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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: CALIFORNIA SERVICE CENTER Date: NOV 19 2010

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:

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 Rhew

(b) Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Cuba 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 committed crimes involving moral turpitude. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h). The director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On appeal, counsel cites letters from healthcare providers to establish that the applicant's spouse's health has been impacted as a result of her husband's uncertain future. In addition, counsel refers to a news article to establish that the applicant's wife will not be able to obtain medication in Cuba.

We will first address the finding of inadmissibility. Section 212(a)(2)(A) of the Act states, in pertinent parts:

> (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.

The Board of Immigration Appeals (Board) 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 *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 criminal record shows that on October 1, 1993, the applicant pled guilty to burglary unoccupied dwelling, possession of burglary tools, and petit theft. The court withheld adjudication of guilt, and ordered that the applicant serve 18 months of probation. On the same date, the applicant also pled guilty to and was found guilty of burglary occupied and third degree grand theft. The court withheld imposition of the sentence, and placed the applicant on probation for 18 months under the supervision of the Department of Corrections. Lastly, on September 7, 1995, the applicant pled guilty to burglary of an unoccupied dwelling, third degree grand theft, possession of burglary tools, resisting an officer without violence, and criminal mischief $200 or less. The court found him guilty of those offenses, and withheld imposition of the sentence. The applicant was placed on probation for two months under the supervision of the Department of Corrections, and was ordered to serve 364 days in jail and to attend Alcoholic Anonymous meetings.

The applicant was convicted under Florida Statutes § 810.06 for possession of burglary tools. That section provides:

> Whoever has in his or her possession any tool, machine, or implement with intent to use the same, or allow the same to be used, to commit any burglary or trespass shall be guilty of a felony of the third degree . . .

Florida Statutes § 812.014(3)(a), which provides the definition for theft, reads in pertinent parts:

> (1) A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:
>
> (a) Deprive the other person of a right to the property or a benefit from the property.
>
> (b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.
>
> . . .

The applicant was convicted of burglary, which is defined under Florida Statutes § 810.02 and reads in pertinent parts:

> (1)(a) For offenses committed on or before July 1, 2001, "burglary" means entering or remaining in a dwelling, a structure, or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain…
>
> . . .
>
> (3) Burglary is a felony of the second degree…if, in the course of committing the offense, the offender does not make an assault or battery and is not and does not become armed with a dangerous weapon or explosive, and the offender enters or remains in a:
>
> (a) Dwelling, and there is another person in the dwelling at the time the offender enters or remains;
>
> (b) Dwelling, and there is not another person in the dwelling at the time the offender enters or remains;
>
> (c) Structure, and there is another person in the structure at the time the offender enters or remains;
>
> (d) Conveyance, and there is another person in the conveyance at the time the offender enters or remains; or

(e) Authorized emergency vehicle…

The Board has determined that to constitute a crime involving moral turpitude, a theft offense must require the intent to permanently take another person's property. *See Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973) ("Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended."). The AAO notes that Florida's theft statute is divisible, and can be violated by either permanently or temporarily depriving another person of the right or benefit of that person's property. Thus, not all of the prohibited acts under the statute involve moral turpitude, so the offense is not one that categorically involves moral turpitude.

