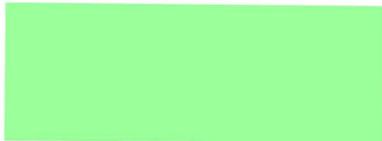




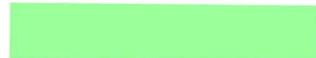
U.S. Citizenship
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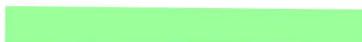


Date: APR 15 2014

Office: ATLANTA, GEORGIA

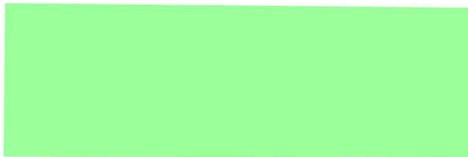


IN RE:



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

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

A handwritten signature in black ink that reads "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting Field Office Director, Atlanta, Georgia and a subsequent appeal was denied by the Administrative Appeals Office (AAO). The application is now before the AAO on motion. The motion will be granted and the appeal sustained.

The applicant is a native and citizen of Mexico who was found inadmissible to the United States 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 been convicted of possession of a controlled substance, marijuana. The applicant seeks a waiver of this ground of inadmissibility 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 father, daughter, and common law wife.

In a decision, dated April 27, 2010, the acting field office director considered hardship to the applicant's father and found that the record did not show that the applicant's father would suffer extreme hardship as a result of his inadmissibility. The waiver application was denied accordingly.

On appeal, the applicant submitted additional evidence of hardship. In our decision, dated September 14, 2012, we found that the applicant had not met his burden to show that he was eligible to apply for a waiver under section 212(h) of the Act because he had not shown that his conviction for possession of marijuana involved thirty grams or less of the drug. We also found that if the applicant had shown he was eligible to apply for a waiver of inadmissibility, the record did not establish that a qualifying relative would suffer extreme hardship as a result of his inadmissibility.

On motion, counsel submits documentation showing that the applicant is eligible for a section 212(h) waiver because his conviction involved possession of less than 30 grams of marijuana. In addition, counsel submits additional hardship evidence and numerous character reference letters for the applicant.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Section 212(a)(2)(A) states:

(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 –

- (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or
- (II) a violation of (or a 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.

As stated in our previous decision, the record indicates that on May 15, 2001, in Alabama, the applicant was convicted of Possession of Marijuana in the second degree, was fined, and was sentenced to 30 days in jail. Thus, the applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act for having been convicted of possession of a controlled substance.

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

The Attorney General may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), (D), and (E) or 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* (emphasis added.)

Previously, the record failed to indicate the amount of marijuana the applicant was convicted of possessing and whether that amount was 30 grams or less. The record now contains documentation from the [REDACTED] which states that the applicant's court records indicate that the applicant was charged with possession of marijuana in the second degree, that the applicant was found to have in his possession several marijuana roaches for personal use only, and that the marijuana weighed less than 30 grams. We find that the applicant has now met his burden in showing that he is eligible to apply for a waiver under section 212(h) of the Act.

A waiver of inadmissibility under section 212(h) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse, parent, son or daughter of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. The applicant's father, daughter, and wife are the qualifying relatives in this case.¹

The record establishes that for immigration purposes, the applicant's common law marriage is a valid marriage.

¹ The record indicates that the applicant's mother is or has applied to be a lawful permanent resident, but no documentation has been submitted to support her lawful permanent resident status nor has any hardship claims been made in regards to the applicant's mother.

9 F.A.M 40.1, N1.2, states:

In the absence of a marriage certificate, an official verification, or a legal brief verifying full marital rights, a common law marriage or cohabitation is considered to be a “valid marriage” for purposes of administering the U.S. immigration law only if:

- (1) It bestows all of the same legal rights and duties possessed by partners in a lawfully contracted marriage; and
- (2) Local laws recognize such cohabitation as being fully equivalent in every respect to a traditional legal marriage, e.g.:
 - (a) The relationship can only be terminated by divorce;
 - (b) There is a potential right to alimony;
 - (c) There is a right to intestate distribution of an estate; and
 - (d) There is a right of custody, if there are children.

In Alabama, the state where the applicant and his wife are cohabitating, common law marriages are recognized with the full marital rights as a traditional legal marriage. A valid common-law marriage exists in Alabama when there is capacity to enter into a marriage, present agreement or consent to be husband and wife, public recognition of the existence of the marriage, and consummation. *Mattison v. Kirk*, 497 So.2d 120 (Ala.1986). No specific words of assent are required; present intention is inferred from cohabitation and public recognition. *Walton v. Walton*, 409 So.2d 858 (Ala.Civ.App.1982). The record establishes that all of these requirements exist in the applicant’s relationship with his wife: they have the capacity to enter into a marriage; they cohabit; they have a child, so their relationship has been consummated; and, as attested to through letters from their family and friends, there is public recognition that they are husband and wife. Thus, hardship to the applicant’s U.S. citizen spouse as a qualifying relative will be considered.

If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and 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 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 v. I.N.S.*, 138 F.3d 1292 (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.

