U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Avenue, NW, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

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DATE: DEC 0 5 2012 Office: NEWARK, NEW JERSEY 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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** 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 Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Newark, New Jersey. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of Nigeria who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude, and 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 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 conjunction with an application for adjustment of status, in order remain in the United States with his U.S. citizen wife and minor children.

The Field Office Director concluded that the record established the existence of extreme hardship to the qualifying relatives, as required for a waiver under section 212(h) of the Act. However, the director found that the applicant did not merit an exercise of discretion, and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Field Office Director's Decision,* dated November 30, 2010.

On appeal, counsel contends that the director erred in finding that the applicant's weapons possession conviction is not a crime involving moral turpitude and asserts that the applicant's conviction for marijuana may be waived under section 212(h) of the Act because the gross weight of the marijuana involved was less than 30 grams. He further asserts that the director erred in giving too much weight to the negative discretionary factors in denying the applicant's waiver application.

The record of evidence includes, but is not limited to, the applicant's wife's statement; birth certificates of the applicant's U.S. citizen children; doctor's letters and medical records for the applicant's two U.S. citizen children; the applicant's and his wife's marriage certificate; the couple's 2009 tax returns; documents evidencing the bona fides of the applicant's marriage; and the applicant's conviction records. The entire record was reviewed and considered in rendering this decision on the appeal.

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.
>
> (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.

(ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

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

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

(1) (A) . . . .

(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 . . . .

The applicant alleges that he first entered the United States on or about August 15, 1989. *See Form I-485, Application to Register Permanent Resident or Adjust Status,* dated January 29, 2005. He remained in the United States without permission. He thereafter departed the United States and was paroled back into the country for a period of one year on or about January 11, 2006 to pursue his pending application for adjustment of status. *See Form I-94, Arrival/Departure Record*, issued January 11, 2006. The adjustment application, which was based on an approved visa petition by his current U.S. citizen wife, was subsequently denied on May 11, 2006. The applicant filed a subsequent adjustment application, dated on February 1, 2007, along with the Form I-601 waiver application that is the basis of the instant appeal.

The record shows that the applicant was arrested on October 28, 1994 and charged with possession of a weapon of mass destruction in violation of section 14-288.8 of the North Carolina General Statutes (N.C.G.S) and with felony possession of a weapon on school grounds. He was convicted on the first charge on July 18, 1995 and was sentenced to 13 to 16 months imprisonment and 24 months of probation. The record contains a criminal court computer printout, showing the conviction, and a court letter, indicating that its records from the year of the conviction had been destroyed. The applicant was also convicted on June 6, 2006 of possession of marijuana under 50 grams in violation of section 2C:35-10A(4) of the New Jersey Statutes (N.J.S.).

On appeal, counsel contends that the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act because the conviction for possession of a weapon of mass destruction is not a crime involving moral turpitude. However, as counsel has not disputed the applicant's inadmissibility under section 212(a)(2)(A)(i)(II) of the Act, for controlled substance violation, based on the latter's marijuana conviction, and the record does not show the finding to be in error, the AAO will not disturb that determination of inadmissibility. The applicant seeks a waiver under section 212(h) to overcome inadmissibility. The qualifying relatives for purposes of this waiver are the applicant's U.S. citizen wife and two U.S. citizen children.

The record demonstrates that the applicant's conviction for possession of less than 50 grams of marijuana involved less than 30 grams of the drug. The lab report contained in the record indicates the actual amount of marijuana involved to be 0.32 grams. Accordingly, the director properly considered the applicant's application for a waiver under section 212(h) of the Act, as the conviction did not render him statutorily ineligible for the waiver. We need not address counsel's contention that the applicant's weapons conviction is not a crime involving moral turpitude, inasmuch the applicant requires the section 212(h) waiver to overcome inadmissibility arising from the marijuana conviction regardless.

