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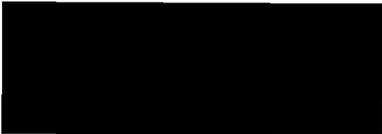
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



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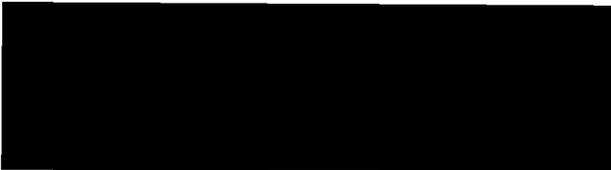
Date: **NOV 09 2010**

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:



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. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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 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 seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h). The director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On appeal, counsel contends that the applicant's fundamental due process rights were violated on the grounds that there was only a superficial review of the waiver application and submitted evidence, and that the applicant was never interviewed. Counsel maintains that the applicant has a right to a hearing, to confrontation, and to basic due process. Counsel argues that an improper standard was applied in the evaluation of the waiver application. He asserts that the applicant is a citizen and national of Cuba and that the United States recognizes Cuba as a violator of human rights, and has enacted the Cuban Adjustment Act so as to assist victims of the Cuban regime. Counsel avers that the United States currently bans travel to Cuba. Counsel maintains that the foregoing issues were ignored in the adjudication of the waiver application. According to counsel, the country conditions in Cuba and the hardship to the applicant's U.S. citizen family members warrant approval of the waiver application.

We will first address the finding of inadmissibility. 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.

The Board of Immigration Appeals (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....

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. 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.

The record reflects the following offenses in Florida.

<u>Arrest date</u>	<u>Crime/Sentence</u>
• 01/01/1979	Florida Statutes § 784.021 (aggravated assault) Dismissed for lack of prosecution

- 11/15/1980 Florida Statutes § 810.02 (attempt burglary)  
Dismissed
- 03/19/1982 Florida Statutes § 322.34 (driving while license suspended)  
Florida Statutes § 316.192 (reckless driving)  
Found guilty. Sentencing information is no longer available.
- 05/17/1984 Florida Statutes § 810.08 (trespass)  
Unknown disposition.
- 03/08/1985 Florida Statutes § 322.34 (driving while license suspended)  
Florida Statutes § 322.32 (unlawful use of driver's license)  
Found guilty. Sentencing information is no longer available.
- 05/16/1985 Florida Statutes § 316.193 (driving under the influence)  
1 year probation
- 02/12/1989 Florida Statutes § 877.03 (disorderly conduct)  
Florida Statutes § 874.03 (simple battery)  
Unknown disposition.
- 03/08/1989 Florida Statutes § 810.08 (trespass)  
Unknown disposition.
- 06/17/1989 Florida Statutes § 810.08 (trespass)  
Unknown disposition.
- 05/26/1990 Florida Statutes § 322.34 (driving while license suspended)  
Found guilty. Sentencing information is no longer available.
- 08/16/1990 Florida Statutes § 810.02 (burglary, occupied)  
Sentence: 1 year and 1 day (concurrent)  
Florida Statutes § 284.045 (aggravated battery)  
Sentence: 1 year and 1 day (concurrent)  
Florida Statutes § 790.19 (throwing a deadly missile into an occupied dwelling)  
Sentence: 1 year and 1 day (concurrent)  
Florida Statutes § 806.13 (criminal mischief)  
Sentence: 1 year and 1 day (concurrent)

The applicant's most recent criminal convictions are for burglary, aggravated battery, throwing a deadly missile, and criminal mischief. His burglary conviction is under Florida Statutes § 810.02, which reads 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...

We are unaware of any published federal cases addressing whether the crime of burglary under Florida law is a crime of moral turpitude. Nonetheless, in *Matter of Louissaint*, 24 I&N Dec. 754, 759 (BIA 2009), the Board held that "moral turpitude is inherent in the act of burglary of an occupied dwelling itself and the respondent's unlawful entry into the dwelling of another with the intent to commit *any crime* therein is a crime involving moral turpitude." In the applicant's case, the record is clear in that his burglary offense of "burglary occupied" involved a dwelling. In accordance with *Louissaint* his offense involves moral turpitude, which renders the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The applicant was convicted of aggravated battery under Florida Statutes § 284.045. That statute provides:

(1)(a) A person commits aggravated battery who, in committing battery:

1. Intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement; or
2. Uses a deadly weapon.

(2) Whoever commits aggravated battery shall be guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Fla. Stat. § 784.045 provides:

(1) Unless otherwise provided by law, whenever a person is charged with a felony, except a felony in which the use of a weapon or firearm is an essential element, and during the commission of such felony the defendant carries, displays, uses, threatens to use, or attempts to use any weapon or firearm, or during the commission of such felony the defendant commits an aggravated battery, the felony for which the person is charged shall be reclassified as follows:

- (a) In the case of a felony of the first degree, to a life felony.
- (b) In the case of a felony of the second degree, to a felony of the first degree.
- (c) In the case of a felony of the third degree, to a felony of the second degree.