On appeal the record of hardship included a statement from the applicant, a statement from the applicant's father, a statement from the mother of the applicant's daughter, copies of checks written to the applicant, and medical documentation for the applicant's daughter's mother.

On motion, the record of hardship includes: a statement from the applicant's father, a statement from the mother of the applicant's daughter, medical documentation, pictures of the applicant with his family, financial documentation, and reference letters for the applicant.

On appeal, the applicant claimed that his father, mother, and child would suffer emotionally and financially as a result of his inadmissibility. The record indicated, through statements from the applicant, his father, and the mother of his daughter that the applicant is the sole source of income for the entire family and to have the applicant relocate to Mexico would be emotionally hard. In addition, the statements asserted that the applicant's daughter would suffer medically and educationally if she relocated to Mexico.

On motion, the record indicates, through a statement from the applicant's father, that the applicant had been estranged from his parents for 14 years, reuniting with them in 2007. The record indicates that the applicant lives in Alabama with his wife and his daughter and the rest of his family resides in either Houston, Texas or Mexico (awaiting their immigrant visas to reside in Texas with his father). The record does not show that his parents rely on him financially, physically, or emotionally. The applicant's father states that his family would experience extreme hardship as a result of the applicant's waiver being denied, but does not provide more information about how his family would specifically be affected. Thus, the current record does not establish that the applicant's father would suffer extreme hardship as a result of separation or as a result of relocation to Mexico.

We now turn to the hardship the applicant's spouse and/or daughter would face as a result of the applicant's inadmissibility. The record indicates that the applicant's daughter is seven years old and the applicant is the family's sole source of financial support. The record includes financial documentation to show that the applicant works as an independent contractor installing floors and earns approximately \$800 to \$1,400 per month. The applicant's spouse states that she is not able to work due to a mental health condition. The record indicates that the applicant's spouse suffers from depression and anxiety and regularly takes prescriptions for these problems. The record also indicates that the applicant is a great source of emotional support for his spouse, who previously suffered through an abusive relationship that left her alone to raise three children.

The applicant's spouse indicates that she would be concerned with the lack of familial support, educational opportunities, and medical care upon relocation to Mexico, but does not provide documentation to support a finding that conditions in Mexico would make relocation an extreme hardship. However, the record does show that the applicant's spouse has lived her whole life in the United States and has a mother and four children in the United States. The record also shows that the applicant would have no familial support in Mexico because his family is planning to move to Texas. Thus, the record indicates that the applicant's U.S. citizen spouse would suffer extreme hardship as a result of separating from the applicant and as a result of relocation. The applicant is the family's sole source of financial support, his spouse is unable to work because of a mental health

condition, she has extensive family ties in the United States, including four children, and no familial or cultural ties to Mexico. Considered in the aggregate, the applicant has established that his spouse would face extreme hardship if the applicant's 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-Moralez*, 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 his 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.

The AAO notes that *Matter of Marin*, 16 I & N Dec. 581 (BIA 1978), involving a section 212(c) waiver, is used in waiver cases as guidance for balancing favorable and unfavorable factors and this cross application of standards is supported by the Board of Immigration Appeals (BIA). In *Matter of Mendez-Moralez*, the BIA, assessing the exercise of discretion under section 212(h) of the Act, stated:

We find this use of *Matter of Marin, supra*, as a general guide to be appropriate. For the most part, it is prudent to avoid cross application, as between different types of relief, of particular principles or standards for the exercise of discretion. *Id.* However, our reference to *Matter of Marin, supra*, is only for the purpose of the approach taken in that case regarding the balancing of favorable and unfavorable factors within the context of the relief being sought under section 212(h)(1)(B) of the Act. *See, e.g., Palmer v. INS*, 4 F.3d 482 (7th Cir.1993) (balancing of discretionary factors under section 212(h)). We find this guidance to be helpful and applicable, given that both forms of relief address the question of whether aliens with criminal records should be admitted to the United States and allowed to reside in this country permanently.

Matter of Mendez-Moralez at 300.

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 BIA further states that upon review of the record as a whole, a balancing of the equities and adverse matters must be made to determine whether discretion should be favorably exercised. The equities that the applicant for section 212(h)(1)(B) relief must bring forward to establish that he merits a favorable exercise of administrative discretion will depend in each case on the nature and circumstances of the ground of exclusion sought to be waived and on the presence of any additional adverse matters, and as the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence. *Id.* at 301.

The favorable factors in the applicant's case include the extreme hardship his spouse would suffer as a result of his inadmissibility; his other family ties to the United States; the lack of any criminal record beyond the conviction for possession of marijuana, and, as attested to by numerous character references submitted on his behalf, the applicant's attributes as a loving and supportive father and husband. The unfavorable factors in the applicant's case include his illegal entry into the United States, his unauthorized employment and unlawful residence in the United States, and his criminal conviction.

Although the applicant's violations of immigration law and criminal conviction cannot be condoned, the positive factors in this case outweigh the negative factors. In these proceedings, the burden of establishing eligibility for the waiver rests entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met his burden. The motion is granted and the appeal will be sustained.

ORDER: The motion is granted and the appeal sustained.