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



U.S. Citizenship
and Immigration
Services

DATE: **APR 03 2013**

OFFICE: NORFOLK, VA

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in cursive script, appearing to read "Ron Rosenberg".

for Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

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 is the father of two U.S. citizens. He seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States.

The Field Office Director found that the applicant had failed to demonstrate that his inadmissibility would result in extreme hardship for a qualifying relative or that his case warranted a favorable exercise of discretion. She denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Decision of the Field Office Director.*

On appeal, counsel states that the applicant's inadmissibility would result in extreme hardship for his two children, exacerbating their medical conditions. *Form I-290B, Notice of Appeal or Motion.*

The record includes, but is not limited to: counsel's briefs; statements from the applicant, his spouse and his children; psychological evaluations of the applicant's children; published materials concerning the impact of removal on children; country conditions information on Cuba; tax returns, W-2 Wage and Tax Statements and Forms-1099; 2012 earnings statements for the applicant; a copy of U.S. Health & Human Services' federal poverty guidelines for 2012; documentation of the applicant's and his spouse's financial obligations; statements of support for the applicant; printouts of emails from the applicant's sister in Cuba; school records for the applicant's children; statements regarding the applicant's children from a former teacher and the principal of their school; and court records relating to the applicant's convictions. The entire record was reviewed and all relevant evidence considered in reaching a decision on the appeal.

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

(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –

a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

The applicant was convicted on November 1, 2000 of second degree Assault, Code of Maryland 1957 (MD Code), Art. 27, § 12A. He was sentenced to 11 months in jail, which were suspended, and placed on probation. On June 18, 2004, the applicant was convicted of Violation of Provisions of Protective Orders, Virginia Code (Va. Code) § 16.1-253.2 and sentenced to 30 days in jail, 29 of which were suspended. This same date, he was also convicted for immigration purposes of Assault and Battery Against a Family or Household Member, Va. Code § 18.2-57.2, with adjudication deferred. He was placed on probation until June 9, 2006 and the charges against him were dismissed on July 18, 2007.¹ On July 7, 2005, the applicant was convicted of Petit Larceny, Va. Code § 18.2-

¹ Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines "conviction" for immigration purposes as:

96, and sentenced to four months in jail, two months of which were suspended. He was fined \$272 and ordered to perform two months of community service. On July 16, 2008, the applicant was convicted of Contempt of Court, Va. Code § 18.2-456, and sentenced to 80 days in jail, 60 of which were suspended, and fined \$191.

Counsel has conceded on appeal that the applicant has been convicted of crimes involving moral turpitude, and we find no error in the determination that the applicant is inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Act. We, therefore, turn to a consideration of whether the record establishes his eligibility for a waiver under section 212(h) of the Act.

Section 212(h) of the Act states 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 –

....

(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

If eligibility is established under section 212(h)(1)(B) of the Act, United States Citizenship and Immigration Services (USCIS) then assesses whether an exercise of discretion is warranted. In most discretionary matters, the alien bears the burden of proving eligibility simply by showing equities in the United States that are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

In the present case, however, the AAO cannot find that the exercise of discretion may be based solely on the balancing of favorable versus adverse factors. Given the applicant's conviction for assault and battery, we conclude that the applicant has been convicted of a violent or dangerous crime that triggers the discretionary requirements of 8 C.F.R. § 212.7(d), which states:

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.

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.

As the record indicates that the court in this case found sufficient facts for a finding of guilt and placed the applicant on probation, he has been convicted of assault and battery for immigration purposes despite the ultimate dismissal of the charges against him.

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.

The record does not include evidence of foreign policy or national security considerations. Accordingly, we will consider whether the applicant has demonstrated that the denial of the waiver application would result in exceptional and extremely unusual hardship, a more restrictive standard than that of extreme hardship. *Cortes-Castillo v. INS*, 997 F.2d 1199, 1204 (7th Cir. 1993).

In *Matter of Monreal-Aguinaga*, 23 I& N Dec. 56, 62 (BIA 2001), the BIA determined that exceptional and extremely unusual hardship in cancellation of removal cases under section 240A(b) of the Act is hardship that "must be 'substantially' beyond the ordinary hardship that would be expected when a close family member leaves this country," but that the applicant need not show that hardship would be unconscionable. *Id.* at 61. The BIA also stated that in assessing exceptional and extremely unusual hardship, it would be useful to view the factors considered in determining extreme hardship. *Id.* at 63. Accordingly, the AAO will first consider the applicant's waiver application under the extreme hardship requirement of section 212(h)(1)(B) of the Act. Should the record establish that the hardship resulting from the applicant's inadmissibility satisfies section 212(h) of the Act, we will proceed with a consideration of whether such hardship also meets the heightened standard imposed on the applicant by 8 C.F.R. § 212.7(d).

