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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

PUBLIC COPY



415

Date: **JAN 13 2012**

Office: WASHINGTON, D.C.

FILE:

IN RE: Applicant:

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

ON BEHALF OF APPLICANT:

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,

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Washington, D.C., and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Bulgaria who was found to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for procuring a visa by willful misrepresentation. The record supports that the applicant is also inadmissible under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. He seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen wife and son.

The field office director denied the Form I-601 application for a waiver, finding that the applicant failed to establish that a qualifying relative will experience extreme hardship upon denial of the waiver application. *Decision of the Field Office Director*, dated July 20, 2011.

On appeal, counsel for the applicant asserts that the field office director applied an erroneous legal standard and failed to sufficiently review the hardship factors presented. *Statement from Counsel on Form I-290B*, dated August 15, 2011.

The record contains, but is not limited to: briefs from counsel; documentation associated with the applicant's criminal conviction; reports on conditions in Bulgaria; documentation relating to the applicant's proceedings in Immigration Court; and documentation relating to the applicant's wife's circumstances should the present waiver application be denied. It is noted that counsel indicated on Form I-290B that she would send a brief and/or evidence to the AAO within 30 days of filing the appeal. The appeal is dated August 15, 2011. However, as of the date of this decision, the AAO has received no further documentation or correspondence from the applicant or counsel and the record is deemed complete. The entire record was reviewed and considered in rendering this decision.

As a preliminary matter, the applicant filed a Form I-485 application to adjust his status to lawful permanent resident on or about February 11, 2009. The applicant filed the present Form I-601 application for a waiver on or about June 7, 2011 due to a finding that he is inadmissible under section 212(a)(6)(C)(i) of the Act. The field office director denied the Form I-485 application on July 20, 2011. In her decision, the field office director identified two separate reasons for denying the application: the applicant's failure to obtain a waiver of his inadmissibility under section 212(a)(6)(C)(i) of the Act and his failure to show that he warrants a favorable exercise of discretion. The field office director emphasized that the discretionary basis for the denial was independent of the applicant's inadmissibility.

The requirements for filing a motion to reopen or motion to reconsider the denial of a Form I-485 application are provided in the regulation at 8 C.F.R. § 103.5. However, the record does not show that the applicant filed a motion with the field office director after her July 20, 2011 decision, and the denial of the Form I-485 application remains in effect.

The present Form I-601 application for a waiver was filed incident to the applicant's Form I-485 application, in order to establish that he is admissible to the United States and eligible to adjust his status to lawful permanent resident. However, even were the applicant obtain to a waiver of his inadmissibility under sections 212(a)(6)(C)(i) and 212(a)(2)(A)(i)(I) of the Act, the discretionary basis for the denial of his Form I-485 application would remain. The AAO lacks jurisdiction to review the field office director's denial of the applicant's Form I-485 application on the basis of an unfavorable exercise of discretion.¹ Therefore, no purpose would be served in fully assessing whether the applicant has shown that he is eligible for a waiver of his inadmissibility under sections 212(a)(2)(A)(i)(I) and 212(a)(6)(C)(i) of the Act, such as determining whether his family members would experience extreme hardship should the present waiver applicant be denied.

However, the AAO will comment on counsel's assertions regarding the applicant's inadmissibility. The record shows that the applicant pled guilty to Theft under Article 252(1) of the Bulgaria Penal Code, amended by Article 195(1), parts 3 and 4, and Article 20(2), for his conduct on or about June 3 and 4, 1990. As part of a subsequent application for an immigrant visa, the applicant submitted a fraudulent Conviction Status Certificate showing that he had never been convicted of a crime. The applicant was issued an immigrant visa on February 7, 2001. Upon arriving at the Dulles International Airport on May 24, 2002, the applicant was granted deferred inspection and ultimately placed into removal proceedings, in part due to a finding that he concealed his criminal record by presenting false documentation and information when applying for his immigrant visa, rendering him inadmissible under section 212(a)(6)(C)(i) of the Act.

Section 212(a)(6)(C)(i) of the Act provides, in pertinent part, that:

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.

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.

¹ The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. See DHS Delegation Number 0150.1 (effective March 1, 2003); see also 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003).

(ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

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 a brief submitted with the Form I-601 application, counsel asserted that the applicant is not inadmissible under section 212(a)(6)(C)(i) of the Act, as his misrepresentation was not material. The materiality of the applicant's misrepresentation depends on whether his concealed conviction for a theft offense in Bulgaria also rendered him inadmissible under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude.

Counsel stated that the applicant's conviction was unconditionally purged by Article 87 of the Bulgarian Penal Code, and the applicant does not stand convicted of any crimes. Counsel asserted that the applicant may not be found inadmissible under section 212(a)(2)(A)(i)(I) of the Act as a result. Article 87 of the Bulgarian Penal Code states:

- (1) In cases other than those under the preceding Art. every convicted can be rehabilitated by the court which has ruled the verdict as first instance if within the course of three years from the expiration of the term of the punishment imposed by the verdict or reduced by work or pardon he has not committed another crime punishable by imprisonment or by a more serious punishment:
 1. if he has had a good conduct and
 2. if he has restored the damages caused by a deliberate crime.
- (2) The court can also rehabilitate the convicted without his restoring the caused damages if there are valid reasons for that.
- (3) (Amend., SG 92/02, amend. SG 103/04) If, along with the punishment of imprisonment a punishment of deprivation of rights according to art. 37, para 1, item 6 and 7 or probation have been imposed the term of this punishment must have expired in order to rule rehabilitation. If a fine is imposed it must have been paid.

