

(b)(6)

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



U.S. Citizenship  
and Immigration  
Services



DATE: JAN 02 2013

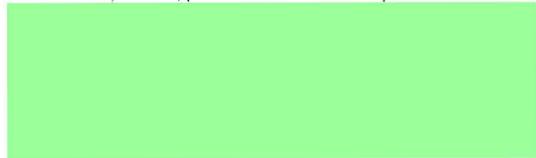
Office: PHILADELPHIA, PA

FILE: 

IN RE: 

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

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in black ink that reads "Michael Shumway".

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Field Office Director, Philadelphia, Pennsylvania 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 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 committed a crime involving moral turpitude and section 212(a)(9)(B)(i)(II) of the Act for having accrued more than one year of unlawful presence in the United States. The applicant is the spouse and mother of U.S. citizens. She seeks a waiver of inadmissibility pursuant to sections 212(a)(9)(B)(v) and 212(h) of the Act, 8 U.S.C. §§ 1182(a)(9)(B)(v) and 1182(h), in order to remain in the United States.

The Field Office Director concluded that the applicant had failed to establish that the bar to her admission would result in extreme hardship for her spouse, her only qualifying relative for the purposes of a section 212(a)(9)(B)(v) waiver. She denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Decision of the Field Office Director*, dated September 15, 2011.

On appeal, counsel asserts that United States Citizenship and Immigration Services (USCIS) has not properly weighed the evidence of hardship already presented and that it establishes extreme hardship to the applicant's spouse. *Form I-290B, Notice of Appeal or Motion*, dated October 17, 2011; *see also Counsel's letter*, dated December 20, 2011.

The record of evidence includes, but is not limited to: counsel's letter on appeal; statements from the applicant and her son; statements of support from friends of the applicant; letters from the applicant's children's teachers and school records; medical documentation relating to the applicant's daughter; a psychological evaluation of the applicant's spouse and children; a statement from the [redacted] regarding the applicant; documentation of the applicant's and her spouse's financial obligations; a bank statement; an employment letter for the applicant's spouse; a copy of a December 2, 2010 AAO decision; court records relating to the applicant's convictions; and a statement from the applicant's parole officer. The entire record was reviewed and all relevant evidence considered in reaching a decision on the appeal.

Section 212(a)(9)(B) states in pertinent part:

**(B) Aliens Unlawfully Present.-**

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . and again seeks admission within 3 years of the date of such alien's departure or removal, or

(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.

(v) Waiver. – The Attorney General [now the Secretary of Homeland Security (Secretary)] 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 to the satisfaction of the Attorney General [Secretary] 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.

In her May 9, 2011 Notice of Intent to Deny the applicant's Form I-485, Application to Register Permanent Residence or Adjust Status, the Field Officer Director indicated that, at her adjustment interview, the applicant had testified that she had entered the United States in 1994 "at a legal point of entry, without inspection as a passenger in a vehicle." As the applicant stated that she did not return to Jamaica until 2002, the Field Office Director found her to be inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act for having accrued more than one year of unlawful presence in the United States and then returning in 2004, prior to the end of the ten-year period during which her admission to the United States was barred. The Field Office Director's September 15, 2011 decision denying the Form I-601 reiterated this same reasoning.

Although the AAO does not find the record in the present matter to provide sufficient evidence to establish the specific circumstances of the applicant's 1994 admission to and 2002 departure from the United States, we note that the burden of proof in waiver proceedings is on the applicant. See section 291 of the Act, 8 U.S.C. § 1361. In the present case, the applicant does not contest that she was unlawfully present in the United States for more than one year between April 1, 1997, the effective date of the unlawful presence provisions under the Act, and her 2002 departure. Accordingly, the AAO finds the applicant to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act.

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-
  - (I) a crime involving moral turpitude . . . or an attempt or conspiracy to commit such a crime . . . is inadmissible.

