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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]

H2

DATE: FEB 14 2012 Office: SAN JUAN, PUERTO RICO FILE: [redacted]

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,

Michael Rhew

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application for waiver of inadmissibility was denied by the Field Office Director, San Juan, Puerto Rico and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Germany who was found to be inadmissible under 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 violated a law relating to a controlled substance. The applicant is applying for a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his U.S. citizen spouse.

On August 4, 2009, the Field Office Director determined that the applicant failed to establish extreme hardship to a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On appeal, counsel for the applicant states that the applicant's plea of nolo contendere does not constitute a conviction, and in the event that it does, that the applicant's spouse will suffer extreme hardship.

In support of the waiver application, the record includes, but is not limited to a brief by the applicant's counsel, biographical information for the applicant and his U.S. citizen spouse, a mental impairment questionnaire prepared by [redacted]n relation to the applicant's spouse, a Physical Residual Functional Capacity Questionnaire prepared by [redacted] regarding the applicant's spouse, documentation of the applicant's immigration and criminal record, documentation regarding the applicant's and his spouse's employment in 2005, and documentation of shared bank accounts and expenses for the applicant and his spouse from 2005 and prior.

We will first address the applicant's admissibility. The applicant was found to be inadmissible by the Field Office Director under INA § 212(a)(2)(A)(i)(II) for having been convicted of a crime involving a controlled substance.

Section 212(a)(2)(A) 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.

On May 7, 2002, in the County Court for Broward County, Florida, the applicant pled nolo contendere to the charge of Possession of Cannabis in violation of Florida Statutes § 893.13(6)(b). The applicant was ordered to pay a fine and attend a substance abuse education program.

Florida Statutes § 893.13(6)(b) states in pertinent part:

> (b) If the offense is the possession of not more than 20 grams of cannabis, as defined in this chapter, or 3 grams or less of a controlled substance described in s. 893.03(1)(c) 46.-50., the person commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. For the purposes of this subsection, "cannabis" does not include the resin extracted from the plants of the genus *Cannabis,* or any compound manufacture, salt, derivative, mixture, or preparation of such resin, and a controlled substance described in s. 893.03(1)(c) 46.-50. does not include the substance in a powdered form.

For this offense, the applicant is inadmissible under INA § 212(a)(2)(A)(i)(II) for possession of a controlled substance. Counsel for the applicant states that because adjudication was withheld by the court that this is not a conviction for immigration purposes. Under INA § 101(a)(48)(A), however, a conviction occurs when a court enters a formal judgment of guilt, or the alien pleads guilty or nolo contendere, or has admitted sufficient facts to warrant a finding of guilt, and a form of punishment has been ordered. Here, the applicant pled nolo contendere and a punishment was imposed in the form of a fine and court ordered classes. Moreover, the applicant has presented no evidence that an attack on any conviction has resulted in any vacatur or has even been filed. As such, the AAO finds that the applicant's May 7, 2002 conviction is a conviction under INA § 101(a)(48)(A). As the record makes clear that the applicant's conviction involved 30 grams or less of marijuana, a waiver is available for this ground of inadmissibility at INA § 212(h).

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

> The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . 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) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that --
> (i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,
> (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
> (iii) the alien has been rehabilitated; or
> (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 . . .; and (2) the Attorney General [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

Since the activities that are the basis for the applicant's criminal conviction did not occur more than 15 years ago, he must prove that the denial of his admission would result in extreme hardship to a qualifying relative. A waiver of inadmissibility under section 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 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 the AAO 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 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. 627, 632-33 (BIA 1996)*; *Matter of Ige, 20 I&N Dec. 880, 885 (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.*

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). 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.

