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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  
and Immigration  
Services

DATE: OCT 02 2013

OFFICE: BALTIMORE, MARYLAND

File: [REDACTED]

IN RE: [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 (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

A handwritten signature in black ink that reads "Ron Rosenberg".

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The District Director, Baltimore, Maryland, denied the waiver application. The Administrative Appeals Office (AAO) dismissed an appeal and a subsequent motion. The matter is now before the AAO on a second motion. The motion will be granted and the underlying application will be approved.

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) for having committed a crime involving moral turpitude. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act in order to remain in the United States with his U.S. citizen spouse and child.

The district director concluded that the applicant failed to establish extreme hardship to a qualifying relative and denied the application accordingly. On appeal, counsel asserted that the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) because he was given probation before judgment and, therefore, does not have a conviction. The AAO dismissed the appeal, finding that the applicant was properly found inadmissible. The AAO specified that although the applicant's successful completion of probation before judgment resulted in no conviction under Maryland state law, in order to receive probation before judgment, the applicant must first be adjudicated guilty or plead guilty (or nolo contendere) and, therefore, under the Act, the applicant has a conviction for immigration purposes. On motion, counsel again asserted that the applicant is not inadmissible because he has no conviction under Maryland state law and asserted that the applicant has shown extreme hardship to a qualifying relative. The AAO granted the motion, but denied the underlying application, affirming our previous decision. The AAO reiterated that while the successful completion of probation before judgment results in no conviction under Maryland state law, nonetheless, the adjudication of guilt and/or plea of guilty or nolo contendere by the applicant, combined with twelve months probation and a fine, constitutes a conviction for immigration purposes under section 101(a)(48) of the Act.

Counsel now submits a second motion contending, among other things, that the applicant does not have a conviction and is not inadmissible. Counsel also submits additional evidence of hardship.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Here, counsel has submitted a brief and additional new documentary evidence to support the applicant's waiver application. The applicant's submission meets the requirements of a motion to reopen. Accordingly, the motion is granted.

In addition to the documents specified in the AAO's previous decisions, the record now also contains copies of medical records and tax documents.

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).

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 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.

(Emphasis added.)

The applicant resides in the jurisdiction of the Fourth Circuit Court of Appeals. The Fourth Circuit Court of Appeals has squarely addressed this issue. In *Yanez-Popp v. U.S. INS*, 998 F.2d 231 (4<sup>th</sup> Cir. 1993), the Fourth Circuit addressed "a single issue: whether a state court's granting of 'probation without judgment' constitutes a 'conviction' within the meaning of the immigration laws of the United States." *Yanez-Popp*, 998 F.2d at 234. The Court relied on the Board of Immigration Appeals case *In re Ozkok*, 19 I&N 546 (BIA 1988), in holding that a Maryland court's entry of probation without judgment constitutes a conviction under the Act.<sup>1</sup> *Id.* at 234-35. In addition, the Court rejected the petitioner's contention that there was no finding of guilt because the Maryland court struck its guilty finding, entering only probation without judgment. *Id.* at 237 ("Striking the guilty finding did not mean the facts supporting the finding no longer existed; it merely rewarded petitioner for good behavior during probation by technically erasing his conviction for reasons unrelated to its validity on the merits.") (citations omitted).

Similarly, in the instant case, the applicant's probation before judgment constitutes a conviction for immigration purposes. As we stated in our prior decisions, section 6-220 of the Maryland Code of Criminal Procedure requires that in order for a court to place a defendant on probation before judgment, the defendant must have pled guilty or nolo contendere, or be found guilty of the crime. Counsel's assertion in his brief that the judge never found the applicant guilty and that the

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<sup>1</sup> The AAO notes that the BIA's three-part test outlined in *Ozkok* for determining whether there is a "conviction" for immigration purposes in cases where adjudication of guilt has been withheld by a state court has been further broadened with the passage of IIRIRA, which eliminated the third part of the test. See *Moosa v. I.N.S.*, 171 F.3d 994, 1002 (5<sup>th</sup> Cir. 1999) ("This section [Section 322(a), codified at section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A)] deliberately broadens the scope of the definition of 'conviction' beyond that adopted by the Board of Immigration Appeals in *Matter of Ozkok*, 19 I&N Dec. 546 [1988 WL 235459] (BIA 1988).") (quoting the committee report on Congressional intent in drafting IIRIRA § 322)).

applicant did not plead guilty or admit to any fact that would warrant a finding of guilt is unsupported by any evidence in the record and contradicts the requirements of the Maryland Code of Criminal Procedure.

