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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: APR 12 2013 OFFICE: MIAMI, FL FILE:

IN RE:

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:

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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Miami, Florida and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Cuba who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having been convicted of controlled substance violations. She seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to benefit from the Cuban Adjustment Act of 1966, Pub.L.89-732.

The Field Office Director found that the applicant had been convicted of two controlled substances violations and was not eligible for waiver consideration under 212(h) of the Act. She denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Field Office Director's Decision*, dated May 13, 2011.

On appeal, counsel asserts that the applicant has only one conviction for possession of marijuana and is eligible to apply for a waiver under section 212(h) of the Act. Counsel also asserts that the waiver application should be granted as a matter of law and in the exercise of discretion. *Form I-290B, Notice of Appeal or Motion,* dated June 3, 2011. On the Form I-290B, counsel indicates that a brief and/or additional evidence will be submitted within 30 days. Although no evidence of this submission is found, counsel, on February 4, 2013, provided a court order relating to the applicant's 1986 conviction for marijuana possession.

The evidence of record includes, but is not limited to: certificates relating to the applicant's completion of manicure and pedicure, and cosmetology training courses; country conditions information on Cuba; a statement relating to the applicant's employment; a statement from the applicant's pastor; tax returns; a Social Security Statement for the applicant; records relating to the applicant's arrests and convictions; and a January 10, 2013 order issued by the [redacted] The entire record was reviewed and all relevant evidence considered in reaching a decision on the appeal.

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 . . . is inadmissible.
> > >
> > > (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 Field Office Director's determination that the applicant was not eligible for waiver consideration under section 212(h) of the Act was based on the applicant's December 27, 1983 and September 27, 1986 convictions for Possession of Marijuana. On appeal, however, counsel has submitted a January 10, 2013 order issued by the vacating the applicant's conviction for Possession of Marijuana, Case Number The order, signed by County Court indicates that the basis for the vacatur is the failure to provide the applicant with sufficient warning of the immigration consequences of her plea.

Under the current statutory definition of "conviction" provided at section 101(a)(48)(A) of the Act, any action that overturns a state conviction other than on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings is ineffective to expunge a conviction for immigration purposes. *Matter of Roldan*, 22 I&N Dec. 512, 523, 528 (BIA 1999). Here, the record establishes that the County Court of the Eleventh Judicial Circuit in and for Miami-Dade County vacated the applicant's conviction on the basis of a defect in her prior legal proceeding. As a result, the applicant's 1986 conviction for Possession of Marijuana is no longer valid for immigration purposes. *See Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006)(holding that a conviction vacated pursuant to section 2943.031 of the Ohio Revised Code for failure of the trial court to advise the alien defendant of the possible immigration consequences of a guilty plea is no longer a valid conviction for immigration purposes). Accordingly, the applicant has been convicted of only one controlled substance violation for the purposes of this proceeding.

At the time of the applicant's 1983 conviction for misdemeanor Possession of Marijuana,

> (f) If the offense is the possession or delivery without consideration of not more than 20 grams of cannabis, as defined in this chapter, that person is guilty of a misdemeanor of the first degree . . . .

As the record establishes that the applicant's 1983 conviction was for possession of 30 grams or less of marijuana, we find that it renders her inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Act, but she is eligible for waiver consideration under section 212(h) of the Act.

The record also reflects that the applicant has numerous convictions for offenses relating to the abuse of alcohol. While the majority of these convictions are not for crimes that would bar the applicant's admission to the United States, we note that three involved potentially violent acts against law enforcement officers or firemen, offenses that are, in certain circumstances, crimes involving moral turpitude. We will, therefore, review these violations to determine whether any render the applicant inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act.

On February 12, 1993, the applicant was arrested for Battery on Police Officer, and Resisting Officer with Violence to His Person, third degree felonies. On November 6, 1993, she was arrested for Battery on a Fireman, also a third degree felony. On December 17, 1993, the in and for withheld adjudication of these charges and placed the applicant under community control. On March 31, 1994, community control was revoked and the applicant was convicted under

[redacted], and sentenced to 364 days in jail. She was also convicted and sentenced to 364 days in jail for Battery on a Fireman, [redacted] The applicant's sentences were to be served concurrently, with credit for all days previously served.

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 applicant's case arises within the jurisdiction of the Eleventh Circuit Court of Appeals (11th Circuit), which has 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,* 24 I&N Dec. 24 I&N Dec. 687 (A.G. 2008). *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 11th 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)). Accordingly, the AAO will consider the applicant's convictions pursuant to the analytical framework that has been outlined by the 11th Circuit.

