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

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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[redacted]

Date: FEB 01 2012 Office: TEGUCIGALPA, HONDURAS 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,

Michael Shumway

for Perry Rhew
Chief, Administrative Appeals Office

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

The applicant, a native and citizen of Honduras, was admitted to the United States as a lawful permanent resident on September 18, 1974. As a result of five criminal convictions for Insurance Fraud the applicant was placed in removal proceedings and ordered removed to Honduras on January 14, 2002. The applicant appealed this decision to the Board of Immigration Appeals (the Board) and on March 31, 2003 the Board affirmed the decision of the immigration judge. The applicant then petitioned the Ninth Circuit Court of Appeals and that petition was dismissed on November 12, 2004. On January 12, 2005 the applicant was removed. In applying for an immigrant visa based on an Alien Relative Petition filed by his daughter 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 lawful permanent resident wife and U.S. citizen children.

In a decision, dated June 25, 2009, the field office director found that the applicant had failed to establish that a qualifying relative would suffer extreme hardship as a result of the applicant's inadmissibility or that he warranted the favorable exercise of discretion.

In a Notice of Appeal to the AAO (Form I-290B), dated July 21, 2009, counsel states that the field office director erred in finding no extreme hardship to the applicant's U.S. citizen spouse and in failing to properly balance the positive factors in the applicants case from the negative factors.

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 –
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> (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.)

The record reflects that on April 8, 1998 the applicant was convicted of five counts of insurance fraud in violation of California Penal Code (CPC) § 550(a)(5). The applicant was sentenced to 5 years imprisonment for four of the counts, 6 years imprisonment for the last count, a period of probation, and was ordered to pay restitution to the victims of his crime.

At the time of the applicant's conviction, CPC § 550(a)(5), provided:

> (a) It is unlawful to do any of the following, or to aid, abet, solicit, or conspire with any person to do any of the following:
>
> > (5) Knowingly prepare, make, or subscribe any writing, with the intent to present or use it, or to allow it to be presented, in support of any false or fraudulent claim.

Fraud has, as a general rule, been held to involve moral turpitude. The U.S. Supreme Court in [redacted] 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 insurance fraud is a crime involving moral turpitude. The applicant does not contest this determination on appeal.

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), (B), . . . of subsection (a)(2) . . . if –
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> . . . .
>
> (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.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the field office does not identify all of the grounds for denial in the initial decision. *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). Thus, the AAO will now consider whether the applicant's conviction was an aggravated felony, which would render the applicant ineligible for a waiver of inadmissibility.

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. As reflected in the language of CPC § 550(a)(5), the crime that the applicant was convicted of involved fraud or deceit within the meaning of section 101(a)(43)(M)(i) of the Act. *See Valansi v. Ashcroft,* 278 F.3d 203, 210 (3rd Cir. 2002).

The record also reflects that numerous victims of the applicant's crimes sustained a loss in excess of $10,000. The record indicates that the applicant was required to pay restitution to [redacted] Insurance Company in the amount of $10,500 and to [redacted] Insurance Group in the amount of $15,432.12. Thus, the AAO finds that the applicant's conviction for insurance fraud is an aggravated felony under section 101(a)(43)(M)(i) of the Act. The applicant is ineligible for a waiver under section 212(h) of the Act because he committed this crime subsequent to his admission to the United States as a lawful permanent resident. Since the applicant is ineligible for a waiver, the AAO need not address whether the applicant's qualifying relatives will suffer extreme hardship as a result of his inadmissibility.

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.