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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



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: NEW DEHLI, INDIA Date: **NOV 26 2010**

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:

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 must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

f/ Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting Field Office Director, New Dehli, India and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of [REDACTED] 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 crimes involving moral turpitude. The record shows that the applicant was lawfully admitted for permanent residence on June 22, 1982 and became a naturalized U.S. citizen on February 13, 1989. On July 25, 1989, the applicant was convicted of two crimes involving moral turpitude. On September 13, 1989, the applicant's U.S. citizenship was rescinded by an immigration judge after it was found that he misrepresented his criminal record on his naturalization application. On January 6, 1993, the applicant was convicted of wire fraud. On May 4, 1995 the applicant was removed from the United States. The applicant has a U.S. citizen spouse and daughter 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 family.

In a decision dated April 7, 2008, the acting field office director found the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of three crimes involving moral turpitude. The acting field office director then found that the applicant's conviction for wire fraud in January 1993 was an aggravated felony. The field office director found that the applicant was statutorily ineligible for a section 212(h) waiver because he was an applicant who was previously admitted to the United States as a permanent resident who had been convicted of an aggravated felony. The Application for Waiver of Grounds of Inadmissibility (Form I-601) was denied accordingly.

In a Notice of Appeal to the AAO (Form I-290B), dated April 24, 2008, counsel states that the applicant has a U.S. citizen wife and daughter, who both reside in Texas. Counsel states that the applicant and his spouse have been married for thirty-six years, that the applicant is suffering in [REDACTED] due to his age and the economic situation, and that the applicant's spouse is suffering financially. Counsel also asserts that the applicant is eligible for a waiver under section 212(c) of the Act because his crime was committed before April 24, 1996, the date the Anti-Terrorism and Effective Death Penalty Act was enacted. In support of this assertion he cites to *INS v. St. Cyr*, 533 U.S. 289, 121 S. Ct. 2271 (2001).

The AAO notes that the ground of inadmissibility at issue in the applicant's case is the applicant's inadmissibility under section 212(a)(2)(A) of the Act and the waiver available under section 212(h) of the Act. Section 212(c) of the Act is not relevant to the current application and thus the reasoning set forth in *St. Cyr* regarding section 212(c) of the Act is not applicable to the applicant's section 212(h) waiver case. Furthermore, in 1996 the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) amended the Act, expanding the definition of an aggravated felony so that all convictions regardless of when they occurred would be applied to the amended law. In the absence of explicit statutory direction, an applicant's eligibility is determined under the statute in effect at the time his or her application is finally considered. See *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999). In addition, if an amendment makes the statute more restrictive after the application is filed, the eligibility is determined under the terms of the amendment. Conversely, if the amendment makes the

statute more generous, the application must be considered by more generous terms. *Matter of George and Lopez-Alvarez*, 11 I&N Dec. 419 (BIA 1965); *Matter of Leveque*, 12 I&N Dec. 633 (BIA 1968).

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.

(ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if—

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

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.

The record indicates that on July 25, 1989 the applicant was convicted of two counts of theft of property of \$20,000 or more, a second degree felony in violation of section 31.03 of the Texas Penal Code. The applicant was sentenced to ten years in prison for each offense to be served concurrently, but this sentence was suspended and he was made to serve ten years probation concurrently. On January 8, 1993, in the U.S. District Court, Northern District of Texas, the applicant was convicted of wire fraud, a class D felony in violation of 18 U.S.C. § 1343. The applicant was sentenced to 27 months in prison with three years probation and restitution to be paid in the amount of \$144,492.

Title 18, United States Code § 1343 states:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

The AAO notes that the record includes the indictment from the U.S. District Court in the applicant's case, dated December 19, 1991. This indictment indicates that the applicant was convicted of knowingly causing the transfer \$325,000 by wire from the offices of Pittsburgh National Bank in Dallas, Texas to Barclay's Bank in London, England.

The AAO also notes that the courts have found that any crime involving fraud is a crime involving moral turpitude. *Burr v. INS*, 350 F.2d 87, 91 (9th Cir. 1965), *cert denied*, 383 U.S. 915 (1966). Thus, the AAO finds that the applicant is inadmissible for having committed a crime involving moral turpitude.¹

Furthermore, the AAO finds that not only has the applicant been convicted of a crime involving moral turpitude, but his conviction also constitutes an aggravated felony.

Section 101(a)(43)(M)(i) of the Act defines an aggravated felony as an offense that, "involves fraud or deceit in which the loss to the victim exceeds \$10,000." In the applicant's case the loss to the victim was \$325,000.

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

(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;

...

¹ The AAO notes that as the applicant's conviction under 18 U.S.C. § 1343 has been found to involve moral turpitude and does not qualify for an exception, no purpose would be served in discussing if his other convictions involved crimes of moral turpitude.

(2) the Attorney General, in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

...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 7 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.

The AAO finds that the record establishes that the applicant is inadmissible for having been convicted of a crime involving moral turpitude and that he requires a waiver to be admitted to the United States. The record also establishes that the applicant was previously admitted to the United States for permanent residence and that he had since been convicted of an aggravated felony. As stated above in section 212(h) of the Act, no waiver of inadmissibility is available to an applicant lawfully admitted for permanent residence who since the date of such admission has been convicted of an aggravated felony. Therefore, the applicant is inadmissible under 212(a)(2)(A) of the Act and is not eligible for a waiver under section 212(h) of the Act.

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 has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.