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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

DATE: MAY 23 2013 Office: KINGSTON, JAMAICA FILE:

IN RE: Applicant:

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v) and under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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, Kingston, Jamaica, and is now before the Administrative Appeals Office (AAO) on appeal. As the applicant is not inadmissible, the appeal will be dismissed as the waiver application is unnecessary.

The applicant is a native and citizen Jamaica 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, and pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for one year or more and seeking readmission within ten years of her last departure from the United States. The applicant's spouse and mother are U.S. citizens. The applicant seeks waivers of inadmissibility under sections 212(h) and 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(h) and (a)(9)(B)(v), in order to reside in the United States with her U.S. citizen spouse and mother.

In a decision dated April 8, 2011, the field office director determined that the applicant failed to establish extreme hardship to a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On appeal, the applicant's spouse details the hardship he would experience if the waiver application is denied.

The record includes, but is not limited to: the applicant's spouse's statement, the applicant's stepfather's statement, the applicant's statement, medical records; financial records; and documentation concerning the applicant's criminal history.

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 has been reviewed and considered in rendering a decision on the appeal.

Section 212(a)(9)(B) of the Act provides, in part:

> (B) Aliens Unlawfully Present
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> > (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-
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> > > (I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . prior to the commencement of proceedings under section 235(b)(1) or section 240, and again seeks admission within 3 years of the date of such alien's departure or removal, or

> (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.
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> . . . .
>
> (v) Waiver. – The Attorney General [now the Secretary of Homeland Security (Secretary)] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the [Secretary] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

The record reflects that the applicant entered the United States with a nonimmigrant visitor visa on February 21, 2001, her authorized period of stay expired on August 20, 2001, she was granted voluntary departure from May 19, 2002 until October 23, 2002, and she departed the United States on July 18, 2002. The applicant accrued unlawful presence from August 21, 2001, the day after her nonimmigrant visitor status expired, until May 19, 2002, the date she was granted voluntary departure. She accrued more than 180 days but less than one year of unlawful presence, however, she did not depart the United States prior to the commencement of her removal proceedings under section 240 of the Act and is therefore not inadmissible under section 212(a)(9)(B)(i)(I) of the Act. In addition, she is not inadmissible under section 212(a)(9)(B)(i)(II) of the Act as she did not accrue one year or more of unlawful presence. Even were we to find that she did, ten years have passed since her departure from the United States.

Section 212(a)(2)(A) of the Act states, in pertinent part, that:

> (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.)

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 February 22, 2001 the applicant was convicted of failure to file a U.S. customs reporting form and conspiracy to evade currency reporting requirement in violation of 31 U.S.C. § 5316(a)(1)(A) and 18 U.S.C. § 371, respectively. For these offenses, the applicant received concurrent sentences of four months imprisonment.

31 U.S.C. § 5316(a)(1)(A) states, in pertinent part, that:

(a) Except as provided in subsection (c) of this section, a person or an agent or bailee of the person shall file a report under subsection (b) of this section when the person, agent, or bailee knowingly—

(1) transports, is about to transport, or has transported, monetary instruments of more than $10,000 at one time—

(A) from a place in the United States to or through a place outside the United States; or…

The AAO is unaware of any published circuit court or BIA case addressing whether the crime of failure to file a U.S. customs reporting form in violation of 31 U.S.C. § 5316(a)(1)(A) is a crime involving moral turpitude. However, in *Matter of L-V-C-*, the BIA held that a violation of 31 U.S.C. §§ 5324(1) and (3), for causing a financial institution to fail to file currency transaction reports and of structuring currency transactions to evade reporting requirements, did not constitute a crime involving moral turpitude because the offense did not include morally reprehensible conduct. 22 I&N Dec. 594, 603 (BIA 1999) (looking at the statutory elements of the offense and the judicial record of conviction to determine that the respondent's offense did not involve moral turpitude). The BIA noted that a conviction for a structuring offense could result where the offender did not have knowledge of the illegality of structuring transactions, and that a conviction did not a require fraud upon the government. *Matter of L-V-C-*, 22 I&N Dec. at 597-601. The BIA further held that a structuring offense to evade a reporting requirement was not inevitably nefarious. *Id.* at 599.

Failure to file a U.S. customs reporting form is a crime against U.S. Customs Laws. Under 31 U.S.C. § 5316(a)(1)(A), a person is required to file a report when that person transports, is about to transport, or has transported, monetary instruments of more than the amount specified by statute at one time from a place in the United States to or through a place outside the United States. The purpose of 31 U.S.C. § 5316 is to require reports of transactions where such reports would be helpful in investigations of criminal, tax, and regulatory violations; another purpose is to gather statistics necessary for the formulation of monetary and economic policy. *U.S. v. $359,500 in U.S. Currency*, 645 F.Supp. 638, 641 (W.D.N.Y. 1986), remanded 828 F.2d 930. The courts have found that possessing and transporting currency is, in and of itself, legal. *Id.* at 643; *U.S. v. $24,900.00 in U.S. Currency*, 770 F.2d 1530 (11th Cir. 1985). The crime under 31 U.S.C. § 5316 is not the transportation of more than the requisite amount of currency but the failure to file the required written report. *See U.S. v. Rojas*, 671 F.2d 159 (5th Cir. 1982).

