



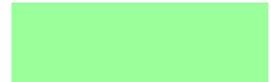
U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: FEB 02 2015 OFFICE: NEWARK

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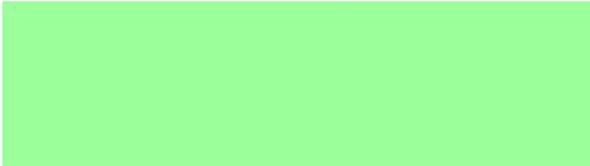


IN RE: APPLICANT:



APPLICATION: Application to Register Permanent Residence or Adjust Status Pursuant to Section 1 of the Cuban Adjustment Act of November 2, 1966 (P.L. 89-732)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

A handwritten signature in cursive script, appearing to read "Michael Shumway".

for Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Field Office Director, Newark, New Jersey, denied the Application to Register Permanent Residence or Adjust Status (Form I-485), and certified the decision to the Administrative Appeals Office (AAO) for review under 8 C.F.R. § 103.4(a)(1). Exercising *de novo* review, we will withdraw the director's findings of inadmissibility, issue a new finding of inadmissibility, and remand the matter for adjudication of the applicant's Form I-601, Application for Waiver of Grounds of Inadmissibility.

The applicant is a native and citizen of Cuba who seeks adjustment of status to that of a United States lawful permanent resident under the Cuban Adjustment Act (CAA) of November 2, 1966, Pub. L. No. 89-732. Section 1 of the CAA provides, in pertinent part, for the adjustment of status of an alien who is a native or citizen of Cuba and who has been inspected and admitted or paroled into the United States subsequent to January 1, 1959 and has been physically present in the United States for at least one year, if the alien is admissible to the United States for permanent residence.

The applicant has satisfied his burden to demonstrate Cuban citizenship,<sup>1</sup> parole into the United States,<sup>2</sup> and the requisite physical presence. At issue is whether the applicant is admissible to the United States for permanent residence.

The applicant filed an initial Form I-485 on December 26, 2010. In a February 29, 2012 decision certified to the AAO, the director denied the application on the grounds that the applicant is inadmissible under section 212(a)(2)(A)(i) of the Immigration and Nationality Act (the Act) for a conviction in Cuba for a crime involving moral turpitude, namely negligent homicide, injury and damage; and under section 212(a)(6)(C)(i) of the Act for willfully misrepresenting a material fact by concealing his criminal record to an officer of U.S. Customs and Border Protection (CBP) to procure entry into the United States on December 1, 2009.<sup>3</sup> The director further determined that the applicant was not eligible for a waiver of inadmissibility under section 212(h) and 212(i) of the Act because had had no qualifying relative(s).

In a decision dated September 13, 2012, we affirmed the director's findings of inadmissibility but did not address the determination of ineligibility for waiver of inadmissibility. We dismissed a subsequent motion to reconsider on June 6, 2013 as untimely filed.

The applicant filed the present Form I-485 on January 11, 2013. In a March 5, 2014 decision certified to the AAO, the director denied the application on the same grounds articulated in his February 29, 2012 decision.

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<sup>1</sup> The record contains two copies of the applicant's Cuban Birth Certificate, one issued November 26, 2010, and another June 13, 2005, each with an English translation; and a copy of the biographic page of the applicant's Cuban passport, issued January 24, 2008.

<sup>2</sup> The record shows that the applicant was paroled into the United States on December 1, 2009, at [REDACTED] Texas, and has lived in New Jersey since that date.

<sup>3</sup> The director also noted that the applicant attested to no criminal history on his initial Form I-485 but indicated that the applicant disclosed it at his interview. The director did not reference this misrepresentation in finding the applicant inadmissible under section 212(a)(6)(C)(i) of the Act.

On March 31, 2014, the applicant filed a Form I-601, Application for Waiver of Grounds of Inadmissibility, listing his naturalized U.S. citizen father, [REDACTED], as the qualifying relative. In a letter to the AAO received April 1, 2014, counsel for applicant references this application and requests that the Form I-485 be reopened and considered in conjunction with the waiver application.

