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U. S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



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

[Redacted]

H2

FILE:

[Redacted]

Office: MANILA

Date:

FEB 25 2011

IN RE:

[Redacted]

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:

[Redacted]

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 \$630. 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,

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application for waiver of inadmissibility was denied by the Field Office Director, Manila, Philippines, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Fiji who was found to be inadmissible 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 is applying for a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h).

The director determined that the applicant failed to establish that he has been rehabilitated, and his admission would not be contrary to the national welfare, safety, or security of the United States. The director further determined that the applicant is unable to establish that the approval of his waiver is warranted in the exercise of discretion. *Decision of the Field Office Director*, dated April 25, 2008.

On appeal, counsel asserts that the director failed to properly consider the applicant's rehabilitation. *Statement on Notice of Appeal (Form I-290B)*, dated August 20, 2008.

In support of the waiver application, the record includes, but is not limited to, the applicant's conviction records, statements from the applicant, and letters attesting to the applicant's good character and rehabilitation. The entire record was reviewed and considered in rendering a decision on the appeal.

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 *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 that on December 2, 1974, the applicant was convicted in Lautoka Court, Fiji, of larceny from dock, and sentenced to three months imprisonment. The applicant's sentence was suspended for 12 months. On June 22, 1989, the applicant was convicted in Nadi Court, Fiji, of using abusive language. He was fined \$20.00 and sentenced to 20 days imprisonment. On June 11, 1990, the applicant was convicted in Nadi Court, Fiji, of act with intent to cause grievous harm. He was fined \$50.00 and served 50 days in prison. He was sentenced to 9 months imprisonment, which was suspended for two years. The record further shows that the applicant was charged in the Nadi Court, Fiji, of act with intent to cause grievous harm, but the proceedings were terminated after "parties reconciled." The applicant was ordered to "keep peace and be of good behavior for the period of 12 months." See Criminal Records Office, List of Previous Convictions, dated February 14, 2007.

Fiji Penal Code § 272, entitled "Larceny from ship, dock, etc." provides:

Any person who steals-

- (a) any goods in any vessel barge or boat of any description in any haven or any port of entry or discharge or upon any navigable river or canal or in any creek or basin belonging to or communicating with any such haven, port, river or canal; or
 - (b) any goods from any dock, wharf or quay adjacent to any such haven, port, river, canal, creek, or basin; or
 - (c) any, part of any vessel in distress, wrecked, stranded, or cast on shore, or any goods, merchandise or articles of any kind belonging to such Vessel,
- is guilty of a felony, and is liable to imprisonment for fourteen years.

Fiji Penal Code § 262 provides, in pertinent part:

Larceny – (1) Stealing for which no special punishment is provided under this Code or any other Act for the time being in force is simple larceny and a felony punishable with imprisonment for five years.

Fiji Penal Code § 259 provides, in pertinent part:

Definition of theft – (1) A person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof.

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)(stating, "It is well settled that theft or larceny, whether grand or petty, has always been held to involve moral turpitude . . .");

Morasch v. INS, 363 F.2d 30, 31 (9th Cir. 1966)(stating, “Obviously, either petty or grand larceny, i.e., stealing another's property, qualifies [as a crime involving moral turpitude].”). The conviction for larceny is considered to involve moral turpitude only when a permanent taking is intended. *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973). In the present case, theft under Fiji Penal Code § 259 is defined as a permanent taking. Since the applicant’s crime involved a permanent taking, the AAO finds the applicant’s conviction for larceny from dock under the Fiji Penal Code § 272 to be a crime involving moral turpitude.

Fiji Penal Code § 224, entitled “Acts intended to cause grievous harm or prevent arrest,” provides, in pertinent part:

Any person who, with intent to maim, disfigure or disable any person, or to do some grievous harm to any person, or to resist or prevent the lawful arrest or detention of any person-

- (a) unlawfully wounds or does any grievous harm to any person by any means whatsoever; . . .
is guilty of a felony, and is liable to imprisonment for life, with or without corporal punishment.

