrate that his U.S. citizen spouse would suffer extreme hardship as a result of his inadmissibility to the United States. The application was denied accordingly.

In a Notice of Appeal to the AAO (Form I-290B) dated February 12, 2008, counsel states that the field office director abused her discretion when denying the applicant's waiver application because she clearly showed that she would suffer extreme hardship if the applicant were removed from the United States. Counsel also states that the gravity of the crimes committed by the applicant do not justify the denial of his waiver application when balanced with the extreme hardship that his U.S. citizen spouse would experience upon his being found inadmissible.

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

(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.

(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, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, 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).

The record shows that on February 18, 1998 in Orange County, Florida the applicant pled nolo contendere to the charge of petit theft. He was then fined, ordered to serve 35 hours of community service, and to attend a petit theft class.

On [REDACTED] the applicant was charged with possession of 50 grams or less of marijuana under New Jersey Statute 2C:35-10A(4). On August 17, 1998 the applicant pled guilty to the charge. The applicant was fined \$805. The AAO notes that the certified laboratory report submitted by the applicant in regards to this conviction shows that the applicant possessed 1.67 grams of marijuana at the time of his arrest.

The AAO notes that the applicant, who was born on March 22, 1966, was over the age of eighteen years old at the time he committed the acts that resulted in his arrests.

The AAO finds that the applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act for having been convicted of a crime involving a controlled substance. As the applicant's conviction relating to a controlled substance involved under 30 grams of marijuana, the applicant is eligible to apply for a section 212(h) waiver.

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

The Attorney General 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 . . . .* (emphasis added.)

....

(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 AAO notes that 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. In this case, the relative that qualifies is the applicant's spouse. Hardship to the applicant is considered only insofar as it results in hardship to a qualifying relative. If extreme hardship is established, the Secretary then assesses whether an 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 are possible 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 to be taken is difficult, and it 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 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*, 22 I&N Dec. 560, 565-66 (BIA 1999), the Board 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. *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).

The record of hardship contains two statements from the applicant’s spouse, a psychological evaluation for the applicant and his spouse, a brief from counsel, and the 2006 U.S. Department of State Country Reports on Human Rights Practices in Costa Rica.

In a statement dated September 18, 2006, the applicant’s spouse states how she has two children from a previous marriage. She states that her former spouse was abusive to both her and her children and that he had substance abuse problems. She explains how she had many difficulties over the years in her relationship with her former spouse. The applicant’s spouse states that she met the applicant in 1996 and after years of being friends they decided to be together. She states that in 2004 she and the applicant cared for her father in their home while he was suffering from Alzheimer’s disease. The applicant’s spouse states that the applicant is a father figure to her daughter and that she feels safe and secure with the applicant as part of her life.

The psychological evaluation dated August 16, 2006, states that the applicant’s spouse has a history of suffering from anorexia and as a result of her former husband’s abuse, suffers from posttraumatic stress disorder. The evaluation also states that after the loss of a partner in a former relationship to cancer and the loss of her parents’ emotional support, the applicant’s spouse suffers delayed bereavement. In the evaluation, Dr. [REDACTED] concludes that the applicant’s spouse is very troubled and is at risk for suicide. She states that the applicant’s immigration problems are compounding his spouse’s problems with anorexia and post traumatic stress disorder. Dr. [REDACTED] further states that if the applicant’s spouse’s anorexia worsens then she is at risk for severe medical consequences such as electrolyte imbalances, cardiac arrhythmias, and even death.

In statement dated December 31, 2007, the applicant’s spouse states that the thought of losing the applicant is provoking severe anxiety attacks and depression. She states that she has lost weight since she has not been eating properly due to stress. She states that she feels sadness, indecision, and insecurity all of the time and that she suffers from anxiety. She states that the applicant is the only person who keeps her sane, grounded, and safe. She states that the applicant is the only person who helps her balance her personal and mental problems and that without him she does not know if she can go on living. The applicant’s spouse states that she cannot relocate outside of the United States

as she does not speak the language; she could not move her career; and due to her delicate health, the change in food, climate, and culture could be a very serious hardship for her.

The AAO finds that given the serious medical and psychological considerations in regards to the applicant's spouse, the applicant's spouse would suffer extreme hardship as a result of the applicant's inadmissibility. The record establishes that the applicant's spouse suffers from anorexia and post traumatic stress as a result of being abused by her former spouse. The applicant's spouse has stated that the stress of the applicant's immigration problems is exacerbating her problems. The applicant's spouse also states that the applicant is her only form of support. Thus, the AAO finds that it would be an extreme emotional, psychological, and physical hardship for applicant's spouse's to be separated from the applicant. In addition, the AAO also finds that for the same reasons relocation to a foreign country where the applicant's spouse does not speak the language and would have to find new employment would also likely exacerbate her psychological and emotional problems. The AAO notes that the applicant's spouse's psychological problems are severe and as stated by Dr. [REDACTED] put her at risk of suicide.

In *Matter of Mendez-Moralez*, 21 I&N Dec. 296 (BIA 1996), the Board held that establishing extreme hardship and eligibility for section 212(h)(1)(B) relief does not create an entitlement to that relief, and that extreme hardship, once established, is but one favorable discretionary factor to be considered. The Attorney General has the authority to consider all negative factors in deciding whether or not to grant a favorable exercise of discretion. *See Matter of Cervantes-Gonzalez, supra*, at 12.

The negative factors in the applicant's case include the applicant's criminal convictions. The positive factors in the applicant's case include the extreme hardship that would be experienced by his U.S. citizen spouse, his role as a supportive husband to his spouse and father figure to his spouse's daughter, his consistent record of employment, and the absence of any criminal record since his convictions in 1998.

Although the applicant's criminal convictions in the United States cannot be condoned, the positive factors in this case outweigh the negative factors.

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 remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has now met that burden. Accordingly, the appeal will be sustained.

**ORDER:** The appeal is sustained.