U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
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Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: JUL 10 2013 Office: MOSCOW FILE:

IN RE: Applicant:

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to 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 (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Administrative Appeals Office (AAO) previously dismissed the applicant's appeal in a decision dated October 4, 2012. The matter is now before the AAO on motion. The motion will be dismissed.

The applicant is a native and citizen of Uzbekistan who was found to be inadmissible 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 a crime involving moral turpitude. She seeks a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h). The Field Office Director, Moscow, Russia, concluded that the applicant had failed to establish that the bar to her admission would impose extreme hardship on a qualifying relative, and denied the application accordingly. *See Decision of Field Office Director*, dated September 1, 2010.

The applicant appealed to the AAO, asserting that her spouse and son were experiencing extreme hardship in her absence. In our decision on appeal, the AAO affirmed the director's finding that the applicant had been convicted of a crime involving moral turpitude. Additionally, we found the applicant to be inadmissible under section 212(a)(6)(C) of the Act for seeking to procure a benefit through fraud or misrepresentation because she answered "no" to question 31, Part II of her immigrant visa application, Form DS-230, which asked whether she had ever been "charged, arrested or convicted" of a crime. Finally, we found that the applicant had failed to demonstrate extreme hardship to a qualifying relative.

In the motion to reconsider, counsel for the applicant claims that the AAO erred in finding that her conviction for larceny by embezzlement under the Criminal Code of the Republic of Uzbekistan was a crime involving moral turpitude. Counsel asserts that the portion of the Criminal Code of the Republic of Uzbekistan under which the applicant was convicted does not specify the elements of the crime or the intent required for a conviction, so it cannot be found to be categorically a crime involving moral turpitude. Counsel further alleges that the record of conviction does not demonstrate that the applicant was convicted for morally turpitudinous behavior. Additionally, counsel contends that the applicant did not willfully misrepresent a material fact when she did not admit to her conviction in question 31 on her Form DS-230 because she disclosed her conviction at another opportunity. Furthermore, counsel asserts that the applicant's lawful permanent resident spouse has been suffering extreme hardship in the applicant's absence and would also suffer such hardship if he were to relocate to Uzbekistan.

A motion to reconsider must establish that the decision was based on an incorrect application of law or Service policy. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record was reviewed and considered in rendering a decision on the motion.

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.

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.)

The record reflects that on July 31, 2001, the applicant pled guilty to and was convicted of larceny by embezzlement in violation of Article 167 of the Criminal Code of the Republic of Uzbekistan. The court sentenced her to serve two years of improvement works, deducted a percentage of her salary, and confiscated her property. The court considered the punishment as a conditional sentence with a one-year probationary appointment.

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.

Article 167 of the Criminal Code of the Republic of Uzbekistan states, in pertinent part:

> Larceny by way of embezzlement of property entrusted to or transferred to disposition of a guilty person –
> shall be punished with fine up to one hundred minimum monthly wages, or correctional labor up to one year, or arrest up to six months.
>
> The same action committed:
> a) in large amount;
> b) repeatedly or by a special dangerous recidivist;
> c) by previous concert by a group of individuals;
> d) by way of abuse of office –
> shall be punished with fine for from one hundred to three hundred minimum monthly wages or correctional labor for up to two years or confinement for up [to] five years.
>
> The same action committed:
> a) in large amount;
> b) by a special dangerous recidivist;
> c) by an organized group or in its interests;
> d) with the aid of computer devices –
> shall be punished with fine from three hundred to six hundred of minimum monthly wages or correctional labor for up to three years or confinement for up to ten years.
>
> In the instance of compensation for the pecuniary damage, penalty of imprisonment shall not be applied.

See Criminal Code of the Republic of Uzbekistan, 2012-XII, 22 Sept. 1994, *available at* http://www.refworld.org/docid/3ae6b59216.html [hereinafter "Criminal Code"].

Embezzlement is generally considered to be a crime involving moral turpitude. *See Matter of Batten*, 11 I&N Dec. 271 (BIA 1965). However, counsel correctly notes that a finding of moral turpitude "requires that a perpetrator have committed the reprehensible act with some form of scienter." *Matter of Silva-Trevino*, 24 I&N Dec. 687 (BIA 2008). While Article 167 itself does not address intent, Article 20 of the Criminal Code provides, "A person, who intentionally or unintentionally committed a socially dangerous act envisaged by this Code, may be recognized guilty." The Code also provides four "classifications" of crimes based on intent and severity, as follows:

> Intentional crimes punishable under law by imprisonment up to three years, as well as crimes committed unintentionally and punishable under law by

> imprisonment up to five years shall be classified as crimes with insignificant social danger.
>
> Intentional crimes punishable under law by imprisonment from three up to five years, as well as crimes committed unintentionally and punishable under law by imprisonment over five years shall be classified as less serious crimes.
>
> Intentional crimes punishable under law by imprisonment from five to ten years shall be classified as serious crimes.
>
> Intentional crimes punishable under law by imprisonment over ten years or capital punishment shall be classified as especially serious crimes.