The applicant was convicted of a violation of Fiji Penal Code § 224(a) for unlawfully wounding or doing “any grievous harm to any person by any means whatsoever.” The director determined that “[a] review of the statutory elements indicates that Applicant is inadmissible for having convicted a crime involving moral turpitude similar to assault with intent to commit great bodily injury under American jurisprudence.” *Decision of the Field Office Director at 2*. We agree with the director’s determination and find that the applicant’s conviction under Fiji Penal Code § 224 is a crime involving moral turpitude. In *Matter of P*, the BIA addressed whether assault with intent to do great bodily harm less than the crime of murder, under the Michigan Penal Code, is a crime involving moral turpitude.¹ 3 I&N Dec. 5 (BIA 1947). In determining that such conduct is categorically a crime involving moral turpitude, the BIA concluded:

Crimes which are accompanied by an evil intent or a depraved motive, generally connote moral obliquity. It has been said that it is in the criminal intent that moral turpitude inheres. Under this generally accepted standard, it seems clear that the offense denounced by the Michigan statute under consideration involves moral turpitude, and as stated, the absence of a showing that a dangerous or deadly weapon was used is not the operative factor in determining the presence or absence of moral turpitude. Conceivably, an assault with a dangerous weapon may be committed in such a manner as to preclude an evil intent, and therefore baseness or vileness. In short, it is the purpose or intent which accompanied the perpetration of the crime, and

¹ Section 750.84 of the Michigan Penal Code provides, “Any person who shall assault another with intent to do great bodily harm, less than the crime of murder, shall be guilty of a felony punishable by imprisonment in the state prison not more than 10 years, or by fine of not more than 5,000 dollars.”

the manner and nature by which it is committed, which determines moral turpitude. . . . There can be little or no difference then, so far as moral turpitude is concerned, between the offense of assault with intent to do great bodily harm less than the crime of murder, and assault with a deadly weapon.

Since the statutory elements of the applicant's offense include the "intent to maim, disfigure or disable any person, or to do some grievous harm to any person," the AAO finds that the applicant's conviction under Fiji Penal Code § 224(a) is categorically a crime involving moral turpitude.

In sum, the AAO finds that the applicant's convictions for act with intent to cause grievous harm and larceny from dock constitute crimes involving moral turpitude, and the applicant is therefore inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The applicant has not contested this determination on appeal.

Section 212(h) of the Act provides, in pertinent parts:

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 [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 . . . ; and

(2) the Attorney General [Secretary], 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.

Section 212(h)(1)(A) of the Act provides that the Secretary may, in her discretion, waive the application of subparagraph (A)(i)(I) of subsection (a)(2) if 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. An application for admission to the United States is a continuing

application, and admissibility is determined on the basis of the facts and the law at the time the application is finally considered. *Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992).

Since the criminal convictions for which the applicant was found inadmissible occurred more than 15 years ago, he is requesting a waiver under section 212(h)(1)(A) of the Act. Section 212(h)(1)(A) of the Act requires that the applicant's admission to the United States not be contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated. On appeal, counsel asserts that the applicant's "crime-free life for about 18 years post-conviction is enough indication of the renunciation of wrong-doing and suffices to re-establish and restore the Applicant as a law abiding citizen of Fiji." *Counsel's Brief* at page 2. However, even assuming the applicant establishes that he meets the requirements of section 212(h)(1)(A), we will not favorably exercise discretion in the applicant's case except in an extraordinary circumstance. *See* 8 C.F.R. § 212.7(d).

The regulation at 8 C.F.R. § 212.7(d) provides:

The Attorney General [Secretary, Department of Homeland Security], in general, will not favorably exercise discretion under section 212(h)(2) of the Act (8 U.S.C. 1182(h)(2)) to consent to an application or reapplication for a visa, or admission to the United States, or adjustment of status, with respect to immigrant aliens who are inadmissible under section 212(a)(2) of the Act in cases involving violent or dangerous crimes, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of the application for adjustment of status or an immigrant visa or admission as an immigrant would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the alien's underlying criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act.

