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

U.S. Citizenship and Immigration Services

[redacted]

H2

DATE: JAN 2 7 2012 OFFICE: ATLANTA, GA 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]

[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 waiver application was denied by the Field Office Director, Atlanta, Georgia and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Guinea 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 and section 2112(a)(2)(B), 8 U.S.C. § 1182(a)(2)(B), for having been convicted of two or more offenses for which the aggregate sentence to confinement totaled at least five years. The applicant is the spouse and father of U.S. citizens. He seeks a waiver of inadmissibility in order to reside in the United States.

The Field Office Director concluded that the applicant had failed to establish that the bars to his admission would impose extreme hardship on a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Field Office Director's Decision*, dated April 28, 2011.

On appeal, counsel contends that United States Citizenship and Immigration Services (USCIS) erred in denying the waiver application. He asserts that USCIS failed to consider the medical hardship of the applicant's spouse and misinterpreted the extreme hardship standard. *Form I-290B, Notice of Appeal or Motion,* dated May 25, 2011.

However, because the applicant has subsequently become inadmissible under section 212(a)(6)(C)(ii)(I) of the Act for making a false claim to U.S. citizenship, for which no waiver is available, no purpose is served in evaluating the applicant's claims of hardship.

In support of the waiver application, the record contains, but is not limited to, counsel's brief; statements from the applicant, his spouse and his son; medical documentation relating to the applicant's spouse and son; W-2 forms and tax returns; country conditions information on Guinea; the monthly budget for the applicant's family; documentation of unemployment benefits paid to the applicant's spouse; a business license issued to the applicant and his spouse; and court records relating to the applicant's convictions. 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.
>
> (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).

Section 212(a)(2)(B) provides:

> Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude for which the aggregate sentences to confinement were 5 years or more is inadmissible.

Prior to considering the applicant's convictions under section 212(a)(2)(A)(i)(I) of the Act, the AAO notes that the applicant is not inadmissible pursuant to section 212(a)(2)(B) of the Act. Although he has multiple criminal convictions, these convictions did not result in an aggregate sentence of five or more years. Therefore, the AAO withdraws the Field Office Director's finding that the applicant is inadmissible under section 212(a)(2)(B) of the Act.

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 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. The methodology adopted by the Attorney General consists of a three-

pronged approach. 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. 24 I&N Dec. at 698 (citing *Duenas-Alvarez*, 549 U.S. at 193). 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 or "modified categorical" inquiry in which the adjudicator reviews the "record of conviction" to determine if the conviction was based on conduct involving moral turpitude. 24 I&N Dec. 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. Finally, 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.

The applicant's case, however, arises within the jurisdiction of the Eleventh Circuit Court of Appeals, which has recently reaffirmed the traditional categorical approach for determining whether a crime involves moral turpitude, declining to follow the "administrative framework" set forth by the Attorney General in *Silva-Trevino*. See *Fajardo v. Attorney General*, 659 F.3d 1301, 1310 (11th Cir. 2011) (finding that the Congress intended the traditional categorical or modified categorical approach to be used to determine whether convictions were convictions for crimes involving moral turpitude and declining to follow the "realistic probability approach" of *Matter of Silva-Trevino*). In its decision, the Eleventh Circuit defined the categorical approach as " 'looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions.' " 659 F.3d at 1305 (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990)). The court indicated, however, that where the statutory definition of a crime includes "conduct that would categorically be grounds for removal as well as conduct that would not, then the record of conviction – i.e., the charging document, plea, verdict, and sentence – may also be considered." 659 F.3d at 1305 (citing *Jaggernauth v. U.S. Att'y Gen.*, 432 F.3d 1346, 1354-55 (11th Cir. 2005)).

The record reflects that on March 14, 2001, the applicant pled guilty to two counts of Forgery in the First Degree, Georgia Statutes (GA ST) § 16-9-1; one count of Forgery in the Second Degree, GA ST § 16-9-2; and one count of Manufacturing, Selling or Distributing False Identification Documents, GA ST § 16-9-4. Finding the applicant eligible for consideration under the Georgia First Offender Act, the Superior Court of DeKalb County, Georgia did not impose a judgment of guilt, but placed the applicant on probation for five years in connection with the forgery charges and for 12 months in connection with the charge involving false identification documents. While the applicant was on probation, he pled nolo contendere to the charge of Battery-Family Violence, GA ST § 16-5-23.1. Based on this conviction, the applicant's First Offender Status was revoked and the record of the Georgia Crime Information Center modified, pursuant to GA ST § 42-8-65(b), to show convictions for the charges to which he had pled guilty on March 14, 2001. On August 16, 2004, the applicant was also convicted of Theft by Taking, GA ST §16-8-2, and sentenced to probation for five years, ordered to pay a fine and fees, and to perform community service.

