identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

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

H2

FILE: [redacted] Office: VIENNA Date: NOV 1 6 2010

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to 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.

Thank you,

Ayumi Sikka
for

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer-in-Charge, Vienna, Austria, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the application will be approved.

The applicant is a native and citizen of Hungary 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), in order to reside in the United States with his U.S. citizen mother.

The officer-in-charge concluded that the applicant 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, the applicant's mother asserts that she will experience extreme hardship if the applicant is prohibited from residing in the United States. *Statement from the Applicant's Mother*, dated May 20, 2008.

In support of the application, the record contains, but is not limited to, statements from the applicant's mother; a certification that the applicant does not have a criminal record in Budapest, Hungary; medical and financial documentation for the applicant's mother; a copy of the applicant's passport; a copy of the applicant's mother's naturalization certificate, and; documentation in connection with the applicant's criminal convictions. The applicant further provided a document in a foreign language. Because the applicant failed to submit a translation of the document, the AAO cannot determine whether the evidence supports the waiver application. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding. With the exception of the untranslated document, the entire record was reviewed and considered in rendering this decision.

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 (other than a purely political offense) 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 *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 shows that the applicant was convicted in Hungary of one count of receiving stolen goods involving a considerable value under sections 326(1) and (4)(a) of the Criminal Code of the Republic of Hungary, and one count of receiving stolen goods under sections 326(1) and (3) of the Criminal Code of the Republic of Hungary, for his conduct that occurred in 1994. The applicant was sentenced to three months of imprisonment as a cumulative punishment for the two offenses. In a subsequent proceeding on June 12, 2003, the applicant's acts that led to the convictions were reclassified as one count of continuing receiving stolen goods involving a significant value pursuant to section 12(2) of the Criminal Code of the Republic of Hungary.

Section 326 of the Criminal Code of the Republic of Hungary provides:

Receiving of Stolen Goods

(1) The person who - for pecuniary profit-making - obtains, conceals or co-operates in the alienation of, a thing originating from theft, embezzlement, fraud, fraudulent breach of trust, robbery, robbery through inebriation or intimidation, blackmailing, unlawful appropriation or receiving of stolen goods, commits receiving of stolen goods.

. . .

(3) The punishment shall be for a felony imprisonment of up to three years, if receiving of stolen goods is committed in respect of a greater value or for an object considered a cultural good.

(4) The punishment shall be imprisonment from one year to five years, if receiving of stolen goods is committed

a) in respect of a considerable value,

b) in respect of a greater value in a business-like manner . . . .

Section 12 of the Criminal Code of the Republic of Hungary provides:

Cumulation

(1) Cumulation of crimes is, if one or more act of the perpetrator realizes more than one act of crime and they are adjudged in the same proceedings.

(2) It is not a cumulation of crimes, but a crime perpetrated continuously, if the perpetrator commits the same crime with unified decision, to the detriment of the same injured party in short intervals on several occasions.

Upon review of sections 326(1), (3), and (4)(a) of the Criminal Code of the Republic of Hungary, the AAO observes that the sections do not explicitly state a requirement that the defendant had knowledge that the property in question originated from illicit means, only that he obtained it for pecuniary profit-making and that it did in fact derive from one of the proscribed acts. However, the Board of Immigration Appeals has noted that "the predominant modern view is that the term 'receiving stolen property' is now used in a generic sense to encompass a number of closely related offenses, including the knowing possession, retention, withholding, or concealing of property with knowledge that it has been stolen." *In Re Bahta*, 22 I&N Dec. 1381, 1390 (BIA 2000). Further, the sections clearly criminalize receiving stolen property in instances where an individual has knowledge that it originated from illicit activity. Yet, as these sections of law are part of a foreign legal tradition and not directly subject to common notions in U.S. law, they will be analyzed in light of the decision in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008) to determine if there is a realistic probability that they would be applied to reach conduct that does not involve moral turpitude.

The AAO is not aware of any cases in which sections 326(1), (3), or (4)(a) of the Criminal Code of the Republic of Hungary were applied to reach conduct that does not involve moral turpitude.

These sections were applied to conduct that involved moral turpitude in the applicant's case. The record shows that the applicant brokered the sale of a stolen vehicle in May 1994, and that he was aware that the vehicle was stolen. *Record of Conviction, Decree No. B.180/2002/2.* In the summer of 1994, he received a second stolen car in order to assist in its sale, and he was aware that it was stolen. *Id.* 5-8. The BIA has found that receipt of stolen goods, where an individual is aware that the goods are stolen, constitutes a crime involving moral turpitude. *Matter of Serna*, 20 I&N Dec. 579, n.10 (BIA 1992).

