

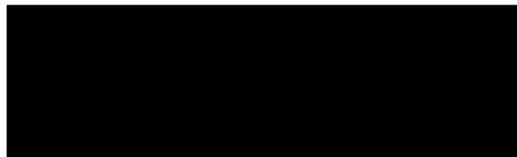
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**



H2

Date: **FEB 01 2012**

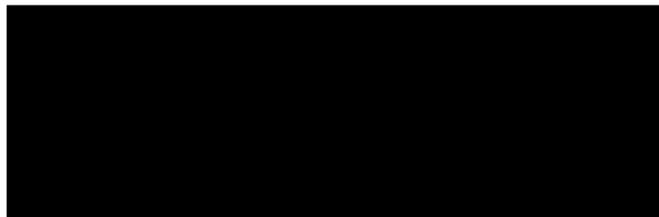
Office: BALTIMORE, MD

FILE: 

IN RE: 

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 District Director, Baltimore, Maryland. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen and reconsider. The motion to reopen and reconsider will be granted and the waiver application will be approved.

The record reflects that the applicant is a native and citizen of New Zealand 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 been convicted of a crime involving moral turpitude.¹ The applicant's spouse is a U.S. citizen. The applicant seeks a waiver of inadmissibility in order to reside in the United States.

The district director found that the applicant was convicted of procuring/possessing a cannabis plant, and this conviction constitutes a crime involving moral turpitude. The applicant failed to submit evidence that he was convicted of possession of under 30 grams, and therefore he failed to establish eligibility for a section 212(h) waiver. *Decision of the District Director*, at 2, dated September 27, 2006. The district director denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Id.* at 3.

On appeal, counsel states that the district director abused his discretion by summarily dismissing the waiver in a context-free denial, the denial was arbitrary and capricious, and no weight was given to the evidence submitted. *Notice of Appeal (Form I-290B)*, received October 11, 2006. Counsel further contends that the applicant has not been convicted of a crime involving moral turpitude. *Brief in Support of Appeal*, received October 23, 2006.

The AAO found that the applicant was eligible to apply for a waiver under section 212(h). However, the AAO concluded that the applicant failed to establish extreme hardship to a qualifying relative, as required by the Act. Consequently, the appeal was dismissed. *Decision of the AAO*, dated June 30, 2009.

In support of the instant motion, counsel for the applicant submitted Form I-290B referencing exhibits including additional financial documentation; an updated letter from the qualifying spouse, her family and friends; medical documentation; photographs; and birth certificates for the qualifying spouse's sister and her youngest nephew. The entire record was reviewed and considered in rendering this decision.

The record reflects that on May 20, 1998, the applicant was convicted of possession of cannabis under Section 7(1)(a) of the New Zealand Misuse of Drugs Act of 1975. *Applicant's Criminal Convictions Report*, dated April 11, 2006. The record reflects that the applicant was in possession of approximately 2 grams of cannabis when he was arrested. *Applicant's Caption Sheet*, undated. As

¹ The AAO notes that section 212(a)(2)(A)(i)(I) of the Act deals with crimes involving moral turpitude and section 212(a)(2)(A)(i)(II) of the Act deals with violation of controlled substance laws.

such, the applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act for violating a law relating to a controlled substance.²

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

(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, or
- (II) A violation (or a 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:

(h) The Attorney General [now, Secretary, Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) and of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if –

....

- (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 [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 is eligible to file for a section 212(h) waiver as his conviction was for a single offense of simple possession of 30 grams or less of marijuana. A waiver of inadmissibility under section

² The AAO notes that the applicant's possession of cannabis conviction does not render him inadmissible under section 212(a)(2)(A)(i)(I) of the Act for committing a crime involving moral turpitude. Moreover, it appears the applicant's February 15, 1995 assault conviction in New Zealand constitutes a simple assault, as the applicant was convicted under Section 194 for "Assault on a child, or by a male on a female" and not for the assaults covered under Sections 192 or 193, which are more likely to be defined as crimes involving moral turpitude or violent or dangerous crimes.

212(h)(1)(B) 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 or parent of the applicant. The applicant's wife 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).

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 applicant's attorney asserts that the qualifying spouse would face emotional, psychological, medical and financial hardships if the applicant returned to New Zealand. The applicant's attorney indicates that, since the filing of the appeal, the qualifying spouse has suffered two miscarriages, is no longer employed and has been raising her sister's child.

