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

(b)(6)

U.S. Citizenship and Immigration Services

Date: SEP 0 5 2014 Office: ATLANTA FILE:

IN RE: Applicant:

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(h) of the Act, 8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

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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
Chief, Administrative Appeals Office

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

The applicant, a native and citizen of Belgium, was found to be ineligible for adjustment of status based on his March 5, 1984 convictions for mail fraud, in violation of 18 U.S.C. § 1341, and aiding and abetting, in violation of 18 U.S.C. § 2. The applicant is 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 and seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his lawful permanent resident spouse and U.S. citizen daughter.

In a decision dated June 25, 1997, the District Director concluded that the applicant was not eligible to obtain permanent resident status, finding that the applicant had been convicted of an aggravated felony.

On appeal, counsel for the applicant stated that the applicant's conviction for mail fraud does not make him ineligible to apply for adjustment of status, as the applicant is eligible to apply for a waiver under section 212(h) of the Act. Due to the prolonged delay in receipt of the applicant's appeal from the field, we provided the applicant an opportunity to submit additional evidence in support of his Form I-601, Application for Waiver of Grounds of Inadmissibility. The applicant timely submitted new evidence in support of his application.

In support of the waiver application, the record includes, but is not limited to: legal arguments by counsel for the applicant; biographical information for the applicant's two U.S. citizen children; notarized letters from the applicant's spouse and daughters; a mental-health evaluation of the applicant's spouse; documentation of the applicant's spouse's medical condition; numerous sworn letters of recommendation from friends and community members; and documentation concerning the applicant's immigration and criminal history.

We conduct 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 appeal.

The applicant is inadmissible under section 212(a)(2) of the Act, which provides, in pertinent part:

> (A)(i) 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, or…
> 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.)

The present case falls within the jurisdiction of the Eleventh Circuit Court of Appeals. In evaluating whether an offense constitutes a crime involving moral turpitude, the Eleventh Circuit employs the categorical and modified categorical approach. *Fajardo v. U.S. Atty. Gen.*, 659 F.3d 1303, 1305-06 (11th Cir. 2011). "To determine whether a conviction for a particular crime constitutes a conviction of a crime involving moral turpitude, both [the Eleventh Circuit] and the BIA have historically looked to 'the inherent nature of the offense, as defined in the relevant statute . . . .'" *Id.* at 1305. "If the statutory definition of a crime encompasses some conduct that categorically would be grounds for removal as well as other conduct that would not, then the record of conviction—i.e., the charging document, plea, verdict, and sentence—may also be considered." *Id.* (citing *Jaggernauth v. U.S. Att'y Gen.*, 432 F.3d 1346, 1354–55 (11th Cir.2005)).

The Eleventh Circuit has rejected the methodology adopted by the Attorney General in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008). *Fajardo*, 659 F.3d at 1308-11. While the Attorney General determined that assessing whether a crime involves moral turpitude may include looking beyond the record of conviction, the Eleventh Circuit has stated that "[w]hether a crime involves the depravity or fraud necessary to be one of moral turpitude depends upon the inherent nature of the offense, as defined in the relevant statute, rather than the circumstances surrounding a defendant's particular conduct." *Itani v. Ashcroft,* 298 F.3d 1213, 1215–16 (11th Cir. 2002). In *Fajardo,* the Eleventh Circuit affirmed its reasoning in *Vuksanovic v. U.S. Attorney General,* 439 F.3d 1308, 1311 (11th Cir. 2006), stating that "the determination that a crime involves moral turpitude is made categorically based on the statutory definition or nature of the crime, not the specific conduct predicating a particular conviction." 659 F.3d at 1308-09.

The record demonstrates that on March 5, 1984, before the U.S. District Court for the District of Nevada, the applicant was convicted of mail fraud, in violation of 18 U.S.C. § 1341, and aiding and abetting, in violation of 18 U.S.C. § 2. On October 11, 1984 before the [redacted] Superior Court, Georgia, the applicant was also convicted of five counts of Theft by Taking in violation of Criminal Code of Georgia § 16-8-2. The applicant's term of imprisonment was suspended and he was placed on probation for five years. He was also ordered to make full restitution in the amount of $26,606.00.

