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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: VERMONT SERVICE CENTER Date: SEP 21 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, 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,

Michael Shumway

Perry Rhew
Chief, Administrative Appeals Office

**ACTION COMPLETED
APPROVED FOR FILING**
Initials: JT Date: 6/22/11
FCO/Unit COW

DISCUSSION: The waiver application was denied by the Director, Vermont 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 Canada 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 applicant 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.

In a decision dated April 23, 2008, the Director found the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of three counts of breaking and entering and one count of assault causing bodily harm. The director found that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative as a result of his inadmissibility and that he did not warrant a favorable exercise of discretion. The Application for Waiver of Grounds of Inadmissibility (Form I-601) was denied accordingly. In addition, the director finds that the applicant resided in the United States unlawfully from 2002 to 2005, but does not make a finding of unlawful presence.

In a Notice of Appeal to the AAO (Form I-290B), counsel states that the director failed to consider the applicant for a waiver under section 212(h)(1)(B) of the Act given that the applicant's criminal convictions occurred more than fifteen years ago.

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).

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 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.

U.S. Citizenship and Immigration Services records indicate that the applicant was convicted of three counts of breaking and entering in 1983 and one count of assault in 1990. The AAO notes that the director’s decision states that the applicant’s conviction for assault involved bodily harm, but the record is not clear as to whether the applicant was convicted of simple assault or aggravated assault. Furthermore, the record does not include any court dispositions regarding the applicant’s convictions. The AAO does note that the record includes documentation showing that the applicant received a pardon for his convictions. However, for purposes of U.S. immigration laws, a foreign pardon, in itself, does not wipe out an applicant’s foreign conviction or relieve him from inadmissibility. *Marino v. INS*, 537 F.2d 686, 691 (2nd Cir. 1976) (citations omitted); *see also*, *Mercer v. Lence*, 96 F.2d 122 (10th Cir. 1938); *United States ex rel. Palermo v. Smith*, 17 F.2d 534 (2nd Cir. 1927).

The AAO agrees with counsel that in so far as the applicant’s convictions are for crimes involving moral turpitude, he is eligible for a waiver under 212(h)(1)(B) of the Act. However, because the record does not include court dispositions of the applicant’s convictions, the AAO will not make a finding at this time as to the applicant’s convictions involving crimes of moral turpitude. The AAO does note that a conviction for assault causing bodily injury may be determined to be a violent or dangerous crime requiring that the applicant meet the heightened discretionary standard of exceptional and extremely unusual hardship under 8 C.F.R. § 212.7(d).

The AAO finds that the applicant is inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8

U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking readmission within ten years of his last departure from the United States.

The applicant states that he entered the United States in January 2002 as a visitor. The applicant remained in the United States until April 2005. Therefore, the applicant accrued unlawful presence from the time his authorized stay as a visitor expired in 2002 until April 2005. In applying for an immigrant visa, the applicant is seeking admission within ten years of his April 2005 departure from the United States. Therefore, the applicant is inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

(B) Aliens Unlawfully Present.-

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

....

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

....

(v) Waiver. - The Attorney General [now the Secretary of Homeland Security (Secretary)] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or 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 such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

Before the AAO can determine whether extreme hardship would be imposed on a qualifying relative, it must first determine whether a qualifying relationship exists and as a consequence if the applicant is eligible to apply for a section 212(a)(9)(B)(v) waiver of inadmissibility. The AAO notes that on April 25, 2008, two days after his waiver application was denied by the Vermont Service Center, the applicant attempted to enter the United States at the port of entry in Buffalo, New York. *See Record of Deportable/Inadmissible Alien (Form I-275)*. Upon being questioned at the port of entry, the applicant stated that he was planning to visit friends for one week in Missouri and that he was no longer married to a U.S. citizen. The AAO notes that the only qualifying relative listed on the applicant's waiver application is a U.S. citizen spouse. Thus, the current record indicates that the

applicant has asserted that he not the spouse and/or child of a U.S citizen or lawful permanent resident. Therefore, the applicant is statutorily ineligible to apply for a waiver of inadmissibility because he lacks a qualifying relationship with a U.S. citizen or lawful permanent resident.

If the applicant was in fact still married to a U.S. citizen at the time of his attempted entry in April 2008, then he may be subject to section 212(a)(6)(C)(i) of the Act for having attempted to procure admission into the United States by willful misrepresentation. But given the applicant's assertions, we find that he lacks a qualifying relationship with a U.S. citizen or lawful permanent resident at this time.

A review of the documentation in the record fails to establish the existence of a qualifying relationship with a U.S. citizen. The applicant is therefore statutorily ineligible for a section 212(i) waiver of inadmissibility.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) 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.