As sections 326(1), (3), or (4)(a) of the Criminal Code of the Republic of Hungary have not been applied to conduct not involving moral turpitude, the AAO concludes that all convictions under the sections may categorically be treated as ones involving moral turpitude.

On July 16, 1999, the applicant was convicted in Hungary of one count of counterfeiting an individual identification mark under section 277/A(1) of the Criminal Code of the Republic of Hungary.

Section 277/A of the Criminal Code of the Republic of Hungary provides:

> Counterfeiting of Individual Identification Marks
>
> (1) Any person who
>
> *a)* removes, or counterfeits in some other way, an individual identification mark,
>
> *b)* acquires or uses an article whose individual identification mark is counterfeit or forged, or whose individual identification mark has been removed, commits a felony offense and shall be punishable with imprisonment of up to three years.

Upon review of section 277/A(1) of the Criminal Code of the Republic of Hungary, the AAO observes that the section does not require that an identification mark was altered for a particular purpose such as fraud, deceit, or unlawful profit-making. It is noted that the Criminal Code of the Republic of Hungary contains other sections that address theft, interaction with stolen property, and fraud. *See, e.g.,* sections 318 and 326 of the Criminal Code of the Republic of Hungary. The record supports that section 277/A(1) has been applied to conduct that does not involve moral turpitude, as the applicant's conviction serves as such an example.

The record of the applicant's conviction shows that he purchased an engine block for his personal use that did not contain an engine number, and he used a tool to add a number to the item. *Record of Conviction, Decree No. 17. B.2591/1999/2.* The court found that the applicant "was not aware that the original number of the [engine block] had been filed [off]." *Id.* at 4. The record does not indicate that the applicant added a number to the block for an evil purpose, such as to conceal a criminal act or defraud a buyer. The court did not make a finding that the engine block had been stolen. It is noted that the applicant was fined the equivalent of approximately $50, which is a

nominal penalty in light of the possible sentence of three years of imprisonment under section 277/A of the Criminal Code of the Republic of Hungary.

Based on the foregoing, the AAO finds that the applicant's conviction under section 277/A of the Criminal Code of the Republic of Hungary was not for a crime involving moral turpitude.

However, as the applicant was convicted of a crime involving moral turpitude under sections 326(1), (3), and (4)(a) of the Criminal Code of the Republic of Hungary, he is inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

A discretionary waiver of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act is available under section 212(h) of the Act if:

> (1)(A) in the case of any immigrant it is established to the satisfaction of the Attorney General 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
>
> (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 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 record supports a determination that the applicant has met the requirements for a waiver under section 212(h)(1)(A) of the Act. The applicant's offenses were committed in 1994, more than 15 years ago, as required under section 212(h)(1)(A)(i) of the Act. The record contains no evidence that the applicant's admission to the United States would be contrary to U.S. national welfare, safety, or security, as required by section 212(h)(1)(A)(ii) of the Act.

The record contains sufficient support for a finding of rehabilitation, as contemplated by section 212(h)(1)(A)(iii) of the Act. While the applicant was convicted of counterfeiting an individual identification mark under section 277/A(1) of the Criminal Code of the Republic of Hungary in 1999, the record of his conviction supports that his offense was deemed minor and that he did not commit the act with a malicious intent. The offense occurred approximately 11 years ago. The applicant submits an Official Certificate of Clean Criminal Record issued by the Central Office of Public Administration and Electronic Public Services in Budapest, Hungary that supports that he ceased engaging in criminal activity. The applicant's mother provides that the applicant operates businesses in Hungary, which supports that he has a propensity to engage in work to support himself.

Statement from the Applicant's Mother, dated May 20, 2008. The applicant's mother further attests that the applicant has experienced a positive change in his behavior. *Id.* at 2.

The AAO also finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the applicant bears the burden of proving that positive factors are not outweighed by adverse factors. *See Matter of Coelho,* 20 I&N Dec. 464, 467 (BIA 1992). The adverse factors in this case are the criminal offenses for which the applicant seeks a waiver. The favorable and mitigating factors in this case include: the applicant's significant ties to his U.S. citizen mother in the United States; the evidence of hardship to the applicant's mother if he is prohibited from residing in the United States, and; the factors supporting the finding of rehabilitation.

The AAO cannot condone the prior criminal acts committed by the applicant. However, the favorable factors in the present case outweigh the adverse factors.

In proceedings regarding an application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant also bears the burden of persuasion. *See Matter of Mendez-Moralez*, 21 I&N Dec. at 301 (applicant must show that he merits a favorable exercise of discretion). In this case, the applicant has met his burden to show that he is eligible for a waiver and that he merits approval of his application.

ORDER: The appeal is sustained.