

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



H2

[REDACTED]

DATE: DEC 28 2012

OFFICE: BALTIMORE, MARYLAND

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 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,

Ron Rosenberg
Acting 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 China 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 committed a crime involving moral turpitude. 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. citizen spouse.

The District Director concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *See Decision of the District Director*, dated April 26, 2011.

On appeal counsel contends that sections 212(a)(2)(A)(ii)(I), 212(a)(A)(i)(II) and section 212(h) were applied incorrectly and therefore, the denial must be overruled. *See Form I-290B, Notice of Appeal or Motion*, received May 17, 2011.

The record contains, but is not limited to: Form I-290B and counsel's appeal brief; various immigration applications and petitions; hardship letters; a 2009 psychological evaluation; rent-related letters; income tax-related records; birth and marriage certificates; and documents pertaining to the applicant's criminal record. The entire record was reviewed and considered in rendering this decision on the appeal.

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 Board of Immigration Appeals (BIA) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

[M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general....

In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required *mens rea* may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

In *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. First, in evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a “realistic probability, not a theoretical possibility,” that the statute would be applied to reach conduct that does not involve moral turpitude. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability exists where, at the time of the proceeding, an “actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien’s own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude.” *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

However, if a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, “the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude.” 24 I&N Dec. at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage inquiry in which the adjudicator reviews the “record of conviction” to determine if the conviction was based on conduct involving moral turpitude. *Id.* at 698-699, 703-704, 708. The record of conviction consists of documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.* at 698, 704, 708.

If review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. 24 I&N Dec. at 699-704, 708-709. However, this “does not mean that the parties would be free to present any and all evidence bearing on an alien’s conduct leading to the conviction. (citation omitted). The sole purpose of the inquiry is to ascertain the nature of the prior conviction; it is not an invitation to relitigate the conviction itself.” *Id.* at 703.

The record shows that the applicant was arrested on November 20, 2006 in Baltimore County, Maryland and charged with Theft: Less \$500 Value, in violation of Maryland CR 7-104, for which the maximum penalty at the time of the offense was 18 months in prison and/or a \$500 fine. On February 5, 2007, the applicant was placed on Probation Before Judgment for a period of 12 months and assessed a criminal fine of \$100. Counsel asserts that the applicant has not been convicted because probation before judgment is not considered a conviction under Maryland state law. Counsel’s assertions are unpersuasive as probation before judgment, like diversion and other deferred action programs, have long been considered convictions for immigration purposes.

Section 101(a)(48) of the Act provides:

- (A) The term “conviction” means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—
- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
 - (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.

Section 6-220 of the Maryland Code of Criminal Procedure addresses conditions for probation before judgment. The statute as constituted at the time of the applicant’s offense, and as still constituted today, allows for a judge, when a defendant pleads guilty or nolo contendere or is found guilty of a crime, to stay the entering of judgment, defer further proceedings, and place the defendant on probation subject to reasonable conditions if: (i) the court finds that the best interests of the defendant and the public welfare would be served; and (ii) the defendant gives written consent after determination of guilt or acceptance of a nolo contendere plea. On violation of a condition of probation, the court may enter judgment and proceed as if the defendant had not been placed on probation; on fulfillment of the conditions of probation, the court shall discharge the defendant from probation which is a final disposition of the matter; and a discharge under this section is without judgment of conviction and is not a conviction in the state of Maryland. While under Maryland state law the successful completion of probation before judgment results in no conviction and the offender’s record can be expunged on proper application, the adjudication of guilt and/or plea of guilty or nolo contendere by the applicant, combined with the order of some form of punishment by the judge (in the present applicant’s case 12 months of probation and a \$100 fine), constitutes a conviction for immigration purposes under section 101(a)(48) of the Act.

While the district director notes that the applicant initially pled not guilty, the conditions for probation before judgment as enumerated in section 6-220 of the Maryland Code of Criminal Procedure clearly require that in order to receive deferred action, the applicant must first be adjudicated guilty or plead guilty (or nolo contendere), and must confirm this in writing.

Md. Crim. Code Ann. § 7-104(g)(2)(i)(ii) provides, in part:

(g) (2) Except as provided in paragraphs (3) and (4) of this subsection, a person convicted of theft of property or services with a value of less than \$500, is guilty of a misdemeanor and:

(i) is subject to imprisonment not exceeding 18 months or a fine not exceeding \$500 or both; and

(ii) shall restore the property taken to the owner or pay the owner the value of the property or services.

U.S. Courts have held that the crime of theft or larceny, whether grand or petty, involves moral turpitude. *See Matter of Scarpulla*, 15 I&N Dec. 139, 140 (BIA 1974)(stating, "It is well settled that theft or larceny, whether grand or petty, has always been held to involve moral turpitude . . ."); *Morasch v. INS*, 363 F.2d 30, 31 (9th Cir. 1966)(stating, "Obviously, either petty or grand larceny, i.e., stealing another's property, qualifies [as a crime involving moral turpitude].") A conviction for theft is considered to involve moral turpitude only when a permanent taking is intended. *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973).