See Criminal Code of the Republic of Uzbekistan, Article 15. Therefore, the Criminal Code allows for criminal conviction of an individual for intentional and unintentional conduct. Accordingly, there is a realistic probability that the statute under which the applicant was convicted would be applied to conduct that did not involve moral turpitude, in that the crime could have been committed unintentionally. 24 I&N Dec. at 698. As a result, we must conduct a modified categorical inquiry, reviewing the record of conviction to determine whether the applicant was convicted for a crime involving moral turpitude. *Id.* at 698-699, 703-704, 708.

In this case, the record of conviction includes the judgment of the which finds the applicant guilty of larceny by embezzlement. *See Adjudgment In the name of the Republic of Uzbekistan,* According to the court, the applicant

> admitted the guilt in full, she explained that she was formalized to the job as yard-keeper, but actually later she did not received [sic] salary. She received salary herself but after that handed it to [her supervisor] on the [sic] power of attorney. She proposed him this herself. And she actually set [sic] at home on childcare.

Id.

Counsel for the applicant claims that because Article 167 does not specify any intent required for conviction, "Mere admission of 'guilt' by a criminal defendant here does not necessarily imply any scienter." *Counsel's Brief on Motion*, dated November 23, 2012. However, in this case the applicant has not only admitted "guilt," which pursuant to the Criminal Code could be based on either intentional or unintentional conduct, but informed the convicting court that she received a salary despite the fact that she never went to work and that she "proposed" a criminal scheme to her supervisor in which she would transfer her salary to him. Therefore, there is no evidence to support counsel's assertions that "[i]t is unclear what exactly the defendant in this case was aware of" or that "[t]he record does not reflect that she knew that her name and false signatures were used in a fraudulent scheme." *Id.* The applicant's own admissions, as documented in the

record of conviction, demonstrate that she was aware of the circumstances of the embezzlement scheme and that she proposed part of the scheme in which she participated. Therefore, the AAO finds that the applicant has failed to demonstrate any error in our finding that she is inadmissible under section 212(a)(2)(A) of the Act for having been convicted of a crime involving moral turpitude.

The applicant also contests our finding that she is inadmissible under section 212(a)(6)(C) of the Act. Pursuant to section 291 of the Act, she bears the burden of demonstrating by a preponderance of the evidence that she is not inadmissible. *See also Matter of Arthur*, 16 I&N Dec. 558, 560 (BIA 1978). Where the evidence for and against admissibility "is of equal probative weight," the applicant cannot meet her burden of proof. *Matter of Rivero-Diaz*, 12 I&N Dec. 475, 476 (BIA 1967) (citing *Matter of M--*, 3 I&N Dec. 777, 781 (BIA 1949)).
Section 212(a)(6)(C) of the Act provides, in pertinent part:

> (i) 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 Act is inadmissible.

The applicant has failed to show that our decision finding her inadmissible for willfully misrepresenting a material fact was in error. Counsel for the applicant asserts that the applicant's failure to indicate her conviction on her immigrant visa application, Form DS-230, did not constitute fraud or a material misrepresentation. The applicant checked "No" in response to Part II, question 31 on the Form DS-230, which asks, "Have you ever been charged, arrested or convicted of any offense or crime?" However, counsel avers that the applicant's response to this question should not render her inadmissible because she "has disclosed her conviction, and explained the nature of it when the issue arose" and because her answer was not material. *Counsel's Brief.*

