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



**U.S. Citizenship
and Immigration
Services**

H2



FILE:



Office: KINGSTON, JAMAICA

Date: **AUG 03 2010**

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:

SELF-REPRESENTED

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 \$585. 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,

A handwritten signature in black ink that reads "Michael Shumway".

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer-in-Charge (OIC), Kingston, Jamaica and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant, a native and citizen of Jamaica, was admitted to the United States as a conditional resident on October 25, 1996 and became a legal permanent resident on November 19, 1998. As a result of numerous criminal convictions the applicant was placed in removal proceedings and granted voluntary departure by an immigration judge. He departed the United States on May 28, 2003. In applying for an immigrant visa based on an Alien Relative Petition filed by his spouse, the applicant was found to be inadmissible to the United States pursuant to 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 committed crimes involving moral turpitude. The applicant now seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his U.S. citizen spouse and mother.

In a decision dated July 13, 2007, the OIC found that the applicant failed to establish that his qualifying relatives were experiencing extreme difficulties that would rise to the level to remove the applicant's inadmissibility. The application was denied accordingly.

On appeal, the applicant asserts that his life has changed. He states that he has enrolled in college in Jamaica and that he works construction. He also states that he has been with his spouse since they were fifteen years old and that the pain of being separated is getting worse. The applicant submits additional documentation on appeal.

The record indicates that on March 12, 2001 the applicant was convicted in [REDACTED] of Theft under New Jersey Statutes Annotated (N.J.S.A.) § 2C:20-3a. On October 11, 2002 the applicant was convicted in [REDACTED] of Aggravated Assault under N.J.S.A. § 2C:12-1b(2), Possession of a Weapon for an Unlawful Purpose under N.J.S.A. § 2C:39-4d, and Unlawful Possession of a Weapon under N.J.S.A. § 2C:39-5d.

N.J.S.A. § 2C:20-3a states, "A person is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with purpose to deprive him thereof."

N.J.S.A. § 2C:20-1 states in pertinent part:

"Deprive" means: (1) to withhold or cause to be withheld property of another permanently or for so extended a period as to appropriate a substantial portion of its economic value, or with purpose to restore only upon payment of reward or other compensation; or (2) to dispose or cause disposal of the property so as to make it unlikely that the owner will recover it.

U.S. Courts have held that the crime of theft or larceny, whether grand or petty, involves moral turpitude. See *Matter of Scarpulla*, 15 I&N Dec. 139, 140 (BIA 1974) ("It is well settled that theft or larceny, whether grand or petty, has always been held to involve moral turpitude . . ."); see

also *Morasch v. INS*, 363 F.2d 30, 31 (9th Cir. 1966) (“Obviously, either petty or grand larceny, i.e., stealing another's property, qualifies [as a crime involving moral turpitude].”) However, the BIA has indicated that a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended. *Matter of Grazley*, 14 I&N Dec. 330, 333 (BIA 1973). The BIA has not clearly defined the meaning of “permanent” in this context. In the subsequently decided *Matter of Jurado-Delgado*, the BIA questioned the premise that “if [an] offense required only an intent to temporarily deprive the owner of the use or benefit of the property taken, the crime would not be one of moral turpitude.” 24 I&N Dec. 29, 33 (BIA 2006). The BIA did acknowledge that the intent to permanently deprive the owner of property was necessary to establish moral turpitude, but it also stated that it is “appropriate to consider the nature and circumstances surrounding a theft offense” to determine if a permanent taking was intended. *Id.* The BIA then held that the respondent’s conviction for retail theft, which required “proof that the person took merchandise offered for sale by a store without paying for it” was of such a nature that “it is reasonable to assume that the taking is with the intention of retaining the merchandise permanently.” *Id.* at 33-34.

We are persuaded that, as stated by the Second Circuit Court of Appeals, a temporary deprivation lacking larcenous intent occurs only where a defendant borrows property without permission with the intent to return the property in full after a short and discrete period of time. *See Ponnappula v. Spitzer*, 297 F.3d 172, 184 (2nd Circuit 2002). We do not believe that the BIA’s decisions stand for the principle that any taking of property, so long as the perpetrator has the intent to return the property at any time in the future, necessarily lacks the requisite mens rea to constitute a crime involving moral turpitude. To possess and use one’s property is essential to the right of private ownership, and being deprived of one’s property for an extended period of time generally entails significant, if not total, interference with this right.