The record reflects that the applicant has five convictions for Retail Theft, 18 Pennsylvania Consolidated Statutes (Pa. C.S.) § 3929(a)(1), an offense that has been found by the Board of Immigration Appeals (BIA) to be a crime involving moral turpitude. In *In re Jurado-Delgado*, 24

I&N Dec. 29, 33-34 (BIA 2006), the BIA determined that a violation of 18 Pa. C.S. § 3929(a)(1) was a crime involving moral turpitude because the nature of retail theft is such that it is reasonable to assume such an offense would be committed with the intention of retaining merchandise permanently. Accordingly, the AAO finds the applicant's admission to the United States is also barred pursuant to section 212(a)(2)(A)(i)(I) of the Act. The applicant does not contest this finding.

A waiver of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act is found under section 212(h) of the Act, which provides, in pertinent part:

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if -

....

(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 . . .

A waiver of inadmissibility under section 212(a)(9)(B)(v) or section 212(h) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, defined by section 212(h) as the U.S. citizen or lawfully resident spouse, parent or child of the applicant and by section 212(a)(9)(B)(v) as the U.S. citizen or lawfully resident spouse or parent of the applicant. While the applicant's children are qualifying relatives for the purposes of a section 212(h) waiver proceeding, the fact that she must also establish eligibility for a waiver under 212(a)(9)(B)(v) of the Act, the more restrictive of the two waiver provisions, makes her spouse the only qualifying relative in this matter. Hardship to the applicant or her children will, therefore, be considered only insofar as it results in hardship to her spouse. 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*, 138 F.3d at 1293 (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.

In her September 15, 2011 decision, the Field Office Director found the applicant to have established that her inadmissibility would result in extreme hardship for her children, but that she had failed to demonstrate that her spouse would suffer extreme hardship as required for a waiver under section 212(a)(9)(B)(v) of the Act.

On appeal, counsel asserts that the May 12, 2011 sworn statement submitted by the applicant in response to the Notice of Intent to Deny issued by Field Office Director, as well as the May 20, 2011 psychological evaluation of the applicant's spouse and children conducted by [REDACTED] Ph.D. both address the hardship that would be suffered by the applicant's spouse if she is removed from the United States. He also finds evidence of the emotional hardship that would be experienced by the applicant's spouse in statements written by two of the applicant's spouse's coworkers who

attest to the strength of the applicant's and her spouse's marriage, and the bond between the applicant's spouse and children. Counsel further asserts that if the applicant is removed, her family could not maintain the economic stability they now enjoy.

Although counsel acknowledges that the applicant's children are not qualifying relatives for the purposes of a 212(a)(9)(B)(v) waiver proceeding, he notes the Field Office Director's determination that both would experience extreme hardship as a result of the denial of their mother's waiver application. Counsel asserts that this hardship should be considered in determining the impact of the applicant's removal on her spouse. He contends that the AAO has previously considered hardship to an applicant's children in cases where that hardship affects the applicant's spouse, which, he states, is the case here. Counsel submits a copy of a December 2, 2010 AAO decision in support of his assertion.<sup>1</sup>

The AAO notes counsel's assertions and acknowledges that hardship to nonqualifying relatives is appropriately considered when the evidence of record demonstrates the impact of that hardship on a qualifying relative. We will, therefore, consider all of the hardship factors raised by the record to the extent that they affect the applicant's spouse, the only qualifying relative in this proceeding.

In her May 12, 2011 statement, the applicant states that she has turned her life around for her spouse and children. She also states that she and her children are the only sources of income for her children and that it would change her children's lives for the worse if she is removed. The applicant further indicates that she has a heart condition and that, as a result, she would find it difficult to care for her children if they returned with her to Jamaica.

