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

U.S. Citizenship and Immigration Services

H2

FILE: [redacted] Office: CHICAGO Date: JUN 06 2011

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,

Michael Shumway

for Perry Rhew
Chief, Administrative Appeals Office

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

The record reflects that the applicant, a native and citizen of Iraq, was admitted to the United States as a conditional permanent resident on November 18, 1996. The applicant divorced the spouse who petitioned for his permanent residence on April 25, 2001. The applicant's conditional residence was terminated on December 9, 2003, after a determination that the applicant failed to prove that his marriage with his former spouse was entered in good faith. The applicant remarried, and is now applying for adjustment of status based on an alien relative petition filed by his current spouse. The applicant 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 applying for a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his U.S. citizen wife and children.

The director determined that the applicant failed to establish extreme hardship to a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Form I-601 Decision*, dated September 24, 2008.

On appeal, counsel asserts,

> Assumption by USCIS that family in the United States has the capability to financially support the petitioner/wife of [redacted] and further ignoring the severe emotional impact on the family unit, the lack of husband in the family unit, the lack of a father figure in the family unit and resulting in the utter destruction of the family unit, failing to consider the ramifications upon the wife and two children without a father and husband.

*Notice of Appeal or Motion (Form I-290B)*, dated September 26, 2008.

In support of the waiver application, the record includes, but is not limited to, the applicant's conviction records, financial documentation, letters from the applicant and his spouse, marriage and birth certificates, employment verification letters, and an approved petition for alien relative (Form I-130) filed on behalf of the applicant by his U.S. citizen spouse. The entire record was reviewed and considered in rendering a decision on the appeal.

The AAO conducts the final administrative review and enters the ultimate decision for U.S. Citizenship and Immigration Services on all immigration matters that fall within its jurisdiction. The AAO reviews each case de novo as to all questions of law, fact, discretion, or any other issue that may arise in an appeal that falls under its jurisdiction. See *Helvering v. Gowran*, 302 U.S. 238, 245-246 (1937); see also, *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).

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

> (A) Conviction of certain crimes. –
>
> (i) In general. – Except as provided in clause (ii), any 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, or
>
> (II) a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), 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.)

The record reflects that on August 31, 2004, the applicant was convicted in the United States District Court Northern District of Illinois of mail fraud in violation of 18 U.S.C. §§ 1341 and 2. (Case No. 04 Cr 51-2). The applicant was sentenced to three years probation, and ordered to pay restitution in the amount of $35,326.99. On September 29, 2004, the applicant was convicted in the Circuit Court of Cook County, Illinois of retail theft (less than $150) in violation of Illinois Compiled Statues Chapter 720 § 5/16A-3(a). (Case No. 03200849501). The applicant was sentenced to 24 months probation.

At the time of the applicant's conviction, [redacted] stated:

> A person commits the offense of retail theft when he or she knowingly:

> (a) Takes possession of, carries away, transfers or causes to be carried away or transferred, any merchandise displayed, held, stored or offered for sale in a retail mercantile establishment with the intention of retaining such merchandise or with the intention of depriving the merchant permanently of the possession, use or benefit of such merchandise without paying the full retail value of such merchandise;

The BIA 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."). In *Matter of Jurado*, 24 I&N Dec. 29, 33-34 (BIA 2006), the BIA found that 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. Thus, the AAO concurs that the applicant's conviction for Retail Theft under 720 ILCS 5/16A-3(a) constitutes a crime involving moral turpitude.

As stated above, the applicant was convicted of mail fraud under 18 U.S.C. § 1341. Fraud has, as a general rule, been held to involve moral turpitude. The U.S. Supreme Court in *Jordan v. De George* concluded that "Whatever else the phrase 'crime involving moral turpitude' may mean in peripheral cases, the decided cases make it plain that crimes in which fraud was an ingredient have always been regarded as involving moral turpitude. . . . Fraud is the touchstone by which this case should be judged. The phrase 'crime involving moral turpitude' has without exception been construed to embrace fraudulent conduct." 341 U.S. 223, 232 (1951). Therefore, the AAO concurs that the applicant's conviction for mail fraud is a crime involving moral turpitude. The applicant does not contest this determination on appeal.

Finally, a Chicago Police Department criminal history report contained in the record reflects that the applicant was convicted on February 19, 2004 of possession of a controlled substance in violation of 720 ILCS 570/402(c). The report indicates that he was sentenced to 18 months imprisonment. (Case No. 2004CR02209). The applicant has not submitted the court disposition, arrest narrative, laboratory report, or any other records related to this conviction. Based on the criminal history report from the Chicago Police Department, it can be concluded that the applicant is also inadmissible under section 212(a)(2)(A)(i)(II) of the Act for a violation of a law related to a controlled substance. The only waiver available for a controlled substance offense is under section 212(h) of the Act for simple possession of 30 grams or less of marijuana. There is no other waiver available to an alien inadmissible under section 212(a)(2)(A)(i)(II) of the Act. Here, the applicant indicated on his waiver application that he is inadmissible for "possession of a controlled substance," but failed to show that his conviction under 720 ILCS 570/402(c) was for simple possession of 30 grams or less of marijuana. Therefore, the applicant may be ineligible for a waiver of this ground of inadmissibility. However, we need not address this issue further, as the applicant was admitted to the United States as a conditional permanent resident, and was then convicted of an aggravated felony, rendering him statutorily ineligible for a section 212(h) of the Act waiver.

