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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

FILE:

[REDACTED]

Office: MIAMI

Date:

MAR 08 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 Shimway

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Miami, Florida. 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 Panama. 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 child.

The District 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). *Decision of the District Director*, dated June 8, 2008.

On appeal, counsel for the applicant asserts that the applicant's spouse and child would suffer extreme hardship if the applicant's waiver application is denied. *Notice of Appeal (Form I-290B)*, filed July 1, 2008.

In support of the application, the record contains, but is not limited to, the applicant's spouse's birth certificate, the applicant's marriage certificate, the applicant's child's birth certificate, court dispositions, financial documentation, medical records, photographs, a country condition report, a letter from the applicant's spouse, and identification documents for the applicant's spouse's family members. 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.

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

The record reflects that on February 1, 2004, the applicant was convicted in the Circuit and County Courts of the Eleventh Judicial Circuit of Florida in and for Miami-Dade County of misdemeanor possession of not more than 20 grams of marijuana in violation of Florida Statutes § 893.13(6)(b) (case number [REDACTED]). Thus, the applicant has been convicted of a crime involving a controlled substance, and is inadmissible pursuant to section 212(a)(2)(A)(i)(II) of the Act. The applicant does not contest his inadmissibility on appeal.

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 child 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.

On appeal, counsel asserts that the director failed to consider the hardships the applicant’s son would suffer if he relocated to Panama. Counsel states that the applicant’s son would suffer from not having proper medical treatment for his hemangioma. Counsel notes that the hospitals in Panama provide poor medical care and it is possible that the applicant’s son’s birth defect would proliferate.

Counsel states that the director failed to consider the country conditions in Panama, and the applicant's child's lack of family ties outside the United States. Counsel states that the applicant's child's grandparents, aunts, uncles, and cousins reside in the United States, and he has no relatives abroad. *Appeal Brief*, undated.

Counsel further asserts that the applicant's spouse was born in the United States and has never lived outside the country. Counsel states that the applicant's spouse is part of a close-knit family, including her mother, father, sister, brother and grandparents, who are all U.S. citizens and reside within close proximity to each other. Counsel states that the applicant's spouse has worked hard to become a medical assistant and she would like to continue her education in the United States. Counsel states that Panama suffers from a high rate of unemployment, and the applicant and his spouse would have difficulty finding employment. *Appeal Brief*, undated. The applicant's spouse asserts that she has no future in Panama. She states that she is a medical assistant and would like to continue a nursing career in the United States. *Letter from* [REDACTED], dated December 17, 2007.

The record reflects that the applicant's five-year-old son, [REDACTED] is enrolled in the Florida Medicaid program. *See Letter from* [REDACTED] dated January 10, 2007. The record contains a letter from [REDACTED], stating that [REDACTED] has been diagnosed with a dermatologic condition known as strawberry hemangiomas, which are benign vascular tumors. [REDACTED] states that [REDACTED] has received treatment for multiple facial hemangiomas, including one on his lower lip, which could affect his ability to eat or speak well. [REDACTED] indicates that [REDACTED] has received topical steroid creams and steroid injections to control the severity of the growths. He notes that [REDACTED] may require further treatment for the next several years. *Letter from* [REDACTED], dated August 6, 2008.

Although the record establishes that the applicant's child is suffering from a medical condition, the applicant has failed to demonstrate that his child's condition is a serious condition that would not be treatable in Panama. According to the U.S. National Library of Medicine, strawberry hemangiomas are "a common vascular birthmark" and "usually grow quickly, stay the same size, and then go away. Ninety-five percent of strawberry hemangiomas disappear by the time the child is 9 years old." Medline Plus, *Birthmarks -- red*. Furthermore, the U.S. Department of State's travel advisory for Panama provides that "Panama City has some very good hospitals and clinics." *Country Specific Information, Panama*, dated November 30, 2009. Counsel contends that the director failed to consider the "high costs of the medical care and treatment that the qualifying child would need, including the financial impact." However, the applicant has failed to demonstrate the costs of medical coverage in Panama for his child, who is currently enrolled in a Medicaid program.

