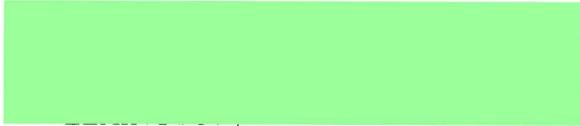




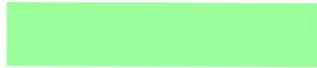
U.S. Citizenship
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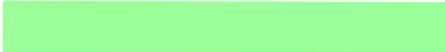


DATE: **MAR 12 2014**

OFFICE: WEST PALM BEACH



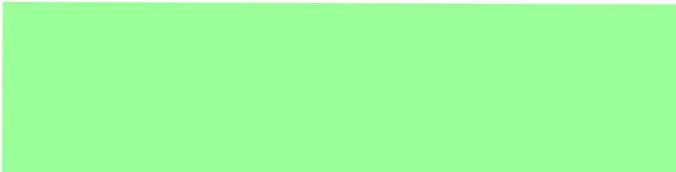
IN RE:



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:

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Michael Shumway
for Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, West Palm Beach, Florida, denied the waiver application and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Ireland 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. The record indicates that the applicant is the spouse of a U.S. citizen and the beneficiary of an approved Petition for Alien Relative (Form I-130). He seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States.

The field office director concluded that the applicant is inadmissible for having been convicted of possession of cannabis/20 grams or less and possession of drug paraphernalia, that he failed to establish that 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 Field Office Director*, dated March 23, 2011.

On appeal counsel contends that the field office director erred in finding that the record evidence did not establish that the applicant's bar to admission would result in extreme hardship to his U.S. citizen wife. Counsel avers that the additional evidence submitted on appeal outlining financial, emotional and medical difficulties demonstrates extreme hardship to the applicant's U.S. citizen wife. Counsel asks the AAO to remand the matter to the West Palm Beach Field Office, citing evidence that the state prosecutor dismissed the charges relating to possession of cannabis and possession of drug paraphernalia. Counsel asserts therefore, that the applicant is no longer "convicted" for immigration purposes and is not inadmissible. In support of these assertions counsel submits a copy of a Motion for *Nolle Prosequi* filed in the County Court of the 19th [REDACTED] by the state prosecutor.

The record contains, but is not limited to: Form I-290B and counsel's appeal brief; an affidavit by the applicant; various immigration applications and petitions; statements from the applicant's spouse, family members and friends; medical-related documents; financial-related documents; country condition-related documents; and documents related to the applicant's criminal history.

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

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

- (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.

The record shows that on April 5, 2007, the applicant pled guilty in the Country Court, Nineteenth Judicial Circuit in and for [REDACTED], of possession of cannabis/20 grams or less and possession of drug paraphernalia. The record further shows that adjudication of guilt was withheld and the applicant was placed on probation for a term of six months and was ordered to pay a \$150 fine. The applicant was therefore, convicted of possession of cannabis and drug paraphernalia, as set forth in section 101(a)(48)(A) of the Act.

Counsel asserts on appeal that the applicant is no longer inadmissible because the state prosecutor dismissed the charge some four years after the applicant was convicted of possession of cannabis and drug paraphernalia.

Under the current statutory definition of conviction provided at section 108(a)(48)(A) of the Act, no effect is to be given in immigration proceedings to a state action that purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). Any subsequent, rehabilitative action that overturns a state conviction, other than on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings, is ineffective to expunge a conviction for immigration purposes. *Id.* at 523, 528; *see also Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003) (holding that in light of the language and legislative purpose of the definition of "conviction" at section 101(a)(48) of the Act, "there is a significant distinction between convictions vacated on the basis of a procedural or substantive defect in the underlying proceedings and those vacated because of post-conviction events, such as immigration hardships"); *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378, 1379 (BIA 2000) (a conviction remains vacated under a state criminal procedural statute, as opposed to a rehabilitative provision, which remains vacated for immigration purposes). The Board of Immigration Appeals (BIA) held further in *Matter of Adamiak*, 23 I&N Dec. 878, 89 (BIA 2006), that a conviction vacated for the failure of the trial court to advise the alien defendant of the possible immigration consequences of a guilty plea was no longer a valid conviction for immigration purposes because the guilty plea has been vacated as a result of a defect in the underlying criminal proceedings, and not for a rehabilitative or immigration hardship purpose.