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, the U.S. citizen or lawfully resident spouse, parent or child of an applicant. The qualifying relatives in this proceeding are the applicant's U.S. citizen daughters. Accordingly, hardship to the applicant or other family members will be considered only insofar as it results in hardship to his children. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and United States Citizenship and Immigration Services (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 BIA 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 BIA 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 BIA 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-González*, 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 BIA 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.

On appeal, counsel asserts that the applicant has two young children who are dependent on him and that their previous separation from the applicant resulted in severe emotional, physical and academic consequences, which will be exacerbated if he is removed from the United States. She states that when the applicant was detained by the Department of Homeland Security, his 11-year-old son and 9-year-old daughter both showed signs of separation anxiety. Counsel reports that the applicant's son was referred for psychiatric treatment and psychotherapy by school personnel after demonstrating suicidal thoughts and that he has been diagnosed with Adjustment Disorder with Mixed Anxiety and Depression. The applicant's daughter, counsel states, was referred for mental

health treatment after she began acting out in school and has been diagnosed with Adjustment Disorder with Mixed Disturbance of Emotions and Conduct. Counsel notes that in addition to the children's individual therapy sessions, the entire family is under counseling and that the applicant and his spouse routinely sit in on their son's psychiatric appointments.

She also asserts that, without the applicant, his spouse would not be able to support their children. Counsel contends that while the applicant was detained, his spouse and their children had to move out of their home and share a one-bedroom with another family. She also states that the applicant's spouse is currently unemployed and has no work permit as she is not in lawful immigration status.² Counsel stresses that even if the applicant's spouse is not removed from the United States, she would not be able to keep the family afloat in the applicant's absence.

In support of the claims of the emotional hardship that would be suffered by the applicant's children as a result of separation, the record includes a June 26, 2012 letter from [REDACTED] one of the applicant's daughter's former teachers, who notes that in 2010-2011, while the applicant was detained, both of his children's grades plummeted and that their school attendance also suffered. She indicates that although normally well-behaved, both children began arguing with classmates and also sobbed uncontrollably in class. A June 28, 2012 letter from [REDACTED] indicates that the applicant's children have had behavioral problems at school as a result of their father's detention and immigration situation. [REDACTED] states that the school has offered the children as much support as possible and that they continue to meet with the school counselor on a regular basis.

In a July 3, 2012 psychological evaluation, psychiatrist [REDACTED] reports that the applicant's son, [REDACTED] is suffering from Adjustment Disorder with Mixed Anxiety and Depression. [REDACTED] notes that at the time of an earlier March evaluation, [REDACTED] symptoms were very severe and that he had been referred as a result of suicidal comments he had made at school. He also indicates that when [REDACTED] was in third grade, he suffered from depression and anxiety, and received therapy, but that in fourth grade, his symptoms were exacerbated by the detention of the applicant, that he became more depressed, experienced a significant weight gain and withdrew. [REDACTED] indicates that although [REDACTED] was prescribed medication, it had only limited effect. The applicant's return home, [REDACTED] states, has also presented problems for [REDACTED] who has struggled to readjust to his father's presence. However, [REDACTED] also reports that during the four months preceding his evaluation, [REDACTED] has benefitted from medication; individual psychotherapy sessions, which are routinely attended by his parents; family therapy; and the positive effect of his parents attending parenting classes offered by [REDACTED] agency.

In a July 11, 2012 report on the applicant's daughter, [REDACTED] states that she is suffering from Adjustment Disorder with Mixed Disturbance of Emotions and Conduct. He indicates that her symptoms have been significant and have interfered with her ability to participate in school, resulting in disruptive behavior in class, altercations with other students and a poor academic performance. Although [REDACTED] reports that [REDACTED] had difficulty with impulsive behavior prior to the applicant's detention, he states that she experienced a "precipitous decline in function" during her father's absence, leading her mother to seek psychiatric care for her.

² A review of relevant data bases indicates that the applicant's spouse applied for and has been issued an employment authorization document for the period September 24, 2012 to September 23, 2013.

The record also reflects that the applicant's spouse, who was born in Colombia, does not have lawful status in the United States. It indicates that she entered the United States without inspection on or about October 29, 1997, and is currently in removal proceedings. In a July 9, 2012 statement submitted for the record, the applicant's spouse contends that her ability to remain in the United States depends on the applicant's Form I-485 and that if he is not found eligible for adjustment, she will have to return to Colombia. She further states that, in her and the applicant's absence, their children will not be able to remain in the United States as they have no immediate family to care for them.

