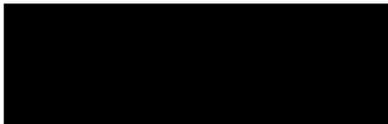


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U.S. Department of Homeland Security  
U.S. Immigration and Citizenship Services  
*Office of Administrative Appeals*  
20 Massachusetts Avenue, N.W., MS 2090  
Washington, DC 20529-2090  
**U.S. Citizenship  
and Immigration  
Services**



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Date: MAY 01 2012

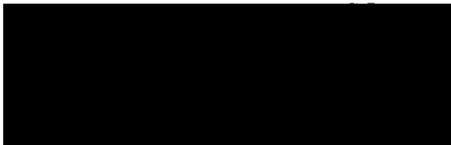
Office: NEWARK, NJ

FILE: 

IN RE: Applicant: 

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,

  
for Perry Rhew  
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Jamaica who was found to be inadmissible under section 212(a)(2)(A)(i)(II) of the 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 a controlled substance. The director stated that 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 bar to 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 disputes the director's finding that the judge's dismissal on August 19, 2010 of the disorderly person's offense for possession of marijuana was solely related to rehabilitation or immigration hardships. Counsel states that the judgment of conviction was in error and on August 27, 2010 a new disposition was provided to U.S. Citizenship and Immigration Services (USCIS) showing that the charges were dismissed. Counsel asserts that the waiver application is therefore not required because the drug possession offense was dismissed, and that USCIS is not authorized to go behind the plain meaning of the dismissal. Counsel cites *In Re Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005), and states that the *Pickering* standard does not apply to New Jersey cases where there is a set policy for dealing with minor marijuana convictions. Counsel, citing *Bakarat v. Holder*, 621 F.3d 398 (6<sup>th</sup> Cir. 2010) and *Agolli v. Holder*, 2010 WL 3398840 (6<sup>th</sup> Cir. 2010), contends that the Sixth Circuit Court of Appeals held that the government bears the burden of proving that an underlying conviction was set aside solely for rehabilitation or immigration purposes and was thus still valid. Counsel thus claims that USCIS erred in requiring that the applicant establish "convincing proof" of why the conviction was vacated, and maintains that the dismissal itself is sufficient proof. Lastly, counsel contends that the criminal charge and dismissal were handled at the municipal court and are consistent with New Jersey's administrative procedure, which is that "minor narcotics offenses should not give way to any criminal liability."

In regard to hardship, counsel states that the applicant's wife will experience extreme hardship if the applicant's wife remained in the United States without the applicant. Counsel conveys that the applicant has a close relationship with his wife and child, and they will be emotionally harmed if separated from him. Counsel declares that the applicant's wife will not be able to support herself and her child in the United States without the applicant's income, and counsel indicates that the applicant's wife may also have to provide financial assistance to the applicant because he will not be able to obtain a job which will pay enough to support himself in Jamaica. Counsel asserts that if the applicant's wife and children joined the applicant to live in Jamaica, it is unlikely they will be able to obtain proper medical care. Counsel states due to poor economic conditions in Jamaica, medical care is not accessible and medication is expensive. Counsel maintains that the applicant has not lived in Jamaica for 13 years, and while living in Jamaica worked at odd jobs. Counsel claims that the applicant has no networking connections in Jamaica, and will not be able to find a job which will sufficiently support his family. Counsel declares that the applicant's wife does not want to accompany the applicant to Jamaica because she is not familiar with Jamaica, will have difficulty raising her child there, and will be separated from her network of friends in the United States. Counsel indicates that the submitted country report indicates that Jamaica has a high crime rate and

is a dangerous place for women, and lacks educational resources. Counsel maintains that the applicant's child have developmental problems due to separation from his familiar environment. Counsel asserts that in this case USCIS abused its discretion by giving undue weight to negative factors and downplaying positive factors.

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

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 —

...

(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 212(h) of the Act provides, in pertinent part, that:

The Attorney General may, in his discretion, waive the application of . . . subparagraph (A)(i)(II) . . . insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if — . . . in the case of an immigrant who is 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 that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully permanent resident spouse, parent, son, or daughter of such alien.

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.

The record shows that on July 10, 2003, the applicant was arrested for possession of marijuana in violation of 2C:35-10a(4) of the New Jersey Statutes. On July 11, 2003, the applicant pled guilty to and was found guilty of the charge. The judge ordered that the applicant pay costs and be placed on conditional discharge status for 12 months. The arresting officer's affidavit dated March 3, 2011 stated that the officer estimated the applicant to possess about ten grams of marijuana. Consequently, in regard to the possession of marijuana offense the applicant has been "convicted" within the meaning of section 101 (a)(48)(A) of the Act and is eligible for the section 212(h) waiver.

