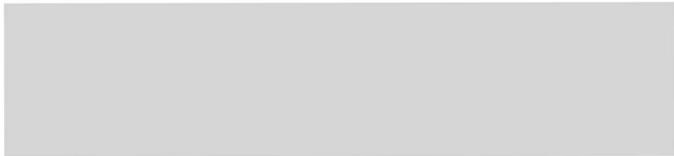


(b)(6)

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



U.S. Citizenship
and Immigration
Services



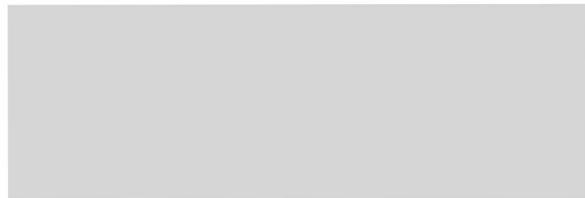
Date: **MAY 27 2015**

FILE: [REDACTED]
APPLICATION RECEIPT #: [REDACTED]

IN RE: Applicant: [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:



Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

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

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Oakland Park, Florida, denied the waiver application and a subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on motion. The motion will be granted and the decision to dismiss the appeal will be affirmed.

The applicant is a native and citizen of Colombia. The director found that the applicant was inadmissible under 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 committing a crime involving moral turpitude. The applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), to remain in the United States with his U.S. citizen spouse and child.

The director denied the waiver application, concluding that the applicant had failed to establish that the bar to admission would result in extreme hardship to a qualifying relative.

On appeal, we determined that the record established that the applicant had been convicted of two crimes of moral turpitude and consequently, he was statutorily ineligible for the petty offense exception. We further found that one of the applicant's convictions, Assault in the 3rd degree under New York Penal Law § 120.00, was for a violent or dangerous which required that the applicant meet the exceptional and extremely unusual hardship standard as contemplated by 8 C.F.R. § 212.7(d). We determined that as the applicant had not met the extreme hardship standard as outlined in section 212(h) of the Act, no purpose would be served in examining the heightened standard of exceptional and extremely unusual hardship under section 8 C.F.R. § 212.7(d). We concluded that even if the applicant had established that a qualifying relative would experience the required hardship, his application would be denied as a matter of discretion due to his extensive criminal record. The appeal was consequently dismissed.

The sole basis for the instant motion is counsel's contention that the applicant was never arrested or convicted of the offense of Assault in the Third Degree under New York Penal Law Section 120.00 or ██████████ 1995, as referenced in our decision to dismiss the appeal. In support, counsel submits criminal records from the State of New York.

Counsel is correct on motion that the record does not establish that the applicant was arrested or convicted of any offense on ██████████ 1995. We apologize for any confusion which may have resulted from our reference to ██████████ 1995. Nevertheless, it is evident from the record that the applicant was convicted of the offense of Assault in the Third Degree¹ under New York Penal Law Section

¹ New York Penal Law Section 120.00 states in pertinent part:

A person is guilty of assault in the third degree when:

1. With intent to cause physical injury to another person, he causes such injury to such person or to a third person; or
2. He recklessly causes physical injury to another person; or
3. With criminal negligence, he causes physical injury to another person by means of a deadly weapon or a dangerous instrument.

120.00 on [REDACTED] 2001, based on a [REDACTED] 2001 offense.² He was sentenced to three years probation and assessed restitution of \$1380. *See Certificate of Disposition, State of New York [REDACTED] Court-Criminal Division, dated [REDACTED] 2012.* Though the date noted in the decision was incorrect, the record does establish that the applicant was convicted of assault.

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) 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.

...

(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).

² The record establishes that the field office director referenced this offense in his [REDACTED] 2013 decision to deny the applicant's Form I-601 application.



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

The Attorney General 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

(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.

As we discussed in our decision to dismiss the appeal, the petty offense exception applies where the alien has committed only one crime involving moral turpitude. As noted above, the record establishes that the applicant was convicted of two crimes involving moral turpitude, specifically, Assault in the 3rd degree and Fraudulent Use of Credit Card. We thus reiterate our finding that the applicant is not eligible for the petty offense exception under 212(a)(2)(A)(ii) 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 or child of the applicant. In the present case, the applicant’s U.S. citizen spouse and child are the only qualifying relatives. Hardship to the applicant can be

considered only insofar as it results in hardship to a qualifying relative. 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 BIA provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative’s family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative’s ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. *Id.* The BIA added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The BIA has also held that the common or typical results of removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one’s present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. See generally *Matter of Cervantes-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 BIA has made it clear that “[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists.” *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator “must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation.” *Id.*

The actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. See, e.g., *Matter of Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate). For example, though family

separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. *See Salcido-Salcido v. I.N.S.*, 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 applicant has been convicted of at least two crimes of moral turpitude, one of which we determined in our decision to dismiss the appeal was considered a violent or dangerous crime. An applicant who has been convicted of a dangerous or violent crime must meet the heightened "exceptional and extremely unusual" hardship standard under section 212.7(d) for purposes of meriting a favorable exercise of discretion.

The regulation at 8 C.F.R. § 212.7(d) provides:

The Attorney General [Secretary, Department of Homeland Security], in general, will not favorably exercise discretion under section 212(h)(2) of the Act (8 U.S.C. 1182(h)(2)) to consent to an application or reapplication for a visa, or admission to the United States, or adjustment of status, with respect to immigrant aliens who are inadmissible under section 212(a)(2) of the Act in cases involving violent or dangerous crimes, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of the application for adjustment of status or an immigrant visa or admission as an immigrant would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the alien's underlying criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act.

Under 8 C.F.R. 212.7(d), the Attorney General will not favorably exercise discretion in cases involving violent or dangerous crimes, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which the alien clearly demonstrates that a denial of the waiver would result in exceptional and extremely unusual hardship. In order to show "exceptional and extremely unusual hardship," the applicant must show more than "extreme hardship." *See Matter of Monreal-Aguinaga*, 23 I&N Dec. 56, 62 (BIA 2001) (holding in cancellation of removal case that the "standard requires a showing of hardship beyond that which has historically been required in suspension of deportation cases involving the 'extreme hardship' standard"). The hardship "must be substantially beyond the ordinary hardship that would be expected when a close family member leaves this country," and is "limited to truly exceptional situations." *Id.* (internal quotation marks omitted). However, the applicant need not show that hardship would be unconscionable. *Id.* at 60.



On appeal, we determined that the record did not support a finding that the applicant's spouse or child would face extreme hardship if the applicant was refused admission. Further, we noted that as the applicant had not met the extreme hardship standard, no purpose would be served in discussing whether the applicant had established "exceptional and extremely unusual hardship" to a qualifying relative, a heightened hardship standard required to be met for purposes of favorable discretion. 8 C.F.R. § 212.7(d).

On motion, the applicant has not submitted any documentation to establish extreme hardship to a qualifying relative. In addition, the applicant has not submitted any documentation to establish exceptional and extremely unusual hardship to a qualifying relative to warrant a favorable exercise 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 motion will be granted and the decision to dismiss the appeal will be affirmed.