#### A. Crime Involving Moral Turpitude

Section 212(a)(2)(A)(i)(I) of the Act states, in pertinent part, that “any alien convicted of ... a crime involving moral turpitude (other than a purely political offense) . . . is inadmissible.”

The Act does not define the term “crime involving moral turpitude.” However, the Board of Immigration Appeals (Board) provided the following definition in *Matter of Perez-Contreras*:

[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. . . .

20 I&N Dec. 615, 617-18 (BIA 1992) (citations omitted). “[N]either the seriousness of the offense nor the severity of the sentence imposed is determinative of whether a crime involves moral turpitude.” *Matter of Serna*, 20 I&N Dec. 579, 581 (BIA 1992).

In the Third Circuit, the jurisdiction in which this case arises, whether a conviction is a crime involving moral turpitude requires a categorical inquiry into “the elements of the statutory state offense . . . to ascertain the least culpable conduct necessary to sustain conviction under the statute.” *Jean-Louis v. Holder*, 582 F.3d 462, 465-66 (3d Cir. 2009) (citing *Knapik v. Ashcroft*, 384 F.3d 84, 88 (3d Cir. 2004)). The “inquiry concludes when [the adjudicator] determine[s] whether the least culpable conduct sufficient to sustain conviction under the statute ‘fits’ within the requirements of a [crime involving moral turpitude].” *Jean-Louis, supra*, at 470.

However, if the “statute of conviction contains disjunctive elements, some of which are sufficient for conviction of [a crime involving moral turpitude] and others of which are not, [an adjudicator] . . . examin[es] the record of conviction for the narrow purpose of determining the specific subpart under which the defendant was convicted.” *Id.* at 466. This is true “even when clear sectional divisions do not delineate the statutory variations . . . .” *Id.* In so doing, an adjudicator may only look at the formal record of conviction. *Id.* The record of conviction is a narrow, specific set of documents which includes the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *See Matter of Louissaint*, 24 I&N Dec. 754, 757 (BIA 2009); *see also Shepard v. U.S.*, 544 U.S. 13, 16 (2005) (finding that the record of conviction is limited to the “charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented”). The Third Circuit does not permit

inquiry beyond the record of conviction. See *Jean-Louis, supra*, at 473-82 (rejecting *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)).

In response to a Request for Evidence (RFE) seeking certified Cuban conviction records, the applicant submitted a Criminal Background Certification from the Cuban Ministry of Justice, with English translation, and a Certification of Sentence from the Secretary of the [REDACTED] with English translation, indicating that on [REDACTED], 1997, the applicant was convicted<sup>4</sup> in [REDACTED] Cuba, of “negligent homicide, injury and damage” and sentenced in accordance with sections 181.1(b), 184.1(a), 184.1(b), 184.1(c), and 184.1(ch) of the Cuban Penal Code,<sup>5</sup> which provide as follows:

- Article 181.1(b) – An individual who allows a person who is intoxicated by alcohol or under the influence of toxic drugs, hallucinogenic or hypnotic substances, narcotics, or other substances producing similar effects to drive a vehicle that the individual owns or is in charge of for any reason is punishable by imprisonment for three months to a year, a fine, or both.
- Article 184.1 – Whosoever due to violating the railway, air or maritime transportation laws or regulations causes an accident shall be punished by:
  - (a) imprisonment of one to ten years if the accident causes death of another individual.
  - (b) imprisonment of one to three years if as a result of the accident serious injury or health is seriously damaged another is caused.
  - (c) imprisonment of one to three months or fine up to one hundred cuotas if as a result of the accident injury is caused to another but does not put the victim’s life in imminent danger or caused deformity or disability of any kind.

<sup>4</sup> The certification also shows that on [REDACTED], 1997, the applicant was convicted in [REDACTED] Cuba, of violating Article 230, “Speculation and Hoarding,” and was sentenced to one year of imprisonment. Article 230 is violated when an individual “a) Acquired merchandise and other objects with the purpose of reselling for profit or gain; b) retains in his possession or transported products in quantities clearly and unjustifiably higher than those normally needed.” A foreign conviction can be the basis for a finding of inadmissibility only where the conviction is “for conduct which is deemed criminal by United States standards.” *Matter of Ramirez-Rivero*, 18 I&N Dec. 135, 137 (BIA 1981) (citing *Matter of McNaughton*, 16 I&N Dec. 569, 572 (BIA 1978)). The director did not address this crime in his decision, and we have discovered no comparable offense cognizable as a crime under state or federal criminal laws of the United States. Accordingly, we find that this conviction does not serve as a basis for inadmissibility in this case.

