identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

U.S. Citizenship and Immigration Services

PUBLIC COPY

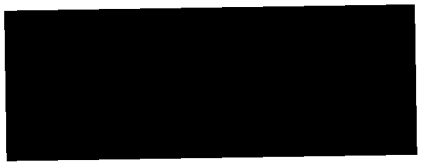
#5

Date: MAY 31 2011 Office: BALTIMORE FILE: A42 771 182

IN RE: Applicant:

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

ON BEHALF OF APPLICANT:



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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Michael Shumway

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Baltimore, Maryland, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Ireland 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 been convicted of possession of a controlled substance, and section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for willfully misrepresenting a material fact to procure admission into the United States. The applicant is applying for a waiver in order to reside in the United States with his U.S. citizen spouse and three U.S. citizen children.

The 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. *Decision of the District Director*, dated February 13, 2009.

On appeal, counsel asserts that "[l]egal error was made in the decision below by not conducting a 212(h)(i)-(iii) analysis as an alternative grounds of eligibility to extreme hardship." Counsel further contends that "[w]ith regard to 212(i), substantial evidence was provided as to the cumulative negative mental impact that the removal of Mr. [redacted] from the United States would have on his wife." *Notice of Appeal (Form I-290B)*, dated March 10, 2009.

In support of the application, the record contains, but is not limited to, financial records, conviction records, the applicant's marriage certificate, the applicant's children's birth certificates, letters of support from the applicant's friends and church, and letters from the applicant and his family members.

The AAO conducts the final administrative review and enters the ultimate decision for U.S. Citizenship and Immigration Services on all immigration matters that fall within its jurisdiction. The AAO reviews each case de novo as to all questions of law, fact, discretion, or any other issue that may arise in an appeal that falls under its jurisdiction. See *Helvering v. Gowran*, 302 U.S. 238, 245-246 (1937); see also, *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), aff'd. 345 F.3d 683 (9th Cir. 2003).

Section 212(a)(2)(A)(i) of the Act states in pertinent part:

> (1) Criminal and related grounds. —
>
> (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 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 March 13, 1990, the applicant was convicted in the Municipal Court, City of , of possession of marijuana under 50 grams in violation of New Jersey Statutes § 2C:35-10. The applicant was ordered to pay fines and his license was revoked for six months (Docket # . Therefore, the applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act for possession of a controlled substance.

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

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 . . .

The only waiver available for a controlled substance offense is under section 212(h) of the Act for a single offense relating to simple possession of 30 grams or less of marijuana. The BIA stated that in determining whether an offense relates to a simple possession of 30 grams or less of marijuana, a categorically inquiry of the offense would obviously be insufficient. *Matter of Espinoza,* 25 I&N Dec. 118, 124-25 (BIA 2009)(stating "we conclude that Congress envisioned something broader, specifically, a factual inquiry into whether an alien's criminal conduct bore such a close relationship to the simple possession of a minimal quantity of marijuana."). Here, the applicant has demonstrated that his conviction was for simple possession of less than 30 grams of marijuana. The applicant submitted a certified laboratory report from the State Police forensic science bureau reflecting that the applicant was arrested for possession of .24 grams of marijuana. *See Certified Laboratory Report*, dated January 31, 1990. Therefore, the applicant is eligible for a section 212(h) waiver of inadmissibility.

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

> (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.

Section 212(i) of the Act provides 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.

The record reflects that the applicant filed an Application for Immigrant Visa and Alien Registration, "Biographic Data," (Optional Form 230 Part I) on November 22, 1991. On March 20, 1992, the applicant signed Part II of the Application for Immigrant Visa, "Sworn Statement," before a Consular Officer in Dublin, Ireland. At part 33 of the sworn statement, where aliens are asked to indicate if they are an alien convicted of, or who admits committing, a violation of any law relating to a controlled substance, the applicant responded "no." The applicant was admitted to the United States as a lawful permanent resident on March 21, 1992. The applicant's misrepresentation is material because it renders the applicant inadmissible under section 212(a)(2)(A)(i)(II) of the Act. Therefore, the applicant is inadmissible under section 212(a)(6)(C)(i) for having willfully misrepresented a material fact to procure admission into the United States.

A section 212(i) waiver of the bar to admission resulting from a violation of section 212(a)(6)(C) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse or parent of the applicant. Hardship the alien or his children experience is relevant to section 212(i) waiver proceedings only to the extent it results in hardship to a qualifying relative, in this case the applicant's spouse. 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).

