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

U.S. Citizenship and Immigration Services

H5

FILE: [redacted] Office: MEXICO CITY (KINGSTON) Date: OCT 14 2010

IN RE: Applicant: [redacted]

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

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.

Thank you,

Michael Shumway

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer in Charge (OIC), Mexico City, Mexico, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant is a native and citizen of Jamaica who was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for seeking admission into the United States by fraud or willful misrepresentation. The applicant sought a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i). The director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. The applicant submitted a timely appeal.

On appeal, counsel makes the following assertions. The applicant is inadmissible for purchasing a fraudulent temporary resident card. The applicant was deported in 1996, and his son [redacted] (who is 14 years old) and his wife, who are both U.S. citizens, will experience extreme financial and emotional hardship if separated from the applicant. The applicant's spouse has endured physical injuries as a result of a car accident in 2005, and the Social Security Administration has indicated that those injuries have left her permanently disabled and unable to perform the duties of any of her prior jobs. The applicant's wife has a history of depression and bi-polar disorder, and life without her husband, with whom she has a close bond, will exacerbate her problems. Jamaica's economic, political, and social conditions are deplorable, and the applicant's spouse will be in danger there. She will not be able to obtain employment in Jamaica, particularly because of her health problems. All of the applicant's wife's extended family members are United States citizens, and they live in the United States.

The AAO will first address the finding of inadmissibility for seeking admission into the United States by fraud or willful misrepresentation, which is under section 212(a)(6)(C) of the Act. That section provides, in pertinent part, that:

> (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.

In the denial letter, the OIC found the applicant inadmissible to the United States on the basis that:

> The applicant willfully and fraudulently misrepresented a material fact when he purchased a fraudulent temporary resident card in an attempt to conceal his illegal status in the United States. He was subsequently convicted in a U.S. District Court of Unlawfully Obtaining a Temporary Resident Card and was formally deported back to Jamaica on February 16, 1996.

In *Matter of Y-G-*, 20 I&N Dec. 794 (BIA 1994), the Board states that:

> It is well established that fraud or willful misrepresentation of a material fact in the procurement or attempted procurement of a visa, or other documentation, must be made to an authorized official of the United States Government in order for excludability under section 212(a)(6)(C)(i) of the Act to be found. *See Matter of D-L- & A-M-*, Interim Decision 3162 (BIA 1991); *Matter of Shirdel,* 19 I & N Dec. 33 (BIA 1984); *Matter of L-L-*, 9 I.& N Dec. 324 (BIA 1961).

Id. at 796.

The record before the AAO reflects that the applicant purchased a fraudulent temporary resident card. The record, however, contains no evidence that the applicant practiced fraud or made a willful misrepresentation to a United States Government official in procuring or in seeking to procure a visa or documentation, or admission into the United States. Accordingly, in view of *Matter of Y-G-*, wherein the Board states that the fraud or willful misrepresentation of a material fact must be made to an authorized official of the United States Government, we find that the applicant's purchase of a fraudulent temporary resident card does not render him inadmissible under section 212(a)(6)(C) of the Act.

Although not addressed by the OIC, review of the record reveals that the applicant's conviction under 18 U.S.C. § 1546(a) for unlawfully obtaining a temporary resident card, Form I-688 ("INS card"), renders him inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

Section 212(a)(2) 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 record indicates that January 29, 1996, the applicant was convicted under 18 U.S.C. § 1546(a). That section provides, in pertinent parts:

> Whoever knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, or utters, uses, attempts to use,

> possesses, obtains, accepts, or receives any visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, knowing it to be forged, counterfeited, altered or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained . . . .
>
> Shall be fined under this title or imprisoned not more than 25 years . . .

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 the recently decided *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. 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." *Silva-Trevino*, 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. *Id.* 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.

In *Omagah v. Ashcroft*, 288 F.3d 254, 261 (5th Cir. 2002), the Fifth Circuit states that the Board parsed section 1546 in a manner that is consistent with the Fifth Circuit's precedent. The Board interpreted section § 1546 as:

> [S]eparately prohibiting (1) simple, knowing possession of illegal documents, (2) possession of illegal documents with an intent to use them, and (3) forgery of illegal documents. Section 1546 prohibits a wide variety of crimes relating to the forgery of immigration papers: forging papers, owning blank papers, lying on applications, and impersonating another person. 18 U.S.C. § 1546(a)-(b).

The Fifth Circuit found reasonable and upheld the Board's decision "that conspiracy to possess forged immigration documents with intent to use them involved moral turpitude." *Id.* at 261-262.

