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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

DATE: JUN 10 2013

Office: JACKSONVILLE

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.

Thank you,

A handwritten signature in black ink that reads "Michael Shumway".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The application for waiver of inadmissibility was denied by the Field Office Director, Jacksonville, Florida and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native of Haiti and citizen of Haiti and Canada 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 June 18, 2012, 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 evidence demonstrates that the applicant's U.S. citizen spouse will suffer extreme hardship as result of the applicant's inadmissibility and that the applicant merits a favorable exercise of discretion.

In support of the waiver application, the record includes, but is not limited to: a brief from counsel; statements from the applicant's spouse; statement from the applicant; statements from the applicant's mother-in-law; medical records pertaining to the applicant's spouse; medical records pertaining to the applicant's mother-in-law; financial and employment documentation for the applicant and his spouse; country conditions information for Canada; country conditions information for Haiti; and documentation of the applicant's criminal and immigration history.

We will first address the applicant's admissibility.

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.

The record reflects that on June 11, 2009, the applicant entered a plea of nolo contendere to the charge of possession of under 20 grams of cannabis in violation of Florida Statutes § 893.13. Adjudication of guilt was withheld by the court and the applicant was ordered to serve one year of probation, which the record reflects that he completed. This is nonetheless a conviction for immigration purposes, as the applicant entered a plea of nolo contendere and the judge ordered a

form of punishment, penalty, or restraint. As a result, the applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act for having violated a law related to a controlled substance.

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.

The applicant is eligible to file a section 212(h) waiver as his conviction was for a single offense related to simple possession of 30 grams or less of marijuana.

The AAO notes that the applicant may also be inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), which provides, in pertinent part:

(i)...Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

...

The record reflects that the applicant attended high school in the United States from 2001-2005. The applicant departed the United States in 2004 and attempted to gain admission using his Canadian passport pursuant to the visa waiver program on July 18, 2004. In a sworn statement at the port-of-entry, he admitted that he had been residing in the United States for the previous three years and attended high school in [redacted] Florida where he stated that he lived with his uncle. He was found inadmissible for not having a valid entry document, namely a student visa,

and was allowed to withdraw his application for admission and returned to Haiti. In Haiti, the applicant obtained a new Canadian passport, although his previous passport was not expired, and gained admission to the United States through a different port-of-entry on September 21, 2004 under the visa waiver program. The applicant was three days short of his 18th birthday at that time. The applicant then proceeded to attend and complete high school in Florida. The record suggests that the applicant had immigrant intent at the time of his nonimmigrant admission on the visa waiver program.

Section 212(i) of the Act provides a waiver for fraud and material misrepresentation. That section states that:

(1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

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 a U.S. citizen or lawfully resident spouse, parent, or child of the applicant. Under section 212(i) of the Act a waiver is dependent on a showing that the bar to admission imposes extreme hardship on more limited categories of qualifying relatives; however, a U.S. citizen spouse is also a qualifying relative under this section. In both cases, hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. The applicant's U.S. citizen 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-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 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.*

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 1292, 1293 (9th Cir. 1998) (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.

The AAO now turns to the question of whether the applicant in the present case has established that a qualifying relative would experience extreme hardship as a result of his inadmissibility.

On appeal, counsel states that the applicant’s spouse would suffer emotional and financial hardship if she were to be separated from the applicant. The record reflects that the applicant and

his spouse resided at the time of the appeal with the applicant's spouse's mother in [REDACTED] Florida. The applicant and his spouse met in 2004 while they were both in high school and were married on February 14, 2009. The record reflects that the applicant's spouse was pregnant with her first child at the time of the appeal. Although the record indicates that the applicant's spouse was employed, earning a salary of \$18,130.47 in 2011, she states that she relied on the applicant's employment for health care and for paying off debt that she had accumulated. The record reflects that the applicant's spouse is a dependent on his health care that he obtained through his employment with [REDACTED]. The record also reflects that the applicant's spouse has a \$9,579.00 car loan, as well as a loan from her mother in the amount of \$6,000. A letter from [REDACTED] dated August 4, 2012, states that the applicant was employed with that company earning an annual salary of \$23,920.00. Although the record does not contain comprehensive documentation of the couple's expenses, the AAO notes that were the applicant's spouse no longer able to rely on the applicant's income and the health insurance through his employment, her income would be just above the poverty line for a family of two, which is \$15,510.00 in 2013. The applicant's spouse also states that she would have to forgo her dream of attending college if she were no longer able to rely on the applicant's support.

