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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

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Date: **MAY 19 2011** Office: KANSAS CITY, MO 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.

Thank you,

Perry Rhew

Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Jamaica 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. 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.

The field office director found that the applicant had failed to establish extreme hardship to his U.S. citizen spouse and the application was denied accordingly. *Decision of the Field Office Director*, dated January 6, 2009.

On appeal, counsel asserts that the field office director made errors of fact and law in her decision. *Form I-290B*, received February 5, 2009.

The record includes, but is not limited to, counsel's brief, counselor's letters, a psychological evaluation, a physician's letter, letters from friends and family, and country conditions information on Jamaica. The entire record was reviewed and considered in rendering a decision.

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

- (i) [A]ny 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 . . . is inadmissible.

The record reflects that on April 6, 2004, the applicant was convicted of simple larceny in Jamaica and sentenced to 9 months (suspended for two years).

Jamaica Penal Code § 262 provides, in pertinent part:

Larceny – (1) Stealing for which no special punishment is provided under this Code or any other Act for the time being in force is simple larceny and a felony punishable with imprisonment for five years.

Jamaica Penal Code § 259 provides, in pertinent part:

Definition of theft – (1) A person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof.

A conviction for larceny is considered to involve moral turpitude only when a permanent taking is intended. *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973). In the present case, Jamaica Penal Code § 262 refers to stealing, and stealing under Jamaica Penal Code § 259 involves the intent to permanently deprive. As such, the AAO finds the applicant's conviction for simple larceny under the Jamaica Penal Code § 262 to be a crime involving moral turpitude. Therefore, the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act. Counsel does not contest the applicant's inadmissibility on appeal.

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

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), . . . of subsection (a)(2) . . . if –

. . . .

(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 spouse is the only qualifying relative 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).

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 the 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 first part of the analysis requires the applicant to establish extreme hardship to a qualifying relative in the event of relocation to Jamaica. Counsel states that the applicant’s spouse does not have a single friend or family member in Jamaica; she has dozens of close friends and family members in the United States; she has resided in the United States her entire life; and she has never been to Jamaica. *Brief in Support of Appeal*, undated.

The applicant’s spouse’s clinical professional counselor states that the applicant’s spouse suffered from severe depression; she began taking medication after which she suffered from moderate depression; someone of her age would have more difficulty adjusting to changes in her life than a younger person; she has suffered from depression for many years; and relocation to Jamaica will cause her severe depression. *Letter from Keith A. White, MA, LCPC*, dated February 24, 2009. The applicant’s spouse was evaluated by a psychologist who states that the applicant’s spouse has the

following diagnostic impressions: major depression, obesity, history of hypertension, arthritis, lap band surgery and severe family problems. *Psychological Evaluation*, dated February 20, 2009. The psychologist states that the applicant has been depressed all of her life; records of her past depression are unavailable or untraceable; she has taken medication on and off for 15 years; her father was emotionally abusive towards her; she was divorced due to infidelity; she raised three children as a single parent; and her second marriage lasted three months after her spouse was unfaithful, physically abusive and stole her money. *Id.* The applicant's spouse states that she would have a hard time caring for herself without her network of friends, family and medical professionals. *Applicant's Spouse's Statement*, dated March 8, 2007. The record includes numerous letters from friends and family members detailing their observations of the applicant's spouse experiencing emotional problems due to difficult situations in her life. The record does not include documentary evidence that the applicant's spouse has taken any medication for her emotional/psychological issues.

The applicant's spouse's physician states that the applicant's spouse has been under his care since August 1996; she is being followed and treated for degenerative arthritis, hypertension and depression; she requires a cane for ambulation due to significant degenerative arthritis primarily in her knees; and she has been treated for intermittent back pain, which is presently stable. *Letter from [REDACTED] M.D.*, dated August 9, 2008. The record includes numerous letters from friends and family members detailing their observations of the applicant's spouse experiencing problems due to arthritis. The record reflects that the applicant's spouse is 64 years old.

Counsel asserts that if the applicant is forced to retire from her current position now, as opposed to three years from now, she will draw \$184 less per month. *Brief in Support of Appeal*. The record includes a document from the Kansas City Board of Election Commissioners which appears to verify this statement, although the applicant's spouse's name is not on the document.

The record includes country conditions information on Jamaica which detail violent crimes in the country. The record is not clear as to whether the applicant's spouse would be residing in a dangerous part of Jamaica.

The applicant's spouse states that due to her age and training she is concerned that she could not obtain employment in Jamaica. *Applicant's Spouse's Statement*. The record includes country conditions information on Jamaica which detail employment issues in the country. The record indicates that it would be difficult for the applicant's spouse to obtain employment in Jamaica. However, the record does not include sufficient evidence to establish that the applicant would not be able to obtain employment in Jamaica.

Considering the applicant's spouse's age, her lack of ties to Jamaica, her ties to the United States, her emotional issues, her medical issues, loss of retirement income and general country conditions, the AAO finds that she would experience extreme hardship upon residing in Jamaica.

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. As mentioned, the applicant's spouse's clinical professional counselor states that the applicant's spouse suffered from severe depression; she began taking medication after which she suffered from moderate depression; someone of her age would have more difficulty adjusting to changes in her life than a younger person; and separation from the

applicant will cause her severe depression. *Letter from [REDACTED] MA, LCPC*, dated February 24, 2009. The applicant's spouse was evaluated by a psychologist who states that the applicant's spouse has the following diagnostic impressions: major depression, obesity, history of hypertension, arthritis and severe family problems. *Psychological Evaluation*, dated February 20, 2009. The record includes numerous letters from friends and family members detailing their observations of the applicant's spouse experiencing emotional problems and difficult life situations, and of the emotional support that the applicant provides to her. The applicant's spouse also details the positive impact that the applicant has made on her life. *Applicant's Spouse's Statement*.

The applicant's spouse's physician states that the applicant's spouse has been under his care since August 1996; she is being followed and treated for degenerative arthritis, hypertension and depression; she requires a cane for ambulation due to significant degenerative arthritis primarily in her knees; and she has been treated for intermittent back pain, which is presently stable. *Letter from [REDACTED] M.D.* The record includes letters from the applicant's spouse's friends and family members detailing the assistance that the applicant provides to his spouse due to her physical limitations.

Considering the applicant's spouse's emotional and medical issues, the role the applicant plays in assisting her, and the normal results of a permanent separation from a spouse, the AAO finds the applicant's spouse would experience extreme hardship if she remained in the United States without the applicant.

The granting of the waiver is discretionary in nature. The favorable factors include the applicant's U.S. citizen spouse, extreme hardship to his spouse, lack of a criminal record since his conviction, and numerous letters evidencing good moral character.

The unfavorable factors include the applicant's criminal conviction, unauthorized period of stay and unauthorized employment.

Although the applicant's criminal history is serious and cannot be condoned, the AAO finds that the applicant has established that the favorable factors in his application outweigh the unfavorable factors.

In discretionary matters, the applicant bears the full burden of proving her eligibility for discretionary relief. *See Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976). Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

**ORDER:** The appeal is sustained.