Counsel's assertion that the applicant disclosed her conviction at another opportunity amounts to a claim that the applicant timely recanted her false statement. "The doctrine of timely recantation is of long standing and ameliorates what would otherwise be an unduly harsh result for some individuals, who, despite a momentary lapse, simply have humanity's usual failings, but are being truthful for all practical purposes." *Sandoval v. Holder*, 641 F.3d 982, 988 (8th Cir. 2011) (quoting *Valadez-Munoz v. Holder,* 623 F.3d 1304, 1309 (9th Cir. 2010)). The Board has recognized the virtue of applying that principle when an alien "voluntarily and prior to any exposure of the attempted fraud corrected his testimony that he was an alien lawfully residing in the United States." *Matter of M--*, 9 I&N Dec. 118, 119 (BIA 1960); *see also Matter of R-R-*, 3 I&N Dec. 823, 827 (BIA 1949). In addition, the Board has found that "recantation must be voluntary and without delay." *Matter of Namio*, 14 I&N Dec. 412, 414 (BIA 1973). When a retraction "was not made until it appeared that the disclosure of the falsity of the statements was imminent [, it] is evident that the recantation was neither voluntary nor timely." *Id.* The record in this case does not establish when the applicant corrected her response to question 31 on the Form DS-230. Counsel's claim that she admitted her conviction "when the issue arose" is vague

and is insufficient to establish that she recanted the false information at the first opportunity. The AAO also notes that the applicant listed a position as a "cleaner" with "'Sobir Obod' Venture" in her employment history on the Form DS-230 despite the fact that her association with that organization was the basis for her conviction. *See Adjudgment In the name of the Republic of Uzbekistan, Tashkent Urban Court of Sessions*. This suggests that the applicant did not simply select "No" on question 31 accidentally, but that she intended to conceal her conviction and to present her association with the Sobir Obod company as legitimate.

Counsel also claims that the applicant's answer to question 31 was not material. To be considered material, a misrepresentation or concealment must be shown by clear, unequivocal, and convincing evidence to be predictably capable of affecting—that is, having a natural tendency to affect—the official decision. *See Kungys v. United States*, 485 U.S. 759, 771-72 (1988); *see also Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998); *Matter of Martinez-Lopez*, 10 I&N Dec. 409 (BIA 1962; AG 1964). The Board has held that a misrepresentation made in connection with an application for visa or other documents, or for entry into the United States, is material if either:

1. the alien is excludable on the true facts, or
2. the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in proper determination that he be excluded.

Matter of S- and B-C-, 9 I&N Dec. 436, 448-49 (BIA 1960; AG 1961). In this case, the applicant is ineligible for a visa on the true facts because her conviction qualifies as a crime involving moral turpitude. Therefore, there is no support for counsel's claim that the applicant's misrepresentation regarding her criminal history was not material.

Finally, the applicant contests our finding that her qualifying spouse would not suffer extreme hardship if the waiver application were denied. In our decision on appeal, we acknowledged that the applicant's spouse has suffered extreme hardship while separated from the applicant but noted that the applicant "has not contended that her husband would experience any hardship if he returned to Uzbekistan to live with her." *AAO Decision*, dated October 24, 2012. The motion to reconsider again focuses on the hardship the qualifying spouse has suffered on separation, stating, "The length of the marital relationship and the resulting hardship form [sic] separation should have been considered by the AAO." *Counsel's Brief.* Counsel briefly states that the qualifying spouse could lose his status as a lawful permanent resident if he were to leave the United States permanently, but makes no other mention of hardship to the qualifying spouse on relocation. The applicant has submitted a letter from a doctor indicating that the qualifying spouse "suffered from soft tissue injuries that are likely amenable to physical therapy, pharmacologic therapy and a modified home exercise program" and that he has "a history compatible with ischemic heart disease and peripheral artery disease." *See Letter from Michael Enoch, M.D.*, dated November 29, 2012. However, the letter does not provide any detail about the certainty or severity of the qualifying spouse's medical issues or their likely effects on his ability to relocate. As noted above, the AAO has already found that the qualifying spouse is

suffering extreme hardship due to his separation from the applicant. However, in order to meet the requirements for a waiver, the applicant must also show that her spouse would suffer extreme hardship if he were to relocate to Uzbekistan. *See Matter of Igeç* 20 I&N Dec. 880, 886 (BIA 1994); *Matter of Pilch*, 21 I&N Dec. 627, 632-22 (BIA 1996). In this case, the record contains almost no evidence to support such a finding. Therefore, the AAO finds that the applicant has failed to meet her burden of proof of demonstrating extreme hardship to a qualifying relative and she has not shown that our previous decision was in error.

The applicant has failed to establish that the AAO s prior decision was based on an incorrect application of law or Service policy. 8 C.F.R. ˆ 103.5(a)(3). As her motion to reconsider does not meet the requirements of a motion, it must be dismissed. 8 C.F.R. ˆ 103.5(a)(4).

ORDER: The motion is dismissed.