identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

U.S. Citizenship and Immigration Services

PUBLIC COPY

H2

[redacted]

FILE: [redacted] Office: MIAMI, FLORIDA Date: JUN 22 2009

IN RE: [redacted]

PETITION: 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 PETITIONER:

[redacted]

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.

Michael Shumway

John F. Grissom
Acting Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Cuba who was found to be inadmissible to the United States 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), for having been convicted of a crime involving moral turpitude. The applicant is the spouse of a U.S. citizen and seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), so that he may reside in the United States with his spouse.

The district director found that the applicant did not demonstrate that his removal from the United States would result in extreme hardship to his qualifying relatives. The District Director noted that the applicant will suffer no physical separation from his family because there are no removals to Cuba. *Decision of the District Director,* dated November 20, 2006.

On appeal, counsel states that the applicant's spouse and step-son would suffer extreme hardship as a result of the applicant's return to Cuba in the form of emotional, financial, and psychological hardship. He further states that the positive factors in the applicant's case greatly outweigh the negative factors. *Brief in Support of Appeal*, undated.

Section 212(a)(2)(A) of the Act 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 . . . 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:

> [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 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. Finally, in all such inquiries, the burden is on the alien to establish "clearly and beyond doubt" that he is "not inadmissible." *Id.* at 709 (citing *Kirong v. Mukasey*, 529 F.3d 800 (8th Cir. 2008))

The record reflects that on December 11, 1992 the applicant was convicted in the Circuit Court of Palm Beach County, Florida for Burglary of a Dwelling in the second degree in violation of section 810.02 of the Florida Statutes and third degree Resisting Arrest with Violence in violation of section 843.01 of the Florida Statutes. He was sentenced to eighteen months probation.

The record also states that the applicant was convicted of Willful and Wanton Reckless Driving on January 9, 1982 in violation of § 316.192 of the Florida Statutes and Sleeping in Public on August 10, 1981.

Florida Statutes § 810.02 provides, in pertinent parts:

> (1)(a) For offenses committed on or before July 1, 2001, "burglary" means entering or remaining in a dwelling, a structure, or a conveyance with the intent to commit an offense

therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain...

(3) Burglary is a felony of the second degree...if, in the course of committing the offense, the offender does not make an assault or battery and is not and does not become armed with a dangerous weapon or explosive, and the offender enters or remains in a:

(a) Dwelling, and there is another person in the dwelling at the time the offender enters or remains;

(b) Dwelling, and there is not another person in the dwelling at the time the offender enters or remains;

(c) Structure, and there is another person in the structure at the time the offender enters or remains;

(d) Conveyance, and there is another person in the conveyance at the time the offender enters or remains; or

(e) Authorized emergency vehicle...

The Board of Immigration Appeals (BIA) (and Attorney General) had previously ruled that burglary is a crime involving moral turpitude only if the crime the perpetrator intended to commit after breaking into a building involved moral turpitude. *See Matter of M-*, 2 I&N Dec. 721 (BIA, AG 1946).

However, the BIA recently expanded the circumstances for which the crime of burglary is to be found a crime involving moral turpitude. In short, entering or remaining in an occupied dwelling, without permission to do so, and with intent to commit any crime therein, is a crime involving moral turpitude. *See Matter of Louissaint*, 24 I&N Dec. 721 (BIA March 18, 2009). In *Matter of Louissaint*, the BIA distinguished *Matter of M-*, in which the BIA addressed a New York statute prohibiting burglary of a "building, or a room, or any part of a building." (citing 2 I&N Dec. at 723). Finding its rationale in *Matter of M-* unpersuasive in the context of burglary of an occupied residence, the BIA held that "moral turpitude is inherent in the act of burglary of an occupied building dwelling itself, and that the respondent's unlawful entry into the dwelling of another with the intent to commit any crime therein is a crime involving moral turpitude." 24 I&N Dec. at 759.

The BIA also cited the Attorney's General's recent decision in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), but did not find it necessary to review the record of conviction or other evidence of the respondent's conduct because "the offense, as defined by its statutory elements, is one in which moral turpitude necessarily inheres . . . ." 24 I&N Dec. at 759. Thus, "there is no 'reasonable probability' that § 810.02(3)(a), which involves the unlawful entry into an occupied dwelling, would be applied to conduct that does not involve moral turpitude. . . ." *Id.* The BIA noted that "the conscious and overt act of unlawfully entering or remaining in an occupied dwelling with the intent

to commit a crime is inherently 'reprehensible conduct' committed 'with some form of scienter' . . . [because] it tears away the resident's justifiable expectation of privacy and personal security and invites a defensive response from the resident." *Id.* at 758-59 (quoting *Matter of Silva-Trevino*, 24 I&N at 706 & n.5).