The Eleventh Circuit Court of Appeals, the jurisdiction wherein the instant case has arisen, has held that aggravated battery, which includes the use of a deadly weapon or results in serious bodily injury, is a crime involving moral turpitude. *See Sosa-Martinez v. U.S. Atty. Gen.*, 420 F.3d 1338, 1342 (11<sup>th</sup> Cir. 2005). In consequence of the holding in *Sosa-Martinez*, we find the applicant's aggravated battery conviction renders him inadmissible under section 212(a)(2) of the Act.

The applicant was convicted of throwing a deadly missile into an occupied dwelling in violation of Florida Statutes § 790.19. Since the burglary and aggravated battery convictions render the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act, we need not determine whether any of his other convictions involve moral turpitude.

The waiver for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act is found under section 212(h) of the Act. That section 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 -

...

(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 . . .

A section 212(h) waiver of the bar to admission resulting from violation of section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant is not a consideration under the statute and will be considered only to the extent that it results in hardship to a qualifying relative. The qualifying relatives here are the applicant's U.S. citizen spouse and sons. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996).

We consider the applicant's convictions for burglary (occupied dwelling) and aggravated battery violent or dangerous crimes under 8 C.F.R. § 212.7(d). Accordingly, the applicant must, at a minimum, show that "extraordinary circumstances" warrant approval of the waiver. 8 C.F.R. § 212.7(d). Extraordinary circumstances may exist in cases involving national security or foreign policy considerations, or if the denial of the applicant's admission would result in exceptional and extremely unusual hardship. Finding no evidence of foreign policy, national security, or other extraordinary equities, the AAO will consider whether the applicant has "clearly demonstrate[d] that the denial of . . . admission as an immigrant would result in exceptional and extremely unusual hardship" to a qualifying relative.

In the instant case, the applicant must demonstrate that denial of admission would result in exceptional and extremely unusual hardship to a qualifying relative, who in the instant case are the applicant's U.S. citizen spouse and sons. The evidence in the record includes letters, a mortgage statement, income tax records, and other documentation. [REDACTED] conveys in his letter dated January 18, 2008, that he is a psychologist and founder of a private school in Naples that specializes in teaching children with learning exceptionalities. He indicates that he knows the applicant's wife and his son [REDACTED] through his private practice and school. He states that it has taken years of special instruction for the applicant's son to progress in school, and that "removal of his father at this stage of his maturation would have negative effects far into adulthood for Jeremy." [REDACTED] asserts that "I am acutely aware of the depth of involvement that both [REDACTED] and [the applicant] have in Jeremy's life." We note that the record indicates that the applicant's son, who was born on March 21, 1994, is now 16 years old. [REDACTED] school, Journeys Academy, specializes in educating children with autism spectrum disorders, attention deficit hyperactivity disorder, dyslexia, and learning disabilities. [REDACTED] states in his letter dated January 24, 2008, that the applicant has been employed with his company since April 23, 2007. Income tax records indicate that the applicant owns a carpenter business and has been the primary financial supporter of the family. The mortgage interest statement shows that the applicant owns their home. The waiver application states that the applicant is the principal provider for his wife and son and that his removal would financially devastate them.

In view of the aforementioned assertions, which have been substantiated by the evidence in the record, the AAO finds that the applicant's wife and son would endure "exceptional and extremely unusual hardship" if they remained in the United States without the applicant. However, we do not find that he meets the "exceptional and extremely unusual hardship" standard with regards to their

relocation to Cuba or that he merits a favorable exercise of discretion in light of his extensive criminal record.

In regard to joining the applicant to live in Cuba, counsel contends that the United States recognizes Cuba as a violator of human rights, and for that reason enacted the Cuban Adjustment Act so as to assist victims of the Cuban regime. We find, however, that the applicant has not furnished any documentation to demonstrate that the applicant's wife and sons will experience "exceptional and extremely unusual hardship" in Cuba by reason of its economic, political, or social conditions. Though [REDACTED] conveys that the applicant's wife has diabetes, there is no documentation of her health condition in the record, and moreover, the applicant has not demonstrated that her physical health will be in jeopardy in Cuba. Even though counsel maintains that the United States currently bans travel to Cuba, no documentation has been provided to establish that the applicant and his wife and sons will be prohibited from living in Cuba. The burden of proof in this proceeding lies with the applicant, and "while an analysis of a given application includes a review of all claims put forth in light of the facts and circumstances of a case, such analysis does not extend to discovery of undisclosed negative impacts." *Matter of Ngai*, 19 I&N Dec. 245, 247 (Comm'r 1984). Lastly, counsel has cited no legal authority in support of his claim that U.S. Citizenship and Immigration Services is legally required to conduct an interview of every I-601 applicant.

Accordingly, in light of the applicant's criminal record, we find that he has failed to demonstrate that he merits a favorable exercise of discretion under 8 C.F.R. § 212.7(d). The appeal will be dismissed.

**ORDER:** The appeal is dismissed.