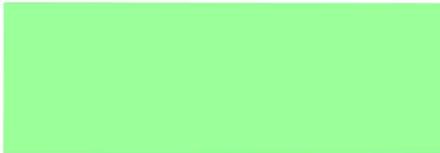


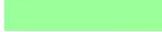


U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **MAR 08 2013** OFFICE: SANTO DOMINGO

FILE: 

IN RE: 

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h), section 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v), and Application for Permission to Reapply for Admission into the United States after Deportation or Removal under section 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Santo Domingo, Dominican Republic. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of St. Kitts-Nevis who was found to be inadmissible 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 been convicted of a crime involving moral turpitude and section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking readmission within 10 years of his last departure. The applicant was also found to be inadmissible pursuant to section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii). The applicant seeks a waiver of inadmissibility and permission to reapply for admission into the United States in order to reside with his wife in the United States.

The Field Office Director found that the applicant failed to establish extreme hardship to a qualifying relative and denied the Form I-601 application for a waiver accordingly. The Field Office Director also denied the applicant's Form I-212 application. *Decision of the Field Office Director*, dated March 14, 2011.

In support of the waiver application and appeal, the applicant submitted identity documents, medical documentation concerning himself and his spouse, financial documentation, and letters from his spouse. The entire record was reviewed and considered in rendering 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.

(ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did

not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

The record reflects that the applicant was convicted of one count of simple assault and battery, on April 17, 2002, in Florence County, South Carolina. There is no information in the record concerning the applicant's sentence for this conviction. However, the record does contain information indicating that the applicant was convicted of a crime carrying a penalty of not more than 30 days.

Section 16-3-600 of the Code of Laws of South Carolina provides, in relevant part:

(E)(1) A person commits the offense of assault and battery in the third degree if the person unlawfully injures another person, or offers or attempts to injure another person with the present ability to do so.

(2) A person who violates this subsection is guilty of a misdemeanor, and, upon conviction, must be fined not more than five hundred dollars, or imprisoned for not more than thirty days, or both.

Section 212(a)(2)(A)(ii)(II) of the Act creates an exception to inadmissibility under section 212(a)(2)(A)(i)(I) of the Act where an applicant has been convicted of a single crime involving moral turpitude and the maximum penalty possible does not exceed imprisonment for one year and the applicant is not sentenced to a term of imprisonment in excess of six months. 8 U.S.C. § 1182(a)(2)(A)(ii)(II). Under South Carolina penal law, assault and battery in the third degree is a crime carrying a maximum sentence of 500 dollars and/or imprisonment of 30 days. The applicant's criminal record does not indicate his sentence for his assault and battery conviction, but statutorily, it could not exceed 30 days. Accordingly, the AAO concludes that the applicant's assault and battery conviction is a "petty offense" under the Act's section 212(a)(2)(A)(ii)(II) exception.¹ Accordingly, the record does not support that the applicant requires a waiver under section 212(h) of the Act.

However, the applicant is also inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present for more than one year and seeking readmission within 10 years of his last departure from the United States.

Section 212(a)(9)(B) of the Act, in pertinent part, provides:

(B) ALIENS UNLAWFULLY PRESENT.-

¹ It is noted that the record reflects that the applicant was arrested for criminal contempt in the second degree pursuant to New York penal law section 215.50 on September 4, 2003. The record does not contain any information concerning a disposition for this charge.

(i) In general.- Any alien (other than an alien lawfully admitted for permanent residence) who-

....

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

....

(v) Waiver.-The Attorney General has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or 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 that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

The applicant is a native and citizen of St. Kitts-Nevis who entered the United States on September 5, 1987 pursuant to a B-2 visa with authorization to remain in the United States until March 4, 1988. The applicant remained in the United States beyond that date and filed a Form I-485, Application for Permanent Residence, on January 14, 1992. The application was denied on August 11, 2000, after the petitioner withdrew her petition filed on behalf of the applicant. The applicant was placed into immigration proceedings and ordered removed by an immigration judge on April 13, 2006. The applicant was removed from the United States in February 2007. The applicant accrued unlawful presence in the United States from August 11, 2000 until his removal in February 2007. Accordingly, he accrued over one year of unlawful presence in the United States, and he is inadmissible under section 212(a)(9)(B)(i)(II) of the Act. The applicant does not contest his inadmissibility on appeal.

A section 212(a)(9)(B)(v) waiver of the bar to admission resulting from section 212(a)(9)(B)(i)(II) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant is not considered in section 212(a)(9)(B)(v) waiver proceedings unless it causes hardship to a qualifying relative, in this case the applicant's wife. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. See *Matter of Mendez*, 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.

The record reflects that the applicant is a 50-year-old native and citizen of St. Kitts-Nevis. The applicant's spouse is a 52-year-old native of St. Kitts-Nevis and a citizen of the United States. The applicant's spouse submitted a letter stating that she and the applicant were in Vancouver, Canada.

The applicant's spouse asserts that she cannot be separated from the applicant because he requires medical care and she has to care for him. The applicant's spouse contends that the applicant requires a major operation for a cancerous growth and that it is a type of surgery that cannot be performed in Nevis. Accordingly, the applicant's spouse asserts that she has to help the applicant to recuperate in Canada after his operation as he has no other family support in that country. The record contains a letter from a physician in Canada stating that the applicant was previously diagnosed with a lumbar injury in New York. The physician further states that the applicant's imaging is consistent with a low-grade chondrosarcoma, but that the applicant would need a core needle biopsy for confirmation. The record also contains medical notes from [REDACTED] recommending MRI imaging and referral to the sarcoma surgery team. A patient coordinator from [REDACTED] also submitted a letter stating that the applicant has been accepted as a patient and that if it were determined that the applicant would require surgery, he would need to remain in Los Angeles for surgery, therapy, and follow up appointments.