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 subparagraphs (A)(i)(I), (B), . . . of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams of less of marijuana 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 . . . . and
>
> (2) the Attorney General [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status. . . .
>
> No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than seven years immediately preceding the date of initiation of proceedings to remove the alien from the United States. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.

In considering whether the respondent's conviction is an aggravated felony, we first apply the "formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." *Taylor v. United States*, 495 U.S. 575, 601 (1990). First, we will look to the statute under which the alien was convicted and compare its elements to the relevant definition of aggravated felony set out in section 101(a)(43) of the Act, 8 U.S.C. § 1101(a)(43). Under this categorical approach, an offense qualifies as an aggravated felony if and only if the full range of conduct covered by the criminal statute falls within the meaning of that term. *Id.*

However, if the criminal statute of conviction could be applied to conduct that would constitute an aggravated felony and conduct that would not, we then see if there is "a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime." *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). In applying this approach, the alien "may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues." *Id.*

If the alien demonstrates a "realistic probability" that the statute would be applied to conduct that falls outside the generic definition of the crime, we then apply a modified categorical approach. Under the modified categorical approach, we conduct a limited examination of documents in the record of conviction to determine if there is sufficient evidence to conclude that the alien was convicted of the elements of the generically defined crime. *Shepard v. U.S.*, 544 U.S. 13 (2005). These documents include the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the transcript of plea proceedings. 544 U.S. at 26.

Section 101(a)(43)(M)(i) of the Act, 8 U.S.C. § 1101(a)(43)(M)(i), includes as an aggravated felony an offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000. A conviction for mail fraud requires proof that the individual has devised or intended to devise "any scheme or artifice to defraud." Therefore, a conviction for mail fraud under 18 U.S.C. § 1341 clearly falls under section 101(a)(43)(M)(i) of the Act.

Having established that the crime categorically involves fraud within the meaning of section 101(a)(43)(M)(i) of the Act, we next look at the facts of the case to assess whether the loss to the victim exceeded $10,000. In *Singh v. Ashcroft*, 383 F.3d 144, 161-62 (3d Cir. 2003), the Third Circuit Court of Appeals noted that "a departure from the formal categorical approach seems warranted when the terms of the statute invite inquiry into the facts underlying the conviction at issue. The qualifier 'in which the loss to the victim or victims exceeds $10,000' in 8 U.S.C. § 1101(a)(43)(M)(i) is the prototypical example-it expresses such a specificity of fact that it almost begs an adjudicator to examine the facts at issue." *Id.* The judgment in the instant case contains an assessment of the criminal monetary penalties, which provides an order of restitution in the amount of $35,326.99 to Farmers Insurance Group. *Judgment in a Criminal Case* (Case No. 04 Cr 51 -2), dated September 3, 2004.

The record reflects that the victim of the applicant's crime sustained a loss in excess of $10,000. Thus, the AAO finds that the applicant's conviction for mail fraud is an aggravated felony under section 101(a)(43)(M)(i) of the Act. An alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence is ineligible for a 212(h) waiver if since the date of such admission the alien has been convicted of an aggravated felony. In this case, the applicant committed mail fraud subsequent to his last admission to the United States on November 18, 1996. The applicant was last admitted to the United States as a conditional permanent resident. The regulations define a conditional permanent resident as:

> an alien who has been lawfully admitted for permanent residence within the meaning of section 101(a)(20) of the Act, except that a conditional permanent resident is also subject to the conditions and responsibilities set forth in section 216 or 216A of the Act.... Unless otherwise specified, the rights, privileges, responsibilities and duties which apply to all other lawful permanent residents apply equally to conditional permanent residents.... All references within this chapter to lawful permanent residents apply equally to conditional permanent residents, unless otherwise specified.

8 C.F.R. § 216.1.

The definition of a lawful permanent resident on a conditional basis makes clear that conditional permanent residents are to be considered lawful permanent residents, except for the elimination of the condition on that status. The condition is that if the Secretary of Homeland Security determines that the qualifying marriage was entered into for the purpose of procuring an alien's admission as an immigrant or has been judicially annulled or terminated, the alien's status as a permanent resident is terminated. *See* section 216(b)(1) of the Act, 8 U.S.C. § 1186a(b)(1).

In conclusion, the applicant falls within the category of aliens who are ineligible for a 212(h) waiver because he was convicted of an aggravated felony subsequent to his admission to the United States as a permanent resident. Since the applicant is statutorily ineligible for a waiver, the AAO need not address the director's determination that the applicant failed to establish extreme hardship to a qualifying relative.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, 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. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.