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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

H2

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: FEB 25 2011

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h) of the 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,

Michael Shumway

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, California Service Center. The matter 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 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), in order to reside with his wife and children in the United States.

The director determined that the applicant failed to establish extreme hardship to a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Director*, dated August 11, 2008.

On appeal, the applicant asserts that his spouse will suffer extreme hardship if he is denied admission to the United States.

In support of the waiver application, the application contains, but is not limited to, the applicant's conviction records, statements from the applicant and his spouse, the applicant's spouse's permanent resident card, the applicant's daughter's birth certificate, and the applicant's son's naturalization certificate. The entire record was reviewed and considered in rendering a decision on the appeal.

The AAO conducts the final administrative review and enters the ultimate decision for U.S. Citizenship and Immigration Services on all immigration matters that fall within its jurisdiction. The AAO reviews each case de novo as to all questions of law, fact, discretion, or any other issue that may arise in an appeal that falls under its jurisdiction. See *Helvering v. Gowran*, 302 U.S. 238, 245-246 (1937); see also, *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), aff'd. 345 F.3d 683 (9th Cir. 2003).

Section 212(a)(2)(C) of the Act provides, in pertinent part, that:

> Controlled Substance Traffickers - Any alien who the consular officer or the Attorney General knows or has reason to believe--
>
> (i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so . . . is inadmissible.

The record reflects that on May 18, 1989, the applicant was convicted in the United States District Court, Southern District of Florida, of conspiracy to possess falsely made and counterfeited obligations of the United States in violation of 18 U.S.C. § 371 and carrying a firearm during and in

relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c) and § 2 (case no. The applicant was sentenced to a term of imprisonment of 21 months for the first offense and 60 months imprisonment for the second offense.

In *Matter of K-L-*, the BIA concluded that an alien who was convicted of use of a firearm during a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1), is inadmissible as a controlled substances trafficker under section 212(a)(2)(C) of the Act. 20 I. & N. Dec. 654, 660 (BIA 1993). Accordingly, we find that the applicant is inadmissible under section 212(a)(2)(C) of the Act for having been an illicit trafficker in a controlled substance. There is no waiver available for inadmissibility under section 212(a)(2)(C) of the Act.

The AAO notes that the applicant is also inadmissible under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude, section 212(a)(2)(B) of the Act, 8 U.S.C. § 1182(a)(2)(B), for multiple criminal convictions, and section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), for a violation of a law relating to a controlled substance. Section 212(a)(2) of the Act states in pertinent part:

> (1) Criminal and related grounds. —
>
> (A) Conviction of certain crimes. –
>
> (i) In general. – Except as provided in clause (ii), any 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, or
>
> (II) a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible. . . .
>
> (B) Multiple criminal convictions.-Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

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 applicant's conviction for conspiracy to possess falsely made and counterfeited obligations of the United States was in violation of 18 U.S.C. § 371. This statute prohibits a conspiracy "to commit any offense against the United States, or to defraud the United States." 18 U.S.C. § 371. The BIA in *Matter of Flores*, 17 I&N Dec. 225, 228 (BIA 1980) noted that the "[i]ntent to defraud the United States is not required for conviction. Since the element of fraud is not inherent in that part of the statute violated, it does not involve moral turpitude." Although the U.S. Supreme Court in *Volpe v. Smith*, 289 U.S. 422, 423 (1933) concluded that counterfeiting obligations of the United States is "plainly a crime involving moral turpitude," the applicant was not convicted of counterfeiting, but possession of falsely made and counterfeited obligations. The BIA has held that the mere possession of fraudulent documents is not a crime involving moral turpitude. *See Matter of Serna* 20 I&N Dec. 579, 586 (BIA 1992)(holding that "the crime of possession of an altered immigration document with the knowledge that it was altered, but without its use or proof of any intent to use it unlawfully, is not a crime involving moral turpitude.").

Since 18 U.S.C. § 371 is not categorically a crime involving moral turpitude, we will apply the modified categorical approach and review the "record of conviction" to determine if the conviction was based on conduct involving moral turpitude. *See Matter of Silva-Trevino*, 24 I&N Dec. 687, 698-699, 703-704, 708 (A.G. 2008). The *Presentence Report* provides:

> Upon arriving at the meeting place, exited the vehicle and began negotiations with the undercover Secret Service agent. . . . subsequently removed the package from the vehicle in which he had arrived. He then showed the special agent a package containing approximately $25,120.00 in counterfeit FRNs [(Federal Reserve Notes)] which were in uncut sheets. At this time the pre-arranged signal was given and both and were placed under arrest. . . . The defendants advised that the printing of the currency had taken place at residence. Secret Service agents received a consent to search residence. A search of the residence revealed cardboard boxes of uncut sheets of counterfeit $20.00 FRNs. Additionally, an offset printing press and paper cutter were also seized. In an adjacent garage/bedroom area of the residence counterfeit plates and negatives for $100.00, $50.00, $20.00, and $5.00 FRNs were seized. The amount of counterfeit currency seized was estimated by the Secret Service to be in excess of $800,000.00.

Presentence Report, pages 2-3.

Based on the foregoing, the AAO finds that the applicant's crime of conspiracy to possess falsely made and counterfeited obligations of the United States involved the implicit intent to defraud the U.S. government, and therefore is a crime involving moral turpitude under section 212(a)(2)(A)(i)(I) of the Act. *See Matter of Flores, supra*; *Matter of K--*, 7 I & N. Dec. 178, 181 (BIA 1956)(holding that both the making and possessing of dies or molds of United States coins implicitly contained the element of intent to defraud and, therefore, were crimes of moral turpitude.). Since the applicant was also convicted of a drug trafficking crime, he is additionally inadmissible under section 212(a)(2)(A)(i)(II) of the Act for a violation of a law relating to a controlled substance. The applicant's two criminal convictions and aggregate sentence of 81 months in prison renders him further inadmissible under section 212(a)(2)(B) of the Act for multiple criminal convictions.

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.

The applicant has applied for a section 212(h) waiver for inadmissibility under sections 212(a)(2)(A) and 212(a)(2)(B) of the Act. However, even were we to find that the applicant has satisfied the requirements for a section 212(h) waiver, he would nevertheless be inadmissible under section 212(a)(2)(C) of the Act, a section for which there is no waiver available. Therefore, no purpose is served in adjudicating a waiver application here, as the adjustment of status application cannot be approved because separate non-waivable inadmissibility. Therefore, the AAO finds that the applicant is statutorily ineligible for a waiver, and the waiver application must be dismissed as moot.

ORDER: The appeal is dismissed.