A conviction must be vacated based on a procedural or substantive defect in the criminal proceedings, not a rehabilitation statute, in order to render it not a conviction under section 101(a)(48)(A) of the Act and not a basis for inadmissibility. *See Nath v. Gonzales*, 467 F.3d 1185 (9th Cir. 2006); *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). As Article 87 of the Bulgarian Penal Code is a rehabilitative measure, and it does not address procedural or substantive defects in the underlying criminal proceedings, the applicant's conviction remains a potential basis for inadmissibility under the Act.

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.

Counsel asserted that the applicant was convicted for an “accessory after the fact” offense, not an act of theft. Counsel stated that an accessory after the fact offense is not a crime involving moral turpitude. However, the record shows that the applicant was convicted of theft, not accessory after the fact. As noted above, the record shows that the applicant pled guilty to a theft offense under Article 252(1) of the Bulgaria Penal Code, amended by Article 195(1), parts 3 and 4, and Article 20(2), for his conduct on or about June 3 and 4, 1990. At the time of the applicant’s conviction, the Bulgaria Penal Code stated:

Article 251. The punishment for a theft of another’s movable object (chattel), which is not a public property, is imprisoned up to three years.

Article 252(1). When the theft of objects is commissioned in the conditions of Article 195, par. 1, the punishment is imprisonment from one to six years, and in the cases of par. 2 – imprisonment from 2 to eight years, and in the latter case the Court may enact also a seizure of up to one half of the property of the guilty.

Article 195(1). The punishment for a theft of a state, cooperative or other public property is imprisonment from one to ten years:

...

3. if it is committed by destruction, damaging or undermining barriers constructed firmly for protection of persons or property;

4. if special technical means and methods were used for the commission of the theft.

Bulgaria Penal Code Article 20 provides:

(1) Accomplices in a deliberate crime are: the perpetrators, the abettors and the accessories.

- (2) Perpetrator is the one who participates in the very commitment of the crime.
- (3) Abettor is the one who has deliberately persuaded somebody else to commit the crime.
- (4) Accessory is the one who has deliberately facilitated the commitment of the crime through advice, explanations, promise to provide assistance after the act, removal of obstacles, providing resources or in any other way.

It is first noted that the applicant's conviction referenced Article 20(2) of the Bulgaria Penal Code, which defines perpetrators as individuals who participate "in the very commitment of the crime." Article 20(4) of the Bulgaria Penal Code addresses an accessory after the fact, yet the applicant was not charged in reference to this section. Thus, despite counsel's assertion and the applicant's description of his culpable actions, the record supports that the applicant was convicted as a perpetrator of theft, not an accessory after the fact.

Articles 252(1), 195(1)(3), and 195(1)(4) of the Bulgaria Penal Code each refer to punishments for acts of theft. In determining whether theft is a crime involving moral turpitude, the Board of Immigration Appeals (BIA) considers "whether there was an intention to permanently deprive the owner of his property." *See In re Jurado-Delgado*, 24 I&N Dec. 29, 33 (BIA 2006). Article 197 of the Bulgaria Penal Code addresses punishments in instances where "the chattel is returned or replaced," but no such provision was referenced with respect to the applicant's conviction. The record supports that the applicant was convicted of an act of theft that constituted a permanent taking. Accordingly, he was convicted of a crime involving moral turpitude.

Counsel asserted that the applicant's offense falls under the "petty theft exception," which excuses inadmissibility under section 212(a)(2)(A)(i)(I) of the Act. Section 212(a)(2)(A)(ii)(II) provides an exception where an applicant has been convicted of only a single crime, the maximum possible sentence did not exceed imprisonment for one year, and the applicant was not sentenced to a term of imprisonment in excess of six months. However, each provision of the Bulgarian Penal Code referenced in the applicant's conviction provides maximum sentences in excess of one year. Accordingly, the exception in section 212(a)(2)(A)(ii)(II) of the Act does not apply, and the applicant remains inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

Based on the foregoing, the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude. Concealing his theft conviction with false documentation constituted a material misrepresentation, as his criminal history rendered him inadmissible. Therefore, the applicant was correctly found inadmissible under section 212(a)(6)(C)(i) of the Act for obtaining an immigrant visa by willfully submitting false documentation.

As noted above, the applicant has not shown that the present Form I-601 application will have an impact on the denial of his Form I-485 application, as the present Form I-601 is incident to the Form I-485 application, and the Form I-485 application was denied in an unreviewable exercise of

discretion. No purpose would be served in fully assessing whether the applicant has shown that he is eligible for a waiver of inadmissibility under sections 212(h) and (i) of the Act, and the AAO need not assess whether denial of the Form I-601 application will result in extreme hardship to his wife or son. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.