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



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DATE: **MAY 25 2012** Office: KENDALL, FL

FILE:

IN RE: Applicant:

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h), 8 U.S.C. § 1182(h) of the Immigration and Nationality Act.

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.

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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Kendall, Florida, and 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 Cuba who was found to be inadmissible to the United States pursuant to 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 committed a crime involving moral turpitude. The applicant's spouse and stepchild (child) are U.S. citizens. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h) in order to reside in the United States with his family.

The field office director found that the applicant had failed to establish that extreme hardship would be imposed on his qualifying relatives and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director*, dated March 22, 2010.

On appeal, counsel asserts that the applicant's spouse and child would experience extreme hardship and that the field office director did not balance the applicant's equities in making a negative discretionary determination. *Form I-290B*, received April 15, 2010.

The record includes, but is not limited to, counsel's brief, a psychological evaluation of the applicant's spouse, medical records for the applicant's child, a medical letter for the applicant's spouse's mother, financial records and country conditions information on Cuba. The entire record was reviewed and considered in arriving at a 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.

The Board of Immigration Appeals (Board) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

[M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general....

In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present.

However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

The record reflects that on March 22, 2004, the applicant was convicted of aggravated battery (great bodily harm deadly weapon) under Florida Statutes § 784.045(1)(a)(1) and (2) and aggravated assault with a deadly weapon under Florida Statutes § 784.021(1)(a).

Fla. Stat. § 784.045 provides:

(1)(a) A person commits aggravated battery who, in committing battery:

1. Intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement; or
2. Uses a deadly weapon.

The AAO notes that the Eleventh Circuit Court of Appeals has held that both prongs of Florida Statutes § 784.045 involve moral turpitude. *Sosa-Martinez v. U.S. Atty. Gen.*, 420 F.3d 1338, 1342 (11th Cir. 2005). In view of the holding in *Sosa-Martinez*, the AAO finds the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act. As such, it will not address whether his aggravated assault with a deadly weapon conviction involve moral turpitude.

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

The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) 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

(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.

A section 212(h)(1)(B) 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. The qualifying relatives here are the applicant's spouse and child. 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.

Counsel states that the applicant’s spouse is from Cuba and has been in the United States for over eight years; her son, mother and sister reside in the United States as citizens or lawful permanent residents; her mother is dependent on the applicant and his spouse for financial support and is under medical care for hypertension, hyperlipidemia, hyperglycemia, osteoarthritis and obesity; she and the applicant drive her mother to the doctor and tend to her everyday needs; her sister moved in recently after losing her job; there is a lack of employment opportunities for her in Cuba; and Cuba has a repressive communist regime and an economy in shambles. The psychologist who evaluated the applicant’s spouse states that she immigrated to the United States to reunite with her family. The record includes a medical letter reflecting that the applicant’s mother has the aforementioned medical issues, although the severity of her conditions is unclear. The record includes a U.S. Department of State 2008 human rights report on Cuba and a Country Specific Information on Cuba, dated August 14, 2009.

Counsel states that the applicant’s son suffers from epilepsy; he has had seizures since the age of five; he is under medical treatment; and medical facilities in Cuba are subpar. The applicant’s son’s medical records reflect that he has a history of seizures.

The record reflects that the applicant’s spouse has family ties in the United States and that her mother has some medical issues, although their severity is unclear. The record reflects that her son has had serious medical issues. However, the medical records submitted are from 2002 and it is not clear how he is currently doing. The record also indicates that he had these issues while residing in Cuba and there is no documentary evidence that he received inadequate medical treatment in Cuba.

The record reflects that the applicant's spouse is from Cuba and that her son was also raised there until he was approximately 13 years old, and there is no documentary evidence that they experienced hardship while residing there. In addition, the record does not include sufficient evidence to establish that the applicant's spouse would be unable to find suitable employment in Cuba. The AAO finds that the record lacks sufficient documentary evidence of emotional, financial, medical or other types of hardship that, in their totality, establish that the qualifying relatives would hardship in Cuba that would be beyond that normally created by relocation.

