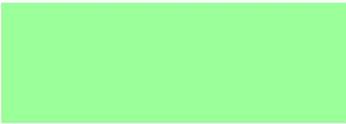


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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Office of Administrative Appeals
20 Massachusetts Ave. NW MS 2090
Washington, DC 20529-2090

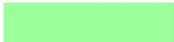


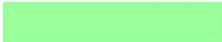
U.S. Citizenship
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Services



DATE: **JUL 09 2013**

OFFICE: BALTIMORE, MARYLAND

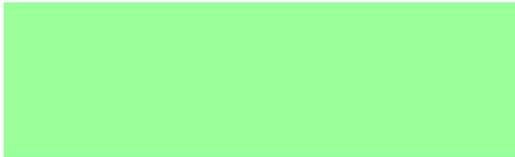
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IN RE: 

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:



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, appearing to read "Ron Rosenberg", with a long horizontal flourish extending to the right.

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Baltimore, Maryland. An appeal of the denial was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on motion. The motion will be granted and the underlying application will remain denied.

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.

In his decision, dated April 26, 2011, the district director concluded that the applicant had 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.

On appeal, counsel asserted that sections 212(a)(2)(A)(ii)(I), 212(a)(2)(A)(i)(II), and 212(h) of the Act were applied incorrectly by the district director and therefore, the denial should have been overruled.

The AAO dismissed the appeal, finding that the applicant was properly found inadmissible and that the applicant failed to show extreme hardship to a qualifying relative as required under section 212(h) of the Act.

On motion, counsel again asserts that the applicant is not inadmissible for having been convicted of a crime involving moral turpitude, and asserts that the applicant has shown extreme hardship to a qualifying relative.

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 *Prudencio v. Holder*, 669 F.3d 472, 484 (4th Cir. 2012), the Fourth Circuit Court of Appeals rejected *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), deferring to the categorical and modified categorical analysis as originally articulated in *Taylor v. U.S.*, 495 U.S. 575, 600–01 (1990) and *Shepard v. U.S.*, 544 U.S. 13 (2005). Thus, to determine whether a conviction is a crime involving moral turpitude in the Fourth Circuit, an adjudicator first applies the categorical approach. *Prudencio*, 669 F.3d at 484-485. (citing *Taylor*, 495 U.S. at 600–01). This analysis requires examining only the statutory elements of the crime, without considering the facts or conduct of the particular violation at issue. 669 F.3d at 484-85 (citing *Yousefi v. U.S. I.N.S.*, 260 F.3d 318, 326 (4th Cir. 2001)). However, where a statute is divisible, encompassing crimes that qualify as crimes involving moral turpitude and crimes that do not, the adjudicator proceeds under the modified categorical approach to review the record of conviction to determine whether the crime of which the alien was convicted qualifies as a crime involving moral turpitude. 669 F.3d at 484-85 (citing *Taylor*, 495 U.S. at 602, 110). The record of conviction is composed of the charging document, the plea agreement, the plea colloquy, and any explicit findings of fact made by the trial judge. 669 F.3d at 484-85 (citing *Shepard*, 544 U.S. at 15).

The record shows that the applicant was arrested on November 20, 2006 in Maryland and charged with Theft: Less \$500 Value, in violation of Md. Crim. Code § 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.

On appeal, counsel asserted that the applicant had not been convicted because probation before judgment is not considered a conviction under Maryland state law. In our previous decision, we found that counsel's assertions were 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, 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 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.

On motion, counsel asserts that the applicant was not convicted for immigration purposes because he pled not guilty to the charge of theft and was granted probation before judgment. Counsel states that the record does not indicate that the applicant ever pled guilty or nolo contendere to the charge against him.

We noted in our previous decision that the applicant initially pled not guilty to the theft charge, but that 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. Thus, we found the applicant had been convicted for immigration purposes in accordance with section 101(a)(48) of the Act.

We affirm our previous finding. The document in the record, showing that the applicant pled not guilty to the theft charge, is a trial summary and provides inconsistent information. The summary states that the applicant pled not guilty and was granted probation before judgment. Under section 6-220 of the Maryland Code of Criminal Procedure this set of facts is not possible. Counsel states that the applicant being granted probation before judgment does not necessarily lead to a finding of guilt or a plea of guilty or nolo contendere, but then fails to assert a statute or case law to support this claim. We note that counsel has also failed to submit the full court record in an effort to resolve this inconsistency. It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the applicant submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Therefore, we affirm the previous finding of the AAO that the applicant has been convicted for immigration purposes in accordance with section 101(a)(48) of the Act.

In our previous decision, we found that the applicant's conviction for theft under Md. Crim. Code § 7-104 was categorically a crime involving moral turpitude because it requires the intent to permanently deprive the victim of his or her property. 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]."); *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973)(a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended); *Price v. State*, 681 A.2d 1206 (1996); *Gamble v. State*, 552 A.2d 928 (1989). Counsel does not contest this finding on motion, so it will not be discussed further.

On motion, counsel does contest the AAO's previous finding that the applicant had not shown extreme hardship to his U.S. citizen wife as a result of his inadmissibility.

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)...

(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.

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 a direct basis for a waiver 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 of hardship on appeal contained: counsel’s appeal brief; hardship letters; a 2009 psychological evaluation; rent-related letters; income tax-related records; and birth and marriage certificates.

In our previous decision, we noted that the applicant and his spouse had been married since April 2008 and had no children together or separately. We noted the psychological evaluation in the record and Dr. [REDACTED]’s diagnosis that the applicant’s spouse was suffering major depressive disorder, single episode, moderate with possible psychotic features. We also noted that Dr. [REDACTED] advised the applicant’s spouse to seek psychiatric treatment in [REDACTED] as soon as possible, which she did not. We found that although separation from the applicant may cause various difficulties for the applicant’s spouse, the evidence in the record was insufficient to demonstrate that the challenges encountered by the qualifying relative, when considered cumulatively, met the extreme hardship standard.

We also found that the applicant failed to show that his wife would experience extreme hardship as a result of relocation. Counsel asserted 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. We found that although the record included one article from the New York Times regarding China’s one child policy, the record contained 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. We then noted

that the AAO had 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, we found 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.

On motion counsel submits documentation indicating that the applicant's spouse is pregnant and states that because of this pregnancy the applicant's permanent absence will increase the severity of his spouse's depression, which will be dangerous for her pregnancy. She also states that the applicant's removal will cause financial hardship.

We find that the applicant has not established that his spouse will suffer extreme hardship as a result of his inadmissibility. The record makes no further assertions regarding hardship upon relocating to China, thus, we affirm the previous finding that the applicant has not shown that his spouse will suffer extreme hardship upon relocation. We acknowledge that the existence of a child in a marriage can make separation more difficult, but the record fails to show that the applicant's spouse would suffer above and beyond what would normally be expected upon separation of a family. We also recognize that the applicant has been diagnosed with major depression, but as stated in our previous decision, the record fails to indicate if the applicant's spouse has sought follow-up treatment and what is her current state. Moreover, the record fails to indicate how the applicant's spouse's depressive symptoms are affecting her everyday functioning.

The applicant has failed to demonstrate that the challenges his spouse faces are 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. Thus, the motion will be granted, but the underlying application will remain denied.

ORDER: The motion is granted and the underlying application remains denied.