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U. S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

[Redacted]

H2

FILE: [Redacted]

Office: [Redacted]

Date: **APR 13 2011**

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.

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 \$630. 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,

Michael Hummeray

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, [REDACTED]. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of [REDACTED]. He was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of 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 and son.

The Field Office Director concluded that the applicant had failed to establish that the bar to his 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 Field Office Director*, August 18, 2008.

On appeal, counsel for the applicant asserts "it is clear that [REDACTED] wife and child would suffer extreme hardship if he is not granted Lawful Permanent Residency to the United States." *Appeal Brief*, filed September 18, 2008.

In support of the application, the record contains, but is not limited to, a statement from the applicant, statements from the applicant's spouse, a statement from the applicant's father-in-law, the applicant's child's birth certificate, the applicant's marriage certificate, a letter from the applicant's employer, a letter from the applicant's church, financial documentation, and the applicant's conviction records. The entire record was reviewed and considered in rendering a decision on the appeal.

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

- (1) 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.

The record reflects that on February 4, 2003 the applicant was convicted in the State Court of [REDACTED] of possession of marijuana in violation of section 16-13-2(b) of the [REDACTED] Code. The applicant was sentenced to 12 months imprisonment, which he was allowed to serve on probation [REDACTED]. At the time of the applicant's conviction, [REDACTED] Code Ann. § 16-13-2(b) provided, "any person who is charged with possession of marijuana, which possession is of one ounce or less, shall be guilty of a misdemeanor and punished by imprisonment for a period not to exceed 12 months or a fine not to exceed \$1,000.00, or both, or public works not to exceed 12 months." Therefore, the applicant was convicted of possession of less than 30 grams of marijuana, and is inadmissible pursuant to section 212(a)(2)(A)(i)(II) of the Act. The applicant does not contest his inadmissibility on appeal.

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)(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

. . . .

(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 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 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 U.S. citizen spouse and son are the 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-Moralez*, 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.

The record reflects that the applicant wed his U.S. citizen spouse, [REDACTED] on September 23, 2005. The applicant and his spouse have a three-year-old U.S. citizen son, [REDACTED]. The applicant listed his U.S. citizen stepdaughter, [REDACTED] as a qualifying relative on his Form I-601 application. However, the applicant has not provided her birth certificate, or other evidence of her identity. Therefore, only the applicant's son and spouse will be considered qualifying relatives for purposes of these proceedings.

On appeal, counsel asserts that the applicant has family ties and a long history of residence in the United States. Counsel states that the applicant was young at the time of his offense, and he has since demonstrated maturity and responsibility. Counsel notes that the applicant is a "strong family man," and is an active member of his church. Counsel contends that denying the applicant admission as a permanent resident is "causing undue stress" to the applicant and his qualifying relatives. Counsel states that the applicant's qualifying relatives would suffer extreme hardship if he were removed. *Appeal Brief*, dated September 16, 2008.

The applicant's spouse asserts that her daughter has become less social and more withdrawn at school because of the denial of the applicant's waiver application. She states that sometimes her daughter "acts out for no apparent reason." She states that she has lost focus at work and school. She states that she fears that if the applicant is not with her, she will not be able to pursue her education goals. She indicates that it would be "next to impossible" to raise her children and maintain her household without the applicant. She contends that their budget has been "under strain from the economic downturn" and immigration applications and attorney's fees. *Affidavit of [REDACTED]* dated September 14, 2008.

The applicant's spouse previously asserted that the applicant is "an extremely dedicated and loving father." She states that her "goal of obtaining a bachelors degree would not have been possible without the support and love" she received from the applicant. She notes that the applicant helps her daughter with homework and soccer training. She states that they plan on having additional children in the future, and she would like to have the applicant present to help guide their children. *Statement from [REDACTED]* undated.

Upon careful review of the record, the applicant has not demonstrated that his spouse or child would suffer extreme hardship if they remain in the United States separated from him as a result of his inadmissibility.

The AAO has considered the claims of financial hardship to the applicant's spouse and child if they reside in the United States without the applicant. The record contains copies of the applicant's household expenses, including a rental agreement reflecting that the applicant and his spouse are paying a monthly rent in the amount of \$750 per month. See [REDACTED] *Rental & Management agreement*, dated December 17, 2007. However, the record does not contain evidence of the applicant's earnings, such as his earnings statements, Form W-2 (Wage and Tax Statements),

tax returns, or any other evidence to establish that his absence would create financial hardship for his spouse. The AAO notes that the record contains a letter from the applicant's supervisor attesting to the applicant's character as a "dependable and trustworthy" employee. *Letter from* [REDACTED]. However, [REDACTED] letter does not provide any details on the applicant's occupation and where he is employed. Moreover, the record does not contain any evidence of the applicant's spouse's occupation and earnings, other than a tax return issued three years prior to the appeal in 2005. 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)). Therefore, the AAO is not in a position to assess the extent of the financial hardship the applicant's spouse and child would suffer if they were separated from the applicant.

The AAO acknowledges that the applicant's spouse and child will experience emotional hardship if they are separated from the applicant as a result of his inadmissibility. In *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998), the Ninth Circuit Court of Appeals, referring to the separation of an alien from qualifying relatives, 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). The AAO finds that the applicant's separation from his spouse and child will constitute emotional suffering and is sympathetic to their situation. However, the applicant has failed to demonstrate that this hardship alone rises to the level of extreme hardship. The applicant has made no other claims of hardship to his spouse or son if they remain in the United States separated from him. While almost every case will present some hardship, the claims of emotional hardship presented here are not beyond the ordinary hardship suffered by individuals who are separated as a result of inadmissibility.

All presented elements of hardship to the applicant's spouse and child, should they remain in the United States, have been considered in aggregate. Based on the foregoing, the applicant has not established that his spouse or child would suffer extreme hardship should they decide to remain in the United States separated from the applicant.

As stated, 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 two possible scenarios - either the qualifying relative will join the applicant to reside abroad or the qualifying relative will remain in the United States. To endure the hardship of separation when extreme hardship could be avoided by joining the applicant abroad is a matter of choice and not the result of removal or inadmissibility. Here, the applicant has not asserted, and the record does not demonstrate, that his spouse or child would suffer extreme hardship if they relocated with him to [REDACTED]. Accordingly, the AAO cannot conclude that the applicant's spouse or child would suffer extreme hardship if they relocated with the applicant to [REDACTED] to maintain family unity.

In conclusion, the record does not reflect that the applicant's spouse or child would suffer extreme hardship upon separation from the applicant or upon relocation to [REDACTED] to maintain family unity. 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 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.