In order to determine whether a *vacatur* is tied to a defect in the underlying conviction, rather than rehabilitative or immigration-related purposes, the adjudicative body starts by examining the order itself. Often the statutory basis for the order will resolve whether the underlying conviction remains valid for immigration purposes. *See Matter of Pickering*, 23 I&N Dec. at 624. Where the order does not specify its statutory basis, the BIA will consider the grounds presented to the court by the petitioner in his or her motion to vacate the conviction. *Id.* ("[W]e look to the law under

which the court issued its order and the terms of the order itself, as well as the reasons presented by the respondent in requesting that the court vacate the conviction.”).

Here, counsel submitted a copy of the Motion for *Nolle Prosequi* to establish that the charges which formed the basis for the applicant’s April 5, 2007 conviction were dismissed. The Motion, filed in the County Court on August 18, 2011, states that the state attorney filed a *Nolle Prosequi* declining to prosecute the charges that formed the basis for the applicant’s conviction. Counsel did not submit a copy of the County Court disposition dismissing the charges or any other document indicating that the court acted on the state prosecutor’s motion. Additionally, it appears that the *Nolle Prosequi* Motion was filed on rehabilitative grounds. In a letter dated May 13, 2011, [REDACTED] asks the state prosecutor to consider permitting the applicant “to complete additional community service or something similar in order to vacate the Withhold of Adjudication and obtain a *Nolle Prose*” in the applicant’s criminal case.

As indicated above, a subsequent, rehabilitative action that overturns a state conviction, other than on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings, is ineffective to expunge a conviction for immigration purposes. Here, the Motion contained in the record does not document a substantive or procedural defect as a basis for the *Nolle Prosequi*. Also, the record does not include a disposition from the state court indicating that the case has been dismissed, irrespective of the dismissal ground. Moreover, the record includes a letter from an attorney requesting the state prosecutor to dismiss the *Nolle Prosequi* on the basis of a rehabilitative scheme. The record contains no documentation to establish that the applicant’s conviction was vacated on the basis of a substantive or procedural defect.

Counsel’s assertions that the applicant is not inadmissible do not constitute evidence. Without supporting documentation, the assertions of counsel are insufficient to meet the burden of proof in these proceedings. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983). Thus, the AAO finds that counsel failed to establish that the applicant’s conviction for possession of cannabis and drug paraphernalia was vacated based on substantive or procedural grounds. Rather, the documentation in the record suggests that the Motion for dismissal of charges was filed on rehabilitative and/or immigration-related grounds. Accordingly, the applicant remains “convicted” within the meaning of section 101(a)(48)(A) of the Act based on his April 5, 2007 guilty plea to possession of cannabis and drug paraphernalia.

Section 212(a)(2) of the Act states in pertinent part:

Criminal and related grounds. —

(A) Conviction of certain crimes. —

(i) In general. — Except as provided in clause (ii), any 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, or
- (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.

As previously indicated, the record reflects that on April 5, 2007, the applicant was convicted of possession of cannabis/less than 20 grams, and possession of drug paraphernalia. The field office director found that the applicant's conviction for cannabis possession rendered him inadmissible under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II). The applicant does not contest whether he has been convicted of a crime involving a controlled substance, or whether he is inadmissible under section 212(a)(2)(A)(i)(II) of the Act. The record of conviction conclusively demonstrates that the applicant was found guilty of a controlled substance violation involving less than 20 grams of marijuana. The only waiver available for a controlled substance offense is under section 212(h) of the Act for a violation relating to a single offense of simple possession of 30 grams or less of marijuana. Even were we to assume for purposes of this appeal that the applicant's convictions relate to a single offense of simple possession of less than 30 grams, the applicant has not demonstrated that denial of the waiver application will result in extreme hardship to a qualifying family member.

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

The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), (D), and (E) or 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.

A waiver of inadmissibility under section 212(h) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse, parent or child of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). In the present case, the applicant asserts that denial of his admission will impose extreme hardship upon his U.S. citizen spouse.

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 applicant’s spouse asserts relocation-related hardship of an emotional, health-related, economic, employment and educational nature. In an undated statement submitted on appeal, the applicant’s spouse states that she recently moved to Kentucky to be eligible for in-state tuition, that she intends to continue her university studies in equine administration, and that she will be unable to continue her education in Ireland. The AAO recognizes that the applicant’s spouse may have to find employment in Ireland to cover her education costs. However, the record evidence does not suggest that she will be unable to pursue a higher-education degree in Ireland. There is no evidence in the record indicating that she will be unable to enroll in a college or university because of her citizenship or immigration status. Also, there is no evidence suggesting that she will be unable to pursue a college degree and career in Ireland in her field of study.

