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

U.S. Citizenship and Immigration Services

[redacted]

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DATE: JUL 05 2012 OFFICE: MEXICO CITY, MEXICO FILE: [redacted]

IN RE: [redacted]

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

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,

for, Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and a citizen of Mexico 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 having sought a benefit under the Act through fraud or willful misrepresentation.[1] He is the son of a U.S. citizen father and a lawful permanent resident mother and seeks a waiver under section 212(i) of the Act, 8 U.S.C. § 1182(i) in order to reside in the United States.

The District Director concluded that the applicant had failed to establish that the bar to his admission would impose extreme hardship on a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Field Office Director's Decision,* dated January 14, 2010.

On appeal, counsel asserts that the applicant's parents have suffered and continue to suffer as a result of his inability to immigrate. *Form I-290B, Notice of Appeal or Motion*, dated February 12, 2010. Counsel submits additional evidence in support of the waiver application.

The record of proceeding includes, but is not limited to, the following evidence: statements from the applicant's parents, siblings and other family members; medical statements relating to the applicant's parents; a letter documenting the applicant's father's employment; earnings statements for the applicant's father; a listing of financial obligations; documentation relating to the applicant's conviction; and several statements in Spanish.[2] The entire record was reviewed and all relevant evidence considered in reaching a decision on the appeal.

Section 212(a)(6)(C) states in pertinent part:

> (i) **In general.** 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 chapter is inadmissible.

The record reflects that in 1996 the applicant was convicted of Use of False Citizenship or Resident Alien Documents, California (Cal.) Penal Code § 114, sentenced to five days in jail and placed on probation for 36 months. The consular officers who conducted the applicant's immigrant

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[1] The AAO notes that the applicant was previously found inadmissible under section 212(a)(1)(A)(iii)(I) of the Act, but that the record indicates that he has successfully established his eligibility for a 212(g) waiver.

[2] The AAO finds that several of the submitted Spanish-language statements in the record are unaccompanied by certified English-language translations. Accordingly, they will not be considered pursuant to the regulation at 8 C.F.R. § 103.2(b)(3).

visa interviews concluded that this conviction established that the applicant had made a false claim to U.S. citizenship prior to September 30, 1996, the date of enactment for the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), and that he was, therefore, inadmissible pursuant to section 212(a)(6)(C)(i) of the Act. While the AAO notes the consular inadmissibility determinations, we do not find the evidence of record to establish that the applicant's admission to the United States is barred by section 212(a)(6)(C)(i) of the Act.

The record indicates that the false document that led to the applicant's conviction pursuant to Cal. Penal Code § 114 was a counterfeit Form I-551, Resident Alien Card, which he presented to an officer of the Ventura County sheriff's office at the time of his arrest on January 29, 1996. *Form I-213, Record of Deportable Alien*, dated February 2, 1996; *Consular Worksheets*, dated November 16, 2006 and March 16, 2007. While the record demonstrates that the applicant was using the Form I-551 for identification purposes, it contains no evidence that establishes he used his counterfeit card to enter the United States or to seek any other benefit under the Act, as required for a finding of inadmissibility under section 212(a)(6)(C)(i) of the Act. The applicant's presentation of his fraudulent I-551 to a Ventura County law enforcement officer does not represent an attempt to obtain an immigration benefit. Moreover, a section 212(a)(6)(C)(i) misrepresentation must be made to an official of the U.S. government, generally an immigration or consular officer. *See Matter of Y-G-* , 20 I&N Dec. 794 (BIA 1994); *Matter of D-L- & A-M-* , 20 I&N Dec. 409 (BIA 1991); *Matter of L-L-* , 9 I&N Dec. 324 (BIA 1961). In that the record does not establish that the applicant used his counterfeit Form I-551 to obtain or to attempt to obtain any benefit under the Act, he is not inadmissible pursuant to section 212(a)(6)(C)(i) of the Act.

The applicant is, however, inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I),[3] which states in pertinent part:

> (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:

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[3] An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the all of the grounds for denial are not identified in the initial decision. *See 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); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

> [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. The methodology adopted by the Attorney General consists of a three-pronged approach. 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. 24 I&N Dec. at 698 (citing *Duenas-Alvarez*, 549 U.S. at 193). 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 or "modified categorical" inquiry in which the adjudicator reviews the "record of conviction" to determine if the conviction was based on conduct involving moral turpitude. 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. Finally, 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.