In support of the applicant's hardship claim, the record contains a May 20, 2011 report prepared by licensed psychologist [REDACTED] who states that the purpose of his evaluation is to determine the impact of the applicant's removal on her spouse and children. [REDACTED] report, however, focuses almost entirely on the applicant, indicating that she suffered abuse at the hands of her first husband, that she reported having rheumatic fever as a child that damaged her heart, that she had heart surgery in 2001, that she takes daily medication to prevent infection and sees a cardiologist periodically. He finds that, as a result of the domestic abuse she experienced, the applicant's spouse suffers from Posttraumatic Stress Disorder, Chronic, which has been compounded by the possibility of her removal from the United States. [REDACTED] indicates that the applicant reported symptoms of intense anxiety, depression, excessive jumpiness, difficulty concentrating, severe headaches and disturbed sleep. He also states that she has frequent and intrusive memories, and nightmares relating to the abuse she suffered in the past and that she is terrified by the prospect of being removed to Jamaica as she and her former husband are from the same community. [REDACTED] concludes that the applicant's physical and mental health would be at risk if she is removed to Jamaica and that her children would also be in danger.

With regard to the applicant's daughter, [REDACTED] indicates that she has had chronic asthma since birth and has required many hospital emergency room visits, the most recent of which occurred two

<sup>1</sup> The AAO does not find the submitted copy of the December 2, 2010 decision to support counsel's assertion, but rather to reflect that the AAO, in reaching a determination of extreme hardship, considered the burden of multiple children on a single parent. However, even if the decision did support counsel's claim, we note that it is not published and, therefore, does not bind the AAO in the present case.

months previously. He further states that the applicant's daughter generally has major asthma attacks as the seasons change. [REDACTED] evaluation of the applicant's son is limited to the observations that he has met all of his developmental milestones, was friendly and cooperative during the interview, and reported remembering his father beating and throwing his mother down the stairs.

[REDACTED] states that the applicant's spouse and the applicant have been married since 2009, that he is a devoted father to his stepchildren and that he also has three other children, two of whom are minors and dependent on his financial support. [REDACTED] also indicates that the applicant's spouse is worried about how he would support the applicant and her children if they relocated to Jamaica.

As indicated by counsel, the record also contains April 1, 2011 statements from two of the applicant's spouse's coworkers who state that the applicant and her spouse have a "genuine love for each other especially when it comes to the children" and that the applicant's spouse "frequently brags about their children." It also includes a March 29, 2011 statement from a friend of the applicant who states that the applicant and her spouse are in love and that ever since their marriage, they are "always together celebrating their love for each other."

The record further provides medical documentation that establishes the applicant's daughter was diagnosed with asthma shortly after her birth and that she has been treated with Albuterol. It also indicates that the applicant's daughter was treated for an ear infection on December 31, 2008; abdominal pain and vomiting on May 22, 2009; an unknown condition on April 29, 2011 for which she was prescribed Zyrtec syrup; and was seen for well-care visits on December 17, 2009 and April 22, 2011, where her asthmatic condition was reviewed. A copy of a September 14, 2009 telephone message indicates that the applicant, on that date, had called her daughter's doctor requesting a refill of her daughter's Albuterol prescription. We also note that a September 10, 2007 medical record for the applicant's daughter includes a handwritten note that indicates the applicant reported that she had rheumatic heart disease and mitral valve stenosis, and that she had undergone a valvuloplasty.

While the AAO does not question that the applicant's spouse would experience hardship if he is separated from the applicant, we do not find the evidence sufficient to establish that his hardship would exceed that normally created by the separation of families. Although the record includes documentation of doctors' visits that establishes that the applicant's daughter has chronic asthma, this documentation does not demonstrate the severity of her condition, the frequency with which she has asthma attacks or that she, as indicated by [REDACTED] has frequently required emergency room treatment. We also do not find the notation on the September 20, 2007 medical record for the applicant's daughter to establish that the applicant suffers from rheumatic heart disease and mitral valve stenosis. Accordingly, the record does not contain sufficient medical evidence for the AAO to determine the extent to which the applicant's daughter health would be a burden for her stepfather if he became solely responsible for her care or that the applicant's health limits her ability to support her children in Jamaica.