Counsel states that the applicant's son suffers from epilepsy; he is under medical treatment; he is completely dependent on the applicant and his mother; he has no contact with his biological father; and the applicant has become his father figure.

Counsel states that the applicant and his spouse have been living together for the past seven years; the applicant's spouse has suffered the loss of two spouses, one from abandonment and one from a car accident; and she has sought psychological and psychiatric treatment in the past and has suffered major depressive episodes. Counsel states that if the applicant is returned to Cuba, his spouse would have to once again suffer the trauma of losing a spouse and a father for her son; and she would not have the applicant's support and assistance in caring for her family's well-being. The psychologist who evaluated the applicant's spouse states that her clients have noticed her sullen affect; she became depressed when her first spouse abandoned her and her second one passed away; her son was affected as he viewed her second spouse as a father figure; she could not bear the thought of seeing her son undergo the loss of another male role model; she received outpatient psychological and psychiatric treatment for depression after her second spouse died and she felt abandoned, alone and scared; she is experiencing mood swings, feels anxious, has difficulty concentrating at work, has poor sleeping and eating habits, and cries for no reason; and she meets the diagnostic criteria for recurrent episodes of Major Depressive Disorder.

Although the record does not include supporting documentary evidence that the applicant's spouse received psychological and psychiatric treatment in the past, it confirms her past marital history. In addition, the record reflects that she meets the diagnostic criteria for recurrent episodes of Major Depressive Disorder. Considering the hardship factors presented, and the normal results of separation, the AAO finds that the applicant's spouse would suffer significant hardship upon remaining in the United States. However, the record does not establish that the applicant's adult son would suffer hardship beyond that normally created by separation.

We can find extreme hardship warranting a waiver of inadmissibility only where an applicant has demonstrated extreme hardship to a qualifying relative in the scenario of separation *and* the scenario of relocation. A claim that a qualifying relative will remain in the United States and thereby suffer extreme hardship as a consequence of separation can easily be made for purposes of the waiver even where there is no intention to separate in reality. *See Matter of Ige*, 20 I&N Dec. 880, 886 (BIA 1994). Furthermore, to separate and suffer extreme hardship, where relocating abroad with the applicant would not result in extreme hardship, is a matter of choice and not the result of inadmissibility. *Id.*, see also *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996). As the applicant has not demonstrated extreme hardship from relocation, we cannot find that refusal of admission would result in extreme hardship to the qualifying relatives in this case.

In addition, the regulation at 8 C.F.R. § 212.7(d) provides:

The Attorney General [Secretary, Department of Homeland Security], in general, will not favorably exercise discretion under section 212(h)(2) of the Act (8 U.S.C. 1182(h)(2)) to consent to an application or reapplication for a visa, or admission to the United States, or adjustment of status, with respect to immigrant aliens who are inadmissible under section 212(a)(2) of the Act in cases involving violent or dangerous crimes, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of the application for adjustment of status or an immigrant visa or admission as an immigrant would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the alien's underlying criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act.

As stated, the applicant was convicted of aggravated battery (great bodily harm deadly weapon) under Florida Statutes § 784.045.¹ From the plain language of this statute, it can be concluded that the applicant has been convicted of a violent crime pursuant to 8 C.F.R. § 212.7(d). Therefore, even if the applicant satisfied the extreme hardship requirement of section 212(h)(1)(B) of the Act, he would still be subject to the heightened hardship requirement of showing exceptional and extremely unusual hardship or establishing that his case involves exceptional circumstances that warrant a favorable exercise of discretion under section 212(h)(2) of the Act. Based on the record, he has not met either of these requirements. In addition, a showing of exceptional and extremely unusual hardship or of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act depending on the gravity of the applicant's underlying criminal offense.

As the applicant has not satisfied the requirements of section 212(h)(1)(B) of the Act or the regulation at 8 C.F.R. § 212.7(d), the AAO finds that no purpose would be served in discussing whether he merits a waiver as a matter of overall discretion.

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. *See* 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.

¹ As the AAO has found the applicant to be convicted of a violent crime, it will not determine whether his conviction for aggravated assault with a deadly weapon is for a violent crime.