In accordance with the language of *Silva-Trevino*, the AAO will review the record in the second-stage inquiry to determine whether the applicant's theft offenses were based on a taking with the intent to permanently deprive. With regard to his two theft offenses, the criminal record indicates that the applicant unlawfully entered into a dwelling or structure of another with the intent to commit a theft. We find it reasonable to assume that the circumstances surrounding the two theft offenses, entering a dwelling or structure of another with the intent to take the property of another, indicate that the applicant's intent was for a permanent taking, which renders him inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The Board (and Attorney General) has previously ruled that burglary is a crime involving moral turpitude where the crime the perpetrator intended to commit after breaking into a building involved moral turpitude. *See Matter of M-*, 2 I&N Dec. 721 (BIA, AG 1946). The Board recently expanded the circumstances for which the crime of burglary is to be found a crime involving moral turpitude. In short, entering or remaining in an occupied dwelling, without permission to do so, and with intent to commit any crime therein, is a crime involving moral turpitude. *See Matter of Louissaint*, 24 I&N Dec. 721 (BIA March 18, 2009). In *Matter of Louissaint*, the Board distinguished *Matter of M-*, in which the Board addressed a New York statute prohibiting burglary of a "building, or a room, or any part of a building." (citing 2 I&N Dec. at 723). Finding its rationale in *Matter of M-* unpersuasive in the context of burglary of an occupied residence, the Board held that "moral turpitude is inherent in the act of burglary of an occupied dwelling itself, and that the respondent's unlawful entry into the dwelling of another with the intent to commit *any crime* therein is a crime involving moral turpitude." 24 I&N Dec. at 759. Thus, the Board found that a conviction for burglary of an occupied dwelling contrary to section 810.02(3)(a) of the Florida Statutes is categorically a conviction for a crime involving moral turpitude. 24 I&N Dec. at 759-760.

The Board also cited the Attorney's General's recent decision in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), but did not find it necessary to review the record of conviction or other evidence of the respondent's conduct because "the offense, as defined by its statutory elements, is one in which moral turpitude necessarily inheres . . . ." 24 I&N Dec. at 759. Thus, "there is no 'reasonable probability' that § 810.02(3)(a), which involves the unlawful entry into an occupied dwelling, would be applied to conduct that does not involve moral turpitude. . . ." *Id.* The Board noted that "the conscious and overt act of unlawfully entering or remaining in an occupied dwelling with the intent to commit a crime is inherently 'reprehensible conduct' committed 'with some form of scienter' . . . {because} it tears away the resident's justifiable expectation of privacy and personal

security and invites a defensive response from the resident." *Id.* at 758-59 (quoting *Matter of Silva-Trevino*, 24 I&N at 706 & n.5).

In the applicant's case, the record is not clear whether his burglary offense of "burglary occupied" involved a dwelling. The criminal record is clear, however, that his burglary offenses were committed with the intent to commit a theft, and we find it reasonable to conclude that the theft was for a permanent taking, which thereby renders the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The applicant's convictions of resisting an officer without violence and criminal mischief $200 or less are not crimes involving moral turpitude. Florida Statutes § 843.02, resisting officer without violence to his or her person, reads:

> Whoever shall resist, obstruct, or oppose any officer . . . without offering or doing violence to the person of the officer, shall be guilty of a misdemeanor of the first degree . . .

Assault on a law enforcement officer has been found to be a crime involving moral turpitude where the perpetrator knows the victim to be a law enforcement officer performing his official duty and the assault results in bodily injury to the officer. *See Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988) (distinguishing cases in which knowledge of the police officer's status was not an element of the crime and where bodily injury or other aggravating factors were not present to elevate offense beyond "simple" assault); *see also Matter of B-*, 5 I&N Dec. 538 (BIA 1953) (a*s modified by Matter of Danesh, supra.*) (assault on prison guard not a crime involving moral turpitude because offense charged appeared to be only "simple" assault and no bodily injured was alleged); *Ciambelli ex rel. Maranci v. Johnson*, 12 F.2d 465 (D. Mass 1926) (assault on an officer was not a crime involving moral turpitude in spite of fact that defendant was armed with a razor because the razor was not used in the assault).

The plain language of Florida Statutes § 843.02 conveys that conduct is punishable even though no violence is perpetrated against the officer. In consideration of the foregoing cases, *Danesh, Matter of B-*, and *Ciambelli,* in which assault on a law enforcement officer involves moral turpitude when the assault results in bodily injury to the officer, we find that by its terms Florida Statutes § 843.02 does not involve moral turpitude because the perpetrator is not required to cause bodily injury to the officer.

Florida Statutes § 806.13, criminal mischief, states:

> (1)(a) A person commits the offense of criminal mischief if he or she willfully and maliciously injures or damages by any means any real or personal property belonging to another, including, but not limited to, the placement of graffiti thereon or other acts of vandalism thereto.
>
> (b)1. If the damage to such property is $200 or less, it is a misdemeanor . . .