Under the current statutory scheme, a person's willful failure to report the currency transaction gives rise to a criminal violation, irrespective of the origin of these funds. *See U.S. v. O'Banion*, 943 F.2d 1422 (5th Cir. 1991). Thus, knowledge that the funds were derived from illicit or unlawful activity is not an element of the offense. *See U.S. v. Ortiz*, 738 F. Supp. 1394, 1401-02 (S.D. Fla. 1990) (noting that a transporter of currency will simultaneously violate the Money Laundering Control Act and 31 U.S.C. § 5316 only if transporter has knowledge that money comes from illegal source). Rather, all that is required is for a defendant to have knowledge of the applicable reporting

requirements and an intent to evade such requirements. *U.S. v. Gomez-Osorio*, 957 F.2d 636 (9th Cir. 1992).

It is noted that crimes that contain, as an element, knowledge that the transported currency represents the proceeds of an unlawful activity are covered by other sections of the United States Code. For instance, 18 U.S.C. § 1956(a)(2)(B) punishes money laundering by penalizing the transportation of funds to a place outside of the United States when the person has knowledge that the transported funds are derived from a specified unlawful activity and the transfer of funds is designed to avoid reporting requirements. *See U.S. v. Ghali*, 699 F.3d 845 (7th Cir. 2012); *U.S. v. Gabel*, 85 F.3d 1217, 1224 (7th Cir. 1996) ("The offense of money laundering is the act of designing a transaction to conceal or disguise the nature or other identifying features of the property."). In addition, it is noted that 18 U.S.C. § 1956 punishes the evasion of a transaction reporting requirement when the person has knowledge that the proceeds result from the manufacture, importation, sale, or distribution of a controlled substance as defined in section 2 of the Controlled Substances Act, 21 U.S.C. § 802. In contrast, the legality of the conduct that furnishes the monetary instruments, that is later involved in the failure to file a written report, is not determinative of, or an element of, a failure to file a U.S. customs reporting form. *See U.S. v. Gomez-Osorio, supra*. Likewise, knowledge that the unreported monetary instruments derive from a criminal activity is also not an element of a failure to file a U.S. customs report offense. Furthermore, we note that the offense of failing to file a U.S. customs currency report does not include, as an element, an intent to defraud the government. *See generally Matter of Adetiba*, 20 I&N Dec. 506, 508 (BIA 1992) (noting that crimes that include as a requirement an intent to defraud have been held to involve moral turpitude). Thus, unlike the aforementioned money laundering and drug trafficking provisions, 31 U.S.C. § 5316(a)(1)(A) can be violated where the defendant has no knowledge that the money used is criminally derived, or even where the money is not derived from criminal activity at all.

In *U.S. v. Bajakajian,* 524 U.S. 321 (1998), for example, the respondent pleaded guilty to failure to report exported currency in violation of 31 U.S.C. § 5316(a)(1)(A). In such instances, 18 U.S.C. § 982(a)(1) orders currency to be forfeited for a "willful" violation of the reporting requirement. In *Bajakajian*, the U.S. Supreme Court analyzed whether forfeiture of the respondent's unreported currency was excessive. In finding that forfeiture was excessive, the Supreme Court held that the respondent's crime of failure to report exported currency was solely a reporting offense. *Id.* at 337 It was permissible to transport the currency out of the country so long as it is reported. *Id.* Thus, the Supreme Court found that the essence of the respondent's crime was a willful failure to report the removal of currency from the United States, and it noted that the respondent's violation was unrelated to any other illegal activities. *Id.* at 337-338. The Supreme Court stated that: "The harm that respondent caused was also minimal. Failure to report his currency affected only one party, the Government, and in a relatively minor way. There was no fraud on the United States, and respondent caused no loss to the public fisc. Had his crime gone undetected, the Government would have been deprived only of the information that $357,144 had left the country." *Id.* at 339.

The AAO thus finds that 31 U.S.C. § 5316(a)(1)(A) punishes a person for failing to file a currency report with U.S. Customs, and, similar to the BIA's finding in *Matter of L-V-C-*, the reporting

requirement offense has no element of morally reprehensible conduct. We find that there is not a realistic probability that the offense of failure to file a U.S. customs reporting form under 31 U.S.C. § 5316(a)(1)(A) involves reprehensible conduct so contrary to the accepted rules of morality as to constitute a crime involving moral turpitude. Even were we to assume the possibility that an offense prosecuted under this section could involve morally turpitudinous conduct, the applicant's judicial record of conviction does not establish that her violation was based on other illegal activities, such as money laundering, drug trafficking activities, or tax evasion. Accordingly, the AAO finds that the applicant's conviction for violation of 31 U.S.C. § 5316(a)(1)(A) is not a crime involving moral turpitude.

18 U.S.C. § 371 states, in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.
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> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

The record of conviction reflects that the applicant was convicted of conspiracy to commit an offense against the United States, with the offense being the evasion of currency reporting requirements in violation of 31 U.S.C. § 5316(a)(1)(A). It is well-established that a conspiracy to commit an offense involves moral turpitude only if the underlying offense which is the object of the conspiracy involves moral turpitude. *Matter of M-*, 8 I&N Dec. 535, 541 (BIA 1960); *see Matter of Flores*, 17 I&N Dec. 225 (BIA 1980) (a conspiracy offense is a crime involving moral turpitude if it contains the element of fraud, or the underlying substantive offense involves fraud). As the AAO has determined that the applicant's conviction for violation of 31 U.S.C. § 5316(a)(1)(A) is not a crime involving moral turpitude, conspiracy to commit this crime would also not be a crime involving moral turpitude. Therefore, the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

As the applicant is not inadmissible under sections 212(a)(9)(B) and 212(a)(2)(A)(i)(I) of the Act, her waiver application is unnecessary.

ORDER: The appeal is dismissed as the waiver application is unnecessary.