We also, as previously stated, do not find [REDACTED] psychological evaluation to offer sufficient evidence to determine the impact of the applicant's removal on her spouse's emotional or mental health or to determine the extent of the emotional hardship that would be experienced by her

children. Although [REDACTED] indicates that the applicant is terrified at the prospect of being returned to Jamaica, he does not report how her fear of removal is affecting her spouse.

The record also lacks sufficient evidence to support the applicant's spouse's concerns regarding his ability to provide for the applicant and his stepchildren in Jamaica. The record includes only limited documentation of the applicant's and his spouse's financial circumstances, including their 2009 and 2010 tax returns, the lease for the family's apartment that reflects they pay \$900 a month in rent, their semi-annual auto insurance payments, and an electric bill showing a past due amount of \$862.97. While we find the applicant's and her spouse's 2010 tax return to indicate that they claim two dependents in addition to the applicant's children, the record provides no evidence that establishes the amount of the support provided to these dependents. Further, as previously discussed, the record does not demonstrate that the applicant's health would prevent her from working in Jamaica and no country conditions information in the record indicates that conditions in that country would prevent her from obtaining employment, thereby eliminating or at least reducing her need for financial support from the applicant.

Based on the record before us, the AAO cannot conclude that the applicant's spouse would experience extreme hardship if she is removed and he remains in the United States.

On appeal, counsel states that the applicant's spouse is unable to relocate as he has three U.S. citizen children, two of whom he supports, and that he also cares for a sick mother, which he could not do if he returned to Jamaica. Counsel also maintains that the applicant's spouse is employed as an administrative supervisor in a law firm and that he would not be able to duplicate this level of employment outside the United States.

In her May 12, 2011 statement, the applicant contends that relocation would place her children at risk as they would not be safe from her abusive first husband who lives in Jamaica. She states that their lives would be full of hardship and abuse from their father. The applicant also indicates that the quality of life she could provide her children in Jamaica would be lower than that they would have in the United States. She further reports that her daughter suffers from asthma and has to take medication on a daily basis and that she fears that her son would become a casualty of the violence that is prevalent in Jamaica.

With regard to her spouse, the applicant states that he would be willing to return to Jamaica with her, but that she would not want him to make this sacrifice because he has young children and a sick mother in the United States who need him. She also asserts that her spouse would not be able to support his children from Jamaica, and that there is no future for him or her children in Jamaica.

In a May 23, 2011 statement, the applicant's son asserts that he does not believe it would be safe for him and his sister to live in Jamaica. He states that he remembers his father hitting his mother and that he and his sister do not want to live in that environment. He also states that he is doing well in school and does not want to leave his friends in the United States.

The AAO notes the applicant's claim that her spouse has young children and a sick mother in the United States who need him, and that it would be impossible for him to support his children from Jamaica. The record, however, does not establish that the applicant's spouse's mother is ill or that

she requires his care. Moreover, it offers no evidence that establishes the applicant's spouse's relationship to the children who, the applicant states, need him, nor any evidence in the form of country conditions materials that demonstrate he would not be able to obtain employment in Jamaica that would allow him to meet his financial obligations. Going on record without supporting documentation is not sufficient to meet the applicant's burden of proof in this proceeding. 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)).

We also find no documentary evidence that supports the applicant's claims that her daughter could not return to Jamaica because of her asthma or that her son would become a casualty of the country's violence. *Id.* Neither do we find the record to establish that the applicant's first husband would pose a threat to the applicant's children if they moved to Jamaica with the applicant and their stepfather. Accordingly, we cannot conclude that such hardships would result in hardship for the applicant's spouse upon relocation.

Therefore, having reviewed the record, the AAO does not find the applicant to have established that her spouse would suffer extreme hardship if he relocated with her to Jamaica.

As the record does not establish that the applicant's inadmissibility would result in extreme hardship for her spouse, she has not established eligibility for a waiver under section 212(a)(9)(B)(v) of the Act. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether she merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility rests with the applicant. See section 291 of the Act. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.