We will first turn to the applicant's conviction for mail fraud, in violation of 18 U.S.C. § 1341, which states that:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Crimes involving fraud are generally crimes involving moral turpitude. *Jordan v. DeGeorge*, 341 U.S. 223, 232 (1951); *Matter of Flores*, 17 I&N Dec. 225 (BIA 1980); *see also Matter of L-V-C-*, 22 I&N Dec. 594, 603 (BIA 1999) (noting that crimes involving fraud are generally considered crimes involving moral turpitude). The AAO is not aware of and the applicant has not presented any case for which a conviction under this provision of law did not involve moral turpitude. As a result, the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act. We do not need to determine whether the applicant's other convictions also fall under the purview of section 212(a)(2)(A)(i)(I) of the Act at this time.

Section 212(h) of the Act provides, in pertinent parts:

> The Attorney General [now Secretary of Homeland Security (Secretary)] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if -
>
> (1) (A) in the case of any immigrant it is established to the satisfaction of the [Secretary] that -
>
> > (i) . . . the 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 [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.

Since the activities that are the basis for the applicant's criminal conviction occurred more than 15 years ago, he is eligible to apply for a waiver under section 212(h)(1)(A) of the Act.[1] Section 212(h)(1)(A) of the Act requires that the applicant's admission to the United States not be contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated. Demonstrating that his that admission to the United States is not contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated, as required by section 212(h)(1)(A)(ii) and (iii) of the Act, is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered.

Evidence in the record to establish the applicant's eligibility under section 212(h)(1)(A)(ii) and (iii) of the Act consists of: documentation of the applicant's important role in caring for his spouse who is suffering from cancer; documentation of the applicant's involvement in the lives of his U.S. lawful permanent resident spouse, U.S. citizen daughters and in the community; statements from friends and community members concerning the applicant's moral character; and documentation regarding the applicant's career as a tennis coach.

In view of the record, which shows that the applicant's only convictions pertain to criminal activities performed by the applicant prior to August 27, 1983, that the applicant has not been convicted of any other crimes, that the applicant has had a positive role in the life of his family and the community, and that numerous individuals have attested to the moral character of the applicant, we find that the applicant has provided sufficient evidence to demonstrate that his admission to the United States is not contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated, as required by section 212(h)(1)(A)(ii) and (iii) of the Act.

Demonstrating that his admission to the United States is not contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Id.* For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Id.* at 299. The adverse factors evidencing an applicant's

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[1] The applicant is also eligible to apply for a waiver under 212(h)(1)(B) of the Act as the spouse of a U.S. lawful permanent resident and the parent of a U.S. citizen. In order to qualify for this waiver, he must first prove that the refusal of his admission to the United States would result in extreme hardship to one of his qualifying relatives. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and U.S. Citizenship and Immigration Services then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296, 301 (BIA 1996). We will first consider whether the applicant has met the waiver criteria under 212(h)(1)(A) of the Act, and if so, we need not consider his eligibility under 212(h)(1)(B) of the Act.

undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

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). We must "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." *See Matter of Mendez-Moralez*, 21 I&N Dec. 296, 300 (BIA 1996) (citations omitted).

The adverse factors in the present case are the applicant's criminal convictions related to his conviction for mail fraud in 1984. The record also indicates that the applicant was again arrested in 1991, 1992 and 1993 and faced charges for theft and financial card transaction, but the applicant has no other apparent criminal convictions.

The favorable factors in the present case are the applicant's family ties to the United States, including his U.S. lawful permanent resident spouse and U.S. citizen daughters; the hardship his family, particularly his spouse, would experience in his absence; the passage of 30 years since his conviction; and his positive impact on their community as described in numerous letters from community members and friends. We find that the applicant has established that the favorable factors in his application outweigh the unfavorable factors. Therefore, a favorable exercise of the Secretary's discretion is warranted.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met.

ORDER: The appeal is sustained.