On appeal, counsel asserts that "[l]egal error was made in the decision below by not conducting a 212(h)(i)-(iii) analysis as an alternative grounds of eligibility to extreme hardship." Section 212(h)(1)(A) of the Act provides that the Secretary may, in her discretion, waive the application of subparagraph (A)(i)(I) of subsection (a)(2) if 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. Section 212(h)(1)(A) of the Act requires that the applicant's admission to the United States not be contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated. However, even if we found that the applicant is eligible for a waiver under section 212(h)(1)(A), he would remain inadmissible under section 212(a)(6)(C)(i). Section

212(a)(6)(C)(i) is a permanent ground of inadmissibility, and can be waived only under section 212(i). A waiver under the extreme hardship requirement of section 212(i) will also serve to waive the applicant's inadmissibility under section 212(a)(2)(A)(i)(II). Thus, we will now address the applicant's eligibility for a section 212(i) waiver.

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. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *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.*

We observe that 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., In re 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).

The applicant asserts that he and his spouse "share the financial burdens" of their household. He states that they "struggle monthly to get all the bills paid and usually have little left over." He states that if he is denied admission his family would "have to re-locate to rented accommodations" and would be "moving away from friends and family." He contends that his spouse would have to find afterschool care for their children, and his children's afterschool activities would be cancelled because his spouse would have to find a second job "just to pay the rent & put food on the table." He contends that if he is denied admission, his children would be "traumatized to a point of psychological impact." He notes that he supports his children "with their schoolwork, sport activities, diet, psychological development, religious education." He asserts that his removal would be a psychological, emotional and financial burden on his spouse. *Applicant's Letter*, dated March 10, 2009.

The applicant's spouse asserts that the applicant is involved in "every aspect" of their children's "lives and development." She states that the applicant was the sole provide for their family while she stayed at home with their children. She notes that she is now a "para-educator" for a public school system, but her salary alone would be "totally inadequate" to support their children. She asserts that if the applicant is denied admission, she would lose her home, and her children would suffer "psychological devastation." *Letter from Maria Salehi*, dated December 28, 2006.

The AAO acknowledges that the applicant's spouse would face financial hardship if the applicant is denied admission and she remains in the United States. The most recent financial documentation in the record reflects that in 2007, the applicant and his spouse had a joint income of $76,987 – the applicant's spouse earned $32,925.48 and the applicant earned 35,076.85, and they earned $8,144 in income from a business. *See 2007 U.S. Individual Tax Return, 2007 Wage and Tax Statements (Forms W-2)*. The record shows that the applicant and his spouse own a home and have three children, ages 9, 16 and 14 years old. While the applicant failed to submit evidence of his major household expenses, we acknowledge that raising three children on the applicant spouse's income alone would create financial hardship for his spouse. Although we do not know the extent of this financial hardship, we will give it some weight in an overall determination of extreme hardship.

The AAO acknowledges that the applicant's spouse will experience emotional hardship if she is separated from the applicant as a result of his inadmissibility. In *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998), the Ninth Circuit Court of Appeals, referring to the separation of an alien from qualifying relatives, held that "the most important single hardship factor may be the separation of the alien from family living in the United States," and that "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion." (Citations omitted). The AAO finds that the applicant's separation from his spouse and children will constitute emotional suffering for his spouse, and is sympathetic to their situation. However, the applicant has failed to demonstrate that this hardship combined with claim of financial hardship rises to the level of extreme hardship. As stated, the applicant has failed to demonstrate the extent of the financial hardship his spouse would suffer if they were separated. While almost every case will present some hardship, the claims of financial and emotional hardship presented here are not beyond the ordinary hardship suffered by individuals who are separated as a result of inadmissibility.

Further, the applicant has not asserted, and the record does not demonstrate, that his spouse would suffer extreme hardship if she relocated with him to Ireland. Accordingly, the AAO cannot conclude

that the applicant's spouse would suffer extreme hardship if she relocated with the applicant to Ireland to maintain family unity. The burden of proof in this proceeding lies with the applicant, and "while an analysis of a given application includes a review of all claims put forth in light of the facts and circumstances of a case, such analysis does not extend to discovery of undisclosed negative impacts." *Matter of Ngai*, 19 I&N Dec. at 247.

In conclusion, the record does not reflect that the applicant's spouse would suffer extreme hardship upon separation from the applicant or upon relocation to Ireland to maintain family unity. The AAO therefore finds that the applicant has failed to establish eligibility for a waiver of inadmissibility under section 212(i) of the Act. Having found the applicant ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.