identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

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

H4

[redacted]

FILE: [redacted] Office: [redacted] Date: APR 13 2011

IN RE: [redacted]

APPLICATION: Application for Permission to Reapply for Admission into the United States after Deportation or Removal under section 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

ON BEHALF OF APPLICANT:

[redacted]

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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Michael Kumoway

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) was denied by the Director, [redacted] Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant, a native of [redacted] and citizen of [redacted] was admitted to the United States as a lawful permanent resident on February 18, 1980. On August 20, 2001 the applicant was convicted in the United States District Court for the Southern District of [redacted] of one count of conspiracy in violation of 18 U.S.C. § 371, and eight counts of wire fraud in violation of 18 U.S.C. §§ 1343, 1346 and 2. [redacted] The applicant was sentenced to 44 months imprisonment and three years supervised release, and ordered to pay restitution in the amount of $844,098.35. The applicant's conviction was affirmed by the United States Court of Appeals for the Second Circuit. *See United States v.* [redacted] (2nd Cir. 2002).

As a result of numerous criminal convictions the applicant was placed in removal proceedings and ordered removed to [redacted] on March 11, 2004. On July 12, 2004, the BIA affirmed the immigration judge's decision to remove the applicant. The applicant departed the United States on October 20, 2004. *See Warrant of Removal/Deportation.*

The applicant is permanently inadmissible pursuant to section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii), for being an alien convicted of an aggravated felony. The applicant requests permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii), in order to reside in the United States with his U.S. citizen spouse and children.

The director determined that based on the gravity of the applicant's offense, the applicant does not merit a favorable exercise of discretion, and denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal accordingly. *Form I-212 Decision*, dated January 2, 2008.

On appeal, counsel asserts that the applicant's "equities prove that refusing his admission to the United States has resulted, and will continue to result, in extreme hardship to his U.S. citizen wife, 3 U.S. citizen children, and 2 U.S. citizen parents." Counsel states that the applicant has "has spent substantial time outside the United States and is a rehabilitated man and productive member of the society." Counsel requests that the waiver application be approved "in the interest of family unity." *Notice of Appeal or Motion (Form I-290B)*, dated February 1, 2008.

In support of the Form I-212 application, the record includes, but is not limited to, the applicant's conviction records and an approved petition for alien relative (Form I-130) filed on behalf of the applicant by his U.S. citizen spouse. The entire record was reviewed and considered in rendering a decision on the appeal.

The AAO conducts the final administrative review and enters the ultimate decision for U.S. Citizenship and Immigration Services on all immigration matters that fall within its jurisdiction. The AAO reviews each case de novo as to all questions of law, fact, discretion, or any other issue that

may arise in an appeal that falls under its jurisdiction. See *Helvering v. Gowran*, 302 U.S. 238, 245-246 (1937); see also, *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), aff'd. 345 F.3d 683 (9th Cir. 2003).

Section 212(a)(9)(A) of the Act states in pertinent part:

> (A) Certain aliens previously removed.-
>
> (i) Arriving aliens.- Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within five years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.
>
> (ii) Other aliens.- Any alien not described in clause (i) who-
>
> (I) has been ordered removed under section 240 or any other provision of law or
>
> (II) departed the United States while an order of removal was outstanding and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.
>
> (iii) Exception.- Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General [now Secretary, Homeland Security, "Secretary"] has consented to the alien's reapplying for admission.

Before the AAO can weigh the discretionary factors in this case, we must first determine whether the applicant is eligible to apply for the relief requested.

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.

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 record reflects that on August 20, 2001 the applicant was convicted in the United States District Court for the Southern District of [redacted] of one count of conspiracy in violation of 18 U.S.C. § 371, and eight counts of wire fraud in violation of 18 U.S.C. §§ 1343, 1346 and 2. [redacted] The applicant was sentenced to 44 months imprisonment and three years supervised release, and ordered to pay restitution in the amount of $844,098.35. The applicant's conviction was affirmed by the United States Court of Appeals for the Second Circuit. *See United States v.* [redacted] (2nd Cir. 2002).

At the time of the applicant's conviction, 18 U.S.C. § 1343 provided:

> 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, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five 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.

Fraud has, as a general rule, been held to involve moral turpitude. The U.S. Supreme Court in *Jordan v. De George* concluded that "Whatever else the phrase 'crime involving moral turpitude' may mean in peripheral cases, the decided cases make it plain that crimes in which fraud was an ingredient have always been regarded as involving moral turpitude. . . . Fraud is the touchstone by which this case should be judged. The phrase 'crime involving moral turpitude' has without exception been construed to embrace fraudulent conduct." 341 U.S. 223, 232 (1951). Therefore, the AAO finds that the applicant's conviction for wire fraud is a crime involving moral turpitude. The applicant does not contest this determination on appeal.