Counsel's reliance on *Gakaba v. State*, 84 Md.App. 154 (1990), and *Myers v. State*, 303 Md. 639 (1984), for the proposition that the Maryland General Assembly's unmistakable intent is that probation before judgment is not a conviction is unpersuasive. Neither case address convictions in the context of immigration law and they do not address the Act's definition of "conviction."<sup>2</sup>

To be clear, although the successful completion of probation before judgment may result in no conviction under Maryland state law, the adjudication of guilt and/or plea of guilty or nolo contendere by the applicant, combined with the imposition of twelve months of probation and a \$100 fine, constitutes a conviction for immigration purposes under section 101(a)(48) of the Act. Therefore, the applicant is inadmissible to the United States under section 212(a)(2)(A)(i) of the Act for having been convicted of a crime involving moral turpitude.<sup>3</sup>

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,

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<sup>2</sup> The Court in *Gakaba* concluded only that it lacked jurisdiction to decide the case because a defendant may not appeal from a probation before judgment under the Post Conviction Act. *Gakaba*, 84 Md.App. at 155, 157; cf. *Abrams v. State*, 176 Md.App. 600 (2007) (distinguishing *Gakaba* and holding that probation before judgment qualifies as a "conviction" in a coram nobis proceeding). The Court in *Myers* held only that a person who is given probation before judgment is competent to testify in a criminal proceeding in Maryland. *Myers*, 303 Md. at 648.

<sup>3</sup> Counsel did not contest in his first motion, nor does he now challenge, that the applicant's conviction is for a crime involving moral turpitude.

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.

After a careful review of the entire record, including the additional evidence submitted on motion, the AAO finds that if the applicant’s wife, Ms. [REDACTED] returned to China, where she was born, to avoid the hardship of separation, she would experience extreme hardship. According to the psychological evaluation in the record, Ms. [REDACTED] has lived in the United States for the past twenty years, since she was eleven years old. The record shows she was naturalized as a U.S. citizen in November 2000. Ms. [REDACTED] would need to readjust to living in China after having lived her entire adult life in the United States, a difficult situation made more complicated by the fact that she recently gave birth to a premature baby. According to copies of medical records submitted on motion, Ms. [REDACTED] underwent an emergency Cæsarian section on May 26, 2013, at 27 weeks gestation. The records indicate that the couple’s newborn baby was born with a number of health problems, including, but not limited to: respiratory failure, respiratory distress syndrome, sepsis, cardiomyopathy, atrial septal defect, kidney anomaly, and intraventricular hemorrhage, and that a gastric tube was placed in the baby’s stomach. The records also indicate that both the baby and Ms. [REDACTED] will undergo genetic testing for tuberous sclerosis. The AAO recognizes that relocating

to China would disrupt the continuity of Ms. [REDACTED]'s and the baby's medical care. Considering the unique factors in this case cumulatively, the AAO finds that the hardship Ms. [REDACTED] would experience if she returned to China to be with her husband is extreme, going well beyond those hardships ordinarily associated with inadmissibility or exclusion.

The AAO also finds that if the applicant's wife remains in the United States without her husband, she would suffer extreme hardship. As stated above, the record contains documentation corroborating counsel's contentions that the couple has a newborn baby with numerous, significant health problems. The record also contains copies of tax records showing that the applicant earned \$32,400 in wages in 2012. According to Ms. [REDACTED]'s Biographic Information form (Form G-325A), although she had once been employed as a cashier, she has been unemployed since April 2008. The AAO acknowledges counsel's contention that the applicant is the sole income earner for the family and recognizes the difficulties Ms. [REDACTED] would experience as an unemployed, single parent to a child with health problems. Considering these unique circumstances cumulatively, the AAO finds that the hardship the applicant's wife would experience if she remains in the United States is extreme, going beyond those hardships ordinarily associated with inadmissibility.

The AAO also finds that the applicant merits a waiver of inadmissibility as a matter of discretion.

In discretionary matters, the alien bears the burden of proving that positive factors are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957). The adverse factors in the present case include: the applicant's probation before judgment for a crime involving moral turpitude and his unauthorized presence in the United States after overstaying his visitor's visa. The favorable and mitigating factors in the present case include: the applicant's significant family ties to the United States, including his U.S. citizen wife and child; the extreme hardship to the applicant's family if he were refused admission; and the applicant's lack of any arrests or other criminal convictions since 2006.

The AAO finds that, although the applicant's criminal conviction and immigration violation are serious and cannot be condoned, when taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met.

**ORDER:** The motion will be granted and the underlying waiver application is approved.