

Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

**PUBLIC COPY**

U.S. Department of Homeland Security  
20 Massachusetts Avenue NW, Room 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

#2

[Redacted]

FILE:

[Redacted]

Office: CALIFORNIA SERVICE CENTER

Date: JUN 03 2008

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:

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Director, California Service Center, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed, as the waiver application is moot.

The applicant, a citizen of Haiti, was found inadmissible to the United States 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), for having been convicted of a crime involving moral turpitude. The applicant is the spouse and mother of United States citizens, and 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 her family.

The District Director concluded that the applicant had failed to establish that extreme hardship would be imposed on her husband and daughter and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility.

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

- (A)(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:

- (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 applicant was arrested at Miami International Airport on March 6, 1999 after it was discovered that she was attempting to depart the United States with \$46,688 in currency. On a U.S. Customs currency report Form 503 she only claimed \$3000. The remainder of the cash was discovered upon a search of the applicant and her belongings. On April 29, 1999 she pleaded guilty to violating 31 U.S.C. § 5316, for failure to file a United States Customs currency report form. As part of her April 29, 1999 plea agreement, the applicant acknowledged that she could receive a sentence of up to five years of imprisonment, followed by a term of supervised release, as well as fine of up to \$250,000.

The applicant's sentencing took place on July 28, 1999. She was sentenced to a period of imprisonment equal to the amount of time she had served, so she was immediately released into the custody of the United States Marshal. She was sentenced to a six-month period of supervised release, and a monetary penalty of \$100.

As noted previously, the Director found that the applicant's criminal activity constituted a crime involving moral turpitude. However, he did not undertake an analysis as to why her criminal activity constituted a crime involving moral turpitude. Accordingly, the AAO will address the issue of whether the applicant's crime was one involving moral turpitude.

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. Assault may or may not involve moral turpitude. Simple assault is generally not considered to be a crime involving moral turpitude.

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.

The BIA and U.S. courts have found that it is the "inherent nature of the crime as defined by statute and interpreted by the courts and as limited and described by the record of conviction" and not the facts and circumstances of the particular person's case that determines whether the offense involves moral turpitude. *See, e.g., Matter of Short*, 20 I&N Dec. 136, 137 (BIA 1989); *Omagah v. Ashcroft*, 288 F.3d 254, 260 (5<sup>th</sup> Cir. 2002); *Goldeshtein v. INS*, 8 F.3d 645 (9<sup>th</sup> Cir. 1993). 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 of moral turpitude, the statute in question by its terms, must necessarily involve moral turpitude. *Matter of Esfandiary*, 16 I&N Dec. 659 (BIA 1979); *Matter of L-V-C*, 22 I&N Dec. 594, 603 (BIA 1999) (finding no moral turpitude where the "statutory provision . . . encompasses at least some violations that do not involve moral turpitude"). As a general rule, if a statute encompasses acts that both do and do not involve moral turpitude, deportability cannot be sustained. *Hernandez-Martinez v. Ashcroft*, 329 F.3d 1117 (9<sup>th</sup> Cir. 2003), *reh'g denied* 343 F.3d 1075 (9<sup>th</sup> Cir. 2003). Although evil intent signifies a crime involving moral turpitude, willfulness in the commission of the crime does not, by itself, suggest that it involves moral turpitude. *Goldeshtein v. INS, supra*. Under the statute, evil intent must be explicit or implicit given the nature of the crime. *Gonzalez-Alvarado v. INS*, 39 F.3d 245, 246 (9<sup>th</sup> Cir. 1994).

In *United States v. Bajakajian*, 524 U.S. 321, 118 S. Ct. 2028 (1998), the Supreme Court addressed 31 U.S.C. § 5316, the statute at issue in this case. In describing the harm that the respondent in that case caused as "minimal," the Court explained:

Failure to report his currency affected only one party, the Government, and in a relatively minor way.<sup>1</sup> There was no fraud on the United States, and the respondent caused no loss to the public fisc. Had his crime gone undetected, the Government would have been deprived only of the information that \$357,144 had left the country.<sup>2</sup>

In *Matter of L-V-C-*, 22 I&N Dec. 594 (BIA 1999) (cited above), the BIA addressed the Supreme Court's decision in *Bajakajian*. Although *Matter of L-V-C-* involved a different section of the United States Code (31 U.S.C § 5324) than *Bajakajian*, the BIA deemed sections 5316 and 5324 sufficiently similar that it applied the Court's reasoning in *Bajakajian* to find that a conviction under 31 U.S.C § 5324 does not necessarily involve moral turpitude.

Crimes involving fraud are also generally considered crimes involving moral turpitude. As noted above, the element of fraud, deceit, or trickery is not essential to a conviction for currency structuring under § 5324. No doubt, some structuring offenses under § 5324 involve deliberate attempts to deprive the Government of information which would otherwise have been valuable in combating criminal activity. However, the statute encompasses convictions for benign nonreporting which would not impair Government functions, as well as convictions which involve the deliberate cover-up of illegal activity.