We are unaware of any published federal cases addressing whether the crime of criminal mischief under Florida law is a crime of moral turpitude. However, in *Matter of N-*, 8 I&N Dec. 466 (BIA 1959), the Board found that violation of Delaware's malicious mischief statute (section 692 of the Delaware Penal Code), which consisted of causing damage to the furnishing of the Wilmington Girls Club, does not involve moral turpitude as the act was not "inherently base or depraved." Moreover, the Board found that the malicious mischief of breaking the glass in a door of a building and damaging a mailbox were not crimes involving moral turpitude in *In Re C-*, 2 I&N Dec. 716 (BIA 1947) and in *In Re B-*, 2 I&N Dec. 867 (BIA 1947). Florida Statutes § 806.13 provides that any person who willfully and maliciously injures or damages any property is guilty of the offense. The AAO does not find that the statutory language pertains to conduct that is inherently base, vile, or depraved. Accordingly, the applicant's malicious mischief conviction for damaging property under Florida Statutes § 806.13 is not a crime involving moral turpitude.

In sum, the applicant is inadmissible since his burglary and theft offenses involve moral turpitude. The waiver for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act is found under section 212(h) of the Act. That section 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 . . .

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. Since the activities rendering the applicant inadmissible occurred in March 1995 and in June and September of 1993, which is more than 15 years ago, they are waivable under section 212(h)(1)(A)(i) of the Act.

Section 212(h)(1)(A)(ii) and (iii) of the Act requires that the applicant's admission to the United States not be contrary to the national welfare, safety, or security of the United States; and that the applicant establish his rehabilitation. Evidence in the record to establish the applicant's eligibility under section 212(h)(1)(A)(ii) and (iii) of the Act consists of an affidavit by his wife, a letter by [redacted]b, income tax records reflecting the applicant's employment with [redacted]

[redacted], and his ownership of real estate. [redacted] conveys in her letter dated May 16, 2006 that the applicant plays an essential role in his wife's health and is her support system. The applicant's spouse asserts in her affidavit dated April 11, 2006, that she has been under treatment for severe depression and that her husband has changed and improved her life. She maintains that she feels better when she is with him, that she is financially and emotionally supported by him, and that he takes care of both her and their household.

The record shows that the applicant has not committed any crimes since September 7 1995, has been employed for a substantial period of time, is regarded as being of good character by his present spouse, and owns real estate. In consideration of those factors, the AAO finds that the applicant has demonstrated that his admission to the United States is not contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated, as required by section 212(h)(1)(A)(ii) and (iii) of the Act.

Once eligibility for a waiver is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion in favor of the waiver. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296, 301 (BIA 1996). A favorable exercise of discretion is limited in the case of an applicant who has been convicted of a violent or dangerous crime. Specifically, 8 C.F.R. § 212.7(d) states:

> The Attorney General, in general, will not favorably exercise discretion under section 212(h)(2) of the Act (8 U.S.C. 1182(h)(2)) to consent to an application or reapplication for a visa, or admission to the United States, or adjustment of status, with respect to immigrant aliens who are inadmissible under section 212(a)(2) of the Act in cases involving violent or dangerous crimes, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of the application for adjustment of status or an immigrant visa or admission as an immigrant would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the alien's underlying criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act.

In *Perez Pimentel v. Mukasey*, 530 F.3d 321 (5th Cir. 2008), the Court found that burglary is a violent or dangerous crime and that 8 C.F.R. § 212.7(d) applies. Accordingly, the applicant must show that "extraordinary circumstances" warrant approval of the waiver. 8 C.F.R. § 212.7(d). Extraordinary circumstances may exist in cases involving national security or foreign policy considerations, or if the denial of the applicant's admission would result in exceptional and extremely unusual hardship. Finding no evidence of foreign policy, national security, or other extraordinary equities, the AAO will consider whether the applicant has "clearly demonstrate[d] that the denial of . . . admission as an immigrant would result in exceptional and extremely unusual hardship" to a qualifying relative.