At the time of the applicant's 1993 convictions for Battery on a Police Officer and Battery on a Firefighter, [redacted] stated:

> [redacted] Assault or battery of law enforcement officers, firefighters, intake officers, or other specified officers; . . . .
>
> . . . .
>
> (2) Whenever any person is charged with knowingly committing an assault or battery upon a law enforcement officer, a firefighter . . . while the officer, firefighter . . . is

engaged in the lawful performance of his duties, the offense for which the person is charged shall be reclassified as follows:

. . . .

(b) In the case of battery, from a misdemeanor of the first degree to a felony of the third degree.

In 1993, battery was defined in as follows:

(1) A person commits battery if he:

(a) Actually and intentionally touches or strikes another person against the will of the other; or

(b) Intentionally causes bodily harm to an individual.

(2) Whoever commits battery shall be guilty of a misdemeanor of the first degree, punishable as provided in s.

At the time of the applicant's 1993 conviction for Resisting Officer with Violence, stated:

Whoever knowingly and willfully resists, obstructs, or opposes any officer as defined in . . or any other person legally authorized to execute process in the execution of legal process or in the lawful execution of any legal duty, by offering or doing violence to the person of such officer or legally authorized person, is guilty of a felony of the third degree, punishable as provided in s.

Assault on a law enforcement officer has been found to be a crime involving moral turpitude where the perpetrator knows the victim to be a law enforcement officer performing his official duty and the assault results in bodily injury to the officer. *See Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988) (distinguishing cases in which knowledge of the police officer's status was not an element of the crime and where bodily injury or other aggravating factors were not present to elevate offense beyond "simple" assault); *see also Matter of O-*, 4 I&N Dec. 301 (BIA 1951) (German law involving an assault on a police officer was not a crime involving moral turpitude because knowledge that the person assaulted was a police officer engage in the performance of his duties was not an element of the crime); *Matter of B-*, 5 I&N Dec. 538 (BIA 1953) (as *modified by Matter of Danesh, supra*.) (assault on prison guard not a crime involving moral turpitude because offense charged appeared to be only "simple" assault and no bodily injured was alleged); *Ciambelli ex rel. Maranci v. Johnson*, 12 F.2d 465 (D. Mass 1926) (assault on an officer was not a crime involving moral turpitude in spite of fact that defendant was armed with a razor because the razor was not used in the assault).

has ruled that knowledge of the officer's status is an element of the crime of battery upon a law enforcement officer under has also ruled that the phrase "knowingly

and willfully resists, obstructs, or opposes any officer" in imposes a requirement that a defendant have knowledge of the officer's status as a law enforcement officer.

However, is violated by either intentionally touching or striking an officer against his will or by intentionally causing bodily harm to an officer. Similarly, is violated by either "offering" to do violence, or by "doing" violence, and there is no requirement that the victim suffer bodily injury. Thus, based solely on the statutory language, it appears that encompass conduct that involves moral turpitude and conduct that does not. Accordingly, we cannot find that the applicant's violations are categorically crimes involving moral turpitude and will, therefore, conduct a modified categorical inquiry into his offenses. Pursuant to the 11th Circuit's decision in *Fajardo*, our inquiry will be limited to the applicant's records of conviction.

We note that the copies of the court records submitted by the applicant in relation to her battery convictions, and Resisting Officer with Violence, have been certified by the Clerk of Accordingly, we find it likely that the applicant has submitted all the court documentation currently available to her regarding these offenses. Included in this documentation are court dockets, indictments containing the charges brought against the applicant, and the judgments reached by the court, all of which are considered part of the record of conviction and may be reviewed in determining the nature of the applicant's offenses. Arrest reports are also found in the submitted documentation, but will not be considered here as they are not included among the documents identified by the 11th Circuit as being part of a record of conviction.

The AAO does not, however, find the applicant's records of conviction to provide any additional information regarding the nature of his offenses. The indictments restate the language of the relevant statutes, while the judgments reiterate the sections of law under which the applicant was convicted and the penalties imposed. They do not indicate what actions on the part of the applicant led to her conviction. Neither do they establish that these actions resulted in bodily harm to the involved law enforcement officers or firefighter. As a result, the applicant's records of conviction do not establish that her convictions under are for crimes involving moral turpitude.

