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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

H2

[redacted]

FILE: [redacted] Office: CHICAGO, IL Date: DEC 0 1 2010

IN RE: [redacted]

PETITION: 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 PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Michael Shumway

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Chicago, Illinois, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Nigeria who was found to be 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 crimes involving moral turpitude. The applicant is the spouse of a U.S. citizen and has four 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.

In a decision dated August 25, 2009, the field office director found that the record contained information regarding unresolved arrests and that given the applicant's lengthy criminal record and record of immigration violations he did not warrant the favorable exercise of discretion.

In a Notice of Appeal to the AAO (Form I-290B), dated September 24, 2009, counsel states that the events leading to the applicant's criminal convictions occurred more than 15 years ago, the first offense by the applicant should not be considered a conviction because adjudication was withheld, and the applicant is eligible for a 212(h)(1)(A) waiver as his admission to the United States would not be contrary to the national welfare, safety, or security of the United States. Counsel asserts that the applicant has had a clean criminal record for 18 years and is a devoted father to four U.S. citizen children. Counsel also states that the applicant meets the requirements for a section 212(h)(1)(B) waiver because his spouse and children will suffer extreme hardship as a result of his inadmissibility.

The record indicates that on July 17, 1985, in Broward County, Florida the applicant was arrested and charged with fraudulently obtaining a driver's license. On September 24, 1985 adjudication of the charge was withheld and the applicant was sentenced to one year probation. The record indicates that on July 19, 1985, in Miami-Dade County, Florida the applicant was arrested and charged with credit card theft, over $100. On November 8, 1985 adjudication of the charge was withheld and the applicant was sentenced to two years probation. In 1986 the applicant then violated his probation, which was not resolved until September 15, 2010.

In addition, on November 1, 1985, in Miami-Dade County, Florida the applicant was charged with Grand Theft Auto. On November 20, 1985 these charges were dismissed and no action was taken. The applicant also states that on May 12, 1988 he was convicted of retail theft and sentenced to three months probation in Chicago, Illinois.

The AAO notes that in his decision, the field office director lists three other arrests which occurred in Chicago, Illinois: retail theft on December 11, 1986, burglary on October 20, 1991, and theft on October 21, 1991. Records indicate that none of these arrests resulted in convictions and that the charges were either dismissed or the applicant was released with no charges filed.

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

> (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 . . . or an attempt or conspiracy to commit such a crime . . . is inadmissible.

Counsel contends that because adjudication was withheld for the applicant's charges of fraudulently obtaining a driver's license and credit card theft that these charges did not result in convictions for immigration purposes.

Section 101(a)(48) 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.

The AAO notes that court records for both of these arrests indicate that the applicant pled guilty and was ordered to punishment in the form of probation. Thus, the applicant's record includes three convictions.

Next the AAO will turn to whether the applicant's three convictions were for crimes 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....
>
> 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.)

In the recently decided *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. First, in evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a "realistic probability, not a theoretical possibility," that the statute would be applied to reach conduct that does not involve moral turpitude. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). A realistic probability exists where, at the time of the proceeding, an "actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien's own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude." *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

However, if a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, "the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude." 24 I&N Dec. at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage inquiry in which the adjudicator reviews the "record of conviction" to determine if the conviction was based on conduct involving moral turpitude. *Id.* at 698-699, 703-704, 708. The record of conviction consists of documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.* at 698, 704, 708.

If review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. 24 I&N Dec. at 699-704, 708-709. However, this "does not mean that the parties would be free to present any and all evidence bearing on an alien's conduct leading to the conviction. (citation omitted). The sole purpose of the inquiry is to ascertain the nature of the prior conviction; it is not an invitation to relitigate the conviction itself." *Id.* at 703.

The AAO notes that any crime involving fraud is generally held to involve moral turpitude. *Burr v. INS*, 350 F.2d 87, 91 (9th Cir. 1965), *cert denied*, 383 U.S. 915 (1966). In addition, the BIA has determined theft involves moral turpitude when a permanent taking is intended. *See Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973). The AAO notes that theft by credit card implies that the taking is permanent. Furthermore, in *Matter of Jurado*, 24 I&N Dec. 29, 33-34 (BIA 2006), the BIA found that a violation of a Pennsylvania retail theft statute involved moral turpitude because the nature of retail theft is such that it is reasonable to assume such an offense would be committed with the intention of retaining merchandise permanently. The reasoning in *Jurado* is applicable to the the applicant's 1988 conviction for retail theft. Thus the applicant was convicted of knowingly taking goods of another with the intent to permanently deprive that person of such goods. Therefore, the AAO finds that all three of the applicant's convictions were for crimes involving moral turpitude and the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

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

The applicant's convictions were based on actions taken by the applicant in 1985 and 1988. The AAO notes that an application for admission or adjustment of status is considered a "continuing" application and "admissibility is determined on the basis of the facts and the law at the time the application is finally considered." *Matter of Alarcon*, 20 I.&N. Dec. 557, 562 (BIA 1992) (citations omitted). The issue of admissibility is the subject of the waiver application, and the Board in *Alarcon* applied the principles articulated for adjustment applications to the respondent's waiver application. A determination of the applicant's admissibility is not final until the applicant's appeal has been adjudicated. Thus, as it has now been more than 15 years since the actions that made the applicant inadmissible occurred, the AAO finds that the applicant is eligible for a waiver under section 212(h)(1)(A) of Act.

The AAO notes that with the exception of a probation violation, the applicant has had a clean criminal record since 1991. The record also establishes that the applicant and his spouse have been married since 1994 and together they have four U.S. citizen children. The record also indicates that the applicant has been filing his U.S. income taxes jointly with his wife. The record contains an affidavit from the applicant stating that after the birth of his children and the death of his parents he joined the Faith Tabernacle Pentecostal Church in 1993. He states that giving his life to Christ has transformed him into a new person and has forced him to see the errors of his past behavior. He states that he is dedicated to his family and his church and has been employed with the same company for the last three years. The record also includes letters from two of the applicant's children. The applicant's daughter, who is currently attending Princeton University, asserts that her father is loving and attentive. She states that he has worked tirelessly so that she and her older brother can attend college and that he is an important part of their community in Chicago. The applicant's oldest son, who is currently attending DePaul University, also attests to his father's strong moral character, supportive nature, and work ethic.

The AAO finds that the record establishes that the applicant has been rehabilitated and the record does not establish that the admission of the applicant to the United States would be "contrary to the national welfare, safety, or security of the United States." Thus, the record reflects that the applicant

meets the requirements for waiver of his grounds of inadmissibility under section 212(h)(1)(A) of the Act.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the applicant 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 section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the 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 then, "[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 factor in the present case is the applicant's criminal record. The favorable factors in the present case are the applicant's strong support of his family and church, the applicant's record of employment, and the applicant's lack of a criminal record or offense since 1991.

The AAO finds that the applicant has established that the favorable factors in his application outweigh the unfavorable factors. 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 now met that burden. Accordingly, the appeal will be sustained.

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