In the applicant's case, the record is clear that he was convicted of Burglary of a Dwelling in the second degree under § 810.02(3) of the Florida Statutes; however, the record of conviction is not clear as to which subsection of § 810.02(3) the applicant was convicted under and consequently whether the dwelling was occupied at the time of the applicant's offense. The AAO notes that the entire record was reviewed and found inconclusive as to whether the dwelling was occupied at the time of the applicant's offense.

Furthermore, following the decision reached in *Matter of M-*, 2 I&N Dec. 721 (BIA, AG 1946), where the BIA ruled that burglary is a crime involving moral turpitude only if the crime the perpetrator intended to commit after breaking into a building involved moral turpitude, the record is also inconclusive as to the crime the applicant intended to commit upon entering the dwelling. However, absent evidence that a prior case exists in which any section of Florida Statutes § 810.02(3) has been applied to conduct not involving moral turpitude, the AAO must determine that the applicant's burglary conviction is categorically a crime involving moral turpitude. The AAO turns to the applicant's conviction under Florida Statutes § 843.01.

Florida Statutes § 843.01 provides, in pertinent part, that "[w]hoever knowingly and willfully resists, obstructs, or opposes any officer . . . by offering or doing violence to the person of such officer . . . is guilty of a felony of the third degree . . . ."

Assault on a law enforcement officer has been found to be a crime involving moral turpitude where the perpetrator knows the victim to be a law enforcement officer performing his official duty and the assault results in bodily injury to the officer. *See Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988) (distinguishing cases in which knowledge of the police officer's status was not an element of the crime and where bodily injury or other aggravating factors were not present to elevate offense beyond "simple" assault); *see also Matter of O-*, 4 I&N Dec. 301 (BIA 1951) (German law involving an assault on a police officer was not a crime involving moral turpitude because knowledge that the person assaulted was a police officer engage in the performance of his duties was not an element of the crime); *Matter of B-*, 5 I&N Dec. 538 (BIA 1953) (as *modified by Matter of Danesh, supra.*) (assault on prison guard not a crime involving moral turpitude because offense charged appeared to be only "simple" assault and no bodily injured was alleged); *Ciambelli ex rel. Maranci v. Johnson*, 12 F.2d 465 (D. Mass 1926) (assault on an officer was not a crime involving moral turpitude in spite of fact that defendant was armed with a razor because the razor was not used in the assault).

The Florida Supreme Court has ruled that the phrase "knowingly and willfully resists, obstructs, or opposes any officer" in Florida Statutes § 843.01 imposes a requirement that a defendant have knowledge of the officer's status as a law enforcement officer. *See Polite v. State of Florida*, 973 So.2d 1107, 1112 (Fla. 2007).

However, the AAO notes that Florida Statutes § 843.01 is violated by either "offering" to do violence, or by "doing" violence, and there is no requirement that the victim suffer bodily injury. Thus, based solely on the statutory language, it appears that Florida Statutes § 843.01 encompasses (hypothetically) conduct that involves moral turpitude and conduct that does not.

However, in accordance with *Silva-Trevino*, the AAO must determine if an actual case exists in which these criminal statutes were applied to conduct that did not involve moral turpitude. The AAO is aware of a prior case in which Florida Statutes § 843.01 has been applied to conduct not involving moral turpitude. In *Wright v. State*, 681 So.2d 852, 853-54 (Fla. 5th Dist. App. 1996), the court found that the state was not required to prove that the appellant, who had denied under oath that he had hit, kicked or otherwise resisted the officers apprehending him, had actually struck either of the officers because evidence that he "struggled, kicked, and flailed his arms and legs was sufficient to show that he offered to do violence to the officers within the meaning of section 843.01." Similarly, in *Hendricks v. State*, 444 So.2d 542, 542-43 (Fla. 1st Dist. App. 1999), the court noted that the appellant had been charged and convicted of battery in the form of touching or striking a law enforcement officer, but not for intentionally causing bodily harm to an officer.

Therefore, the AAO cannot find that the offense described in Florida Statutes § 843.01 is categorically a crime involving moral turpitude. The AAO must therefore review the entire record, including the record of conviction and, if necessary, other relevant evidence, to determine if the applicant's conviction under this statute involved a crime of moral turpitude. The AAO notes that the entire record is inconclusive as to whether the applicant caused bodily injury to the officer who arrested him. The AAO is unable to determine whether the applicant's conviction under Florida Statutes § 843.01 is a crime involving moral turpitude. Therefore, the AAO turns to the applicant's conviction under Florida Statutes § 316.192.

