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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**



H₂

DATE: JUN 06 2011 Office: LOS ANGELES, CA

FILE: 

IN RE: Applicant: 

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:



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.


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Los Angeles, California. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of El Salvador who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having committed a crime involving moral turpitude, and pursuant to section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), for violating a law related to a controlled substance. The applicant's father is a U.S. citizen and his mother is a lawful permanent resident. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h).

The field office director concluded that the applicant had failed to establish extreme hardship to a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director*, dated October 20, 2008.

On appeal, counsel asserts that the field office director did not properly balance the factors in this case. *Form I-290B*, received November 19, 2008.

The record includes, but is not limited to, counsel's brief, prior counsel's I-601 brief, the applicant's statement, the applicant's mother's statement, a psychological evaluation of the applicant's mother, medical records for the applicant's mother, photographs, education-related documents, letters of support, information on adjustment disorders, and country conditions information on El Salvador. The entire record was reviewed and considered in arriving at a decision on the appeal.

The applicant was convicted of possession of marijuana not more than 28.5 oz. on January 17, 2001 under California Health and Safety Code § 11357(B). As such, the applicant is inadmissible pursuant to section 212(a)(2)(A)(i)(II) of the Act for violating a law related to a controlled substance. He is eligible to file for a waiver under section 212(h) of the Act as his conviction was for a single offense of simple possession of 30 grams or less of marijuana.

The record reflects that the applicant was convicted on August 29, 1996 of burglary under California Penal Code § 459. The AAO will not address whether the applicant's conviction was for a crime involving moral turpitude as a section 212(h) waiver for his marijuana conviction would apply to a commission of a crime involving moral turpitude.¹

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

Criminal and related grounds. —

(A) Conviction of certain crimes. —

¹ The AAO notes that the applicant would not be eligible for the petty offense exception, located at section 212(a)(2)(A)(ii)(II), as he was sentenced to 365 days in jail (suspended).

- (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 subparagraphs (A)(i)(I), (B), (D), and (E) 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

- (1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that –
 - (i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,
 - (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
 - (iii) the alien has been rehabilitated; or
- (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 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 mother and father are the only qualifying relatives in this case. The AAO will only address hardship to the applicant's mother as no claim of hardship was made for the applicant's father. 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 a qualifying relative, 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 AAO notes counsel’s claim that the applicant resides in an area covered by the U.S. Court of Appeals for the Ninth Circuit and that its case law would be controlling over case law from other federal circuits. The AAO is bound by decisions from the circuit court of appeals for cases originating within the circuit. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit).

Counsel states that the applicant’s mother, in applying for benefits under the NACARA program, previously established that she would suffer extreme hardship if she or her children had to return to El Salvador. *Brief in Support of Appeal*. The AAO notes that the applicant’s mother obtained her lawful permanent residence through the NACARA program and she was required to establish that her removal would result in extreme hardship to herself, or her U.S. citizen or lawful permanent resident spouse, child or parent. The AAO notes that a 212(h) waiver in this case requires establishment of extreme hardship to the applicant’s mother in the event of the applicant’s removal. Therefore, the applicant’s mother’s NACARA extreme hardship claim would have differed from the instant claim.

The first part of the analysis requires the applicant to establish extreme hardship to a qualifying relative in the event of relocation to El Salvador. Counsel states that the applicant’s mother has 7 U.S. citizen or lawful permanent resident cousins in the United States; and she does not have any family in El Salvador. *Brief in Support of Appeal*, dated December 18, 2008. The record reflects that the applicant’s mother has two U.S. citizen children. However, the record does not include supporting documentary evidence of the applicant’s mother’s other claimed relatives. The AAO notes that without documentary evidence to support these claims, the assertions of counsel will not satisfy the applicant’s burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel states that the applicant's mother fled El Salvador during the civil war; she filed for asylum and temporary protected status; she obtained permanent residence through a NACARA application; she entered the United States in or around 1985. *Brief in Support of Appeal*. Counsel states that the applicant's mother cannot return to El Salvador due to her mental health condition; she would have to relive the attacks and threats that she suffered at the hands of the civil war participants; El Salvador is suffering from a social, economic, and political crisis; El Salvador suffers from a prevalent gang problem and the applicant's mother's safety would be in jeopardy; the applicant's mother's teenage boys would be targeted for gang recruitment or assassination; and El Salvador has a high level of poverty. *Id.* The record does not include supporting documentary evidence of the claims made in regard to the applicant's mother's past experiences in El Salvador. However, the record includes articles on criminal, poverty, safety and gang issues in El Salvador.