In the instant case, the applicant must demonstrate that denial of admission would result in exceptional and extremely unusual hardship to a qualifying relative, who in the instant case is the applicant's U.S. citizen spouse. The evidence in the record includes a psychological evaluation, medical records, the U.S. Department of State Country Reports on Human Rights Practices – 2005 for Cuba, an article in the New Herald about medicine in Cuba, an affidavit by the applicant's spouse, letters by physicians, a Social Security Administration (SSA) letter, a consultation report, and other documentation.

[redacted] conveys in his psychological evaluation dated March 17, 2006 that the applicant's spouse indicated that she has been under the care of [redacted], a psychiatrist, since January 27, 2000. [redacted] states that the applicant's spouse has been treated for major depressive disorder with psychotic features, and takes medication for her condition. [redacted] avers that the applicant's wife "has a long history of depression which limits her coping abilities under stress." [redacted] states in her consultation dated July 19, 2006 that the applicant's wife "has had increasing depression since the death of her granddaughter, but lately, she has been faced with the fact that her husband probably will be deported to Cuba" and is afraid that someone will break into her house. [redacted] indicates that the applicant takes care of his wife and provides her with emotional and monetary support. She avers that at the consultation the applicant's wife stated that "she felt like killing herself by burning herself." Further, in the letter dated May 15, 2006, [redacted] states that the applicant's spouse required hospitalization from April 13, 2006 to April 21, 2006, and that she "has little or no support system except for her husband." She conveys that when the applicant's wife learned of her husband's probable deportation to Cuba, "her medical condition deteriorated, especially her depression, which led to her hospitalization." [redacted] states that the applicant's wife will require oxygen in the very near future, which will be impacted by electrical power failures in Cuba. [redacted] avers that the applicant's spouse is under her care for non-obstructive coronary artery disease, advanced chronic obstructive lung disease, hypertension, major depression with anxiety, hyperlipidemia, lumbar radiculopathy, degenerative disks disease, and gastroesophageal reflux. [redacted] lists the medicines that are taken by the applicant's spouse.

The article "The Scarce Medicine in Cuba is Grave" posted on February 13, 2006 in the New Herald states that it is frequently impossible to find a simple analgesic in a town pharmacy in Cuba. The article discusses shortages in Cuba for medications, IV equipment in hospitals, needles for hemodialisis, and antibiotics. The applicant's wife declares in her affidavit dated April 11, 2006 that her life improved after she met her husband and that she will not be able to survive without him emotionally or financially. She indicates that he makes it possible for her to afford her medication since most are not covered by her medical plan. The SSA states in the letter dated November 30, 2003 that the applicant's wife receives $564 in monthly benefits. Lastly, the applicant's wife conveys that she is afraid of moving to Cuba because medicine is scare and her chances of obtaining medicine are "practically zero."

In view of the aforementioned assertions of emotional and financial hardship to the applicant's wife, which have been substantiated by the evidence in the record demonstrating her history of major

depressive disorder with psychotic features and her economic and emotional dependence on her husband, the AAO finds that the applicant's wife will endure "exceptional and extremely unusual hardship" if she remained in the United States without the applicant.

The applicant's wife is anxious about not being able to obtain medication in Cuba for treatment of her mental health and physical health problems. The record corroborates that she has major depression and serious health diseases which include non-obstructive coronary artery disease, advanced chronic obstructive lung disease, and degenerative disks disease. Further, the New Herald article corroborates that there is a shortage of medical supplies, which includes equipment and medicine, in Cuba. In view of the foregoing assertions, which have been corroborated by the evidence in the record, we find that the applicant's wife will endure "exceptional and extremely unusual hardship" if she joined her husband to live in Cuba. The applicant, consequently, has shown that the hardship to his qualifying relative meets the "exceptional and extremely unusual hardship" standard as specified in 8 C.F.R. § 212.7(d).

Accordingly, the applicant demonstrated that he merits a favorable exercise of discretion under 8 C.F.R. § 212.7(d), and the appeal will be sustained.

ORDER: The appeal is sustained.