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

U.S. Citizenship and Immigration Services

(b)(6)

[redacted]

Date: MAR 07 2013 Office: NEWARK FILE: [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:

[redacted]

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 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 with the field office or service center that originally decided your case by filing a Form I-190B, 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 a 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Peru who was found to be inadmissible to the United States pursuant to 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 a crime involving a controlled substance. On June 20, 2011, the applicant filed an Application for Waiver of Grounds of Inadmissibility (Form I-601). The applicant seeks 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. Lawful Permanent Resident parents.

In a decision dated December 19, 2011, the field office director found the applicant inadmissible for having been convicted of the offense of possession of marijuana, less than 30 grams. The field office director concluded that the applicant had failed to establish that extreme hardship would be imposed on his qualifying relatives and denied the waiver application accordingly.

On appeal, counsel for the applicant asserts that the field office director erred in denying the applicant's waiver application. Counsel contends that the evidence outlining family and community ties to the United States, long residence, emotional hardships and financial difficulties demonstrate extreme hardship to the applicant's qualifying relatives. Counsel further asserts on appeal that, as of the time of the filing of the applicant's appeal brief, the applicant was expecting a child through his fiancée, and that, upon the birth of the child, "the [applicant] will have an additional qualifying relative who will be harmed if [the applicant] is deported from the United States.

The record includes, but is not limited to: counsel's brief; statements by the applicant's parents and siblings; college enrollment records; financial documentation; a statement by the applicant's fiancée; copy of the applicant's residential lease contract and car loan; copy of the applicant's birth certificate; documentation concerning the applicant's immediate family members' immigration status; an employer reference letter; country conditions documentation; documentation regarding the applicant's removal proceeding, which was terminated without prejudice; and documentation regarding the applicant's criminal history.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record has been considered in rendering a decision on the appeal.

Section 212(a)(2)(A) of the Act provides, in pertinent part, that:

> (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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> (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or
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> (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 January 23, 2006, the applicant was arrested and charged in the Township of Lyndhurst, New Jersey, of possession of marijuana under 50 grams, a disorderly persons offense under section 2C:35-10A(4) of the New Jersey Statutes (NJSA). On March 14, 2006, the applicant entered a plea of not guilty for this offense and commenced his six-month participation in the New Jersey Conditional Discharge Program, a deferred prosecution program under section 2C:36A-1 of the NJSA. The record evidence shows that the applicant successfully completed the conditional discharge program and that, on November 19, 2008, entered an order dismissing the possession of marijuana charge against the applicant.

N.J. Stat. Ann. § 2C:36A-1 states, in pertinent part, that:

> Conditional discharge for certain first offenses; expunging of records.
>
> a. Whenever any person who has not previously been convicted of any offense under section 20 of P.L.1970, c. 226 (C.24:21-20),or a disorderly persons or petty disorderly persons offense defined in chapter 35 or 36 of this title or, subsequent to the effective date of this title, under any law of the United States, this State or any other state relating to marijuana, or stimulant, depressant, or hallucinogenic drugs, is *charged with* or convicted of any disorderly persons offense or petty disorderly persons offense under chapter 35 or 36 of this title, the court upon notice to the prosecutor and subject to subsection c. of this section, may on motion of the defendant or the court:
> (1) Suspend further proceedings and with the consent of the person after reference to the State Bureau of Identification criminal history record information files, place him under supervisory treatment upon such reasonable terms and conditions as it may require; ...
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> ...
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> Upon violation of a term or condition of supervisory treatment the court may enter a judgment of conviction and proceed as otherwise provided, or where there has been no plea of guilty or finding of guilty, resume proceedings. Upon fulfillment of the terms and conditions of supervisory treatment the court shall terminate the supervisory treatment and dismiss the proceedings against him. Termination of supervisory treatment and dismissal under this section shall be without court adjudication of guilt and shall not be deemed a conviction for purposes of disqualifications or disabilities, if any, imposed by law upon conviction of a crime or disorderly persons offense but shall be reported by the clerk of the court to the State Bureau of Identification criminal history record information files. Termination of supervisory treatment and dismissal under this section may occur only once with respect to any person.

(Emphasis added).

In *Matter of Grullon*, 20 I&N Dec. 12, 15 (BIA 1989), the Board of Immigration Appeals (Board), applying the standard now codified in section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), held that a conviction does not exist for immigration purposes where an alien's criminal charges

were dismissed following successful completion of a pretrial intervention program and there has been no adjudication of guilt. In this case, the applicant submitted court documents showing that he successfully completed a conditional discharge program in New Jersey and that court records indicate that the applicant pled not guilty, that there was no adjudication of guilt entered by the trial judge, and that the charge against him was dismissed under the same conditional discharge program. Having reviewed the court documents, and cognizant of N.J. Stat. Ann. § 2C:36A-1, which establishes that entry into the program suspends the criminal proceeding and that dismissal from the program shall be without adjudication of guilt, the AAO finds that the applicant was not convicted of a drug offense for immigration purposes. *See Id.* at 14. Accordingly, the applicant's January 23, 2006 arrest for possession of marijuana does not render him inadmissible under section 212(a)(2)(A)(i) of the Act.