Section 212(h) of the Act provides that a waiver of the bar to admission is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (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 of Immigration Appeals 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 v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (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 director determined that the applicant demonstrated extreme hardship to his qualifying relatives, namely his U.S. citizen spouse and children. The record reflects that the applicant's wife suffers chronic uncontrolled hypertension and receives treatment for allergic bronchitis. The evidence also demonstrates that both of the applicant's U.S. citizen children, now ages eight and nine, were born severely premature, resulting in a number of medical complications. Medical records indicate that

the applicant's son, [redacted] was previously treated for Gastrostomy Tub, ASD with Shunting, and Chronic Lung Disease. The applicant's wife in her letter indicates that her son's medical problems resulted in other problems, including delayed development and notes that he remained in the hospital for eight months after his birth. She indicates that she relied on her husband physically and emotionally to help her with her son's medical problems. She asserts that she and the applicant are always going in and out of doctor's offices and emergency visits at the hospital because of her son's chronic lung disease and severe asthma. Both children suffer from lung problems resulting from their premature births, currently manifesting as asthma. The applicant's wife also indicates that her son is receiving Medicaid and social security income assistance due to his medical history and delayed development, in part because her husband does not have work authorization papers that would enable him to assist the family more financially. She also maintains that it is not an option for her to relocate to Nigeria, as her children's and her own medical needs cannot be met there. Based on the evidence in the record, the AAO concurs that the applicant has demonstrated extreme hardship to a qualifying relative.

However, as noted, even where the applicant satisfies the statutory requirements for the waiver, it may still be denied in the exercise of discretion. For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Matter of Mendez*, 21 I&N Dec. at 299. The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

In the instant case, the applicant, as a matter of discretion, does not merit a grant of this waiver. The negative discretionary factors against this applicant include his immigration violations and criminal history. Specifically, this applicant has resided unlawfully in the United States without authorization since 1989. Since his initial entry, the applicant has accumulated a lengthy history of criminal and traffic violations, including the two previously referenced convictions, which we find to be weighty adverse factors.

On April 3, 1993, the applicant was arrested and charged with obstruction of justice in violation of N.J.S. § 2C:29-3. The complaint and arrest report indicate that the applicant falsely provided his brother's name and information during a routine traffic stop. The matter was administratively dismissed when the applicant failed to appear in court. During the course of pursuing his adjustment application, the applicant attempted to obtain court records of this case. Subsequently, the criminal charges were refiled and on May 24, 2006, the applicant was found guilty of hindering apprehension in violation of N.J.S. § 2C:29-3(a)(7).

On July 20, 1994, the applicant was convicted in North Carolina of driving without a license in violation of N.C.G.S. § 20-158(b)(2).

On May 12, 1994, he was charged with driving without a license in violation of N.C.G.S. § 20-7(a) and failure to stoop in violation of N.C.G.S. § 20-158(b)(2). The court's computer printout indicates there was disposition on March 11, 1996, but does not provide the disposition itself.

On August 14, 1994, the applicant was charged with failure to return rental property in violation of N.C.G.S. § 14-167. Once again, while a disposition date provided, there is no disposition indicated in the court's computer printout contained in the record.

Following an October 28, 1994 arrest, the applicant was convicted of possession of a weapon of mass destruction under N.C.G.S. § 14-288.8 on July 18, 1995, as detailed previously. Counsel asserts on appeal that the conviction related only to a shotgun with one barrel under 18 inches and contends that the director erred in finding that the crime was committed on school property where there was no confirmable evidence of such fact. The AAO notes again, however, that it is the applicant who bears the burden to demonstrate that he is deserving of discretionary relief. *Matter of Mendez*, 21 I&N Dec. at 299. The criminal enforcement records specify that the applicant was initially charged with two separate counts, including possession of a weapon on school grounds. In addition to shotguns, section 14-288.8 of the N.C.G.S. includes in the definition of "weapon of mass death and destruction," bombs, grenades, and other such devices. The applicant has not provided any criminal complaints, arrest reports, transcripts, or other records specifying the weapon or demonstrating the facts as asserted by counsel. There are also no presentence reports or statements from the applicant, relaying the circumstances of the arrest and conviction. Moreover, the lengthy sentence imposed is suggestive of the severity of the crime. Based on the record and absent evidence to the contrary, we find it reasonable to conclude that the applicant committed the crime on school grounds, potentially endangering the lives of children. The applicant has not demonstrated otherwise. Although we have found it unnecessary to address whether or not this crime is a crime involving moral turpitude, we note that if it were found to be such, we would also deem it a violent or dangerous crime, requiring the applicant to meet the heightened discretionary standard at 8 C.F.R. § 212.7(d).

