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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**



H6

[REDACTED]

Date: **MAR 30 2012** Office: KINGSTON FILE: [REDACTED]

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v)

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 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,

for Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Jamaica who was found to be inadmissible to the United States 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. He was also found inadmissible under 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 one year or more and seeking readmission within 10 years of his last departure. He seeks waivers of inadmissibility in order to reside in the United States with his U.S. citizen wife.

The field office director denied the Form I-601 application for a waiver, finding that the applicant is statutorily barred from obtaining a waiver due to his criminal conviction. *Decision of the Field Office Director*, dated September 28, 2009.

On appeal, the applicant's wife asserts that she will suffer extreme hardship should the present waiver application be denied. *Statement from the Applicant's Wife*, dated October 13, 2010.

The record contains, but is not limited to: statements from the applicant's wife; medical documentation for the applicant's stepdaughter and wife; documentation relating to the applicant's wife's finances and employment; and documentation regarding the applicant's criminal activity. The entire record was reviewed and considered in rendering this decision.

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 shows that the applicant was convicted of assault in the third degree under New York Penal Law § 120.00 for a domestic violence incident against his wife on or about June 17, 2004. Based on this conviction, the field office director determined that the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude. However, this conviction meets the requirements for the exception found in section 212(a)(2)(A)(ii)(II) of the Act. Assault in the third degree under New York Penal Law § 120.00 is a Class A misdemeanor that carries a maximum sentence of one year of incarceration. The applicant received a sentence of 20 days of incarceration. The record does not show that the applicant has been convicted of any other crimes involving moral turpitude. Accordingly, he meets the exception found in section 212(a)(2)(A)(ii)(II) of the Act and he is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude.

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

(B) Aliens Unlawfully Present.-

(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.

The applicant entered the United States in B-2 nonimmigrant status on July 29, 2000 with authorization to remain until January 28, 2001. He was ordered removed on or about September 21, 2005, and he departed on or about December 10, 2005. Accordingly, he accrued over four years of unlawful presence. He now seeks admission as an immigrant pursuant to his marriage to a U.S. citizen. He was deemed inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present for more than one year and seeking readmission within 10 years of his last departure. The applicant does not contest his inadmissibility under section 212(a)(9)(B)(i)(II) of the Act on appeal.

The field office director determined that the applicant is permanently ineligible for admission to the United States due to his criminal conviction. However, as discussed above, the applicant's

conviction meets the “petty offense” exception found in section 212(a)(2)(A)(ii)(II) of the Act. His conviction does not render him inadmissible under alternate provisions of the Act. Thus, he may be considered for a waiver of his inadmissibility under section 212(a)(9)(B)(i)(II) of the Act pursuant to section 212(a)(9)(B)(v) of the Act.

Section 212(a)(9)(B)(v) of the Act provides for a waiver of section 212(a)(9)(B)(i) inadmissibility as follows:

The Attorney General [now Secretary of Homeland Security] 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 . . . 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.

A waiver of inadmissibility under section 212(a)(9)(B)(v) 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 wife is the only demonstrated qualifying relative in this case. 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 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).

In the present matter, the field office director found that the applicant established that his wife would suffer extreme hardship should the present waiver application be denied. The record clearly shows that the applicant’s wife faces significant hardship, including her own health problems and additional challenges due to caring for her daughter with substantial emotional health concerns. However, the applicant has not shown that his presence will alleviate his wife’s difficulty. In fact, when he resided in the United States, he contributed substantially to his wife’s burdens and he presented a risk to her safety.

The record shows that the applicant’s wife supported him financially, including during a period when he was compelled to reside away from her due to a protection order entered against him. The record also contains a document titled “Sheriff’s Notice of Impending Levy” that reflects that the applicant’s wife obtained a judgment against him due to his misappropriation of her funds. There is no evidence that the applicant has assisted his wife financially at any time, or that his return would have a positive impact on her economic circumstances.

The applicant’s wife has contacted United States Citizenship and Immigration Services (USCIS) on multiple occasions to report that the applicant harassed her, threatened her life, that he poses a risk of harm to her, and that he is engaged in selling controlled substances. She requested that he be detained as a measure to protect her from his abuse, and she withdrew her sponsorship of his permanent residence. The AAO acknowledges that the applicant’s wife now wishes to reside with the applicant in the United States, and that a new Form I-130 relative petition has been approved. However, the applicant’s wife’s change in position occurred after he departed, at such time that they have been residing in separate countries, and the record does not show that they have resided together since. The applicant has not submitted any explanation or evidence to support that he has

reformed his behavior since he left the United States, or that he will conduct himself differently should he be permitted to return. Thus, as presently constituted, the record does not show that separation is causing extreme hardship, but rather supports that the applicant's return to the United States would increase his wife's difficulties.

To meet the requirements of section 212(a)(9)(B)(v) of the Act, the applicant must establish that denial of his waiver application "would result in extreme hardship" to a qualifying relative. However, the applicant has not shown a link between his absence and his wife's present challenges. The record does not show that his absence is the source of her hardship, or that his return would reduce her difficulties. Based on the foregoing, the applicant has not met his burden to show that denial of his application would result in extreme hardship for his wife. As such, no purpose would be served in assessing whether he merits a waiver as a matter of discretion.

In proceedings regarding a waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of proving eligibility 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.