We note that in *Matter of Serna,* 20 I&N Dec. 579, 586 (BIA 1992), the Board analyzed whether possession of an altered document in violation of section 1546(a) involved moral turpitude. The Board held that "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." The Board reasoned that there may be circumstances under which the respondent might not have had the intent to use the altered immigration document in his possession unlawfully. *Id.*

By its terms, section 1546(a) convicts a person for conduct that both does and does not involve moral turpitude. A person may be convicted for simple, knowing possession of illegal documents without having any intent to use those illegal documents, which *Serna* and *Omagah* indicate does not involve moral turpitude. Conversely, a person may be convicted under section 1546(a) for possession of illegal documents with an intent to use them, which conduct involves moral turpitude. Therefore, the AAO cannot find that a violation of section 1546(a) is categorically a crime involving moral turpitude.

Since the full range of conduct proscribed by the statute at hand does not constitute a crime involving moral turpitude, we will apply the modified categorical approach and engage in a second-stage inquiry by reviewing the record of conviction to determine if the conviction was based on conduct involving moral turpitude. *Silva-Trevino,* 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. If review of the record of conviction is inconclusive, we will then consider any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. *Id.* at 699-704, 708-709.

On January 29, 1996, the record of conviction establishes that the applicant entered into a plea agreement where he pled guilty to count III of the indictment, violation of 18 U.S.C. § 1546(a), that

he did knowingly obtain a temporary resident card (Form I-688), knowing the card to have been unlawfully obtained. The record of conviction does not reveal whether the applicant intended to use the fraudulent temporary resident card. However, in the applicant's affidavit dated July 9, 2007, which was submitted in support of the waiver application, the applicant states that he obtained the fraudulently obtained "green card" in Miami, and that when he returned from Miami he used his passport and his fraudulently obtained "green card" at the Social Security Office. Thus, we find that the record demonstrates that the applicant's intention was to use the illegally obtained temporary resident card unlawfully, which renders him inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude.

The waiver for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act is found under section 212(h) of the Act. That section provides, in pertinent part:

> (h) The Attorney General [Secretary of Homeland Security] 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 Attorney General [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 . . .

Section 212(h)(1)(A) of the Act provides that the Attorney General may, in his discretion, waive the application of subparagraph (A)(i)(I) of subsection (a)(2) if 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. Since the conviction rendering the applicant inadmissible occurred in May 1994, more than 15 years ago, it is waivable under section 212(h)(1)(A) of the Act. The BIA has held that "*admissibility* is determined on the basis of the facts and the law at the time the application is finally considered." 20 I.&N. Dec. 557, 562 (BIA 1992) (citations omitted, emphasis added).

Section 212(h)(1)(A)(ii) and (iii) 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 the applicant establish his rehabilitation. Evidence in the record to establish the applicant's eligibility under section 212(h)(1)(A)(ii) and (iii) of the Act consists of letters commending his character. Oscar states in his letter dated August 3, 2007, that he and his brother spend time with his father during the summer and that he misses his father. [redacted] the applicant's mother-in-law, conveys in her letter dated August 1, 2007, that the applicant "is loved by all of the family." She commends him as a father and a son-in-law. [redacted], the applicant's brother-in-law, indicates in his letter dated August 2, 2007, that the applicant "is a good man, [and] a good father and husband to

my sister." The Application for Immigrant Visa and Alien Registration reflects that the applicant has been a manager and co-owner of a health bakery since 1998. In view of the record, which shows that the applicant has not committed any crimes since May 1996, has maintained steady employment, and is commended by his family members, the AAO finds 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.

In *Matter of Mendez-Moralez,* 21 I&N Dec. 296, 301 (BIA 1996), the Board stated that once eligibility for a waiver is established, it is one of the favorable factors to be considered in determining whether the Secretary should exercise discretion in favor of the waiver. Furthermore, the Board stated that:

> In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

Id. at 301.

The AAO must then, "[B]alance 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. " *Id.* at 300. (Citations omitted).

The adverse factor in the present case is the criminal conviction of "unlawfully obtained INS card" and any unauthorized employment. The favorable factors in the present case are the applicant's character, as witnessed by the positive references; his steady employment as a manager and co-owner of a bakery; and the passage of 16 years since the criminal conviction that rendered the applicant inadmissible to the United States. The AAO finds that the crime committed by the applicant is serious in nature; nevertheless, when taken together, we find the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility rests with the applicant. *See* section 291 of the Act. Here, the

applicant has now met that burden. Accordingly, the appeal will be sustained and the waiver application will be approved.

ORDER: The appeal is sustained.