The record of conviction shows that on August 19, 2010 the possession of marijuana offense was dismissed. The case was reopened before the court and the original plea was vacated and the case was dismissed. Counsel claims that in view of *In Re Cota-Vargas*, the *Pickering* standard does not apply to New Jersey cases where there is a set policy for dealing with minor marijuana convictions. In *In Re Pickering*, 23 I&N Dec. 621, 624 (BIA 2003), the Board held that if a state court vacates a conviction for reasons unrelated to a procedural or substantive defect in the underlying criminal proceedings, the alien remains "convicted" for immigration purposes. The Board in *In Re Cota-Vargas* essentially concluded that the *Pickering* standard does not apply in the context of sentence modifications. 23 I&N Dec. at 850-852. Counsel has not demonstrated that the *Pickering* standard does not apply where a State such as New Jersey has an established policy for handling minor marijuana convictions or that the judge's dismissal of the applicant's marijuana possession offense was analogous to a sentence modification. Additionally, counsel's assertion that we are bound by Sixth Circuit law in *Bakarat* and *Agolli* in determining the burden of proof standard is not convincing as the instant matter arises in New Jersey, which is the jurisdiction of the Third Circuit Court of Appeals. As previously stated, the burden of proof is upon the applicant to establish eligibility for the benefit sought. See Section 291 of the Act. Counsel has not demonstrated, and the submitted record of conviction does not show, that the applicant's drug possession offense was vacated for reasons unrelated to a procedural or substantive defect in the underlying criminal trial. The applicant therefore remains "convicted" for immigration purposes and 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.

The waiver for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act is 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 subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . 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) 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. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. See *Matter of Mendez-Morales*, 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.

In the instant case, the asserted hardships to the applicant's U.S. citizen wife and child if they remain in the United States without the applicant are financial and emotional in substance. The claim of emotional hardship as a consequence of separation from the applicant is consistent with the affidavits by the applicant's U.S. citizen wife dated March 22, 2011 and April 16, 2011, the letter by the pastor with the [REDACTED] dated March 10, 2011, and the letter by the applicant's mother-in-law. The applicant's spouse stated in her letter that she and her two-year-old U.S. citizen son have a close relationship with the applicant and spend time together in church activities. She conveyed that she was terminated from her job so she takes care of their child and that the applicant is training to be a chef. The applicant's wife stated that she is an only child and that they live with her U.S. citizen mother. The pastor's letter conveyed that the applicant and the applicant's wife, child, and mother-in-law are at church every Sunday. The applicant's mother-in-law indicated in the letter dated August 20, 2010 that she and her daughter worked outside the house, sharing the cost of rent and utilities, while the applicant took care of his son. The birth certificate in the record shows that the applicant's child was born on March 7, 2009. Lastly, the letter by the restaurant owner dated April 18, 2011 stated that the applicant is training to be a cook. When the hardships are considered collectively, we find that the applicant has demonstrated that the hardship that his young child will experience as a result of separation from his father is extreme.

In regard to relocation with the applicant to Jamaica, the applicant's wife asserted that she does not want to take her son to live in Jamaica because its educational system and health care facilities are inferior to what their son has access to in the United States. She stated that the applicant's family lives in a rural area in St Anne, Jamaica, far away from educational and health facilities. The applicant's wife conveyed that she would be distressed about her son's safety in Jamaica due to its high unemployment and prevalence of violent crimes and drug use. The applicant's wife stated that her 51-year-old mother raised her as a single parent and that she has lived with her mother most of her life, and does not want to separate from her. Counsel conveyed that Jamaica has a poor economy, that medical care is not accessible and medication is expensive, and that it is unlikely that the applicant's wife and child will have proper medical care in Jamaica. Counsel statement that the applicant will have difficulty finding a job for which he qualifies which will pay enough to adequately support his family is consistent with the U.S. Department of State information concerning economic conditions in Jamaica. U.S. Department of State, Bureau of Western Hemisphere Affairs, *Background Note – Jamaica* (January 17, 2012); U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, *Country Reports on Human Rights Practices – 2010: Jamaica* (April 8, 2011). In view of the record, which demonstrates that the applicant and his wife have held lower paying jobs, it is likely that the applicant and his wife will face difficult economic circumstances in Jamaica. When the emotional and financial hardships are considered

collectively, we find that the applicant has demonstrated that the hardship his wife and child will experience as a result of joining him to live in Jamaica is extreme.

In *Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996), the Board stated that once eligibility for a waiver is established, it is one of the favorable factors to be considered in determining whether the Secretary should exercise discretion in favor of the waiver. Furthermore, the Board stated that:

In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien 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 and seriousness, and the presence of other evidence indicative of the 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 alien began 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 or service in 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 AAO must then, “[B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country. “ *Id.* at 300. (Citations omitted).

The adverse factor in the present case is the marijuana possession conviction in 2003. The favorable factors are the hardship to the applicant's wife and child, and the statements by the applicant's wife, mother-in-law and pastor commending the applicant's character. In addition, it has been eight years since the applicant's criminal conviction in July 2003. The AAO finds that the crime committed by the applicant is serious in nature; nevertheless, when taken together, we find the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

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 now met that burden. Accordingly, the appeal will be sustained and the waiver application will be approved.

**ORDER:** The appeal is sustained.