Upon review of Maryland court decisions, the AAO finds that a conviction for theft under the Maryland Criminal Code requires the specific intent to deprive the victim of his or her property permanently. In *Price v. State*, the Maryland Court of Special Appeals discussed the distinctions between a conviction for theft and a conviction for carjacking. 681 A.2d 1206 (1996). The Court stated that a theft conviction "requires proof of circumstances that would indicate the offender's intent permanently to deprive the owner of his or her property whether by way of appropriating it to one's own use or concealment or abandonment in such a manner as to deprive the owner of the property" while carjacking "does not require that there be any asportation or removal of the vehicle for criminal responsibility to attach." 681 A.2d at 1214. In *Gamble v. State*, the Maryland Court of Special Appeals discussed whether the offender's conduct constituted a "trespassory taking." 552 A.2d 928 (1989). The Court stated that the primary elements of the theft statute are "willfully and knowingly obtaining unauthorized control over the property or services of another, by deception or otherwise, with the intent to deprive the owner of his property by using, concealing, or abandoning it in such a manner that it probably will not be returned to the owner." 552 A.2d at 931. The Court concluded that the offender committed theft because the evidence indicated that he "took the money with the intent permanently to deprive the rightful owner of it." *Id.* Therefore, the AAO finds that a conviction for theft under Md. Crim. Code § 7-104 is categorically a crime involving moral turpitude because it requires the intent to permanently deprive the victim of his or her property. The applicant is found to be inadmissible under section 212(a)(2)(A)(i)(I) of the Act as a consequence of his conviction for theft. And despite counsel's

assertions to the contrary, as the statute shows on its face that the maximum penalty possible exceeds one year in prison, the petty offense exception does not apply.

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.

The AAO notes that section 212(h) of the Act provides that a waiver of inadmissibility is dependent first upon a showing that the bar to admission imposes an extreme hardship on a qualifying family member. In this case, the relative that qualifies is the applicant's U.S. citizen spouse. Hardship to the applicant himself is not relevant under the statute and will be considered only insofar as it results in hardship to a qualifying relative. If extreme hardship is established, the Secretary then assesses whether an exercise of discretion is warranted.

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.

The record reflects that the applicant's spouse is a 31-year-old native of China and citizen of the United States who has been married to the applicant since April 2008. They have no children together or separately. The applicant's spouse presents no direct assertions of any hardship related either to separation from the applicant or relocation to China. [REDACTED] after interviewing the applicant's spouse on a single occasion in Maryland on June 3, 2009, relays that she indicated experiencing a number of depression symptoms beginning about a month before the May 22, 2009 denial of the applicant's waiver application. As a result, [REDACTED] diagnoses the applicant's spouse with major depressive disorder, single episode, moderate with possible psychotic features. [REDACTED] writes that the applicant's spouse was advised to seek psychiatric treatment in San Francisco as soon as possible. The record contains no documentary evidence showing that the applicant's spouse has ever sought psychiatric treatment at any time and no current or updated psychological evaluation has been submitted on appeal or thereafter. Counsel contends that the U.S. Citizenship and Immigration Services (USCIS) understates the severe mental illness caused to the applicant's spouse. While the AAO acknowledges [REDACTED] reporting on what was told him by the applicant's spouse, it notes that his evaluation was based on the latter's self-reporting on a single occasion and that she has sought no subsequent treatment for the symptoms described.

The AAO acknowledges that separation from the applicant may cause various difficulties for the applicant's spouse. However, it finds the evidence in the record insufficient to demonstrate that the challenges encountered by the qualifying relative, when considered cumulatively, meet the extreme hardship standard.

The applicant's spouse makes no direct assertions of any relocation-related hardships and Dr. [REDACTED] is silent on the issue. Counsel asserts that "as the applicant and his spouse are entering their children bearing years, the Chinese government's continuing efforts to enforce their One Child Policy is a very significant issue" should the latter relocate to China to be with the former. While the applicant submits a March 2008 internet article from the New York Times called "China Sticking With One-Child Policy," the record contains no documentary evidence that the applicant and his spouse intend to or have attempted to have any children, that they would be unable to have more than one should they so choose, that they would be unable to have more than one child even in China with the understanding that a fine or other penalty might be imposed, or that the possibility of not having more than one child constitutes extreme hardship to the applicant's spouse. As no other relocation-related hardships have been asserted, the AAO cannot speculate in this regard.

The AAO has considered cumulatively all assertions of relocation-related hardship to the applicant's spouse including her adjustment to a country in which she has not resided in a number of years and counsel's stated concerns regarding China's one child policy. Considered in the aggregate, the AAO finds the evidence insufficient to demonstrate that the applicant's U.S. citizen spouse would suffer extreme hardship were she to relocate to China to be with the applicant.

The applicant has, therefore, failed to demonstrate that the challenges his spouse faces are unusual or beyond the common results of removal or inadmissibility to the level of extreme hardship. Accordingly, the AAO finds that the applicant has failed to demonstrate extreme hardship to a qualifying relative. As the applicant has not established extreme hardship to a qualifying family member no purpose would be served in determining whether the applicant 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 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.