Counsel states that the applicant's mother's two U.S. citizen children do not speak Spanish and they will lose educational opportunities. *Id.*

The record includes medical records for the applicant's mother reflecting that she has been diagnosed with hypertension, allergic rhinitis, neck and shoulder pain, tension headaches and bronchitis; and she had foot surgery. The record reflects that she takes medication every day for high blood pressure. *Doctor's Note*, dated July 14, 2008.

In addition to the factors noted above, the AAO notes that El Salvador is currently designated under the Temporary Protected Status (TPS) program due to the devastation caused by a series of severe earthquakes in 2001. 75 Fed. Reg. 131 (July 9, 2010) Under the TPS program, citizens of El Salvador are allowed to remain in the United States temporarily due to the inability of El Salvador to handle the return of its nationals due to the disruption of living conditions. Based on the record as a whole and the fact that El Salvador is currently designated for TPS, the AAO finds that requiring the applicant's U.S. citizen mother to relocate to El Salvador would constitute extreme hardship.

The second part of the analysis requires the applicant to establish extreme hardship in the event that a qualifying relative resides in the United States. Counsel states that the applicant's mother's husband was deported from the United States; she has suffered due to the loss of her husband; she relies heavily on the applicant; the applicant is a father figure to his younger siblings; she will not be able to emotionally handle separation from the applicant; and the applicant is the most important thing in her life. *Brief in Support of Appeal*. The applicant's mother states that her spouse was deported; the applicant has stepped in and helped her raise her two other sons; she has been anxious and depressed; her body is tired and in pain but she works to make money for her family; the applicant assists her with caring for her sons and her errands; she could not afford to visit him in El Salvador; and she could not bear the suffering after having her spouse deported. *Applicant's Mother's Statement*, dated January 15, 2008. The applicant's mother was evaluated by a psychologist who states that the applicant's spouse is emotionally dependent on the applicant; she fulfills the criteria for adjustment disorder with mixed anxiety and depressed mood; and his conclusion is based on the applicant's mother's personality characteristics, turbulent past experience in El Salvador, divorce in the United States, medical background, testing and present observations; and it can be safely projected that her mental state would deteriorate significantly without the applicant. *Psychological Evaluation*, dated November 25, 2008.

Prior counsel states that the applicant's mother's health would likely decline and her blood pressure would go up. *Prior Counsel's Brief*, undated. The applicant's mother states that she has migraine headaches, neck pain, high blood pressure, sciatica pain and foot pain; her high blood pressure once required strong medication to prevent a heart attack; and the applicant assists her with medication. *Applicant's Mother's Statement*, dated January 15, 2008. The AAO notes that some of the applicant's mother's medical problems have been documented.

Counsel states that the applicant helps sustain the household financially. *Brief in Support of Appeal*. The record is not clear as to how he provides financial assistance.

However, considering the applicant's mother's connection to the applicant, the absence of her spouse, her medical issues, the normal results of separation from a son, the role that the applicant plays in assisting his mother's other two children, and her emotional issues, the AAO finds that she would experience extreme hardship upon remaining in the United States.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

See Matter of Mendez-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Id.* at 300. (Citations omitted).

The main adverse factors in the present case are the applicant's aforementioned convictions, his March 18, 1998 conviction for alcohol in a public place, and his unauthorized period of stay.

The favorable factors include the presence of the applicant's lawful permanent resident mother, extreme hardship to his mother, and letters attesting to his good moral character.

The AAO finds that the violations committed by the applicant are serious in nature and cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.