<sup>5</sup> In addition to translations of the Cuban Penal Code provided by the applicant, we have used translations of Lawyers Without Borders UK Limited (2009) and as provided by the Library of Congress, Legal Research Center, in an October 2014 report provided to USCIS entitled “Cuba: Mens Rea Requirement for Negligent Homicide.” For purposes of this appeal, we assume these translations are accurate and reflect the state of the Cuban Penal Code at the time of the applicant’s conviction.

(ch) imprisonment of three months to one year or a fine of one hundred to three hundred cuotas, or both if as consequence of the accident causing damage to property of others belongings, of considerable value.

The applicant was sentenced to imprisonment for a total period of ten years. He was paroled after serving six years of his sentence.

The individual sections of Article 184.1 appear to be penalty provisions. The relationship between these and the other statute violated, Article 181.1(b), is not specified in the criminal record. The record does not specify any additional “railway, air or maritime transportation laws or regulations” that further define the applicant’s conviction for “negligent homicide, injury and damage,” and none of the provisions referenced contain the term negligence or any definition thereof. The record does not contain a charging document or other documents that are often part of a record of conviction. The applicant’s submission complied with the director’s request, but it is unclear what efforts the applicant, who has the burden of proof on the issue of admissibility, made to obtain his criminal records and whether any other documentation may yet be available. Nevertheless, consistent with the applicant’s own descriptions,<sup>6</sup> we conclude from the reference to Article 181.1(b) and four separate sections of Article 184.1 that the applicant, formerly a train conductor, was convicted of multiple criminal counts in relation to a train accident that resulted in the death or injury of numerous individuals as well as significant damage to property, and that the *mens rea* associated with these offenses was “negligence.”

Negligence is defined in Article 9.1(3) of the Cuban Penal Code as follows:

The offense shall be committed by negligence when the agent predicted the possibility of occurrence of the socially harmful consequences of its action or omission, but expected, carelessly, to avoid them; or when he did not predict the possibility of occurrence although he could have or should have predicted them.

Generally, an offense committed negligently is not a crime involving moral turpitude, as

[t]he hallmark of moral turpitude is a reprehensible act committed with an appreciable level of consciousness or deliberation. The negligent infliction of bodily injury lacks this essential culpability requirement. By definition, a negligent assault is unintentional, unwitting, and committed without contemplation of the risk of injury involved.

*Partyka v. Attorney General of the United States*, 417 F.3d 411, 414 (3d Cir. 2005). Criminal negligence does not involve “actual awareness of the risk created by the criminal violator’s action.”

<sup>6</sup> The applicant has submitted affidavits, newspaper articles and additional documentation related to his conviction, the underlying incident, and his duties as a train conductor. While we take notice of these documents and the applicant’s assertions, we cannot consider information outside the record of conviction in determining whether the applicant’s conviction constitutes a crime involving moral turpitude, as explained herein.

*Matter of Medina*, 15 I&N Dec. at 613-14. Thus, in *Matter of Perez-Contreras*, the Board found that moral turpitude was not inherent in a Washington third-degree assault statute, because neither intent nor recklessness was required for a conviction for causing bodily harm with criminal negligence. 20 I&N Dec. 615, 619 (BIA 1992). Thus, while “moral turpitude [may be] present in criminally reckless conduct,” criminal negligence does not involve moral turpitude because it exists when a person fails to contemplate the risk of injury involved in his or her actions. *Id.* at 618.