We find that the deprivation prohibited under N.J.S.A. § 2C:20-3a and N.J.S.A. § 2C:20-1 does not entail mere borrowing of property with the intent to return it, but rather manifests the evil intent characteristic of permanent takings that have been found to involve moral turpitude. Thus, the AAO finds that the applicant’s conviction for theft required the intent to permanently take another person’s property and is thus a conviction for a crime involving moral turpitude.

In addition, the applicant’s conviction for aggravated assault under N.J.S.A. § 2C:12-1b(2) is a crime involving moral turpitude. N.J.S.A. § 2C:12-1b(2) states in pertinent part, “A person is guilty of aggravated assault if he...(2) Attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon...”

In *Matter of O-*, 3 I&N Dec. 193 (BIA 1948) and *Matter of Montenegro*, 20 I&N Dec. 603 (BIA 1992), the Board of Immigration Appeals (BIA) held that assault with a weapon is a crime involving moral turpitude. It is noted that as a general rule, simple assault or battery is not deemed to involve moral turpitude for purposes of the immigration laws. *Matter of Fualaau*, 21 I&N Dec. 475, 477 (BIA 1996). However, this general rule does not apply where an assault or battery necessarily involved some aggravating dimension, such as the use of a deadly weapon.... *See, e.g., Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988).

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.

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

...No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than seven years immediately preceding the date of initiation of proceedings to remove the alien from the United States. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.

Section 101(a)(43) of the Act states in pertinent part:

The term "aggravated felony" means-

...

(F) a crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment is at least 1 year;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at least 1 year;

18 U.S.C. § 16 states:

The term "crime of violence" means--

- (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

The AAO notes that the applicant's convictions for theft and aggravated assault are third degree offenses in New Jersey which allow for a sentencing of up to five years imprisonment. Thus, the AAO finds that the applicant's conviction for theft is an aggravated felony under Section 101(a)(43)(G) of the Act and the applicant's conviction for aggravated assault is an aggravated

felony under Section 101(a)(43)(F) of the Act, making the applicant ineligible for a waiver under section 212(h) of the Act.

In addition to being ineligible for a waiver under section 212(h) of the Act as an alien lawfully admitted for permanent residence who since the date of his admission has been convicted of an aggravated felony, the applicant is also ineligible for a waiver under section 212(h) of the Act as an alien lawfully admitted for permanent residence who has not lawfully resided continuously in the United States for a period of 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States. The applicant was admitted to the United States as a conditional resident on October 25, 1996, and on May 16, 2003 the applicant was placed in removal proceedings. Thus, the period of time between when the applicant was admitted and when removal proceedings were initiated against him was six years and seven months, or less than seven years.

The AAO notes further that the applicant's record indicates that he is also inadmissible under section 212(a)(6)(C)(ii) of the Act. United States Citizenship and Immigration Services (USCIS) records indicate that the applicant falsely claimed to be a U.S. citizen on an I-9 Form submitted for employment purposes. An applicant who marks the "citizen or national of the United States" box on a Form I-9 for the purpose of falsely representing himself as a citizen to secure employment with a private employer has falsely represented himself for a benefit or purpose under the Act. *Rodriguez v. Mukasey*, 519 F.3d 773 (8th Cir. 2008).

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

(i) 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.

(ii) Falsely claiming citizenship. –

(I) In General –

Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this Act . . . is inadmissible.

....

(iii) Waiver authorized. – For provision authorizing waiver of clause (i), see subsection (i).

Section 212(i) of the Act provides:

- (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

The AAO notes that aliens making false claims to U.S. citizenship on or after September 30, 1996 (the applicant did not enter the United States until October 25, 1996) are ineligible to apply for a Form I-601 waiver. *See* Sections 212(a)(6)(C)(ii) and (iii) of the Act.

In considering a case where a false claim to U.S. citizenship has been made, Service [CIS] officers should review the information on the alien to determine whether the false claim to U.S. citizenship was made before, on, or after September 30, 1996. If the false claim was made before the enactment of IIRIRA, Service [CIS] officers should then determine whether (1) the false claim was made to procure an immigration benefit under the Act; and (2) whether such claim was made before a U.S. Government official. If these two additional requirements are met, the alien should be inadmissible under section 212(a)(6)(C)(i) of the Act and advised of the waiver requirements under section 212(i) of the Act.

Memorandum by Joseph R. Greene, Acting Associate Commissioner, Office of Programs, Immigration and Naturalization Service, dated April 8, 1998 at 3.

Thus, the OIC erred in finding the applicant eligible for a waiver pursuant to section 212(h) of the Act. The applicant is ineligible for a waiver of inadmissibility.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i) and 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 has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.