

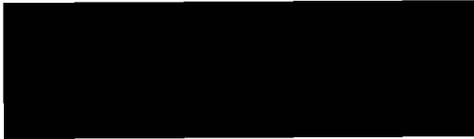


U.S. Citizenship
and Immigration
Services

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FILE:

Office: BANGKOK, THAILAND

Date: **JUL 06 2006**

IN RE:



APPLICATION:

Application for Waiver of Grounds of Inadmissibility under Sections 212(h) and 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h) and § 1182(i)

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Bangkok, Thailand and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the applicant is not inadmissible under 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) or section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), thus the relevant waiver application is moot.

The record reflects that the applicant is a native and citizen of New Zealand who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude. The applicant was also found to be inadmissible pursuant to section 212(a)(6)(C)(i) of the Act for having procured multiple admissions to the United States by fraud or willful misrepresentation. The record indicates that the applicant has a U.S. citizen spouse and he seeks a waiver of inadmissibility in order to reside with his spouse in the United States.

The district director found that based on the evidence in the record, the applicant failed to establish extreme hardship to his U.S. citizen spouse. The application was denied accordingly. *Decision of the District Director*, dated November 18, 2003.

On appeal, the applicant asserts that he did not knowingly misrepresent his criminal convictions and that the crime of rioting does not involve moral turpitude. *Brief in Support of Appeal*, at 1, dated February 23, 2004.

The record includes, but is not limited to, the applicant's brief and his criminal records. The entire record was reviewed and considered in arriving at a decision on the appeal.

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

- (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-
 - (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

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

- (h) The Attorney General [now, Secretary, Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) . . . if –

- (1)(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien.

The district director's decision lists the applicant's convictions and states that he was convicted of a crime involving moral turpitude, however, it is unclear to which crime(s) the district director is referring.

The applicant was convicted of the following offenses: minor purchasing liquor (12/24/1984), operating a vehicle carelessly (10/16/1984), rioting (08/21/1986), wilful [sic] damage (03/18/1988) and offensive behavior (05/08/1999). The record indicates that the rioting, wilful [sic] damage and offensive behavior convictions were at issue. See *Memorandum of Report of Interview of Ineligible Applicant*, dated August 27, 2003.

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.

Neither the seriousness of the criminal offense nor the severity of the sentence imposed is determinative of whether a crime involves moral turpitude. *Matter of Serna*, 20 I&N Dec. 579, 581 (BIA 1992). Before one can be convicted of a crime involving moral turpitude, the statute in question must involve moral turpitude. *Matter of Esfandiary*, 16 I&N Dec. 659 (BIA 1979).

The applicant plead guilty to rioting under section 87 of the 1961 New Zealand Crimes Act which states, in pertinent part, that:

A riot is a group of 6 or more persons who, acting together, are using violence against persons or property to the alarm of persons in the neighborhood of that group.

9 FAM § 40.21(a) N2.3-3 (b) lists riot as a crime which does not involve moral turpitude. In addition, the statute does not include any language of intent, willfulness, knowledge or even recklessness. In *Matter of Perez-Contreras*, the BIA found that moral turpitude does not inhere where the required mens rea may not be determined from the statute. *Matter of Perez-Contreras*, at 618. Therefore, the AAO finds that this is not a crime involving moral turpitude.

The applicant was convicted of wilful [sic] damage under section 298(4) of the 1961 New Zealand Crimes Act which states, in pertinent part, that:

Everyone is liable to imprisonment for a term not exceeding 5 years who wilfully [sic] destroys or damages any property in any case not provided for elsewhere in this Act.

In *Matter of B*, 2 I&N Dec. 867 (BIA 1947), the BIA found a similar wilfully [sic] damaging property statute, which also included a 5 year term of imprisonment, to not involve moral turpitude. Therefore, the AAO finds that this is not a crime involving moral turpitude.

The applicant was convicted of an offence under section 4(1)(A) of the Summary Offences Act of 1981 which states, in pertinent part, that:

In or within view of any public place, behaves in an offensive or disorderly manner.

As this statute neither includes a mens rea requirement nor does it involve inherently base, vile, or depraved acts, the AAO finds that it is not a crime involving moral turpitude. *Decision of the District Director*, at 4.

The district director found that the applicant entered the United States more than once under the Visa Waiver Pilot Program and failed to inform immigration officers of his previous convictions, thereby committing a willful misrepresentation. *Decision of the District Director*, at 4.

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

- (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Section 212(i) of the Act provides that:

- (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

An applicant for admission to the United States under the Visa Waiver Program is required to submit Form I-94W, Arrival/Departure Card, to the inspecting officer. This form asks various questions regarding inadmissibility including whether the applicant has ever been “arrested or convicted for an offense or crime involving moral turpitude.” *Form I-94W*, Side 2. As the applicant has not been arrested or convicted of an offense or crime involving moral turpitude, he appropriately answered the question in the negative and did not misrepresent a material fact as his answer was accurate.

Based on the record, the AAO finds that the applicant did not commit a crime involving moral turpitude or misrepresent a material fact and he is not inadmissible under sections 212(a)(2)(A) and 212(a)(6)(C)(i) of the Act. The waiver filed pursuant to sections 212(h) and 212(i) of the Act is therefore moot.

In proceedings for application for waiver of grounds of inadmissibility under sections 212(h) and 212(i) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant is not required to file the waiver. Accordingly, the appeal will be dismissed as moot.

ORDER: The appeal is dismissed as the underlying application is moot.