In that the applicant's records of conviction do not establish that the offenses she committed are crimes of moral turpitude, the AAO will not find that they too bar her admission to the United States under section 212(a)(2)(i)(I) of the Act. Accordingly, the applicant's only inadmissibility, as established by the record, is for her conviction for possessing less than 20 grams of marijuana,

Section 212(h) of the Act states:

> (h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), (D), and (E) of subsection (a)(2) of this section and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if –

(1)(A) [I]t is established to the satisfaction of the Attorney General that-

(i) [T]he 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; or

(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 . . . .

The record reflects that the applicant is eligible for waiver consideration under section 212(h)(1)(A) of the Act as the controlled substance violation for which she is inadmissible occurred more than 15 years in the past. She does not, however, appear eligible for waiver consideration under section 212(h)(1)(B) of the Act as the record does not demonstrate that she has a U.S. citizen or lawful permanent resident spouse, parent or child on which to base a waiver request. While the applicant's most recent Form I-485, Application to Register Permanent Residence or Adjust Status, indicates that she is married to a U.S. citizen, the record contains no proof of this marriage or her spouse's U.S. citizenship.

To be eligible for a section 212(h)(1)(A) waiver, an applicant must demonstrate that his or her admission to the United States would not be contrary to its national welfare, safety, or security, and that he or she is rehabilitated. In the present case, there is no indication that the applicant has ever been involved in conduct or activities that would be contrary to the safety or security of the United States or that she has engaged in any activity contrary to its welfare since the 1994 events that led to her most recent convictions. Accordingly, the AAO concludes that the applicant's admission would not be contrary to the welfare, safety or security of the United States and turns to the question of whether the record establishes that the applicant has also been rehabilitated.

In reviewing the record for evidence of the applicant's rehabilitation for purposes of section 212(h)(1)(A) of the Act, the AAO notes that the controlled substance violation that bars the applicant's admission to the United States occurred more than 29 years ago. We also find the record to contain an April 15, 2010 letter from [redacted] who states that the applicant has been a member of his church for several years, that she comes to the church for spiritual counsel and that "her great life style is a good example in the community." [redacted] further reports that the applicant is a person of "noble character who likes to stay out of trouble" and that she is always available to attend services, praying for others, as well as herself. An April 16, 2010 letter from [redacted] states that the applicant has been taking care of him and his house since 2000 and that she is paid $300 a month for her services, which include housework and preparing food. Further, the record contains certificates indicating that the applicant completed courses in providing manicures and pedicures in 2001 and in cosmetology in 2005. Also included in

the record are the applicant's tax returns for 2009 and 2010, as well as an October 28, 2009 Social Security Statement indicating that between 1999 and 2008, the applicant had some type of employment.

While we note the applicant's numerous convictions prior to 1994, we also observe that she has not been convicted of any offense since 1994, more than 19 years ago. We further acknowledge the statement from the applicant's employer who indicates that she has taken care of him and his home since 2000, the cosmetology diplomas that indicate the applicant has taken steps to improve her employment skills and the statement of support provided by her pastor. When the AAO considers the significant period of time that has passed since the applicant's last conviction and the preceding evidence of her reformed behavior, we find the record to establish that she has been rehabilitated for the purposes of section 212(h)(1)(A) of the Act. Accordingly, the applicant is statutorily eligible for a waiver under section 212(h) of the Act, and the AAO will consider whether or not she is eligible for a favorable exercise of discretion.

In discretionary matters, the applicant bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

> In evaluating whether . . . 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).

See Matter of Mendez-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then "balance 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 factors in the applicant's case are her many criminal convictions and traffic violations prior to 1994, including the controlled substance violation for which she now seeks a waiver. The mitigating factors are the applicant's many years of residence in the United States; the more than 18 years that have passed since she was last convicted of any crime; her inability to return to Cuba; her more than ten years with the same employer; her completion of cosmetology training courses; and the regard in which she is held by her pastor.

Although the AAO acknowledges the strong negative factor that the applicant's pre-1994 convictions present in this case, we find the reformation of her behavior since that time to provide a countervailing weight in support of the waiver. Accordingly, we find that when taken together, the mitigating factors in the present case outweigh the adverse factors such that a favorable exercise of discretion is warranted.

In proceedings for waivers of and exceptions to the grounds of inadmissibility, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In discretionary matters, the applicant bears the full burden of proving his or her eligibility for discretionary relief. *See Matter of Ducret,* 15 I&N Dec. 620 (BIA 1976). Here, the applicant has met that burden. Accordingly, the appeal is sustained. The application is approved.

ORDER: The appeal is sustained.