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

U.S. Citizenship and Immigration Services

H2

[redacted]

DATE: AUG 12 2011 OFFICE: [redacted] FILE: [redacted]

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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ellen C. Johnson

Perry Rhew
Chief, Administrative Appeals Office

DICUSSION: The waiver application was denied by the Director, [redacted] and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico 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 a crime involving moral turpitude. The applicant is the mother of a U.S. citizen. She 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.

The Director found that the applicant was inadmissible based on her conviction for a crime involving moral turpitude and that she had failed to establish that the bar to her admission would result in extreme hardship for a qualifying relative, as required for a waiver under section 212(h) of the Act. She denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Decision of the Director,* dated July 29, 2008. On appeal, counsel asserted that the Director had ignored the hardships that would be suffered by the applicant's daughter, whether she moved to [redacted] to care for her mother, or remained in the United States and, thereby, abandoned her. *Form I-290B, Notice of Appeal or Motion,* dated August 27, 2008.

On June 6, 2011, the AAO issued a Notice of Intent to Dismiss the appeal, finding the record to establish that the applicant was also inadmissible to the United States pursuant to section 212(a)(9)(C)(i)(II) of the Act for having entered the United States without inspection after having been ordered removed. *Decision of the Chief, Administrative Appeals Office*, dated June 6, 2011.

The evidence of record includes, but is not limited to: counsel's statements; statements from the applicant's daughter; documentation relating to the applicant's medical conditions; a tax return, W-2 forms and earnings statements for the applicant's daughter; country conditions materials on [redacted] and court records relating to the applicant's conviction. The entire record was reviewed and all relevant evidence considered in reaching a decision on the appeal.

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 (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

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 *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining inadmissibility under section 212(a)(2)(i)(I) of the Act, adopting the "realistic probability" standard used by the Supreme Court in *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183 (2007). The methodology requires an adjudicator to review the criminal statute at issue to determine if there is a "realistic probability, not a theoretical possibility," that the statute could be applied to reach conduct that does not involve moral turpitude. 24 I&N Dec. 687, 698 (A.G. 2008)(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 has been 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.

In the present case, the record reflects that, on December 9, 1992, the applicant pled guilty to Felonious Theft By Wrongfully Obtaining Assistance in violation of [redacted] Statutes (M.S.) § 256.98, § 609.05, and § 609.52, Subd. 3(2).

At the time of the applicant's conviction, M.S. § 256.98 stated in pertinent part:

> **Subdivision 1. Wrongfully obtaining assistance.** A person who obtains, or attempts to obtain, or aids or abets any person to obtain by means of a willfully false statement or representation, by intentional concealment of a material fact, or by

> impersonation or other fraudulent device, assistance to which the person is not entitled or assistance greater than that to which the person is entitled [emphasis added], or who knowingly aids or abets in buying or in any way disposing of the property of a recipient or applicant of assistance without the consent of the county agency with intent to defeat the purposes of sections 256.12, 256.72 to 256.871, and chapter 256B, or all of these sections [emphasis added] is guilty of theft and shall be sentenced pursuant to section 609.52, subdivision 3, clauses (2), (3)(a) and (c), (4), and (5).

The applicant has not presented and the AAO is unaware of any prior case in which a conviction has been obtained under M.S. § 256.98 for conduct not involving moral turpitude. Nevertheless, in accordance with the language of *Silva-Trevino*, the AAO will review the record, including the applicant's record of conviction, as part of our categorical inquiry to determine if the statute was applied to conduct not involving moral turpitude in the applicant's own criminal case.

Included in the record is a copy of the indictment containing the charge to which the applicant pled guilty on December 9, 1992, which states:

> . . . [D]uring the period from April 1, 1991 through September 30, 1992 . . . the defendants . . . aiding and abetting and being aided and abetted by each other, wrongfully and unlawfully obtained general assistance to which they were not entitled and to which they knew that they were not entitled in an amount greater than $2,500.00 by means of their willfully false statements and representations or other fraudulent devices that they submitted on eligibility review forms to the [redacted] County Community Human Services Department during this period, to wit: that they did not have income when, in fact, the defendants . . . did have income, intending thereby to obtain general assistance for themselves.

Crimes in which fraud is identified as an element or that require a specific intent to defraud have long been held to be crimes involving moral turpitude. *Matter of Flores*, 17 I&N Dec. 225, 229 (BIA 1980); *Jordan v. DeGeorge,* 341 U.S. 223, 232 (1951); *Padilla v. Gonzales*, 397 F.3d 1016 (7th Cir. 2005). Crimes that are inherently deceptive or include conduct that results in the impairment of government functions have also been deemed to involve moral turpitude even though they do not require a specific intent to defraud for conviction. In *Matter of Flores*, the Board of Immigration Appeals (BIA) held that if fraud is clearly an ingredient of a crime, it involves mortal turpitude even if the usual phraseology concerning fraud is absent from the statute. The BIA found that impairing and obstructing a function of a department of government by defeating its efficiency or destroying the value of its lawful operations by deceit, graft, trickery or dishonest means is a crime involving moral turpitude. *Matter of Flores, supra.* In *Rodriguez v. Gonzales*, the Second Circuit Court of Appeals, found that the respondent's conviction for having knowingly made a false statement on a U.S. passport application was a crime involving moral turpitude as it involved deceit and an intent to impair the efficiency and lawful functioning of the government, which alone was "sufficient to categorize a crime as a CIMT." 451 F.3d 60, 64 (2nd Cir. 2006).