As a general rule, when the statute under which an alien is convicted includes some crimes which may, and some may not, involve moral turpitude, an alien is not excludable or deportable on moral turpitude grounds unless the record of conviction itself demonstrates that the particular offense involved moral turpitude.<sup>3</sup>

Where a statute is divisible (broad or multi-sectional), *see, e.g., Matter of P-*, 6 I&N Dec. 193 (BIA 1954); *Neely v. U.S.*, 300 F.2d 67 (9<sup>th</sup> Cir. 1962), as is the case here, the court looks to the "record of conviction" to determine if the crime involves moral turpitude. *Matter of Ajami*, 22 I&N Dec. 949, 950 (BIA 1999) (look to indictment, plea, verdict, and sentence; *Zaffarano v. Corsi*, 63 F.2d 67 757 (2d Cir. 1933); *U.S. v. Kiang*, 175 F.Supp.2d 942, 950 E.D. Mich. 2001). A narrow, specific set of documents comprises the record: "[the] charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Shepard v. U.S.*, 125 S.Ct. 1254, 1257 (2005). The Ninth Circuit has further clarified that that the charging document, or information, is not reliable where the plea was to an offense other than the one charged. *Martinez-Perez v. Gonzales*, 417 F.3<sup>rd</sup> 1022, 1028-29 (9<sup>th</sup> Cir. 2005). It is also important to note that the record of conviction does not include the arrest report. *See In re Teixeira*, 21 I&N Dec. 316, 319-20 (BIA 1996).

Courts have described the two separate ways of analyzing crimes as the "categorical" and "modified categorical" approaches. The former looks solely to the structure of the statute of conviction to determine whether a person has been convicted of a designated crime; the latter looks to a limited set of documents in the

---

<sup>1</sup> The AAO notes that the respondent in *Bajakajian* failed to report currency in the amount of \$357,144, an amount considerably higher than the \$46,688 at issue here.

<sup>2</sup> *Id.* at 2039.

<sup>3</sup> *In re L-V-C-*, 22 I&N Dec. at 603.

record of conviction in cases where the statute of conviction was facially over inclusive. *See, e.g., Chang v. INS*, 307 F.3d 1185, 1189-92 (9<sup>th</sup> Cir. 2002).

In this case, the applicant pleaded guilty to a single offense: failure to file a United States Customs currency reporting form. The court judgment clarifies that the applicant pleaded guilty to violating 31 U.S.C. § 5316, which states the following:

- (a) Except as provided in subsection (c) of this section, a person or an agent or bailee of the person shall file a report under subsection (b) of this section when the person, agent, or bailee knowingly—
  - (1) transports, is about to transport, or has transported, monetary instruments of more than \$10,000 at one time--
    - (A) from a place in the United States to or through a place outside the United States; or
    - (B) to a place in the United States from or through a place outside the United States; or
  - (2) receives monetary instruments of more than \$10,000 at one time transported into the United States from or through a place outside the United States.
- (b) A report under this section shall be filed at the time and place the Secretary of the Treasury prescribes. The report shall contain the following information to the extent the Secretary prescribes:
  - (1) the legal capacity in which the person filing the report is acting.
  - (2) the origin, destination, and route of the monetary instruments.
  - (3) when the monetary instruments are not legally and beneficially owned by the person transporting the instruments, or if the person transporting the instruments personally is not going to use them, the identity of the person that gave the instruments to the person transporting them, the identity of the person who is to receive them, or both.
  - (4) the amount and kind of monetary instruments transported.
  - (5) additional information.
- (c) This section or a regulation under this section does not apply to a common carrier of passengers when a passenger possesses a monetary instrument, or to a common carrier of goods if the shipper does not declare the instrument.

- (d) Cumulation of closely related events.--The Secretary of the Treasury may prescribe regulations under this section defining the term "at one time" for purposes of subsection (a). Such regulations may permit the cumulation of closely related events in order that such events may collectively be considered to occur at one time for the purposes of subsection (a).

A conviction of this offense does not necessarily involve fraud. As it may therefore be considered a divisible statute, the decision-maker may look to the record of conviction to determine the elements of the crime, which is then considered in a determination of whether the offense involves moral turpitude.

As noted above, the record of conviction includes a limited set of documents and does not include the arrest report, or in this case, the March 8, 1999 affidavit of the United States Customs Service special agent who arrested the applicant. *See In re Teixeira*, 21 I&N Dec. 316, 319-20 (BIA 1996).

The only documents in this case that comprise the record of conviction for purposes of ascertaining the details of the applicant's crime are the indictment, the plea agreement, and the judgment. These documents do not indicate whether the applicant committed fraud.<sup>4</sup> Most significant to a determination of whether moral turpitude is involved is that, regardless of whether fraud was committed, evil intent is neither explicit nor implicit given the nature of the crime in this case. *See Gonzalez-Alvarado v. INS, supra*, at 246. Moreover, there is no indication that the act requires a vicious motive or corrupt mind, another consideration in determining whether a crime involves moral turpitude. *Matter of Perez-Contreras, supra*, at 617-18.

In this case, it is clear that the statute does not require the commission of acts that involve moral turpitude. Moreover, looking beyond the statute at the record of conviction and the relevant charges, there is no indication of malicious intent or fraud. Before one can be convicted of a crime of moral turpitude, the statute in question must, by its terms, necessarily involve moral turpitude. *Matter of Esfandiary, supra*. In light of current case law and the statute and record of conviction in this case, the applicant's conviction of failing to file a United States Customs currency reporting form cannot be interpreted as having been a crime involving moral turpitude.

Based on the record, the AAO finds that the applicant did not commit a crime involving moral turpitude. The applicant, therefore, is not inadmissible to the United States. She does not require a waiver of inadmissibility. The Form I-601 is moot.

Having found that the applicant is not in need of the waiver, no purpose would be served in discussing whether extreme hardship would accrue to his children. Accordingly, the appeal will be dismissed as moot.

**ORDER:** The appeal is dismissed, as the waiver application is moot.

---

<sup>4</sup> Although Count II of the indictment mentions fraud and willful misrepresentation, the AAO notes that Count II was dropped.