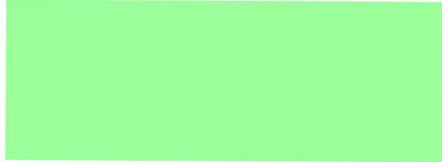




U.S. Citizenship  
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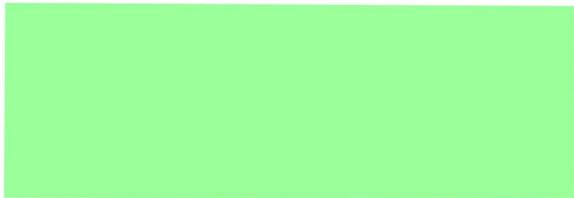
DATE: **JAN 08 2015** OFFICE: BOSTON

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)

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. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg  
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Brazil who is 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 involved in a crime related to a controlled substance.<sup>1</sup> The applicant requests 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 with his U.S. citizen spouse.

The Field Office Director concluded that the applicant failed to establish the requisite hardship to a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility. *See Decision of the Field Office Director*, dated February 14, 2014.

On appeal, the applicant asserts that he has proven that his qualifying spouse will suffer extreme hardship in the event that she relocates to Brazil or if she remains in the United States without him.

On November 19, 2014, we issued a Notice of Intent to Dismiss (NOID) the applicant's appeal of the denial of his waiver application based on his inadmissibility under section 212(a)(2)(A)(i)(II) of the Act for his conviction related to a crime involving a controlled substance, because of evidence that appeared to indicate he also was convicted of cocaine possession. The applicant was granted thirty (30) days to submit a rebuttal. In response the applicant submits additional documentation related to his arrest for possession of cocaine, including his motion for a new trial with supporting affidavits, attachments related to his current occupation, and a certified court docket printout.

The record includes, but is not limited to: an appeal letter written on behalf of the applicant; letters from the qualifying spouse, her employer and friend; a letter from a nurse practitioner regarding the adoptive mother of the qualifying spouse; financial documentation; proof of the qualifying spouse's health insurance and documentation regarding the applicant's criminal history and occupation. The entire record was reviewed and considered in rendering a decision on the appeal.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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 –

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<sup>1</sup> The Field Office Director referred to the applicant's controlled substance violation, specifically marijuana possession, as a crime involving moral turpitude; the record, however, does not reflect that this violation also makes the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

- (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) 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.

Section 101(a)(48) of the Act provides:

- (A) The term “conviction” means, with respect to an alien, 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.

The record reflects that, on March [REDACTED], the applicant admitted sufficient facts to Possession of a Class D Drug (Marijuana), in the Trial Court of Massachusetts, [REDACTED] District Court, in violation of Massachusetts General Laws Annotated (M.G.L.A.) 94C § 34, and was sentenced to two years of probation and ordered to remain drug-free and to submit to urinalysis as required by his probation officer. The record establishes that the applicant was arrested with less than six grams of marijuana. The applicant does not dispute that he is inadmissible for this conviction under section 212(a)(2)(A)(i)(II) of the Act.

A waiver for this ground of inadmissibility is outlined in section 212(h) of the Act, which provides, in pertinent part:

The [Secretary] may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if-

- (1) (A) in the case of any immigrant it is established to the satisfaction of the [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 [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

the [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 record also reflects that on March [REDACTED] the applicant admitted sufficient facts to Possession of a Class B Drug (Cocaine), in the Trial Court of Massachusetts, [REDACTED] District Court, in violation of M.G.L.A. 94C § 34, and was sentenced to two years of probation and ordered to remain drug-free and to submit to urinalysis as required by his probation officer. The applicant subsequently moved for a new trial on September 8, 2010, and the count relating to his cocaine possession was dismissed on September 28, 2010.

