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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

**PUBLIC COPY**

[Redacted]

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Date: DEC 22 2011 Office: SAN JOSE, CA FILE: [Redacted]

IN RE: Applicant: [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,

  
Perry Rhew

Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Acting Field Office Director, San Jose, California. 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 the Philippines 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 violating laws related to a controlled substance. The applicant's spouse and two children are U.S. citizens. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h).

The acting field office director concluded that the applicant is not eligible to file a section 212(h) waiver due to having two controlled substance convictions. *Decision of the Acting Field Office Director*, dated August 29, 2008.

On appeal, counsel asserts that the applicant only has one drug conviction and that he is eligible to file for a section 212(h) waiver. *Brief in Support of Appeal*, dated October 24, 2008.

The record includes, but is not limited to, the applicant's spouse statement, statements from friends and family of the applicant, insurance documents, financial records, country conditions information on the Philippines, and the applicant's criminal record. The entire record was reviewed and considered in arriving at a decision on the appeal.

The record reflects that on November 30, 2004 the applicant was convicted under California Vehicle Code § 23222(b) of possession of marijuana while driving. The applicant's conviction was expunged on April 22, 2008. At the time of the applicant's conviction, California Vehicle Code § 23222(b) stated:

(b) Except as authorized by law, every person who possesses, while driving a motor vehicle upon a highway or on lands, as described in subdivision (b) of Section 23220, not more than one avoirdupois ounce of marijuana, other than concentrated cannabis as defined by Section 11006.5 of the Health and Safety Code, is guilty of a misdemeanor and shall be punished by a fine of not more than one hundred dollars (\$100)...

The record reflects that on December 7, 2004 the applicant was convicted under California Health and Safety Code § 11357(b) of possession of marijuana (28.5 grams or less). At the time of the applicant's conviction, California Health and Safety Code § 11357(b) stated:

(b) Except as authorized by law, every person who possesses not more than 28.5 grams of marijuana, other than concentrated cannabis, is guilty of a misdemeanor and shall be punished by a fine of not more than one hundred dollars (\$100).

Counsel asserts that the applicant's first drug conviction is characterized as a "simple" possession offense; it would receive treatment under the Federal First Offender Act as it was expunged; it falls

under the purview of *Lujan-Armendariz v. INS*, 222 F.3d 728 (9<sup>th</sup> Cir. 2000); as his first drug conviction was eliminated for immigration purposes under the rationale in *Lujan-Armendariz v. INS*, he is eligible for a section 212(h) waiver to cover his second drug conviction; and his spouse and children would suffer extreme hardship if the waiver is not granted.

The Ninth Circuit Court of Appeals has held that one whose offense would have qualified for treatment under the Federal First Offender Act (“FFOA”), but who was convicted and had his or her conviction expunged under state or foreign law, may not be removed on account of that offense. *See Dillingham v. INS*, 267 F.3d 996 (9<sup>th</sup> Cir. 2001); *Lujan-Armendariz v. INS*, 222 F.3d 728 (9<sup>th</sup> Cir. 2000). In order to qualify for treatment under the FFOA, the defendant must have been found guilty of an offense described in section 404 of the Controlled Substances Act (“CSA”), 21 U.S.C. § 844; have not been convicted of violating a federal or state law relating to controlled substances prior to the commission of such an offense; and have not previously been accorded first offender treatment under any law. *See* 18 U.S.C. § 3607(a); *Cardenas-Uriarte v. INS*, 227 F.3d 1132, 1136 (9<sup>th</sup> Cir. 2000). Section 404 of the CSA provides that it is “unlawful for any person knowingly or intentionally to possess a controlled substance . . . .” 21 U.S.C. § 844(a). The AAO notes that *Lujan-Armendariz v. INS* was overruled in *Nunez-Reyes v. Holder*, 646 F.3d 684 (9<sup>th</sup> Cir. July 14, 2011) (*en banc*), however, the ruling in *Nunez-Reyes v. Holder* applies only prospectively. *Id.* at 687. As such, the AAO will apply *Lujan-Armendariz v. INS* to the applicant’s 2006 conviction.

Counsel asserts that generally in criminal law, possession of small quantities of drugs is usually considered “simple possession”; it is irrelevant when categorizing a crime as “simple possession” whether one possesses the drug in a home, car, on the street, etc.; a violation of California Vehicle Code § 23222(b), a possession of nor more than one ounce of marijuana while driving in a vehicle, is a “simple possession” conviction; it is a misdemeanor with no jail penalty and a \$100 maximum fine; the offense is less serious than the simple possession drug offense in *Lujan-Armendariz v. INS*, simple possession of heroin under California Health and Safety Code § 11350(a), a felony punishable by a term of imprisonment of up to three years; and as the basis of the rule is Equal Protection, any offense for which a maximum sentence was equal or less than that for the qualifying possession would also be covered based on *Cardenas-Uriarte v. INS*, 227 F. 3d 1132 (9<sup>th</sup> Cir. 2000).