Based on the record before us, the AAO finds the applicant's children's prior separation from the applicant to have had significant, long-term negative impacts on their emotional health and behavior, particularly in the case of the applicant's 11-year-old son, and that his removal from the United States would be likely to result in further damage to their emotional well-being. We also recognize that because of the unlawful status of their mother, the denial of the waiver application would potentially deprive the applicant's children of both of their parents, thereby precluding them, as minors, from residing in the United States, which is their right as U.S. citizens. When these hardships and those that normally result from the separation of families are considered in the aggregate, the AAO finds the applicant to have established that both his children would experience extreme hardship if the applicant is removed from the United States.

On appeal, counsel asserts that relocation to Cuba would be detrimental to the applicant's children. She states that they have lived their entire lives in the United States, have never been to Cuba, do not speak Spanish well and would be in danger as the applicant is considered a traitor by the Cuban government.

To establish the circumstances that would face the applicant and his children upon relocation to Cuba, counsel has submitted the following country conditions materials: the U.S. Department of State's 2010 Human Rights Report: Cuba, issued April 8, 2011; an Amnesty International report entitled "Restrictions on Freedom of Expression in Cuba;" a copy of a March 22, 2012 report, "Freedom in the World 2012 - Cuba," published by Freedom House; and a Human Rights Watch publication, "New Castro, Same Cuba, Political Prisoners in the Post-Fidel Era," published in November 2009. The AAO notes that all the submitted materials indicate the widespread restriction and repression of civil rights and liberties by the Cuban government, particularly in the case of individuals viewed as dissidents.

The record also contains an immigration judge's August 17, 2011 order removing the applicant from the United States. This same document, however, reflects that the immigration judge granted the applicant withholding of removal under section 241(b)(3) of the Act with regard to Cuba. We note that to establish eligibility for withholding, the applicant must have demonstrated a future threat to his life or freedom by establishing that it is more likely than not that he would be persecuted upon return to Cuba. See 8 C.F.R. § 208.16(b)(2).

The AAO is further aware that the BIA has previously found that a 15-year-old child who had lived her entire life in the United States, was completely integrated into the American lifestyle and was not fluent in Chinese would suffer extreme hardship if she relocated to Taiwan. *Matter of Bing Chih*

Kao and Mei Tsui Lin, 23 I&N Dec. 45, 51 (BIA 2001). The BIA concluded that uprooting the child at her stage of education and social development and requiring her to survive in a Chinese-only environment would be such a significant disruption that it would constitute extreme hardship.

Having considered country conditions in Cuba; the finding of the immigration judge regarding the likelihood that the applicant would face persecution if he were to return to Cuba; the impact on the applicant's children if they returned to Cuba with a father potentially at risk from the Cuban government; and the reasoning in *Matter of Bing Chih Kao and Mei Tsui Lin*, particularly as it relates to the applicant's 11-year-old son, we conclude that the applicant has established that relocation to Cuba would result in extreme hardship for his children.

We further find that the factors that led us to conclude that the applicant's inadmissibility would result in extreme hardship for his children also satisfy the exceptional and extremely unusual hardship requirement of the regulation at 8 C.F.R. § 212.7(d).

In discretionary matters generally, the applicant bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y*, 7 I&N Dec. 582 (BIA 1957).

In evaluating whether . . . 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).

See Matter of Mendez-Morales, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then "balance 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).

Although the applicant has established extraordinary circumstances, the AAO concludes that a favorable exercise of discretion is not warranted in the present case. We note that the record reflects that on July 11, 2010, the applicant was arrested in Maryland on six counts of burglary and three counts of theft. Although four of the burglary charges and one of the theft charges have been dismissed, there are no dispositions for the two remaining charges of Burglary in the Fourth Degree, MD Code, Criminal Law, § 6-205, or for the two charges of Theft Less than \$1,000, MD Code, Criminal Law, § 7-104. In the absence of evidence demonstrating whether these charges have or

have not resulted in convictions, we find the record insufficient to establish that the positive factors outweigh adverse and factors in this case. This recent arrest calls into question the applicant's rehabilitation, which weighs heavily on our discretionary analysis. As the record lacks the evidence necessary to establish that the applicant's case is deserving of a favorable exercise of the Secretary's discretion, the appeal will be dismissed.

In proceedings for an application for a waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. See section 291 of the Act, 8 U.S.C. § 1361. In discretionary matters, the applicant bears the full burden of proving his or her eligibility for discretionary relief. See *Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976). Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.