Under the statutory definition of "conviction," no effect is to be given in immigration proceedings to a state action that purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). Any subsequent, rehabilitative action that overturns a state conviction, other than on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings, is ineffective to expunge a conviction for immigration purposes. *Id.* at 523, 528. *See also, Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003) (holding that in light of the language and legislative purpose of the definition of a "conviction" at section 101(a)(48) of the Act, "there is a significant distinction between convictions vacated on the basis of a procedural or substantive defect in the underlying proceedings and those vacated because of post-conviction events, such as rehabilitation or immigration hardships); and *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378, 1379 (BIA 2000) (a conviction vacated under a state criminal procedural statute, rather than a rehabilitative provision, remains vacated for immigration purposes.) The BIA held further in, *Matter of Adamiak*, 23 I&N Dec. 878, 879 (BIA 2006), that a conviction vacated for the failure of the trial court to advise the alien defendant of the possible immigration consequences of a guilty plea was no longer a valid conviction for immigration purposes, because the guilty plea has been vacated as a result of a defect in the underlying criminal proceedings, and not for a rehabilitative or immigration hardship purpose.

In order to determine whether a *vacatur* is tied to a defect in the underlying conviction, rather than rehabilitative or immigration-related purposes, the adjudicative body starts by examining the order itself. Often, the statutory basis for the order will resolve whether the underlying conviction remains valid for immigration purposes. See *Matter of Pickering*, 23 I. & N. Dec. at 624. Where the order does not specify its statutory basis, the BIA will consider the grounds presented to the court by the petitioner in his or her motion to vacate the conviction. *Id.* (“[W]e look to the law under which the court issued its order and the terms of the order itself, as well as the reasons presented by the respondent in requesting that the court vacate the conviction.”).

In response to our NOID, which concerned his possession of cocaine charge, the applicant supplements the record with copies of his motion for a new trial dated September [REDACTED] and affidavits from himself and three others who were with him the night of his arrest. The basis for his motion for a new trial under Rule 30 of the Massachusetts Rules of Criminal Procedure was that it was in the interest of justice and that he had “newly discovered evidence.” The affidavits all indicated that the cocaine did not belong to the applicant, and one of the affiants admitted the cocaine was his. The count relating to his cocaine possession was dismissed on September 28, 2010. As such, the applicant’s cocaine possession count was not dismissed for immigration purposes but rather for a violation of his rights within his criminal proceedings. Accordingly, this evidence indicates that the applicant was not convicted, within the meaning of section 101(a)(48)(A) of the Act, for possession of cocaine, in violation of M.G.L.A. 94C § 34.

As the applicant has demonstrated that he was convicted of a single offense of simple possession of 30 grams or less of marijuana, he is eligible to seek a waiver under section 212(h)(1)(B) of the Act.

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 the U.S. citizen or lawfully resident spouse or parent of the applicant. 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 U.S. Citizenship and Immigration Services 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 qualifying spouse indicates that she would experience emotional and financial hardships if she were to be separated from the applicant. She states that she and the applicant trust and love each other. She also states that he “has been a huge part of [her] family,” and separating from him would cause her emotional distress. She claims that her life has been more stable and predictable since they married; she became orphaned at a young age; and her step-grandmother adopted her, raising

her with seven other children. She states that the loss of her parents caused her to become extremely depressed. The record contains a death certificate for the applicant's qualifying spouse's father, indicating that he died when she was young, and an adoption certificate, indicating that she was adopted by her grandmother. In addition, the record contains a handwritten letter from the qualifying spouse's medical provider dated May 29, 2013, stating that she has a long history of anxiety and depression. It is unclear, however, who wrote the letter. Moreover, absent an explanation in plain language from the treating physician or therapist of the exact nature and severity of any mental or psychological condition and a description of any treatment or family assistance needed, we are not in the position to reach conclusions concerning the severity of the applicant's spouse's psychological condition or the treatment she needs. Further, while it is understandable that the applicant's spouse would experience emotional difficulties if she remains in the United States without the applicant, the record provides little detail regarding the specific emotional hardships that she would experience upon separation. The applicant also does not address whether the qualifying spouse's family would be able to support her emotionally in the event that he returns to Brazil.