While the record lacks sufficient evidence to establish the nature of the applicant's convictions under GA ST §§ 16-8-2 and 16-9-4, we have previously found the crime of Forgery and Battery-Family

Violence, GA ST §§ 16-9-1 and 16-5-23.1 respectively, to be crimes involving moral turpitude. GA ST § 16-9-1 is violated when the offender with "intent to defraud" utters or delivers a fictitious writing. Fraud has, as a general rule, been held to involve moral turpitude. *Jordan v. De George,* 341 U.S. 223, 232 (1951). In particular, in *Matter of Seda*, the BIA determined that a conviction for forgery in the first degree in violation of Georgia law is a crime involving moral turpitude. 17 I&N Dec. 550, 552 (BIA 1980). Under GA ST § 16-5-23.1, "[a] person commits the offense of battery when he or she intentionally causes substantial physical harm or visible bodily harm to another." Pursuant to GA ST § 16-5-23.1(f), "[i]f the offense of battery is committed between past or present spouses, . . . then such offense shall constitute the offense of family violence battery . . . ." The intentional infliction of this level of harm to a member of a protected class such as a spouse is a crime involving moral turpitude.[1] *Cf. Matter of Sanudo,* 23 I&N Dec. 968 (BIA 2006) (stating that "assault and battery offenses that necessarily involved the intentional infliction of serious bodily injury on another have been held to involve moral turpitude," and holding that a battery conviction that involves only a minimal, nonviolent touching does not inhere moral turpitude even when inflicted upon a spouse); *Matter of Tran*, 21 I&N Dec. 291 (BIA 1996) (holding that a conviction for willful infliction of corporal injury on the parent of one's child under section 273.5(a) of the California Penal Code is a conviction for a crime involving moral turpitude); *Grageda v. U.S. INS*, 12 F.3d 919 (9th Cir. 1993).

The applicant does not contest that he is inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. §1182(a)(2)(A)(i)(I), for having committed crimes involving moral turpitude. Waivers are available to individuals inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act under section 212(h) of the Act.

However, the AAO finds that no purpose is served in considering the applicant's eligibility for a waiver under section 212(h) of the Act, as we find the record to reflect that he is also inadmissible under section 212(a)(6)(C)(ii) of the Act, which states:

> (ii) Falsely claiming citizenship.—
>
> > (I) In general—Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this Act (including section 274A) or any other Federal or State law is inadmissible
> >
> > (II) Exception—In the case of an alien making a representation described in subclause (I), if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of making such representation that he or she was a citizen, the alien shall not be considered to be inadmissible under any provision of this subsection based on such representation.

[1] This conviction also constitutes a "violent or dangerous" crime within the meaning of 8 C.F.R. § 212.7(d), requiring the applicant to demonstrate extraordinary circumstances to merit a favorable exercise of discretion.

The record indicates that on January 25, 2011, the applicant sought admission to the United States as a returning U.S. citizen, presenting a fraudulent U.S. passport to an immigration inspector at the [redacted] In a statement made during his secondary inspection, the applicant indicated to immigration officials that he had applied for the passport under a false identity and had been using it for travel outside the United States.

Based on the applicant's presentation of a fraudulent U.S. passport in his attempt to enter the United States, he has made a false claim to U.S. citizenship and is inadmissible under section 212(a)(6)(C)(ii)(I) of the Act. No waiver is available for a violation of section 212(a)(6)(C)(ii)(I) and the record fails to demonstrate that the applicant qualifies for the exception described in section 212(a)(6)(C)(ii)(II). Accordingly, the applicant's admission to the United States is statutorily barred by section 212(a)(6)(C)(ii)(I) of the Act and no purpose would be served in considering whether he might be able to establish eligibility for a waiver under section 212(h) of the Act. Accordingly, 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 Immigration and Nationality Act, 8 U.S.C. § 1361, places the burden of proof upon the applicant to establish that eligibility. Here, the applicant has not met that burden.

ORDER: The appeal is dismissed.