The record further shows that on January 18, 2007, the applicant was convicted in the Municipal Court for the Borough of Fort Lee, New Jersey, of possession of marijuana under section 2C:35-10a(4) of the NJSA. The applicant was sentenced to two years of probation, was ordered to pay fines and penalties, and his driving license was suspended for a period of six months. Accordingly, the applicant was convicted for immigration purposes pursuant to the definition of "conviction" found under section 101(a)(48)(A) of the Act. Based upon this conviction, the applicant is inadmissible under section 212(a)(2)(A)(i)(II) for having been convicted of a crime relating to a controlled substance. The applicant does not dispute his inadmissibility on appeal.

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

> (h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), . . . of subsection (a)(2) . . . if –
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> . . .
>
> (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 simple possession of 30 grams or less of marijuana. For purposes of a section 212(h) waiver of the applications of section 212(a)(2)(A)(i)(II) of the Act, the Board has held that an adjudicator must engage in a "circumstance-specific" inquiry where the conviction record does not clearly specify that the crime is possession of 30 grams or less of marijuana:

> We conclude that section 212(h) employs the term "offense" . . . to refer to the specific unlawful acts that made the alien inadmissible, rather than to any generic crime. Our main reason for drawing this conclusion is that the "offense" in question is defined so narrowly, by reference to a specific type of conduct (simple possession) committed on a specific number of occasions (a "single" offense) and involving a specific quantity (30 grams or less) of a specific substance (marijuana).

Matter of Martinez-Espinoza, 25 I&N Dec. 118, 124 (BIA 2009) (*citing Nijhawan v. Holder,* 557 U.S. 28, 33-34, 129 S.Ct. 2294, 2298-2299 (2009)); *cf. Matter of Davey*, 26 I&N Dec. 37, 38-39 (BIA 2012) (applying a "circumstance-specific" inquiry to section 237(a)(2)(B)(i) of the Act, 8 U.S.C. § 1227(a)(2)(B)(i), to find that convictions for two offenses – possession of marijuana and possession of drug paraphernalia – may be considered a "single" offense of possession).

Additionally, it has long been held by the Board that where the amount and type of a controlled substance that an alien has been convicted of possessing cannot be readily determined from the conviction record, "the alien who seeks relief must come forward with credible and convincing testimony, or other evidence independent of his conviction record, to meet his burden of showing that his conviction involved "30 grams or less or marihuana." *Matter of Grijalva*, 19 I&N Dec. 713, 718 (BIA 1988).

Here, the record evidence reflects that the New Jersey Police Office of Forensic Sciences Certified Laboratory Report submitted by the applicant in regards to his January 18, 2007 possession of marijuana conviction shows that the applicant possessed 18 grams of marijuana at the time of his arrest. Accordingly, the applicant's conviction relates to simple possession of not more than 30 grams of marijuana, and he is therefore eligible for a waiver of inadmissibility under section 212(h)(1)(B) of the Act.

The AAO notes that section 212(h) of the Act provides that a waiver of inadmissibility is first dependent upon a showing that the bar to admission imposes an extreme hardship on a qualifying family member. In this case, the relatives that qualify are the applicant's LPR parents. Though counsel for the applicant asserts that the applicant's unborn child is also a qualifying relative in these proceedings, the record as presently constituted does not include evidence of the child's birth or of the asserted hardships to this unborn child. Accordingly, for the purposes of this decision, the AAO will only evaluate hardship to the applicant's parents. Under the statute, hardship to the applicant himself is not relevant and will be considered only if it results in hardship to a qualifying relative. If extreme hardship to a qualifying relative is established, USCIS then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Moralez,* 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 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 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 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.

With regards to relocation and joining the applicant to live in Peru, the asserted hardship factors to the applicant's parents are the financial hardship, their residence of long duration in the United States, as well as their family and community ties in the United States, and adverse country conditions in Peru. The record evidence reflects that the applicant's parents have resided continuously in the United States since 1994 and have not returned to their home country since then. The record evidence further reflects that the applicant's father holds stable employment in the United States, that he provides for the family household of four, and that relocation to Peru would result in the applicant's father having to secure employment with sufficient income to support a household of at least four in a country which he has not visited in 18 years. Further, the record evidence reflects

that the applicant's parents are homeowners in the United States with a mortgage and financial obligations. Moreover, the record reflects that the applicant's parents have an 11-year-old U.S. citizen son who was born and raised in the United States.

