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

**identifying data deleted to prevent clearly unwarranted invasion of personal privacy**
**PUBLIC COPY**

U.S. Citizenship and Immigration Services

[redacted]

H2.

Date: OCT 18 2011 Office: LONDON FILE: [redacted]

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under sections 212(i) and 212(h) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(i), 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

for Perry Rhew
Chief, Administrative Appeals Office

**DISCUSSION**: The waiver application was denied by the District Director, Rome, Italy. The Field Office Director, London, subsequently dismissed the motion to reopen and reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained, and the waiver application will be approved.

The record reflects that the applicant is a native of Uganda and a citizen of the United Kingdom, 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 a crime involving moral turpitude. The applicant was also found to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for seeking to procure admission to the United State through fraud or misrepresentation. The applicant is married to a lawful permanent resident. The applicant is also the beneficiary of an approved Petition for Alien Relative (Form I-130); his United States citizen son was the petitioner. The applicant seeks a waiver of inadmissibility in order to live in the United States with his spouse and son.

The District Director concluded that the applicant failed to establish extreme hardship to a qualifying relative, and denied the application. *See Decision of the District Director*, dated July 22, 2008. The applicant thereafter moved to reopen and reconsider, and the Field Office Director subsequently dismissed the motion. *See Decision of the Field Office Director*, dated February 10, 2009.

On appeal, counsel contends that the District Director should have granted a waiver under section 212(h)(1)(A) of the Act because the applicant's conviction was more than 15 years ago, he has shown rehabilitation, and his admission would not be contrary to U.S. safety, security, or the national welfare. Counsel further asserts that the District Director erred in denying a waiver under section 212(h)(1)(B) because the applicant established extreme hardship to his U.S. citizen spouse and son. *See Brief in Support of Appeal*, dated April 3, 2009. Counsel asserts that the applicant is not inadmissible under section 212(a)(6)(C)(i) of the Act because his misrepresentations were not willful.

The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Section 212(a)(6)(C) of the Act provides, in pertinent part:

> Misrepresentation
>
> (i) In general
>
> Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this chapter is inadmissible.

Section 212(i) of the Act provides:

> (1) The Attorney General [now the Secretary of Homeland Security (Secretary)]

> may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

The AAO determines that the applicant is not inadmissible under section 212(a)(6)(C)(i) of the Act because he did not *willfully* misrepresent a material fact in order to obtain an immigration benefit. The term "willfully" should be interpreted as knowingly and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the factual claims are true. *See* U.S. Department of State, *Foreign Affairs Manual* 40.63, n. 5.1; *see also Forbes v. I.N.S.* , 48 F.3d 439 (9th Cir. 1995). In order to find the element of willfulness, it must be determined that the alien was fully aware of the nature of the information sought and knowingly, intentionally, and deliberately misrepresented material facts. *Id.*

In the present case, a review of the record reflects that the applicant applied for admission into the United States under the Visa Waiver program in 1998, 2000 and 2003. On each occasion, the applicant failed to disclose on the Nonimmigrant Visa Waiver Arrival/Departure Form (I-94W) that he had been convicted of a crime or offense involving moral turpitude. The applicant also submitted a Nonimmigrant Visa Application (DS-156) to obtain a B-2 visitors visa in London wherein he responded in the negative to a question asking whether he had ever been arrested or convicted for a crime, even though subject of a pardon, amnesty or other similar legal action. Finally, the record shows that the applicant affirmatively disclosed his arrest and conviction in his Immigrant Visa Application (DS-230) in October 2007.

Counsel argues that the applicant's failure to disclose his arrest and conviction was not willful. He asserts that the question posed in Form I-94W is overly complicated and was confusing for the applicant, who is elderly and not fluent in English. Counsel contends that the applicant was unclear of the meaning of a "crime involving moral turpitude." Counsel argues that the wording of the Form I-94W, which includes the phrase "crime involving moral turpitude," is confusing to a layperson, especially one who is not fluent in English. Counsel indicates that the applicant sought the assistance of his United States citizen son in filling out his Immigrant Visa Application and his son told him to disclose his arrest and conviction. Counsel asserts that the applicant took additional care in completing the Immigrant Visa Application because the application would allow him to reside permanently in the United States, and that was very important to him. Counsel further argues that it would be counterintuitive for the applicant to have willfully tried to hide his conviction for applications of lesser significance to him. The record contains letters from the applicant and his United States citizen son containing assertions consistent with counsel's arguments and generally explaining the applicant's intentions with regard to his visa applications.

The AAO finds that the applicant's failure to disclose his arrest and conviction in Forms I-94W and DS-156 was not willful. As we have stated in prior decisions, the phrase "crime involving moral turpitude" is a complex legal term not in common usage, and it is reasonable to believe that a layperson will not understand its meaning as used in U.S. immigration law, and/or mistakenly

believe that it does not apply to that person's crimes. Furthermore, the form I-94W is completed while in transit to the United States, making consultation with legal counsel prior to the completion of the form impractical. The record does not show that the applicant had been made aware previously that this conviction was a crime involving moral turpitude, or demonstrate other circumstances from which we can conclude that the applicant concealed his criminal record with the knowledge that his crime was within the purview of the question on Form I-94W. Indeed, the applicant again responded in the negative to a similar question (question 30b) on the Form DS-230, while simultaneously disclosing his conviction in response to a separate question (question 31) that asked only if he had "ever been charged, arrested or convicted of any offense or crime?" The applicant's disclosure of his conviction in response to question 31 strongly suggests that his failure to disclose it in response to question 30b was the result of a misunderstanding of a complicated legal term, and/or or its application to his crime, not an intentional attempt to conceal his inadmissibility. Likewise, we find the applicant's responses on the Form I-94W were inadvertent rather than willful.