The AAO notes that the words "violent" and "dangerous" and the phrase "violent or dangerous crimes" are not further defined in the regulation, and the AAO is aware of no precedent decision or other authority containing a definition of these terms as used in 8 C.F.R. § 212.7(d). A similar phrase, "crime of violence," is found in section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F). Under that section, a crime of violence is an aggravated felony if the term of imprisonment is at least one year. As defined by 18 U.S.C. § 16, a crime of violence is 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 any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. We note that the Attorney General declined to reference section 101(a)(43)(F) of the Act or 18 U.S.C. § 16, or the specific language thereof, in 8 C.F.R. § 212.7(d). Thus, we find that the statutory terms "violent or dangerous crimes" and "crime of violence" are not synonymous and the determination that a crime is a violent or dangerous crime under 8 C.F.R. § 212.7(d) is not dependant on it having been found to be a crime of violence under 18 U.S.C. § 16 or an aggravated felony under section 101(a)(43)(F) of the Act. *See* 67 Fed. Reg. 78675, 78677-78 (December 26, 2002).

Nevertheless, we will use the definition of a crime of violence found in 18 U.S.C. § 16 as guidance in determining whether a crime is a violent crime under 8 C.F.R. § 212.7(d), considering also other common meanings of the terms “violent” and “dangerous”. The term “dangerous” is not defined specifically by 18 U.S.C. § 16 or any other relevant statutory provision. Thus, in general, we interpret the terms “violent” and “dangerous” in accordance with their plain or common meanings, and consistent with any rulings found in published precedent decisions addressing discretionary denials under the standard described in 8 C.F.R. § 212.7(d). Black’s Law Dictionary, Seventh Edition (1999), defines violent as “of, relating to, or characterized by strong physical force” and dangerous as “likely to cause serious bodily harm.” Decisions to deny waiver applications on the basis of discretion under 8 C.F.R. § 212.7(d) are made on a factual “case-by-case basis.” 67 Fed. Reg. at 78677-78.

In finding that the applicant’s offense constitutes a crime of violence as defined by 18 U.S.C. § 16, the director concluded:

Here, the Fijian statute requires a specific intent to “maim, disfigure, or disable any person” and cannot be based on simple negligence or recklessness. Secondly, subsection (a) requires that the perpetrator actively use force in an effort to inflict a “wound” or do any “grievous harm.” In other words, the actor must actively employ force in order to wound or cause harm. Third, the use of force to “wound or to do any grievous harm” constitutes a “destructive or violent force,” and, therefore, an aggravated felony.

Decision of the Field Office Director at 3.

The AAO agrees with the director’s conclusion and finds that a violation of Fiji Penal Code § 224(a), which proscribes the unlawful wounding or grievous harm to any person by any means whatsoever with the intent to maim, disfigure or disable any person, to be a violent and dangerous crime within the meaning of 8 C.F.R. § 212.7(d). Consequently, the heightened discretionary standards found in that regulation are applicable in this case.

Accordingly, the applicant must 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. *Id.* 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. *Id.*

Although 8 C.F.R. § 212.7(d) does not specifically state to whom the applicant must demonstrate exceptional and extremely unusual hardship, the AAO interprets this phrase to be limited to qualifying relatives described under the corresponding waiver provision of section 212(h)(1)(B) of the Act. A waiver of inadmissibility under section 212(h)(1)(B) of the Act is dependent on a

showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse, parent, son or daughter of the applicant.

In the instant case, the applicant does not appear to have any qualifying relatives through whom he can claim eligibility for a discretionary waiver. The applicant has only listed his siblings as qualifying relatives on his Application for Waiver of Grounds of Inadmissibility (Form I-601). The applicant is applying for an immigrant visa based on an underlying approved Petition for Alien Relative (Form I-130) filed by his brother on his behalf. The record does not reflect that the applicant's parents, spouse, or children are U.S. citizens or lawful permanent residents. Since the applicant has failed to show that he warrants a favorable exercise of discretion pursuant to 8 C.F.R. § 212.7(d), the applicant's inadmissibility under section 212(a)(2)(A)(i)(I) cannot be waived, and the appeal must be dismissed.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval 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.