The applicant’s spouse avers that the current economic conditions in Ireland are poor and because of her preexisting medical conditions she will be unable to find a job as a racehorse rider. The record includes country conditions documents as well as a letter from a Public Representative of the Irish Parliament noting Ireland’s current economic challenges. The BIA has found, however, that economic disadvantage is a common or typical result of removal or inadmissibility and is insufficient, when considered individually, to constitute extreme hardship. Moreover, the record

does not establish that the applicant or his spouse would be unable to secure employment in Ireland. The applicant's spouse asserts economic hardship concerning her financial obligations in the United States, including her existing credit card debt and a residential lease she recently signed. No documentary evidence demonstrating her monthly obligations has been submitted nor is there evidence suggesting that she would be unable to meet her obligations in the event of relocation. Additionally, there is no documentation in the record indicating that the applicant or his spouse would be unable to meet their financial needs and obligations with their current assets or through employment abroad in Ireland. Going on record without supporting documentation will not meet the applicant's burden of proof in this proceeding. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The record reflects that the applicant's spouse has received treatment for lower back pain and she asserts that she has been diagnosed with a degenerated lower back disc. In an undated letter, Dr. [REDACTED] states that the applicant's spouse visited her office on February 22, 2011 complaining of lower back, neck and ankle pain. [REDACTED] states that she rendered treatment and recommended that the applicant's spouse refrain from riding horses. Though [REDACTED] asserts that she treated the applicant's spouse only after evaluating her complete medical history, no such medical history reports have been submitted for the record. As such, the AAO finds that the medical documentation submitted as evidence does not detail the severity of the conditions and the required follow-up care. Thus, the AAO cannot make a determination as to whether these conditions would cause extreme hardship to the applicant's spouse. Additionally, there is no documentation indicating that she requires constant medical treatment or monitoring, or whether her conditions have worsened. Moreover, there is no evidence indicating the unavailability of healthcare in Ireland or that her medical issues cannot be addressed there. In fact, the applicant's spouse noted in her statement on appeal that free healthcare is provided in Ireland to individuals with a European Health Insurance card. There is no evidence in the record suggesting that the applicant's spouse would be unable to pay for medical care abroad should that become necessary. The applicant's spouse states that the quality of healthcare is not comparable in Ireland, but no evidence has been submitted to illustrate that she would be unable to receive the care she needs. Consequently, the record fails to establish that healthcare in Ireland would be insufficient to address the applicant's spouse's medical conditions.

In letters and statements from the applicant's spouse and her family, it is asserted that she has a good, stable relationship with her family and depends upon her father for emotional and financial support. The applicant's spouse states that she communicates with her father via telephone daily and that, though she no longer resides in Minnesota, she is involved in the lives of her parents. She asserts that she visits her parents in Minnesota three or four times a year and that she would be unable to communicate with them regularly if she relocates to Ireland. The AAO acknowledges that the applicant's spouse will experience some emotional difficulties related to separation from family in the United States were she to relocate to Ireland, but the applicant has failed to demonstrate that this hardship, when combined with other hardship factors, would be extreme. The AAO recognizes the significance of family separation as a hardship factor but concludes that the difficulties described, and as demonstrated by the evidence in the record, are the common results of inadmissibility or removal and do 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).

Based on the foregoing, the AAO finds that when considering the emotional, medical, financial and educational hardships collectively, the applicant has not fully demonstrated that the hardship his spouse would experience as a result of relocation is more than the common result of removal or inadmissibility.

No assertions have been made in the record, nor has documentary evidence been submitted, addressing any hardship the applicant's spouse would experience if she were separated from the applicant as a result of his inadmissibility to the United States. As the record contains no assertions of separation-related hardship, the AAO will not speculate in this regard. Accordingly, the AAO finds the evidence in the record insufficient to demonstrate that the applicant's qualifying relative spouse would suffer extreme hardship were she to remain in the United States separated from the applicant as a result of his inadmissibility.

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 he merits a waiver as a matter of discretion.

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 not been met.

ORDER: The appeal is dismissed.