Florida Statutes § 316.192 provides, in pertinent part, that "[a]ny person who drives any vehicle in willful or wanton disregard for the safety of persons or property is guilty of reckless driving."

Although evil intent signifies a crime involving moral turpitude, willfulness in the commission of the crime does not, by itself, suggest that it involves moral turpitude. *Goldeshtein v. INS.* 8. F.3d 645, 648 (9th Cir. 1993). Under the statute, evil intent must be explicit or implicit given the nature of the crime. *Gonzalez-Alvarado, v. INS,* 39 F.3d 245, 246 (9th Cir. 1994). The AAO notes that the statute under which the applicant was convicted is a divisible statute violated by either willfully or wantonly driving a vehicle with disregard for the safety of persons or property. The Florida courts have defined these terms in the context of the reckless driving statute. They have found that "willful" is defined as intentional, knowing, and purposeful and "wanton" is defined a having a conscious and intentional indifference to the consequences and with knowledge that damage is likely to be done to persons or property. *See D.E. v. State*, 904 So.2d 558, 561 (Fla. Dist. App. 5th 2005); *see also W.E.B. v. State*, 553 So.2d 323, 326 (Fla. Dist. App. 5th 1989). The AAO notes that based on these definitions, a wanton commission of a crime would indicate evil intent or malice and thus signifies a crime of moral turpitude, but willfully driving a vehicle with disregard for the safety of persons or property, by the language of the statute, may not be a crime involving moral turpitude.

The AAO notes that the applicant has not presented and the AAO is unaware of any prior case in which a conviction has been obtained under Florida Statutes § 316.912 for conduct not involving moral turpitude. Nevertheless, in accordance with the language of *Silva-Trevino*, the AAO will review the record as part of its categorical inquiry to determine if the statute was applied to conduct not involving moral turpitude in the applicant's own criminal case. The AAO notes that the documents comprising the record of conviction are inconclusive as to whether the applicant acted with willful or wanton intent. However, the record contains an arrest report dated September 1, 1982 that states:

> Evidence at the scene of the accident reveals that the defendant did run another vehicle off the roadway by force causing possible harm to the occupants in the other vehicle as well as the defendant did run two witnesses off the road at high speed.

Based on the evidence in the record, the AAO finds that the applicant's crime was for driving a vehicle in wanton disregard for the safety of persons or property. He was thus convicted of a crime involving moral turpitude, and is inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

Section 212(h) of the Act 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; or

The applicant's convictions were based on actions taken by the applicant in 1992, 1982 and 1981. The AAO notes that an application for admission or adjustment is a "continuing" application adjudicated based on the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). There has been no final decision made on the applicant's adjustment application, so the applicant, as of today, is still seeking admission by virtue of adjustment from his current status. Thus, it has now been more than 15 years since the actions that made the applicant inadmissible occurred. The AAO finds that the applicant is eligible for a waiver under section 212(h)(1)(A) of Act.

The AAO notes that the record reflects that the applicant has not been charged with any crimes since his conviction in 1992. The record also establishes that the applicant and his spouse have been married since 2001, together they own a home and care for the applicant's mother-in-law and the

applicant's spouse's son. The record includes a letter from the applicant's employer, The Ritz-Carlton Hotel, stating that he has been a fulltime employee there since March 20, 2006. *Letter from Employer*, dated September 28, 2006. The record also establishes that the applicant's spouse and stepson receive health insurance through the applicant's employment.

The AAO finds that the record establishes that the applicant has been rehabilitated and the record does not establish that the admission of the applicant to the United States would be "contrary to the national welfare, safety, or security of the United States." Thus, the record reflects that the applicant meets the requirements for waiver of his grounds of inadmissibility 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 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).

See Matter of Mendez-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). 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 applicant's criminal record. The favorable factors in the present case are the support the applicant provides to his spouse, step-son and mother-in-law, the applicant's record of employment, and the applicant's lack of a criminal record or offense since 1992.

The AAO finds that the applicant has established that the favorable factors in his application outweigh the unfavorable factors. In discretionary matters, the applicant bears the full burden of

proving his eligibility for discretionary relief. *See Matter of Ducret,* 15 I&N Dec. 620 (BIA 1976). Here, the applicant has now met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained and the application is approved.