Here, the AAO recognizes that the applicant's U.S. citizen son, has resided in the United States his entire life and is integrated into the community. The Board and U.S. Courts decisions have found extreme hardship in cases where the language limitations of the children impeded an adequate transition to daily life in the applicant's country of origin. In *Matter of Kao and Lin*, 23 I&N Dec. 45, 50 (BIA 2001), the Board concluded that the language abilities of the respondent's 15-year-old daughter were not sufficient for her to have an adequate transition to daily life in Taiwan. The girl had lived her entire life in the United States and was completely integrated into an American life style, and the Board found that uprooting her at that stage in her education and her social development to survive in a Chinese-only environment would constitute extreme hardship. In *Ramos v. INS,* 695 F.2d 181, 186 (5th Cir. 1983), the Fifth Circuit Court of Appeals stated that "imposing on grade school age citizen children, who have lived their entire lives in the United States, the alternatives of . . . separation from both parents or removal to a country of a vastly different culture where they do not speak the language," must be considered in determining whether "extreme hardship" has been shown. In *Prapavat v. INS*, 638 F. 2nd 87, 89 (9th Cir. 1980) the Ninth Circuit Court of Appeals found the Board abused its discretion in concluding that extreme hardship had not been shown to the aliens' five-year-old citizen daughter, who was attending school, and would be uprooted from the country where she lived her entire life and taken to a land whose language and culture were foreign to her. Though the AAO recognizes that is not a qualifying relative in these proceedings, it notes there is evidence in the record indicating that the prospect of relocating to Peru with their U.S. citizen son is causing emotional difficulties to the applicant's parents, as they are concerned about his transition to a different culture.

When considered in the aggregate, the hardships that would result if the applicant's parents relocated to Peru, including their length of residence in the United States, separation from their family members, the emotional hardship related to having their U.S. citizen son assimilate into a new culture and language, and the asserted potential issues with finding employment in Peru, rise to the level of extreme hardship.

The applicant's parents asserted hardship factors if they were to remain in the United States without him are the financial and emotional difficulties resulting from separation. With regard to financial hardship, the applicant's mother indicates in her statement dated March 23, 2010, that separation would cause them financial hardship because they will have to "send [the applicant] money to survive and continuing [sic] his education." The applicant's father states in his declaration dated March 22, 2010, that "[they] have nowhere to send [the applicant]" if the applicant has to return to Peru without them. Counsel for the applicant indicates that the applicant would rely upon his parents for financial support in the event of separation, as he contends that construction manager positions in that country pay approximately $400.00 per month. Counsel further contends that the applicant's father is covering his son's tuition costs and that the he would continue to pay for his son's education if he were removed to Peru.

However, there is insufficient evidence in the record to substantiate these claims, or to show that the applicant's parents would experience financial hardship as a result of the applicant's inadmissibility. Firstly, the record contains an employer reference letter from [redacted] which indicates that the applicant has been employed full time since August 2009 and earns $19.30 an hour. The record does not contain documentary evidence demonstrating that the applicant relies on his parents for financial assistance, nor does it contain evidence corroborating counsel's assertions that the applicant's father pays his son's tuition costs. That is, the applicant has failed to submit sufficient documents evidencing how his removal would affect his family's finances. Further, there is no evidence in the record detailing why the applicant's parents would be his only source of income, how much money they would have to send to their son in Peru, and how much remittances they could actually afford. With regard to counsel's contentions regarding construction management salaries in Peru, the AAO notes that the record does not contain evidence explaining the asserted salary. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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 letters and statements from the applicant's parents, siblings, and fiancée, it is asserted that the applicant has learned from his mistakes, and that separation would bring emotional devastation to the family he would leave behind in the United States. They also indicate that the applicant regrets his mistakes, is honest and hard-working, and has demonstrated good character. Additionally, it is recognized that the applicant has a close relationship with his U.S. citizen brother, as demonstrated by the statements from the applicant's mother. The AAO acknowledges that the applicant's parents will experience emotional difficulties if they remain in the United States without the applicant, but the applicant has failed to demonstrate that this hardship, when combined with other hardship factors, will be extreme. The AAO recognizes the significance of family separation as a hardship factor, but concludes that the hardship described by the applicant's parents, and as demonstrated by the evidence in the record in the form of statements and letters, is the common result of removal or inadmissibility and does not rise to the level of extreme hardship. U.S. court decisions have repeatedly held that the common results of removal or inadmissibility are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F. 2d 465, 468 (9th Cir. 1991).

The AAO can find extreme hardship warranting a waiver of inadmissibility only where an applicant has demonstrated extreme hardship to a qualifying relative in the scenario of separation *and* the scenario of relocation. To relocate and suffer extreme hardship, where remaining the United States and being separated from the applicant would not result in extreme hardship, is a matter of choice and not the result of inadmissibility. *Cf. Matter of Ige*, 20 I&N Dec. 880, 886 (BIA 1994), *also cf. Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996). As the applicant has not demonstrated extreme hardship to his qualifying relatives from separation, we cannot find that refusal of admission would result in extreme hardship to the qualifying relatives in this case.

The documentation in the record fails to establish the existence of extreme hardship to the applicant's parents caused by the applicant's inadmissibility to the United States. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for an 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, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.