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U.S. Immigration and Citizenship Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: BANGKOK (SEOUL, KOREA) Date: OCT 21 2009

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.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The District Director, Bangkok, Thailand denied the waiver application. The matter is now on appeal before the Administrative Appeals Office (AAO) in Washington, DC. The appeal will be sustained.

The applicant, [redacted], is a native and citizen of Korea 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 been convicted of committing a crime involving moral turpitude.

The applicant is the spouse of a lawful permanent resident of the United States and the father of U.S. citizen children. He seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), so that he may reside in the United States with his family members. 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 Excludability (Form I-601) accordingly. *Decision of the District Director*, dated January 15, 2007. The applicant submitted a timely appeal.

On appeal, counsel states that the applicant's professional negligence that resulted in a death conviction is not a crime involving moral turpitude. He further states that the record establishes extreme hardship to the applicant's spouse and daughter if the waiver application were denied.

The AAO will first address the finding of inadmissibility.

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

> (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 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines "conviction" for immigration purposes as:

> 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 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.)

On appeal, counsel states that the director erred in finding [redacted] inadmissible for embezzlement, bribery, and forgery. Counsel states that those crimes did not involve [redacted] but related to [redacted]. Based on the record, the AAO agrees with counsel. The crimes of embezzlement, bribery, and forgery do not relate to [redacted]

On September 4, 1973, in the Seoul Civil District Court/Seoul Criminal District Court, [redacted] was found guilty of intentional interference of official business and was sentenced to 10 months imprisonment. The court found that the driving school under [redacted] management treated several codefendants as graduates of his driving school although they had not completed required tests. The codefendants were able to obtain driver's licenses because [redacted] unlawfully exempted them from taking certain tests. The record indicates that [redacted] violated the Penal Code; however, it does not contain the language of the penal code that he violated.

On September 18, 1975, in the Seoul Civil District Court/Seoul Criminal District Court, [redacted] was found guilty of fraud and intentional interference of official business. He violated articles 137, 57, and 62 of the Penal Code. He was sentenced to one year and six months imprisonment, which was to be reduced by 50 days incarceration, with a three-year stay of execution. Fraud is a crime involving moral turpitude.

Counsel asserts on motion that was found to have engaged in intentional interference of official business in violation of the Rules and Regulations of the Traffic and Vehicular Law. Counsel states that the charge of intentional interference of official business was based on the allegation that [redacted] issued certificates of completion to students who did not complete the prescribed course on driving, which resulted in a violation of the Rules and Regulations of the Traffic and Vehicular Law. Counsel cites to *In re Eslamizar*, 23 I&N Dec. 684 (BIA 2004), and states that since the nature of the applicant's offense is a violation, and not a crime, it should not constitute a basis for inadmissibility. The BIA in *In re Eslamizar* states that proceedings under

section 101(a)(48)(A) of the Act must be "criminal in nature under the governing laws of the prosecuting jurisdiction, whether that may be in this country or in a foreign one." *Id.* at 688.

The record before the AAO does not support counsel's assertion that [redacted] was in violation of the Rules and Regulations of the Traffic and Vehicular Law. The decisions of the Court do not state that [redacted] was guilty of violation of the Rules and Regulations of the Traffic and Vehicular Law. Thus, the AAO cannot find that his conviction of intentional interference of official business is a violation, and not a crime. Furthermore, the record is not clear as to whether or not intentional interference of official business involves moral turpitude because it does not contain articles 137, 57, and 62 of the Penal Code.

The AAO notes that the Summary Order in the record shows that in Korea the applicant was found guilty of professional negligence resulting in death on February 27, 1992, for which he was ordered to pay a fine. The facts of the offense convey that the applicant neglected the job duty of providing his employees with safety training and instructing them to ensure briquette gas was not seeping into the night watch room, and as a result, an employee died of carbon monoxide.

The applicant's crime would be equivalent to homicide by criminal negligence and would not be a crime involving moral turpitude because criminal negligence lacks the required mens rea for a finding of moral turpitude. *See, e.g., In re Perez-Contreras*, 20 I&N Dec. 615, 619 (BIA 1992) (conviction for third-degree assault under Washington law, defined as criminal negligence that causes bodily harm, was not a crime involving moral turpitude because "there was no intent required for conviction, nor any conscious disregard of a substantial and unjustifiable risk); and *Partyka v. Atty. Gen.*, 417 F.3d 408, 416 (3rd Cir. 2005) ("negligently inflicted bodily injury lacks the inherent baseness or depravity that evinces moral turpitude").

The AAO will now consider whether the applicant's section 212(h) waiver should be granted.

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

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

Section 212(h)(1)(A) of the Act provides that the Attorney General may, in his discretion, waive the application of subparagraph (A)(i)(I) of subsection (a)(2) if 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; and if the applicant's admission to the United States is not contrary to the national welfare, safety, or security of the United States and the applicant establishes that he has been rehabilitated.

An application for admission or adjustment is a "continuing" application, adjudicated on the basis of the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). The applicant's conviction of a crime involving moral turpitude occurred more than 30 years ago. He is eligible for a waiver under section 212(h)(1)(A)(i) of the Act.

Section 212(h)(1)(A)(ii) and (iii) of the Act require that the applicant's admission to the United States not be contrary to the national welfare, safety, or security of the United States; and the applicant is required to establish that he has been rehabilitated.

The evidence in the record to establish the applicant's eligibility under section 212(h)(1)(A)(ii) and (iii) of the Act consists of Charters of Commission regarding volunteerism, a certificate of sincere taxpayer, and a letter by the applicant's youngest daughter commending her father's character. The record shows the applicant is the owner of two successful driving schools in Korea.

The negative factors here are the applicant's convictions, which have already been addressed in this decision, and his violations, which are as follows: in 2003, the labor standard law by having employees work more than 44 hours a week; in 1998, the fire prevention law; in 1990, the city plan law; in 1981 and 1983, the vehicular transportation business law; in 1977, the road and traffic law; and in 1976, the road transportation vehicle law.

Based on the record, the AAO finds that the applicant's admission to the United States is not contrary to the national welfare, safety, or security of the United States; and furthermore, that the applicant has been rehabilitated. The applicant therefore has established the criterion under the waiver provision of section 212(h)(1)(A) of the Act.

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 eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-,* 7 I&N Dec. 582 (BIA 1957). In evaluating whether relief is warranted in the exercise of discretion, the factors adverse to the alien may include the nature and underlying circumstances of the removal ground at issue:

> [T]he presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

See Matter of Mendez-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must:

> [B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country.

Id. at 300. (Citations omitted).

The adverse factors are the applicant's convictions and violations in Korea as already set forth in this decision. The favorable factors are the applicant's ownership of successful driving schools, his payment of taxes, and the hardship to his wife and daughter if the waiver application were denied, and the Charters of Commission regarding volunteerism. When taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the applicant merits a waiver of inadmissibility.

In discretionary matters, the applicant bears the full burden of proving his eligibility for discretionary relief. *See Matter of Ducret,* 15 I&N Dec. 620 (BIA 1976). Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained and the application is approved.