In the present case, the applicant was convicted of having willfully submitted false statements, representations or fraudulent devices to obtain financial assistance from the [redacted] County

Community Human Services Department while aware that she was not eligible for such assistance. Although the intent to defraud is not explicitly stated in M.S. § 256.98, the AAO finds the statute to punish conduct that is inherently deceitful. We note that the applicant, through dishonest means, acquired more than $2,500 in financial assistance from the [redacted] County Community Human Services Department, thereby impairing the agency's function of providing financial assistance and services to needy families without income. Accordingly, the applicant's conviction is found to be a conviction for a crime involving moral turpitude and to bar her admission to the United States under section 212(a)(2)(i)(I) of the Act. The applicant does not contest this finding.

Beyond the decision of the Director, the AAO also finds the applicant to be inadmissible to the United States pursuant to section 212(a)(9)(C) of the Act.[1]

Section 212(a)(9)(C)(i) of the Act states, in pertinent part:

> (C) Aliens unlawfully present after previous immigration violations.-
>
> (i) In general.-Any alien who-
>
> . . . .
>
> (II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law,
>
> and who enters or attempts to reenter the United States without being admitted is inadmissible.
>
> (ii) Exception.—Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if . . . the Attorney General [now the Secretary of Homeland Security] has consented to the alien's reapplying for admission....

The record reflects that, on November 23, 1993, an immigration judge ordered the applicant removed from the United States and that she was returned to Mexico on November 25, 1993. In an attachment to the Form I-601, the applicant provided a listing of her periods of residence in the United States, which indicated that she had re-entered without inspection in March 1994 and October 1998. In that the applicant's second entry without inspection occurred after April 1, 1997, the effective date for the provisions under section 212(a)(9)(C) of the Act, the AAO finds that she is inadmissible to the United States under section 212(a)(9)(C)(i)(II) of the Act for having entered the United States without inspection after having been ordered removed.

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[1] An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the original decision does not identify all of the grounds for denial. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), aff'd, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO conducts appellate review on a *de novo* basis).

In response to the Notice of Intent to Dismiss issued on June 6, 2011, counsel asserts that the applicant is not subject to section 212(a)(9)(C)(i)(II) of the Act. He states that the applicant's U.S. citizen daughter assisted her by preparing the Form I-601 attachment and that the October 1998 reentry date she provided is incorrect. Counsel contends that the applicant departed the United States in early 1996 and remained in [redacted] only a few months before returning. Consequently, he asserts, the applicant's last entry without inspection took place in October 1996, rather than October 1998. In support of these claims, counsel provides a June 28, 2011 affidavit from the applicant's daughter who states that her family did not realize the importance of the dates provided in the attachment to the Form I-601 and that following a family conference, they all agree that their mother spent no more than a few months in [redacted] subsequent to her early 1996 departure. The applicant's daughter contends that her mother returned to the United States in October 1996, not October 1998.

The AAO acknowledges the preceding claims regarding the applicant's 1996 return to the United States but finds them, in the absence of any type of supporting documentation, to be insufficient proof that the October 1998 entry date listed on the Form I-601 attachment is the result of an error made by the applicant's daughter. Without supporting documentation, the assertions of counsel are not sufficient to meet the burden of proof in these proceedings. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentation is not sufficient to meet the applicant's burden of proof in this proceeding. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Other than the affidavit provided by her daughter, the applicant has submitted no evidence to demonstrate that her last entry without inspection occurred in October 1996. The record contains no statements from individuals who can personally attest to the applicant's presence in the United States in 1996, including statements from additional family members and her friends. Neither does it include any statements from medical personnel, clergy, employers or landlords who may have had contact with the applicant in late 1996. The applicant has also submitted no financial or employment records that would support her claim of an October 1996 return, e.g., earnings statements, rent receipts, rental agreements, bank statements, cancelled checks or tax returns from this period. Absent such documentation, the AAO concludes that the record continues to support a finding that the applicant is inadmissible to the United States pursuant to section 212(a)(9)(C)(i)(II) of the Act.

To seek an exception from a finding of inadmissibility under section 212(a)(9)(C)(i)(II) of the Act, an applicant must remain outside the United States for at least ten years following his or her last departure. *See Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006). The record in the present matter does not establish that the applicant has resided outside the United States for the required ten years. Accordingly, she is statutorily ineligible to seek an exception from her inadmissibility under section 212(a)(9)(C)(ii) of the Act.

The applicant is inadmissible to the United States pursuant to section 212(a)(9)(C)(i)(II) of the Act and is not eligible to apply for the exception found in section 212(a)(9)(C)(ii). Therefore, the AAO finds no purpose would be served by considering her eligibility for a waiver of inadmissibility under section 212(h) of the Act. The appeal will be dismissed.

In proceedings for application for waiver of grounds of inadmissibility, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden.

ORDER: The appeal is dismissed.