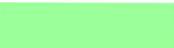
With respect to the applicant's spouse's emotional and medical hardship, the record indicates that the applicant's spouse has suffered numerous emotional hardships in the preceding years, including the suicide of her mother's husband and the incarceration of her only sibling. An evaluation conducted by counselor [REDACTED] dated May 17, 2012, indicates that the applicant's spouse is suffering from major depression as result of the applicant's immigration situation and that "her work performance has been impacted by her mood." Ms. [REDACTED] notes that the applicant's spouse is fearful of the applicant's removal and that she has accumulated debt beyond her means and has been angry about her inability to go to college due to the applicant's immigration situation. The applicant's spouse was prescribed anti-depressants. The record also indicates that the applicant's spouse was in a car accident in 2010 and has suffered from back pain since that time. A letter from [REDACTED] dated May 11, 2012, states that the applicant's spouse "sustained an exacerbating condition which leaves her dependent on her husband's assistance on an everyday occurrence. Especially when her symptoms are exacerbated." Although the applicant and his spouse reside with the applicant's spouse's mother, the record indicates that the applicant's spouse's mother suffers from numerous medical conditions that have left her reliant on the applicant and his spouse for physical support. A letter from [REDACTED] dated August 8, 2012 states that the applicant's spouse's mother suffers from "rheumatoid arthritis, osteoarthritis, fibromyalgia, Sjorgren's syndrome, generalized anxiety disorder, major depressive disorder, polyneuropathy, non-insulin-dependent diabetes mellitus and hypothyroidism." He also indicates that she is "not capable of performing all normal activities of daily living in the home, including cleaning, cooking, washing, and like tasks..." In a statement in the record, the applicant's spouse's mother states that she relies on the applicant to assist her around the house and he has done so in the preceding years. Having reviewed the evidence, the AAO finds it to establish that the applicant's spouse would experience extreme hardship resulting from separation from the applicant. In reaching this conclusion, we note the applicant's spouse's emotional condition, pregnancy, and her financial status. Documentary evidence and statements from family and medical professionals corroborate the

applicant's spouse's claims of emotional hardship and financial concerns. Furthermore, the record demonstrates that stress caused by their separation, coupled with the applicant's spouse's concerns for her husband's safety and health in Haiti and his financial and emotional well-being in Canada, further exacerbate the hardship that she would suffer in his absence. The AAO concludes that, considering the evidence in the aggregate, the applicant's spouse would be experiencing extreme hardship resulting from separation from the applicant.

The AAO also finds the record to establish that the applicant's spouse would experience extreme hardship if she were to relocate to Haiti or Canada. The applicant's spouse's safety, financial, and health concerns about living in Haiti are justified given the country conditions in Haiti. The AAO notes that the U.S. Department of State has issued a travel warning for Haiti, updated on December 28, 2012, concerning the sanitary conditions in that country. The AAO also notes that the applicant was born in the United States, appears to have resided her entire life in Florida, and does not appear to speak French. In regards to relocation to Canada, the analysis is more difficult considering the favorable country conditions there; however, the record indicates that the applicant has never visited Canada and obtained Canadian citizenship through his father who apparently attended college there but now resides in Haiti. Neither the applicant nor the applicant's spouse have family ties to that country according to the record. Additionally, the applicant's spouse has strong family ties to the United States, namely her mother with whom she has resided her entire life. Additionally, the AAO notes that the record indicates that the applicant's spouse's mother suffers from numerous debilitating medical conditions and has relied on the applicant and his spouse for physical support. The applicant's spouse notes that she would not want to abandon her mother, especially considering that her mother's husband committed suicide in 2003 and her other child is apparently in prison on a 30 year sentence. The AAO notes that although the applicant and his spouse could possibly find comparable work in Canada, they do not appear to have any savings and would face difficulty establishing themselves in that country. The applicant's spouse indicates that the thought of accumulating even more debt when her credit score is already low causes her additional anxiety. The AAO concludes that, considering the evidence in the aggregate, the applicant's spouse would experience extreme hardship should he relocate to either Haiti or Canada to reside with the applicant.

When the specific hardship factors noted above and the hardships routinely created by the separation of families are considered in the aggregate, the AAO finds that the applicant has established that his spouse would face extreme hardship if the applicant's waiver request is denied. The applicant has established statutory eligibility for a waiver of her inadmissibility under section 212(h) of the Act.

In that the applicant has established that the bar to her admission would result in extreme hardship to his qualifying relative, the AAO now turns to a consideration of whether the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, 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 *Matter of Mendez-Moralez*, in evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the BIA stated that:

The factors adverse to the applicant 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, recency and seriousness, and the presence of other evidence indicative of an 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 the alien began his 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 and service to 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)...

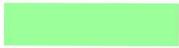
Id. at 301. The AAO must then, “balance the adverse factors evidencing an alien’s undesirability as a permanent resident with the social and humane considerations presented on the alien’s behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country.” *Id.* at 300. (Citations omitted).

The adverse factors in the present case are the applicant's conviction for possession of not more than 20 grams of marijuana and his admission to the United States on the visa waiver program where the record reflects the applicant had immigrant intent. He has no other known criminal or immigration violations. The favorable factors in the present case are the applicant’s family ties to the United States, the hardship to the applicant’s U.S. citizen spouse if the application were denied, the applicant’s gainful employment, and his acceptance of responsibility for his actions. The record indicates that the applicant completed probation for his criminal offense on June 10, 2010. The applicant also states in the record that he “deeply regret[s] the mistake [he] made” and that he “learned to deal with [his] problems in a more adult and legal fashion.” The record does not reflect that the applicant has had any other interactions with law enforcement since the completion of his probation. The AAO also notes the applicant’s mother-in-law’s statement that the applicant has provided crucial support and assistance to her and her daughter since he became a part of their family. The AAO finds that the applicant has established that the favorable factors in his application outweigh the unfavorable factors.

The crime committed by the applicant is very serious in nature and cannot be condoned. Nonetheless, the AAO finds that the applicant has established that the favorable factors in his application outweigh the unfavorable factors. Therefore, a favorable exercise of the Secretary's discretion is warranted.

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

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Act, 8 U.S.C. § 1361. In discretionary matters, the applicant bears the full burden of proving eligibility for discretionary relief. *See Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976). Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.