On March 16, 1995, the applicant was arrested for possession of fictitious and/or expired license plates and/or vehicle registration in violation of N.C.G.S. § 20-111(2). The matter was resolved on April 11, 1995, but the disposition is not specified in the court printout provided by the applicant.

On May 25, 1995, the applicant was charged under N.C.G.S. § 14-107(d)(4) with issuing a check drawn on an account he knew to be closed. The court printout provided does not show the matter to have been resolved.

On June 8, 1995, the applicant was arrested and charged with breaking and entering in violation of N.C.G.S. §14-54(a) and for larceny under N.C.G.S. § 14-72(b)(2). The court printout provided does not show the matter to have been resolved.

On July 28, 1995, the applicant was again stopped for failing to stop for a red light in violation of N.C.G.S. § 20-158(b)(2) and for driving while his license had been revoked in violation of N.C.G.S. § 20-28(a). He was convicted of the former charge on March 11, 1996.

On February 15, 1996, the applicant was against stopped for driving while his license had been revoked in violation of N.C.G.S. § 20-28(a). He pled guilty to driving without a license under while his license had been revoked in violation of N.C.G.S. § 20-27(a) on March 28, 1996.

On February 7, 2006, shortly after the applicant was paroled back into the United States and while his first adjustment application was pending, he was again arrested. He was convicted of possession of marijuana on June 6, 2006 under N.J.S. § 2C:29-3(a)(7).

After the applicant's adjustment application was denied and while his second one was pending, the applicant was arrested on August 10, 2008 of driving while impaired in violation of N.C.G.S. § 20-138.1(a) and possession of marijuana in violation of N.C.G.S. § 90-95(d)(4). He was convicted of driving while impaired on October 27, 2008 and was sentenced to 30 days imprisonment and 18 months of probation.

The applicant's extensive history of criminal and traffic violations, along with his immigration violations, show an obvious disregard for the laws of the United States. Moreover, we note that the criminal records provided for a number of his arrests do not reflect a disposition of the charges, including the charges of breaking and entering and larceny. These latter charges, along with his arrest and conviction for driving while impaired, also suggest that the applicant poses a danger to others in the community. The applicant has not provided evidence of having attended or completed any rehabilitation programs, or any statements or other evidence showing his remorse and rehabilitation for his criminal acts. In fact, his most recent arrests in 2006 and 2008, after the birth of his children and while his application seeking an immigration benefit from the United States government remained pending, are evidence to the contrary.

The favorable discretionary factors for this applicant are his U.S. citizen wife and minor children; his long-term, albeit unlawful, residence in the United States; the extreme hardships that would be suffered by his U.S. citizen spouse and children whether they are separated from the applicant in the United States or relocates to Nigeria, as detailed above, and the letter of support by the applicant's wife submitted on behalf of the applicant.

The immigration and criminal violations committed by the applicant are serious in nature and cannot be condoned. The applicant's has recent convictions, occurring while his adjustment of status application was pending, which demonstrate a lack of rehabilitation. In addition, the applicant has a lengthy traffic violation history, having had his license revoked on multiple occasions. Through his actions, the applicant has demonstrated a continuing disregard for the immigration and criminal justice systems. The AAO finds that the applicant has not established that the favorable factors in his application outweigh the unfavorable factors. Therefore, a favorable exercise of the Secretary's discretion is not warranted.

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. 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.