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

[REDACTED]

H₂

Date: **FEB 13 2012**

Office: PORTLAND, MAINE

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 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 waiver application was denied by the Field Office Director, Portland, Maine, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native of Barbados who was found to be inadmissible under 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 been convicted of a crime involving moral turpitude; and under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), and for having been convicted of a crime involving a controlled substance (marijuana less than 30 grams). The applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h). The director concluded that the applicant had failed to establish that his admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On appeal, counsel declares that U.S. Citizenship and Immigration Services erred in stating that the applicant did not provide sufficient evidence to demonstrate that the applicant's mother will experience extreme hardship. Counsel conveys that the affidavit of the applicant's mother is credible because it is consistent with the medical records showing that the applicant's mother had arthroscopic surgery. Counsel states that though the applicant's doctor did not indicate that the applicant's mother required assistance for daily activities, the doctor stated on January 31, 2006 that the applicant's mother continues to have occasional knee pain and is cautious walking up and down stairs. Counsel conveys that the applicant's mother is not able to walk down stairs to the basement where laundry and food supplies are, and that the applicant's mother is physically not able to work the number of hours required to support her family. And finally, counsel states that the submitted report on National Public Radio indicates that arthroscopic surgery provides few long-term benefits.

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

(2) 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 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines “conviction” for immigration purposes as:

A formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where –

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.

On June [REDACTED], the applicant was found guilty of motor vehicle larceny in violation of section 28(a) of chapter 266 of the General Laws of Massachusetts. The judge sentenced the applicant to serve 11 months of probation. On October [REDACTED] the applicant pled guilty to drug possession class D in violation of section 34 of chapter 94(C) of the General Laws of Massachusetts, and to assault or assault and battery in violation of section 13A/B of chapter 265 of the General Laws of Massachusetts. For the drug and assault and battery offense, the judge’s sentence indicated that the applicant pled guilty and that sufficient facts were found for the plea, and that the matter was to be continued without finding guilt.¹ The judge sentenced the applicant to pretrial probation, and on April [REDACTED] the offenses were dismissed on recommendation of the Probation Department.

As the applicant has not disputed inadmissibility on appeal, and the record does not show the finding of inadmissibility under section 212(a)(2)(A)(i)(II) of the Act to be erroneous, we will not disturb the finding of the director. Additionally, the director stated that, on November [REDACTED] in Massachusetts, the applicant was charged with assault with a dangerous weapon and possession of a firearm without permit, and that the applicant failed to submit requested certified court dispositions for the charges. Assault with a deadly weapon is a crime involving moral turpitude. *See Matter of Sanudo*, 23 I&N Dec. 968, 971 (BIA 2006) (“assault and battery with a deadly weapon has long been deemed a crime involving moral turpitude . . . because the knowing use or attempted use of deadly force is deemed to be an act of moral depravity that takes the offense outside the “simple assault and battery” category.” Thus, if this charge resulted in a conviction, it would be a crime involving moral turpitude, and it would render the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act.²

¹ There is insufficient evidence in the record to determine whether this assault and battery offense was a “simple” assault/battery, or whether it involved aggravating circumstance that would render it a crime involving moral turpitude. As the applicant’s controlled substance conviction renders him inadmissible under section 212(a)(2)(A)(i)(II) of the Act, and we dismiss the appeal because the applicant has not demonstrated extreme hardship to a qualifying relative, we need not address this issue. However, we note that if it is a crime involving moral turpitude, it is also likely a violent or dangerous crime, which would require that the applicant satisfy the conditions of 8 C.F.R. § 212.7(d) for a favorable exercise of discretion.

² Assault with a deadly weapon is also a violent or dangerous crime, requiring the applicant to satisfy the conditions of 8 C.F.R. § 212.7(d) for a favorable exercise of discretion.

The waiver for inadmissibility under section 212(a)(2)(A)(i)(I) and (II) of the Act is found under section 212(h) of the Act. That section provides, in pertinent part:

- (h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B) . . . of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection as it relates to a single offense of simple possession of 30 grams 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 section 212(h) waiver of the bar to admission resulting from violation of section 212(a)(2)(A)(i)(I) and (II) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant is not a consideration under the statute and will be considered only to the extent that it results in hardship to a qualifying relative. The qualifying relatives in this case are the applicant's U.S. citizen mother and stepfather. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Moralez*, 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 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.

In rendering this decision, the AAO will consider all of the evidence in the record.

The applicant’s mother stated in the letter dated April 19, 2006 that the applicant lived in poor conditions in Barbados with his father so she eventually brought him to the United States. The applicant’s mother conveyed that she had surgery on her left leg in 2005 to relieve pain, and still has tightness, burning, and pain in her leg where she had a blood clot; and that she has pain in her right leg and might require surgery. She conveyed that she reduced her work hours after the surgery because her leg is not able to withstand stress. The applicant’s mother stated that, while at home, she elevates her feet, as her doctor advised, and that she is able to do this because the applicant helps her with household chores as well as when she has migraine headaches. The applicant’s mother stated that her husband is not able to help with household chores due to his work works as a courier. The applicant’s mother declares that if the applicant could get a job and drive that would be even more helpful. The applicant’s mother conveyed that it would be an extreme hardship for her to support herself and perform daily household chores.

The asserted hardship factors in the instant case are emotional and financial in nature. Medical records are consistent with the applicant’s mother’s statement of having knee arthroscopy. In regard to her mobility, the evaluations dated November 2, 2005 and August 12, 2005 do not corroborate her statements. The November evaluation conveyed that the applicant’s mother “goes up the stairs well”

and is “a little uncomfortable” going down the stairs, and “has made excellent progress and continues to improve.” The August evaluation conveyed that the applicant’s mother “is happy with her progress. She is now able to drive as well as go up and down stairs.” The applicant has not submitted any recent medical records to indicate his mother’s current condition. The applicant has not submitted independent documentation to demonstrate that due to his mother’s reduced work hours his mother and stepfather are not able to meet their household expenses. The medical records submitted indicate that the applicant’s mother has a daughter who accompanied her to medical appointments. We acknowledge that the applicant’s mother has a close relationship with their son and that he has assisted her with household chores. Yet when the hardship factors are considered collectively, we find they do not demonstrate that the applicant’s mother and stepfather will experience extreme hardship if they remain in the United States without him. Additionally, the applicant has not described the hardships that his mother and stepfather will endure if they joined him to live in Barbados.

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. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed and the waiver application will be denied.

ORDER: The appeal is dismissed.