The AAO acknowledges that the applicant's spouse and child will suffer some hardship upon separation from their immediate family members who reside in the United States. The record contains her family members' identification documentations as evidence of their residence in the United States. However, the applicant's spouse has not discussed the extent of her family ties in the United States or expressed her desire to remain in the United States to keep her family unified. *See Letter from* [REDACTED] dated December 17, 2007. Moreover, the record does not

contain letters from her family members illustrating their close family bonds. Although counsel has asserted that the applicant's spouse and child are part of a close-knit family, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 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).

Finally, the applicant has claimed that his spouse would suffer financial hardship in Panama. According to the Central Intelligence Agency's report on Panama, the unemployment rate in Panama is at 4.4%. However, over 28% of the population lives below the poverty line. *The World Factbook*, dated January 19, 2011. While it is possible that the applicant and his spouse would face financial hardships upon relocation to Panama, they have not demonstrated that this hardship would go beyond the hardships typically associated with finding employment in a foreign country. The applicant has not stated whether his spouse would face language or other cultural barriers in Panama. The record reflects that the applicant's spouse is a phlebotomist, and she has a diploma in Medical Assisting. See *Letter from South Florida Cardiology Associates*, dated June 24, 2008 and *National School of Technology Diploma*, dated October 31, 2007. The applicant has not shown that his and his spouse's education and skills would not be transferable to employment in Panama.

All assertions of hardship to the applicant's qualifying family members, should they relocate to Panama, have been considered in the aggregate. While the AAO acknowledges that the applicant's spouse will suffer some hardships from the cultural adjustment of relocating to a new country, leaving family members in United States, and finding new employment, the applicant has not demonstrated that these hardships are atypical or beyond the norm for the spouse of an inadmissible alien. Nor has the applicant established that his son is particularly close with his extended family members, or requires medical care for a serious, chronic condition for which treatment is unavailable in Panama. Accordingly, the AAO cannot conclude that the applicant's spouse or child would suffer extreme hardship if they relocated with the applicant to maintain family unity.

With regard to extreme hardship upon separation, counsel asserts that the applicant's spouse would become a single parent and have an annual income of \$14,587. Counsel states that the applicant's spouse would find it difficult to support her child and visit the applicant in Panama. Counsel notes that the applicant's spouse would have to give up her educational goals. Counsel contends that it is doubtful the applicant would be able to earn enough money in Panama to assist his wife and child in the United States. Counsel states that the applicant's separation from his son would cause severe psychological trauma for his son. Counsel contends that the separation of the applicant from his wife would strain their marriage and "ultimately cause the marriage to end."

The applicant's spouse asserts that the applicant often cares for their son while she is working. She states that the applicant and their son are very emotionally attached, and a separation would cause psychological duress to her and damage their son's psychological well-being. She states that the applicant intends to continue his professional studies part-time, while financially contributing to their household. *Letter from* [REDACTED] dated December 17, 2007.

The AAO has considered the claims of financial hardship to the applicant's spouse, and finds that they are not supported by the record. Counsel states that the applicant is a crew chief for CSI Construction and supervises a crew of fourteen construction workers. *Appeal Brief*, undated. However, the record does not contain an employment verification letter, earnings statements, or any other evidence of the applicant's employment. As stated, the unsupported assertions of counsel do not constitute evidence. The AAO observes that the applicant left blank the section on his Biographic Information Form (Form G-325A), requesting information on his employment for the previous five years. The record does reflect that the applicant's spouse is employed as a head phlebotomist for a medical practice. *See Letter from* [REDACTED] dated June 24, 2008. The applicant earned her diploma in Medical Assisting on October 31, 2007. *See National School of Technology Diploma*, dated October 31, 2007. While the applicant's spouse's individual tax return from 2006 reflects that she earned \$14,587 for that year, she has not provided evidence of her income since receiving her diploma and taking a position as a head phlebotomist. While the AAO acknowledges that the applicant's absence will likely create some financial difficulty, we cannot determine the extent of the financial hardship without additional supporting evidence.

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 if she remains 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.

The AAO therefore finds that the applicant has failed to establish extreme hardship to his spouse or son as required under section 212(h) of the Act. Having found the applicant statutorily 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 proving eligibility rests 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.