However, the question (question 38) on Form DS-156 to which the applicant responded "no" is similar to question 31 on Form DS-230, asking only if an applicant "[has] . . . ever been arrested or convicted for any offense or crime . . . ." It is reasonable to presume that a lay person of normal intelligence would know that disclosure of any criminal convictions is required. Furthermore, the question requires disclosure "even though [the crime or offense is the] subject of a pardon, amnesty or other similar action," which generally forecloses the argument that failure to disclose was based on the honest belief that disclosure is not required because the conviction is "spent" under U.K. law.

But whether a misrepresentation was willful is a question of fact, to be determined based on the evidence and circumstances of each case. *See Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). Having considered all the circumstances, including the applicant's lack of mastery in the English language, we find that the applicant's failure to disclose his arrest and convictions in the DS-156 was accidental and inadvertent. In this case, we believe that the applicant's affirmative disclosure of his arrest and conviction in the Form DS-230 and his previous failure to disclose that arrest and conviction in the Form DS-156 are best reconciled by applicant's assertion that the prior failure to disclose was not willful. Had the prior misrepresentations been willful, it would follow that the applicant would not have voluntarily disclosed his criminal conviction and subject himself to the inadmissibility he had previously eluded. In reaching this finding, we caution that this is based on the unique facts of this case as they inform our determination of the issue of willfulness, and should not be construed as articulating a rule that later disclosure of the true facts generally serves to excuse inadmissibility grounded in a prior misrepresentation of those facts. In this case, the AAO finds that the applicant is not inadmissible pursuant to section 212(a)(6)(C)(i) of the Act.

The AAO will next address the finding of inadmissibility for a crime involving moral turpitude. Section 212(a)(2) 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.

> (ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-
>
> > (I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or
> >
> > (II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

The record indicates that the applicant was convicted on April 11, 1985 at the Kingston Crown Court for one count of theft and kindred offences. He was sentenced to imprisonment of six (6) months wholly suspended for two years and ordered to pay a fine of 2500.00 pounds of sterling.

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 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. 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." *Silva-Trevino*, 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. *Id.* 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 applicant was convicted of theft and kindred offences in the Kingston Crown Court on April 11, 1985. In *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973), the Board determined that to constitute a crime involving moral turpitude, a theft offense must require the intent to permanently take another person's property. *Id. At* 333 ("Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended."). For the crime of possession of stolen goods to be a crime involving moral turpitude, knowledge that the goods are stolen is necessary. *See, e.g., Matter of K-*, 2 I&N Dec. 90 (BIA 1944).

In the instant case, the AAO notes that the record of conviction does not clearly state a specific section of the law that the applicant violated. In a letter from the applicant's United States citizen son, dated August 15, 2007, he states that his father was "arrested for possession of stolen property," when he agreed to store chocolate boxes for a friend at his grocery store. The applicant also provided a handwritten letter that indicates he stored boxes of chocolates for a friend who "could not store them in [his] van because they might be stolen." It appears from the applicant's statement that he had knowledge of his receipt of stolen goods. Further, there is no documentary evidence in the record to indicate that the applicant did not have knowledge that the chocolates were stolen or that the intent was only to retain the goods temporarily. As the applicant is seeking waiver of inadmissibility, the burden of proof is on the applicant to establish by a preponderance of the evidence that he is not inadmissible. We have no direct evidence as to what the applicant's knowledge or intent was at the time of his crime, but the evidence in the record supports the finding that the applicant was involved in a permanent taking, and the applicant has not contested on appeal that his conviction is a crime of moral turpitude. Accordingly, we conclude that the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

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 conviction rendering the applicant inadmissible occurred in April 1985, which is more than 15 years ago, it is waivable under section 212(h)(1)(A) 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 letters commending his character. In a letter from the applicant's United States citizen son, dated August 15, 2007, he states that the applicant "taught [him] the virtue of education and hard work" and that the applicant endured many hardships trying to establish a new life for his family in the United Kingdom after having been refugees in Uganda. The applicant's son also conveys in his letter that his children will benefit from the applicant's presence. The record also contains a letter from the applicant's friend, indicating that the applicant financially assisted him in paying for his daughter's education costs. In consideration of the record, which shows that the applicant has not committed any crimes that would render him inadmissible since April 1985, and that he is commended by his United States citizen son and friend, the AAO finds that the applicant has provided sufficient evidence to demonstrate 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.

In *Matter of Mendez-Moralez,* 21 I&N Dec. 296, 301 (BIA 1996), the Board stated that once eligibility for a waiver is established, it is one of the favorable factors to be considered in determining whether the Secretary should exercise discretion in favor of the waiver. Furthermore, the Board stated that:

> 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).

*Id.* at 301.

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 conviction for theft and kindred offences. The favorable factors in the present case are the applicant's good character as demonstrated by the positive references and the passage of 26 years since the criminal conviction that rendered the applicant inadmissible to the United States. The AAO finds that the crime committed by the applicant is serious in nature; nevertheless, when taken together, we find the favorable factors in the present case outweigh the adverse factor, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility rests with the applicant. *See* section 291 of the Act. Here, the applicant has now met that burden. Accordingly, the appeal will be sustained and the waiver application will be approved.

**ORDER:** The appeal is sustained.