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

> (h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), . . . of subsection (a)(2) . . . if –
>
> . . . .
>
> (1) (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 . . . . and
>
> (2) the Attorney General [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status. . . .
>
> No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than seven years immediately preceding the date of initiation of proceedings to remove the alien from the United States. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.

In considering whether the respondent's conviction is an aggravated felony, we first apply the "formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." *Taylor v. United States*, 495 U.S. 575, 601 (1990). First, we will look to the statute under which the alien was convicted and compare its elements to the relevant definition of aggravated felony set out in section 101(a)(43) of the Act, 8 U.S.C. § 1101(a)(43). Under this categorical approach, an offense qualifies as an aggravated felony if and only if the full range of conduct covered by the criminal statute falls within the meaning of that term. *Id.*

However, if the criminal statute of conviction could be applied to conduct that would constitute an aggravated felony and conduct that would not, we then see if there is "a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime." *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). In applying this approach, the alien "must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues." *Id.*

If the alien demonstrates a "realistic probability" that the statute would be applied to conduct that falls outside the generic definition of the crime, we then apply a modified categorical approach. Under the modified categorical approach, we conduct a limited examination of documents in the record of conviction to determine if there is sufficient evidence to conclude that the alien was

convicted of the elements of the generically defined crime. *Shepard v. U.S.*, 544 U.S. 13 (2005). These documents include the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the transcript of plea proceedings. 544 U.S. 13, 26.

Section 101(a)(43)(M)(i) of the Act, 8 U.S.C. § 1101(a)(43)(M)(i), includes as an aggravated felony an offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000. To prove wire fraud, the evidence must establish beyond a reasonable doubt (1) the defendant's knowing and willful participation in a scheme or artifice to defraud, (2) with the specific intent to defraud, and (3) the use of interstate wire communications in furtherance of the scheme. *United States v. Antico*, 275 F.3d 245, 261 (3rd Cir. 2001). Therefore, the underlying crime that was the object of the applicant's conspiracy involved fraud or deceit within the meaning of section 101(a)(43)(M)(i) of the Act. *See Valansi v. Ashcroft*, 278 F.3d 203, 210 (3rd Cir. 2002).

Having established that the underlying crime categorically involves fraud or deceit within the meaning of section 101(a)(43)(M)(i) of the Act, we next look at the facts of the case to assess whether the loss to the victim exceeded $10,000. In *Singh v. Ashcroft*, 383 F.3d 144, 161-62 (3d Cir. 2003), the Third Circuit Court of Appeals noted that "a departure from the formal categorical approach seems warranted when the terms of the statute invite inquiry into the facts underlying the conviction at issue. The qualifier 'in which the loss to the victim or victims exceeds $10,000' in 8 U.S.C. § 1101(a)(43)(M)(i) is the prototypical example-it expresses such a specificity of fact that it almost begs an adjudicator to examine the facts at issue."

The presentence investigation report in the instant case provides, in pertinent part:

> [redacted] incurred an initial loss of $914,098.35. As noted in the Offense Conduct section, at [redacted] request, [redacted] provided her with $70,000 (albeit from her personal bank account) to cover operating expenses. As such, the loss amount is reduced to $844,098.35.

Presentence Investigation Report (Docket Number [redacted] dated September 19, 2001.

The presentence investigation report reflects that the victim of the applicant's crime sustained a loss in excess of $10,000. Thus, the AAO finds that the applicant's conviction for wire fraud is an aggravated felony under section 101(a)(43)(M)(i) of the Act. The applicant is ineligible for a waiver under section 212(h) of the Act because he committed this crime subsequent to his admission to the United States as a lawful permanent resident.

In *Matter of Martinez-Torres*, 10 I&N Dec. 776 (Reg. Comm. 1964), it was held that an application for permission to reapply for admission is denied, in the exercise of discretion, to an alien who is mandatorily inadmissible to the United States under another section of the Act, and no purpose would be served in granting the application.

In conclusion, the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act. No waiver is

available for this ground of inadmissibility to an alien previously admitted as a lawful permanent resident who was convicted subsequently of an aggravated felony. Therefore, no purpose would be served in the favorable exercise of discretion in adjudicating the application to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act. As the applicant is statutorily inadmissible to the United States, the appeal will be dismissed as a matter of discretion.

ORDER: The appeal is dismissed.