The AAO finds that the applicant's spouse would suffer extreme hardship as a consequence of being separated from the applicant. With respect to the qualifying spouse's emotional and psychological issues, the qualifying spouse's cardiologist indicates in a letter that she suffers from depression. Further, letters from the qualifying spouse, her mother, sister and brother confirm that her family has a history of issues with depression. In the qualifying spouse's sister's letter, she indicated that her own depression issues resulted in drug addiction problems, and a letter from her drug addiction counselor confirms her substance abuse issues. The applicant's attorney also claims that the qualifying spouse has suffered from several medical issues including two miscarriages, heart and breast problems. The record contains documentation from the qualifying spouse's doctors to demonstrate that she suffered from two miscarriages since the filing of her appeal. Further, letters from the qualifying spouse, family and friends describe how emotionally difficult these miscarriages have been for the qualifying spouse. Moreover, the medical documentation provided also lends support to assertions relating to the qualifying spouse's heart and breast concerns.

The applicant's attorney also contends that the qualifying spouse would suffer financial hardship, if the applicant returned to New Zealand, because the applicant has been supporting the qualifying spouse as she is no longer employed. The record contains documentation to demonstrate that the qualifying spouse has been seeking employment and has been denied unemployment benefits. Further, the record contains financial documentation including tax returns and expenses. The documentation provided indicates that the qualifying spouse is in severe debt and has many financial obligations, which far exceed her income. Further, the record also contains letters from the qualifying spouse, family and friends confirming her financial difficulties. For example, letters from the qualifying spouse's mother and brother confirm that her brother moved into her home to help her financially. Moreover, the qualifying spouse's sister also confirms that the qualifying spouse and the applicant financially support their nephew. The qualifying spouse's tax returns also list her nephew as a dependent, demonstrating an additional financial responsibility. As such, the record reflects that the cumulative effect of the emotional, psychological, medical and financial hardships the applicant's spouse would experience in the United States without the applicant rises to the level of extreme.

The AAO further concludes that the applicant has demonstrated that his spouse would suffer extreme hardship in the event that she relocates to New Zealand to be with him. The qualifying spouse was born in the United States, and has resided here for over thirty five years. Further, the qualifying spouse's entire immediate family and her dependent United States citizen nephew live in the United States. Letters from the qualifying spouse's family and friends also establish the close relationships that the qualifying spouse has to her family. The record establishes that the qualifying spouse has been providing emotional and financial support to her sister's child, as her sister is a recovering drug addict. The qualifying spouse also has a close relationship with her elderly grandmother and her mother. Further, in her mother's letter, she states that she has never been on a plane in her entire life because she is afraid to fly and therefore cannot visit her daughter in New Zealand. Moreover, through medical documentation, the qualifying spouse has demonstrated that she has established long-term relationships with her cardiologists and it would be difficult for her to relocate from her medical providers. When considered in the aggregate, the qualifying spouse would suffer extreme hardship if she relocated to New Zealand due to her length of stay in the United States, her separation from her family members and her possible medical hardships.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). 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. *Id.* 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 *Matter of Mendez-Moralez*, in evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the BIA stated that:

The factors adverse to the applicant 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, recency and seriousness, and the presence of other evidence indicative of an 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 the alien began his 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 and service to 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). . . .

Id. at 301.

The BIA further states that upon review of the record as a whole, a balancing of the equities and

adverse matters must be made to determine whether discretion should be favorably exercised. The equities that the applicant for relief must bring forward to establish that he merits a favorable exercise of administrative discretion will depend in each case on the nature and circumstances of the ground of exclusion sought to be waived and on the presence of any additional adverse matters, and as the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence. *Id.* at 301.

The favorable factors in this matter are the extreme hardships the applicant's United States citizen spouse would face if the applicant is not granted this waiver, regardless of whether she accompanied the applicant or remained in the United States, his support from family and friends and his financial support to the qualifying spouse. The unfavorable factors in this matter are the applicant's criminal convictions including his illegal possession of cannabis and his assault conviction. Moreover, the applicant has resided without legal status in the United States for various periods of time, including remaining in the United States after his visitor's visa expired (2000) until he filed for adjustment of status (2005), and failing to depart the United States after his adjustment application was denied (2006).

Although the applicant's violations of the criminal laws are serious and cannot be condoned, the positive factors in this case outweigh the negative factors. The AAO therefore finds that a favorable exercise of discretion is warranted. In these proceedings, the burden of establishing eligibility for the waiver rests entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met his burden and the appeal will be sustained.

ORDER: The motion will be granted, the previous decision withdrawn and the waiver application approved.