At the time of the applicant's conviction, Cal. Penal Code § 114 stated:

> Any person who uses false documents to conceal his or her true citizenship or resident alien status is guilty of a felony, and shall be punished by imprisonment in the state prison for five years or by a fine of twenty-vie thousand dollars ($25,000).

In *People v. Salazar-Merino*, 89 Cal.App.4th 590 (2001), the California Court of Appeal stated that while Cal. Penal Code § 114 had been enacted with the purpose of "prevent[ing] illegal aliens in the United States from receiving benefits or public services in the State of California," the statute punished more than the use of false documents for the purpose of receiving benefits or public

services. *Id.* at 596. The Court of Appeal further found that Cal. Penal Code § 114 was a specific intent penal statute and that it applied only if a person used a false document "with the specific intent to conceal his or her true citizenship or resident alien status." *Id.* (citation omitted).

The AAO is unaware of any published federal cases addressing whether Cal. Penal Code § 114 is a crime involving moral turpitude. However, we note that in *Matter of Serna*, 20 I&N Dec. 579 (BIA 1992), the BIA found 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 was not a crime involving moral turpitude." In *Matter of Flores*, 17 I&N Dec. 225, 230 (BIA 1980), the BIA held that uttering or selling false or counterfeit paper related to the registry of aliens was a crime involving moral turpitude, even though the intent to defraud was not an explicit statutory element. Therefore, in view of the holdings in *Serna* and *Flores*, we find that because Cal. Penal Code § 114 requires the specific intent to use a document for a false purpose (concealing status), the offense "is accompanied by a vicious motive or corrupt mind" and is thus categorically a crime involving moral turpitude. *See Jordan v. DeGeorge*, 341 U.S. 223, 232 (1951)(stating that "[t]he phrase 'crime involving moral turpitude' has without exception been construed to embrace fraudulent conduct."); *see also Omagah v. Ashcroft*, 288 F.3d 254, 262 (5th Cir. 2002) (finding that crimes that do not involve fraud, but that include "dishonesty or lying as an essential element" also tend to involve moral turpitude); *Itani v. Ashcroft*, 298 F.3d 1213, 1216 (11th Cir. 2002) ("Generally a crime involving dishonesty or false statement is considered to be one involving moral turpitude."). In that the applicant was convicted of using a fraudulent document with the specific intent to use it for a false purpose, his conviction is for a crime involving moral turpitude. Accordingly, his admission to the United States is barred by section 212(a)(2)(A)(i)(I) of the Act.

The waiver for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act is found under section 212(h) of the Act, which 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
>
> (ii) 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 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 . . .

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 offense that bars the applicant's admission occurred in on or about January 29, 1996, he is eligible to seek a waiver under section 212(h)(1)(A)(i) of the Act.[4]

In order to be eligible for a section 212(h)(1)(A) waiver, the applicant must demonstrate that his admission to the United States would not be contrary to its national welfare, safety, or security and that he is rehabilitated. The AAO finds no indication in the record that the applicant has been or is involved in conduct or activities that would be contrary to the safety or security of the United States or that he is engaged in any activity contrary to its welfare since he committed the crime that resulted in his conviction. The record contains statements from members of the Mexican community in which the applicant currently resides that attest to his sense of responsibility, his honesty and his financial solvency. The AAO also notes that these statements are evidence that the applicant has remained outside the United States since he voluntarily departed in 1996. Based on the evidence before us, we conclude that the applicant's admission would not be contrary to the national welfare, safety, or security of the United States and that he is rehabilitated. Accordingly, the applicant is statutorily eligible for a waiver under section 212(h)(1)(A) of the Act.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. 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).

> 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

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[4] The AAO notes that an application for admission or adjustment of status is considered a "continuing" application and "admissibility is determined on the basis of the facts and the law at the time the application is finally considered." *Matter of Alarcon*, 20 I.&N. Dec. 557, 562 (BIA 1992) (citations omitted).

> 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 factors in the present case are the applicant's conviction for use of false documents; his prior abuse of alcohol, which initially also barred his admission to the United States; and his prior entry without inspection. The mitigating factors relating to the applicant are his U.S. citizen father, lawful permanent resident mother and U.S. citizen and lawful permanent resident siblings; his parents' chronic medical conditions; the general hardship to his family members if the waiver application is denied; the absence of a criminal record, other than the conviction that now bars his admission; the length of time that has passed since he committed this offense; and the statements submitted by his family and the members of his Mexican community attesting to his strong work ethic and sense of responsibility.

While the AAO finds the offense committed by the applicant to be serious in nature, we conclude that, when taken together, the mitigating 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 met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.