Recklessness, defined generally as “a conscious disregard of a substantial and unjustifiable risk, constituting a gross deviation from the standard of conduct a reasonable person would observe under the circumstances,” can be a sufficient mental state for moral turpitude purposes for crimes also involving significant harm or aggravating factors. *Matter of Leal*, 26 I&N Dec. 20, 22-23 (BIA 2012); *see also Knapik v. Ashcroft*, 384 F.3d 84, 89-90 (3d Cir. 2004); *Matter of Franklin*, 20 I&N Dec. 867, 869-71 (BIA 1994) (finding that a conviction for involuntary manslaughter to be a crime involving moral turpitude because the statute requires “recklessly caus[ing] the death of another person.”); *Matter of Ruiz-Lopez*, 25 I&N Dec. 551, 553-54 (BIA 2011) (a conviction for driving in “wanton or willful disregard for the lives or property of others while attempting to elude a pursuing police vehicle” is a crime involving moral turpitude because “wanton or willful disregard” connoted recklessness); *Matter of Medina*, 15 I&N Dec. 611, 613-14 (BIA 1976) (moral turpitude attached to an Illinois aggravated assault statute that required the use of a deadly weapon and a *mens rea* of recklessness.)

On its face Article 9.1(3) of the Cuban Penal Code contains “disjunctive elements” or is divisible into two alternative definitions of “negligence.” The second – “when he did not predict the possibility of occurrence although he could have or should have predicted them” – is consistent with criminal negligence as defined in Board and Third Circuit precedents. On the other hand, the first – “the agent predicted the possibility of occurrence of the socially harmful consequences of its action or omission, but expected, carelessly, to avoid them” – is defined similarly to the standard of recklessness. It entails a conscious disregard of a risk, though the term “carelessly” is not further defined. However, even assuming it constitutes recklessness for purposes of determining moral turpitude, and that Article 9.1(3) can be considered a divisible statute,<sup>7</sup> the record of conviction is inconclusive as to which definition was applied in convicting the applicant for “negligent homicide, injury and damage.” Although we do not rule out the possibility that additional documents from the record of conviction exist and would prove conclusive, as we find the applicant is inadmissible under section 212(a)(2)(B) of the Act and requires a waiver of inadmissibility in any event, we conclude

<sup>7</sup> The Board, in interpreting the Supreme Court’s recent decision in *Descamps v. United States*, 133 S. Ct. 2276 (2013), found that a Utah statute was not divisible merely because it “disjunctively enumerated intent, knowledge, and recklessness as alternative mental states,” stating that the statute “can be ‘divisible’ into three separate offenses with distinct *mens rea* only if . . . jury unanimity regarding the mental state” was required. *Matter of Chairez-Castrejon*, 26 I&N Dec. 349, 352-54 (BIA 2014). In the absence of such a requirement, the alternative *mens rea* were merely alternative “means” of committing the crime rather than alternative “elements” of the offense, and the statute would not be divisible. *Id.* at 355. However, in considering a Pennsylvania statute containing the disjunctively enumerated *mens rea* of “intent, knowledge or recklessness,” the Third Circuit Court of Appeals applied *Descamps* differently, finding that because the “statute ‘list[s] potential offense elements in the alternative,’ it is ‘divisible,’ and the modified categorical approach applies.” *U.S. v. Marrero*, 743 F.3d 389, 396 (citing *Descamps*, 133 S.Ct. at 2283).

that the record as presently constituted does not support a determination that the applicant was convicted of statutory offenses containing the element of an intentional or reckless state of mind coupled with harm sufficient to constitute crimes involving moral turpitude. Accordingly, we withdraw the finding that the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

### **B. Multiple Criminal Convictions**

Beyond the director's decision, we may dismiss an application or petition that fails to comply with the technical requirements of the law even if the Service Center does not identify all of the grounds for denial 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 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that we conduct appellate review on a *de novo* basis).

Section 212(a)(2)(B) of the Act states:

Multiple criminal convictions. -Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

As detailed above, the criminal record reflects that the applicant was convicted of multiple separate criminal counts under at least five separate statutory provisions on August 18, 1997. The applicant was sentenced to incarceration for a period of ten years for these offenses. Therefore, we find that the applicant is inadmissible under section 212(a)(2)(B) of the Act as an alien who has been convicted of two or more offenses for which the aggregate sentence was over five years of confinement.