The AAO notes that the penalty for possession of marijuana while driving is the same as possession of marijuana, 28.5 grams or less. The AAO also notes that in *Nunez-Reyes v. Holder* the court found that being under the influence was different than and more serious than mere possession because it “carries an immediate risk of dangerous behavior.” However, possession while driving does not carry such a risk, and therefore is akin to simple possession. The AAO finds that the applicant’s first drug conviction was eliminated for immigration purposes under the rationale in *Lujan-Armendariz v. INS*, and he is eligible to file for a section 212(h) waiver to cover his second drug conviction, as it was for simple possession of 30 grams or less of marijuana.<sup>1</sup>

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<sup>1</sup> The AAO also notes that on December 29, 1998 the applicant was convicted under California Penal Code § 488 of theft and was sentenced to six days in jail, two years probation and a \$127 fine. The AAO will not determine whether this is a crime involving moral turpitude, however, if it is the applicant would be eligible for the petty theft exception under section 212(a)(2)(A)(ii)(II) of the Act.

Section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1181(a)(2)(A)(i)(II), states, in pertinent part:

(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-

....  
(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance... is inadmissible.

Section 212(h) of the Act provides that:

(h) The Attorney General [now, Secretary, Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraphs (A)(i)(I)...of 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...

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 spouse 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).

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 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. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *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.*

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., Matter of 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). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. *See Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *but see Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

Counsel states that the applicant’s spouse has lived in the United States her entire life; her parents are U.S. citizens and live close to her; she has two U.S. citizen sisters in California and numerous U.S. citizen relatives; the applicant’s children have lived their entire life in the United States and enjoy their mother’s close family; the qualifying relatives have no family ties outside of the United States; the living conditions in the Philippines are much worse than in the United States; there are terrorist attacks and kidnappings of U.S. citizens in the Philippines; the applicant’s chances of earning employment is slim due to his age and lack of a college degree; the applicant’s spouse would not be able to find employment due to unfamiliarity with the language and customs; and the applicant’s children would lose out on educational opportunities and health coverage in the United States. *Brief in Support of Appeal.*

The applicant’s spouse states that she does speak or understand any other language than English; she eats only American food; she was brought up in the American way of life, culture and tradition; she

is a stranger to the culture in the Philippines; she does not have a single friend or relative in the Philippines; the pollution, humidity and strange environment might affect the health and well-being of her children; the children can only speak and understand English; she does not know if they will be safe from tropical diseases or other illnesses; the older child is in preschool and it would be traumatic to go to a different educational system; the children would need government permits to study in the Philippines; the public schools are not comparable to U.S. public schools; private schools have extremely high tuition; she will lose her medical insurance and she is not confident that her and her children's medical needs will be met; she will be unable to continue making contributions to her social security and retirement funds; she needs a government permit to stay in the Philippines for more than 21 days; and the cost to relocate and start a new life would constitute a huge sum of money. *Applicant's Spouse's Statement*, undated. The record includes insurance cards for the applicant's children and general country conditions information on the Philippines reflecting safety issues.

The record reflects that that the applicant's spouse has family ties to the United States, she only speaks English and that she was raised in the United States. The record reflects that she is working in the United States, medical facilities may not be equivalent to those in the United States and there are general safety issues in the Philippines. As such, she may experience difficulties in the Philippines. However, the record does not include sufficient evidence to establish that she would experience financial hardship in the Philippines or that her children could not attend school there. The record does not include sufficient evidence of financial, medical, emotional or other types of hardship, which in their totality, establish that a qualifying relative would experience extreme hardship upon relocation to the Philippines.

Counsel states that the applicant and his spouse work together to financially support their children; the applicant's spouse earns \$43,000 annually as a store manager and the applicant earns \$35,500; the applicant's chances of earning employment is slim due to his age and lack of a college degree; the applicant's children need his love, support and guidance in their development; and the applicant's spouse would be unable to provide the children with the total security and support available in a two-parent household. *Brief in Support of Appeal*.

The applicant's spouse states that she is very depressed over the applicant's immigration problems; she is suffering from severe anxiety; the applicant and their children are very close; their children will suffer and no amount of child psychological guidance can cushion them from an abrupt separation from the applicant; and she could not meet her financial obligations with only her income. *Applicant's Spouse's Statement*. The record includes several statements from family and friends detailing the applicant's close relationship with his spouse and children.

The record reflects that the applicant's would experience emotional hardship without the applicant. The record lacks sufficient evidence to establish the degree of emotional hardship that the applicant's spouse would experience without the applicant. The record lacks sufficient evidence to establish the degree of financial hardship that the applicant's spouse would experience without the applicant. The record does not include sufficient evidence of financial, medical, emotional or other

types of hardship, which in their totality, establish that a qualifying relative would experience extreme hardship upon remaining in the United States.

A review of the documentation in the record fails to establish the existence of extreme hardship to a qualifying relative caused by the applicant's inadmissibility to the United States. Having found the applicant statutorily ineligible for relief, no purpose would be served in an additional discussion of 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 proving eligibility 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.