The applicant's spouse asserts that she and the applicant have spent thousands of dollars for his medical testing and accompanying expenses. The applicant's spouse contends that this outlay of payments has created extreme financial hardship. The applicant's spouse further asserts that she will suffer financial hardship as she travels to visit the applicant in Nevis and she will be forced to hire somebody to perform the housework that he used to perform in the United States. The record contains financial documentation concerning the applicant's home loan and credit card payments. There is sufficient evidence in the record, in the aggregate, to find that the applicant's spouse is suffering from a level of hardship beyond the common results of separation from a spouse.

The applicant's spouse asserts that she cannot relocate to Nevis to reside with the applicant because she suffers from fibromyalgia and has received treatment for her condition in the United States. The applicant's spouse contends that Nevis does not have the facilities to deal with many medical issues. The applicant's spouse further asserts that she also suffers from high blood pressure, for which she takes medication, and that her health insurance is not accepted outside the United States. The record contains evidence of the applicant's spouse's health insurance coverage, prescriptions, and recommendations from her physician concerning fibromyalgia pain management. The record also contains documentation of the applicant's spouse's medical visits, sometimes as often as several times in a week.

The applicant's spouse asserts that if she relocated to Nevis, she would leave behind her home and family members in the United States. The applicant's spouse states that she has lived and worked

in the United States since 1970 and worked as a registered nurse for 39 years. The applicant's spouse contends that her mother is too advanced in age to visit her in Nevis and that she wanted to watch her grandson graduate from high school. It is noted that the record contains evidence of the applicant's spouse's home ownership in the United States. It is also noted that the record does not contain letters of support from the applicant's spouse's family members. However, based upon the applicant's spouse's ties to the United States, including her family members and years of employment and home ownership, the applicant's health insurance benefits in the United States and evidence of the continuity of care for her fibromyalgia in the United States, the record contains sufficient evidence to show that the hardships faced by the qualifying relative, in the aggregate, would rise to the level of extreme hardship if she relocated to Nevis.

Considered in the aggregate, the applicant has established that his spouse would face extreme hardship if his waiver request is denied. Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996). For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Id.* at 299. The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on her behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

However, as a matter of discretion, the applicant does not merit a grant of this waiver. The negative discretionary factors against this applicant include his physical presence in the United States beyond the authorized date of March 4, 1988. The applicant did not file his Form I-485, Application for Permanent Residence, until January 14, 1992. It is noted that the applicant's ex-spouse withdrew the petition she filed on behalf of the applicant based upon claims of the applicant's physical and mental abuse. The applicant's ex-spouse further stated that she feared bodily harm from the applicant when he learned of her petition withdrawal. It is also noted that the record contains evidence that the applicant threatened bodily harm against an immigration enforcement agent during his detention. The applicant was removed from the United States in February 2007.

The applicant has an extensive history of criminal contacts in the United States. The applicant was arrested for criminal sexual conduct with a minor on September 16, 2000, based upon allegations that the applicant kissed and had sexual intercourse with a six-year-old victim. The applicant subsequently pled guilty to a lesser charge of simple assault and battery on April 17, 2002, after the victim recanted her statement. The applicant was again arrested, twice, for charges of sexual conduct involving minors. On December 15, 2005, the applicant was arrested for criminal sexual acts and sex abuse and on January 1, 2005, the applicant was arrested for sex abuse and sexual contact with rape. For the applicant's January 2005 arrest, the record contains allegations that the applicant sodomized a five-year-old victim on numerous occasions. The record does not contain dispositions for these arrests. The record also does not contain dispositions for any of the applicant's arrests from 2003-2004 for criminal contempt, criminal mischief, menacing, obstruction, and resisting arrest. The record does indicate that the applicant

received an adjournment in contemplation of dismissal for his March 26, 2004 arrest for intent to damage and harassment.

The favorable discretionary factor for this applicant is the extreme hardship the applicant's spouse would experience whether she remained in the United States, separated from the applicant, or accompanied the applicant in St. Kitts-Nevis.

The immigration and criminal violations committed by the applicant are serious in nature and cannot be condoned. In addition, the applicant has not submitted or demonstrated evidence of reformation or rehabilitation. As such, the AAO finds that the applicant has not established that the favorable factors in his application outweigh the unfavorable factors. Therefore, a favorable exercise of the Secretary's discretion is not warranted.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(i)(II) of the Act, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

The AAO notes that the Field Office Director denied the applicant's Form I-212 Application for Permission to Reapply for Admission into the United States After Deportation or Removal (Form I-212) as well as the applicant's I-601 Waiver of Grounds of Inadmissibility (Form I-601). *Matter of Martinez-Torres*, 10 I&N Dec. 776 (reg. Comm. 1964) held that if an application for permission to reapply for admission is denied, in the exercise of discretion, to an alien who is mandatorily inadmissible to the United States under another section of the Act, no purpose would be served in granting the application. As the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act, no purpose would be served in granting the applicant's Form I-212.

ORDER: The appeal is dismissed.