Concerning the applicant's spouse's financial hardship upon separation, the qualifying spouse indicates that she and the applicant financially assist her adoptive mother and that without his income, she would be unable to do so. She fears her mother would have to go to a nursing home as a result of the loss of their financial support. The qualifying spouse indicates through her letters that she feels a responsibility to care for her mother, who adopted her at a young age. The record also contains a letter from the applicant and qualifying spouse's friend, in which she states she understands that the applicant and qualifying spouse help with some of his mother-in-law's bills. However, the applicant submits no documentary evidence, such as receipts or copies of checks, to confirm claims of financial support for the qualifying spouse's mother. Further, the record lacks corroborating evidence to show that the qualifying spouse's mother requires financial assistance and includes no details about her financial situation. As such, the applicant has not provided sufficient evidence to establish that the qualifying spouse would suffer emotional and financial hardships as a result of her separation from the applicant that, considered in the aggregate, are extreme.

Addressing the hardship that the applicant's qualifying spouse would experience if she were to relocate to Brazil, she states that she has no family ties there and that she is close to her family in the United States, including her mother and three siblings. However, the applicant provides no evidence to corroborate his spouse's claims about her relationship with her family in the United States, such as letters from her relatives. The record also lacks evidence regarding whether the applicant has family in Brazil who could support the applicant's spouse and their family upon relocation. While the qualifying spouse states that the applicant came to the United States when he was 16 years old and therefore has few ties to Brazil, the Biographic Information, Form G-325A, submitted with the applicant's adjustment application in 2013, indicates that the applicant's mother lives in Brazil.

The qualifying spouse also indicates that she does not speak Portuguese and will be unable to find employment as a result of her lack of language skills and without an advanced degree or professional license. She also states that she has "worked hard" in her current job "to move up the ladder" and that her "skills are not transferrable." The record contains a letter from the applicant's

spouse's employer, indicating that she earns an hourly wage of \$14.43 and has worked for [REDACTED] as a full-time program coordinator since 2006. A friend, in her letter, indicates that the applicant's spouse was recently promoted. However, the record contains few details about the qualifying spouse's career and does not include an explanation for her concern that her skills would not be transferrable to Brazil. Moreover, because the qualifying spouse believes she could not find work in Brazil, she fears that she would not be able to visit her family in the United States due to the high cost of travel. The record does not contain documentation supporting assertions that she will be unable to find employment in Brazil. Assertions are evidence and will be considered. However, going on record without supporting documentary evidence generally is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). In addition, the qualifying spouse notes that her family could not visit her because they do not have enough money, and that her mother could not make the trip due to her health condition. However, no documentary evidence in the record supports these assertions. While the record indicates that her mother has a heart condition, it does not show that her mobility is restricted or that she is unable to travel.

Concerning hardships related to the qualifying spouse's health issues upon relocation, the applicant's qualifying spouse indicates that she suffers from polycystic ovarian syndrome and hypothyroidism, which contribute to her depression and anxiety. She states that she is currently undergoing treatment to achieve her goal of having a family; that she must be "closely monitored"; and that if her treatment is interrupted by moving to Brazil, where she does not have healthcare, she would never be able to conceive a child. The record contains proof of the applicant's spouse's medical care in the United States. However, the record does not contain information regarding her specific treatment in the United States. While a letter mentions her fertility issues, the record contains no documentary evidence regarding her treatment. Moreover, the record contains no proof that she would be unable to obtain needed treatment in Brazil. Counsel asserts that the only way to prove that the applicant's spouse would not be able to receive treatment in Brazil would be to move there and then to attempt to receive treatment. The record does not reflect that the applicant's efforts to obtain relevant general evidence regarding fertility and other medical treatment in Brazil were unsuccessful. Likewise, although the qualifying spouse indicates that her fertility issues contribute to her depression and anxiety, we are unable to ascertain the nature and severity of her conditions based upon the evidence in the record, as stated above.

Lastly, the qualifying spouse indicates that she takes care of her mother by taking her to medical appointments and helping with her medications. The record contains a letter from the applicant's mother-in-law's nurse practitioner, confirming that she is a patient at the [REDACTED] and has congestive heart failure and cardiomyopathy. However, the applicant does not explain whether other family members could help his mother-in-law with her appointments and medications if his spouse relocated to Brazil.

In this case, the record does not contain sufficient evidence to show that the hardships faced by the qualifying relative, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship. The applicant has not established extreme hardship to his U.S. citizen spouse as required under section 212(h) of the Act. As the applicant has not

established extreme hardship to a qualifying family member, no purpose would be served in determining whether he merits a waiver as a matter of discretion.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.