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

U.S. Citizenship and Immigration Services

(b)(6)

DATE: FEB 0 8 2013 OFFICE: LAGUNA NIGUEL, CA File:

IN RE: Applicant:

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 Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed, as the applicant is not inadmissible and the waiver application is unnecessary.

The applicant is a native and citizen of Haiti 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 seeks a waiver of inadmissibility in order to remain in the United States with her U.S. citizen daughter.

The service center director concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility accordingly. *See Decision of the Service Center Director,* dated May 25, 2011.

On appeal counsel asserts that extreme hardship has been established because country conditions in Haiti are so horrific that the U.S. State Department has issued a travel warning and Haitian citizens without felony records have been granted temporary protected status (TPS). *See Form I-290B, Notice of Appeal or Motion*, received June 24, 2011.

The record contains, but is not limited to: Form I-290B and counsel's statement thereon; various immigration applications, petitions and supporting documents; a hardship affidavit from the applicant's daughter; affidavits from the applicant herself; and documents related to the applicant's criminal conviction. The entire record was reviewed and considered in rendering this decision on the appeal.

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 –
>
> > (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 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. 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. *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." 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. 24 I&N Dec. 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 record reflects that on November 14, 2002 the applicant was convicted in the United States District Court for the Southern District of Florida of "Knowingly Possess an identification document of the United States which is produced without lawful authority knowing such document was produced without such authority," a felony, in violation of 18 U.S.C. § 1028(a)(6), for her conduct between about January 8, 1999 to September 27, 2001. The applicant was sentenced on November 14, 2002 to prison time served and an assessment of $25.

At the time of the applicant's conviction, 18 U.S.C. § 1028 provided, in pertinent part:

> Fraud and related activity in connection with identification documents and information
>
> (a) Whoever, in a circumstance described in subsection (c) of this section--
>
> (6) knowingly possesses an identification document that is or appears to be an identification document of the United States which is stolen or produced without lawful authority knowing that such document was stolen or produced without such authority

The BIA in *Matter of Serna* addressed whether the first offense – simple, knowing possession of illegal documents – constitutes morally turpitudinous conduct, and held, "the crime of possession of an altered immigration document with the knowledge that it was altered, but without its use or proof of any intent to use it unlawfully, is not a crime involving moral turpitude." 20 I&N Dec. 579, 586 (BIA 1992). As mere knowing possession of a fraudulent identification document is not a crime involving moral turpitude, and as 18 U.S.C. § 1028(a)(6) is clear on its face and proscribes only such knowing possession, no inquiry into the present applicant's record of conviction is warranted or permitted. The AAO thus finds that the applicant's conviction under 18 U.S.C. § 1028(a)(6) does not constitute a conviction for a crime involving moral turpitude, and the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act and does not require a waiver under section 212(h) of the Act.[1]

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[1] On Form I-485, application for adjustment of status, the applicant marked at page 3, part 3, numbers 1(a) and (b) the "no" boxes indicating that she has not knowingly committed a crime involving moral turpitude and has not been arrested or charged for violating any law excluding traffic violations. In her affidavit dated July 7, 2010, the applicant maintains that she did so inadvertently. The AAO notes that section 212(a)(6)(C)(i) of the Act renders inadmissible

The AAO concludes that the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act. Accordingly, the service center director's findings concerning inadmissibility under section 212(a)(2)(A)(i)(I) of the Act will be withdrawn. The waiver application filed pursuant to section 212(h) of the Act will, therefore, be determined to be unnecessary as the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The applicant's file will be returned to the service center director to continue processing consistent with this decision.

ORDER: The appeal is dismissed as the applicant is not inadmissible and the underlying waiver application is unnecessary.

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one who seeks to procure a visa, other documentation, or admission into the United States or other benefit provided under the Act by willful misrepresentation. In the present case the applicant is not inadmissible under this provision because the underlying arrest and conviction she concealed or omitted on Form I-485 is one the AAO has determined not to be a crime involving moral turpitude, and thus the misrepresentation was not material as she would not have been excludable on the true facts. *See Kungys v. United States*, 485 U.S. 759 (1988).