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U.S. Citizenship and Immigration Services

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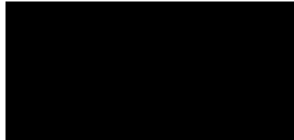
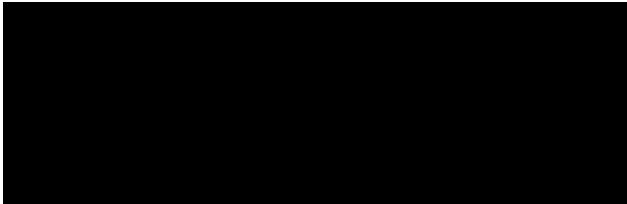


FILE: Office: MIAMI, FL Date: OCT 26 2005

IN RE:

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

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Miami, FL and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I) and the relevant waiver application is therefore moot.

The record reflects that the applicant is a native and citizen of Cuba who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act for having been convicted of crimes involving moral turpitude (resisting an officer without violence, trespassing on a construction site, grand theft in the third degree). The record indicates that the applicant has a U.S. citizen spouse, two U.S. citizen children and two lawful permanent resident parents. The applicant seeks a waiver of inadmissibility in order to reside with his family in the United States.

The district director found that based on the evidence in the record, the applicant failed to establish extreme hardship to a qualifying relative. The application was denied accordingly. *Decision of the District Director*, dated November 18, 2004.

On appeal, counsel asserts that the applicant is not inadmissible as he did not commit a crime involving moral turpitude. *Form I-290B*, dated December 17, 2004. Counsel asserts that if any of the applicant's crimes are considered to involve moral turpitude, the qualifying relatives would suffer great actual and prospective injury. *See id.*

The record includes, but is not limited to, a brief, relevant case law, photos, the applicant's son's medical records, evidence of the family business, support letters for the applicant and the applicant's record of conviction. The entire record was reviewed and considered in arriving at a decision on the appeal.

Section 212(a)(2)(A) of the Act states in pertinent part, that:

> (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.

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

> (h) The Attorney General [now, Secretary, Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . 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.

The applicant has been convicted of several crimes including resisting an officer without violence, trespassing on a construction site and grand theft in the third degree. Although it is unclear which crime(s) the district director specifically found to involve moral turpitude, it is implied from the decision that the district director determined that all of the applicant's convictions render him inadmissible under section 212(a)(2)(A) of the Act.

The Board of Immigration Appeals ("the Board") 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.

Neither the seriousness of the criminal 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). Before one can be convicted of a crime involving moral turpitude, the statute in question must involve moral turpitude. *Matter of Esfandiary*, 16 I&N Dec. 659 (BIA 1979). The Board has held that the courts and immigration authorities may look to the record of conviction if the statute under which an alien is convicted includes some offenses which involve moral turpitude and others which do not (i.e. a divisible statute), in order to determine the offense for which the alien was convicted. *See Matter of Short,* 20 I&N Dec. 136 (BIA 1989). The court in *Matter of Short* included the indictment, plea, verdict, and sentence in its definition of the record of conviction. *Matter of Short*, at 137-38.

The applicant entered a plea of nolo contendere to resisting an officer without violence in violation of Florida Statute § 843.02, which states in pertinent part:

> Whoever shall resist, obstruct, or oppose any officer...or other person legally authorized to execute process in the execution of legal process or in the lawful execution of any legal duty, **without offering or doing violence to the person** of the officer, shall be guilty of a misdemeanor of the first degree...

Counsel cites *Matter of Logan*, Int. Dec. #2791 (BIA 1980), which states that the crime of interfering with a law enforcement officer is analogous to assault and involves moral turpitude when the record of conviction includes the use of deadly physical force. The AAO finds that as the statute under which the applicant was convicted is not divisible and specifically involves resisting an officer without violence, the crime does not involve moral turpitude.

The applicant entered a plea of nolo contendere to trespass on a construction site in violation of Florida Statute § 810.09, which states in pertinent part:

> A person who, without being authorized, licensed, or invited, willfully enters upon or remains in any property other than a structure or conveyance:
>
> 1. As to which notice against entering or remaining is given either by actual communication to the offender or by posting, fencing, or cultivation...or
>
> 2. If the property is the unenclosed curtilage of a dwelling and the offender enters or remains with the intent to commit an offense thereon, other than the offense of trespass, commits the offense of trespass on property other than a structure or conveyance.

Counsel cites *Matter of Esfandiary*, in which the respondent was convicted of malicious trespass. *Matter of Esfandiary*, 16 I&N Dec. 659 (BIA 1979). The BIA determined the portion of the law which was violated from the record of conviction, and it included the charge of breaking into a dwelling with intent to commit a misdemeanor, to wit: petit larceny. *Id.* at 661. The BIA stated that petit larceny is a crime involving moral turpitude, therefore, the respondent's conviction for malicious trespass was a crime involving moral turpitude. *Id.* The AAO finds that the statute under which the applicant was convicted is divisible as section 2 as cited above could involve moral turpitude if the intended offense involved moral turpitude, however, the record of conviction indicates that the applicant was convicted under section 1 as cited above which does not involve moral turpitude.

The applicant entered a plea of nolo contendere to grand theft in violation of Florida Statute § 812.014, which states in pertinent part:

> (1) A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either **temporarily or permanently**:
>
> (a) Deprive the other person of a right to the property or a benefit from the property.
>
> (b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.

Counsel cites *Matter of Grazley*, in which the BIA held that theft is a crime involving moral turpitude only when a permanent taking is intended. *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973). In *Matter of Grazley*, the respondent was convicted under a Canadian theft statute which required the intent to deprive the owner, either temporarily or absolutely. *Id.* at 332. The BIA looked to the record of conviction to conclude that the respondent had intended a permanent taking, thus finding moral turpitude. *Id.* at 332-333. The applicant's information for grand theft states, in pertinent part:

> ...Raul Tapia...did knowingly, unlawfully and feloniously obtain or use, or did knowingly, unlawfully and feloniously endeavor to obtain or use lumber and/or plywood...with the intent to deprive said owner or custodian of a right to said property...

Therefore, the applicant's record of conviction does not specify whether he intended to temporarily or permanently deprive the owner of the property. Therefore, the AAO cannot make a finding of commission of a crime of moral turpitude.

The AAO can only base its decision on prior case law and the record of conviction as defined by the Board. Based on the record, the AAO finds that the applicant did not commit a crime involving moral turpitude and is not inadmissible under section 212(a)(2)(A) of the Act. The waiver filed pursuant to section 212(h) of the Act is therefore moot.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant is not required to file the waiver. Accordingly, the appeal will be dismissed as moot.

ORDER: The appeal is dismissed.