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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: HIALEAH, FL Date: APR 12 2012

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,

for Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The application was denied by the Field Office Director, Hialeah, Florida and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Costa Rica 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 committed a controlled substance violation. 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 her U.S. citizen husband and child.

In her decision, dated October 2, 2009, the field office director concluded that the applicant's conviction for possession of drug paraphernalia renders her ineligible for a waiver of inadmissibility, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601), accordingly.

On appeal, counsel asserts that a factual inquiry into the applicant's conviction indicates that the applicant's conviction was related to simple possession of marijuana and the applicant is eligible to apply for a waiver.

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

- (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 –
    - .....
    - (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 August 30, 1998, the applicant was charged with possession of drug paraphernalia, possession of an alcoholic beverage by person under twenty-one years of age, and driving under the influence of a controlled substance. On June 2, 1999, the applicant was convicted in the District Court of Miami-Dade County, Florida of "Possession of Drug Paraphernalia" under Florida Statutes § 893.147, section 21-81A and Reckless Driving under Florida Statutes § 316.192. The record also reflects that on March 11, 2005 the applicant was arrested and then subsequently convicted of resisting an officer without violence.

In *Matter of Martinez Espinoza*, 25 I&N Dec. 118 (BIA 2009), the BIA addressed the issue of whether an alien can file a 212(h) waiver in a case involving a controlled substance conviction for possession or use of drug paraphernalia. The respondent in *Martinez Espinoza* asserted that drug paraphernalia is not prohibited under Federal law. 25 I&N Dec. at 118, 122. The BIA noted that this argument is without merit since "section 212(a)(2)(A)(i)(II) of the Act does not require that a

State offense be punishable under Federal law in order to support a charge of inadmissibility.” *Id.* The BIA stated that although section 212(a)(2)(A)(i)(II) contains the phrase “as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802),” the phrase “modifies only its immediate antecedent (i.e., ‘controlled substance’), not the whole text of the section.” The BIA viewed the phrase “relating to a controlled substance” under section 212(a)(2)(A)(i)(II) of the Act and concluded that “a law prohibiting the possession of an item intentionally used for manufacturing, using, testing, or enhancing the effect of a controlled substance necessarily pertains to a controlled substance.” *Id.* at 120. The BIA held that possession of “a pipe for smoking marijuana is a crime within the scope of [section 212(a)(2)(A)(i)(II)] because drug paraphernalia relates to the drug with which it is used.” *Id.* at 120 (citation omitted).

In the instant case, the applicant does not dispute that her conviction relates to a controlled substance and that as a result she is inadmissible under section 212(a)(2)(A)(i)(II) of the Act for having been convicted of a violation of a law relating to a controlled substance. However, counsel does contend a factual inquiry shows that this offense was related to a simple possession of less than 30 grams of marijuana and the applicant is thus eligible for a waiver of her inadmissibility.

A section 212(h) the Act waiver of the bar to admission, resulting from the violation of section 212(a)(2)(A)(i)(II) of the Act, is only available for a single offense relating to simple possession of 30 grams or less of marijuana. In *Martinez Espinoza*, the BIA held that “an alien who is inadmissible under section 212(a)(2)(A)(i)(II) of the Act may apply for a section 212(h) waiver if he demonstrates by a preponderance of the evidence that the conduct that made him inadmissible was either ‘a single offense of simple possession of 30 grams or less of marijuana’ or an act that ‘relate[d] to’ such an offense,” such as the possession or use of drug paraphernalia. 25 I&N Dec. at 125. The BIA stated that in determining whether an offense relates to a simple possession of 30 grams or less of marijuana, a categorically inquiry of the offense would obviously be insufficient. *Id.* at 124 (“it is hard to imagine any offense—apart from a few inchoate offenses—that could ‘relate to’ it categorically without actually *being* a simple marijuana possession offense.”). The BIA determined that it was the intent of Congress to have “a factual inquiry into whether an alien’s criminal conduct bore such a close relationship to the simple possession of a minimal quantity of marijuana that it should be treated with the same degree of forbearance under the immigration laws as the simple possession offense itself.” *Id.* at 124-25.

Pursuant to *Martinez Espinoza*, *supra*, and as stated by counsel, we must look at the factual circumstances behind the applicant’s conviction to determine whether it relates to a simple possession of 30 grams or less of marijuana. In this case, the applicant has submitted her arrest report, which indicates that a police officer smelled a strong odor of marijuana in the applicant’s make-up bag where he also found a pipe for smoking marijuana. The arrest report does not indicate that any marijuana was actually found, but the applicant did indicate to the officer that she smokes marijuana to relieve stress. In a declaration dated November 28, 2009, the applicant stated that she has “only used marijuana in small amounts and for personal use certainly less than 30 grams.” We find that this brief statement lacks detail concerning the full extent of her drug use over time, or even on the occasion in question, and the basis for her calculation that the amount did not exceed 30 grams is not specified. It is the applicant’s burden to demonstrate that she is eligible for a waiver of inadmissibility, and the evidence submitted is insufficient to establish that her possession of drug paraphernalia related to simple possession of 30 grams or less of marijuana. Nevertheless, assuming, *arguendo*, that the applicant is able to demonstrate eligibility to apply for a waiver of

inadmissibility under 212(h), the AAO will consider whether she has shown extreme hardship to a qualifying relative to warrant such waiver.

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), (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 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 child and spouse 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).

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 in 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.

The record of hardship includes two statements from the applicant, a statement from the applicant’s spouse, and numerous letters of reference concerning the applicant’s good moral character and community involvement.

The applicant’s spouse is claiming extreme emotional and financial hardship as a result of the applicant’s inadmissibility. He states that he holds a position as department head with his primary employer as a computer technician and that he has a second job with [REDACTED]. He states that he has to have two jobs in order to meet all the household expenses because his wife cannot work. The applicant’s spouse asserts that his wife is the primary caretaker of their son, so if she was removed, their son would relocate to Costa Rica with her. He states that he would not be able to afford travel to Costa Rica to see his family and lists numerous debts the family is obligated to pay. The applicant’s spouse asserts that he would face emotional hardship as a result of being separated from his wife and son.

Based on the current record the AAO cannot find that the applicant’s inadmissibility would cause her spouse and/or child extreme hardship. The record does not include supporting documentation

regarding the hardship claims that the applicant's spouse makes. Furthermore, the applicant's spouse has made no assertions regarding possible hardships that may result from the entire family relocating to Costa Rica. 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. 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). The applicant must submit documentation to support any hardship claims made.

A review of the documentation in the record fails to establish extreme hardship to the applicant's spouse and/or son as a result of the applicant's inadmissibility to the United States. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether she 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.