On appeal, counsel for the applicant asserts that the applicant's U.S. citizen spouse will suffer extreme hardship if he is not admitted to the United States. We will first consider the hardship claimed to the applicant's spouse if she were to remain in the United States without the applicant. Applicant's counsel states that the applicant's spouse would suffer physical, mental and financial hardship. In support of the physical hardship to the applicant's spouse, the applicant submits a form entitled "Physical Residual Functional Capacity Questionnaire" dated June 30, 2009 and signed by [redacted] No title or credentials are provided for Mr. [redacted] d it not clear from the record whether he is a medical doctor or any type of medical professional. The questionnaire states that the applicant's spouse is suffering from chronic back pain and is incapable of "even 'low stress' jobs." No additional evidence is provided in regards to any treatment, if any, prescribed to the applicant's spouse. And no indication is provided regarding whether she is following any course of treatment for her pain. Additionally, there is no evidence in the record indicating any role that the applicant plays in caring for his spouse physically. In support of mental hardship to the applicant's spouse, the applicant submitted a form entitled "Mental Impairment Questionnaire," dated June 25, 2009 and signed by [redacted] The form states that the applicant's spouse has been suffering from severe anxiety since before 2008 and has had a very limited response to "pharmacotherapy." [redacted] lists the medications that have been prescribed to the applicant's spouse and indicates that his prognosis for her is "guarded." He states that she has not worked in 18 months and has incapacitating anxiety. The doctor does not indicate, however, the role that the applicant plays in assisting his spouse or the effect that his inadmissibility would have on her illnesses. The record does not contain a statement by the applicant, his spouse, or any family/community members regarding the role that the applicant plays in his spouse's life or any assistance that he provides to her in relation to her physical or mental complaints. It is not possible from the evidence of record, which consists only of the above named questionnaires to

make a conclusion that the applicant's spouse's medical or psychological conditions would be affected by denial of admission to the applicant. In regards to financial hardship, [redacted] questionnaire indicates that the applicant's spouse has not worked in 18 months. However, no independent evidence is provided of this fact. Moreover, no evidence is provided to illustrate how the applicant financially supports his spouse or whether she has any other means to provide for herself financially. As such it is not possible to draw any conclusion regarding financial hardship to the applicant's spouse if she is separated from the applicant.

As to whether the applicant's spouse would suffer extreme hardship if she were to relocate to Germany to reside with the applicant, the applicant did not provide any documentation concerning any claimed hardship that his spouse would face in Germany. Counsel for the applicant states in his brief that the applicant's spouse does not speak German and, as a result, that she would have trouble assimilating and treating her physical and mental condition in Germany. There is no evidence in the record, however, that suitable treatment is not available to the applicant's spouse in Germany. Moreover, the applicant has not provided any independent evidence that his wife is unable to speak German and what hardship living in Germany would cause to her. No statement is provided by the applicant, his spouse or any other individuals aside from the applicant's counsel in this regard. Statements of counsel are not evidence and the AAO will analyze the hardship in this case based on the documentary evidence of record, and not on the statements of counsel. *See INS v. Phinpathya,* 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503 (BIA 1980). Accordingly, the record does not show that relocation to Germany would cause extreme hardship to the applicant's spouse. *See Matter of Cervantes-Gonzalez,* 22 I&N Dec. at 565-66.

In sum, although the record indicates that the applicant's spouse has suffered from mental anxiety, there is not enough documentary evidence to illustrate that her hardship is affected by the applicant's admissibility or how it would be impacted by the denial of admission. Considered in the aggregate, the hardship to the applicant's spouse does not rise to the level of extreme beyond the common results of removal. *See Hassan v. INS,* 927 F.2d 465, 468 (9th Cir. 1991); *Perez,* 96 F.3d at 392 (defining "extreme hardship" as hardship that was unusual or beyond that which would normally be expected upon deportation); *Matter of Pilch,* 21 I&N Dec. at 631. The AAO therefore finds that the applicant has failed to establish extreme hardship to his U.S. citizen spouse as required under section 212(h) of the Act. Having found the applicant ineligible for relief under section 212(h) of the Act, no purpose would be served in discussing whether the applicant merits a waiver as a matter of discretion.

In proceedings for an 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.