### **C. Misrepresentation**

The director also found the applicant inadmissible to the United States for willfully misrepresenting a material fact by concealing his criminal record to a CBP officer to procure entry into the United States on December 1, 2009. Section 212(a)(6)(C)(i) of the Act provides, in pertinent part, that “[a]ny 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.”

The record shows that the applicant was interviewed by a CBP officer at the [REDACTED] Port of Entry on December 1, 2009. On the related Form I-877, Record of Sworn Statement in Administrative Proceeding, it indicates that applicant answered, “No,” when he was asked, “Do you have any criminal record in Cuba?” However, it also shows that six questions earlier the applicant was asked, “Have you ever been arrested or incarcerated by the Cuban government or police?” and the applicant answered, “Yes, I was the operator of a train that crashed.” The CBP officer apparently asked no follow-up questions. The record shows that the CBP officer granted the

applicant parole pending an immigration court hearing and indicated that the applicant claimed to have no criminal history.

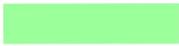
The principal elements of a misrepresentation under section 212(a)(6)(C)(i) of the Act are willfulness and materiality. The Board articulated the test for materiality in *Matter of S- and B-C-* as “(1) the alien is excludable on the true facts, or (2) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded.” 9 I&N Dec. 436, 447 (BIA 1960). The Supreme Court has held that a misrepresentation must be “predictably capable of affecting, that is, having a natural tendency to affect, the official decision in order to be considered material.” *Kungys v. U.S.*, 485 U.S. 759, 771-72 (1988). In this case, the CBP officer had a portion of the true facts concerning the applicant's criminal record from the applicant's initial answer but apparently chose not to follow the line of inquiry to discover further details or deem it relevant to the parole determination. Although the applicant later answered that he had no criminal record, in light of his initial truthful response, we cannot conclude that the subsequent misrepresentation kept the CPB officer from ascertaining the truth. We conclude that there is insufficient basis to find the misrepresentation material. Accordingly, we withdraw the prior finding of inadmissibility under section 212(a)(6)(C)(i) of the Act.

As noted above, the director indicated that the applicant attested to having no criminal record on his initial Form I-485 but revealed it at the time of his interview. This is supported by the form itself and handwritten notes added thereto, though the precise circumstances of the applicant's retraction of the misrepresentation in his Form I-485 are unclear. The applicant states in an affidavit that the retraction was voluntary. We take notice that the director did not find the applicant inadmissible for this misrepresentation. In addition, the director did not explicitly address the applicant's Form I-589, Application for Asylum and for Withholding of Removal, filed on July 20, 2010, in which the applicant also attested to having no criminal record. The record provides no indication that the asylum application was ever adjudicated, or that this misrepresentation has ever been considered by USCIS or addressed with the applicant. Accordingly, we find insufficient basis for inadmissibility under section 212(a)(6)(C)(i) of the Act, but we will remand the matter for further consideration by the director. As inadmissibility under section 212(a)(2)(B) of the Act is waivable under section 212(h), and section 212(a)(6)(C)(i) is waivable under section 212(i), the applicant's inadmissibility can be waived in any event. Therefore, we will remand the case for adjudication of the applicant's Form I-601.

## Conclusion

We withdraw the determination of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act on the basis that it is not supported by the record. We determine that the applicant is inadmissible under section 212(a)(2)(B) of the Act. We withdraw the finding of inadmissibility under section 212(a)(6)(C)(i) of the Act for the applicant's misrepresentation to a CBP officer on December 1, 2009. We note for further consideration misrepresentations on the applicant's Form I-485 and Form I-589, and in the light of the applicant's filing of the Form I-601, we conclude that the matter should be remanded to the director for adjudication of that application.

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*NON-PRECEDENT DECISION*

**ORDER:** The finding of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act is withdrawn. The applicant is found inadmissible under section 212(a)(2)(B) of the Act. The finding of inadmissibility under section 212(a)(6)(C)(i) is withdrawn, and the matter is remanded for further consideration and for adjudication of the Form I-601, Application for Waiver of Grounds of Inadmissibility.