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



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

H2

FILE:

Office: LOS ANGELES, CA Date:

FEB 28 2011

IN RE:

Applicant:

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h), 8 U.S.C. § 1182(h) of the Immigration and Nationality Act.

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.

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 waiver application was denied by the Field Office Director, Los Angeles, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Mexico. The director stated that the applicant was 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 committing a crime involving moral turpitude. The director indicated that the applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h). The director concluded that the applicant had 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 spouse asserts that her husband, who has lived in the United States since he was eight years old, did violate the law by drinking beer in a park and in using a false document to work, but that he did not use the fake documents to conceal his citizenship from the police. She states that the police officer found the fake green card with a picture of her husband in her husband's car, and that her husband explained to the police officer that he used the fake green card to find work and did not use it for identification purposes. The applicant's wife maintains that her husband financially supports their family, and that he is a good father and husband.

The AAO will first address the finding of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act.

The record reflects that the applicant was arrested for use of false documents in violation of Cal. Penal Code § 114 on October 27, 1995. He pled guilty to the charge, and was placed on formal probation for three years and, in addition to other conditions, was ordered to serve 365 days in jail and pay restitution.

Section 212(a)(2)(A)(i)(I) 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.

The Board of Immigration

[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.

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.”

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.”

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.

Cal. Penal Code § 114 provides that:

Any person who uses false documents to conceal his or her true citizenship or resident alien status is guilty of a felony, and shall be punished by imprisonment in the state prison for five years or by a fine of twenty-five thousand dollars (\$25,000).

enacted as part of Proposition 187, and that the purpose of the section was to “prevent illegal aliens in the United States from receiving benefits or public services in the State of California.” (Ballot Pamp., Gen. Elec. (Nov. 8, 1994) text of Prop. 187, § 1, p. 91.) *Id.* at 596. The Court further states

that section 114 is a specific intent penal statute, which applies only if a person uses a false document with the specific intent to conceal his or her true citizenship or resident alien status.” *Id.* (citation omitted). Lastly, the Court indicates that section 114 convicts more than the use of the false documents for the purpose of receiving benefits or public services. *Id.*

The AAO is unaware of any published federal cases addressing whether the crime of use of false documents under this particular California law is a crime of moral turpitude. However, we find that in *Matter of Serna*, 20 I&N Dec. 579 (BIA 1992), the Board held that “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.” Furthermore, in *Matter of Flores*, 17 I&N Dec. 225, 230 (BIA 1980), the Board held that uttering and selling false or counterfeit paper related to the registry of aliens was a crime involving moral turpitude, even though intent to defraud was not an explicit statutory element. The AAO notes that the plain language of Cal. Penal Code § 114 applies to the use of fraudulent documents with the specific purpose of concealing one’s true citizenship or resident alien status. Therefore, in view of the holdings in *Serna* and *Flores*, we find that because Cal. Penal Code § 114 requires the specific intent to use a document for a false purpose (concealing status), whether or not the ultimate motive was to receive a benefit, public service, or to obtain employment, a conviction under this statute “is accompanied by a vicious motive or corrupt mind” and is thus a crime involving moral turpitude. *See, e.g., Omagah v. Ashcroft*, 288 F.3d 254, 262 (5th Cir. 2002) (finding that crimes that do not involve fraud, but that include “dishonesty or lying as an essential element” also tend to involve moral turpitude); *see also Itani v. Ashcroft*, 298 F.3d 1213, 1216 (11th Cir. 2002) (“Generally a crime involving dishonesty or false statement is considered to be one involving moral turpitude.”). Even were we not to find that the applicant’s conviction is categorically a crime involving moral turpitude, the modified categorical approach reveals that the applicant was charged with and convicted of “willfully and unlawfully use false document . . . alien registration and social security cards to conceal his/her true citizenship and resident alien status.” In that the applicant possessed the fraudulent social security cards and Resident Alien Card with the specific purpose of using it, his conviction is a crime involving moral turpitude pursuant to the holding in *Serna*. The applicant is therefore inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The record establishes that the applicant has been convicted of a crime involving moral turpitude, which renders him inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The waiver for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act is found under section 212(h) of the Act. That section 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

(ii) 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 . . .

Section 212(h)(1)(A) of the Act provides that the Attorney General may, in his 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. Since the conviction rendering the applicant inadmissible occurred on October 27, 1995, which is more than 15 years ago, it is waivable under section 212(h)(1)(A)(i) of the Act. *See Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992).

Section 212(h)(1)(A)(ii) and (iii) 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 the applicant establish his rehabilitation. Evidence in the record to establish the applicant's eligibility under section 212(h)(1)(A)(ii) and (iii) of the Act consists of a birth certificate, and an affidavit by the applicant's spouse. The affidavit by the applicant's wife dated October 6, 2006 states that her husband works hard and financially supports her and her daughter. The birth certificate indicates that the applicant's daughter was born on December 12, 2002, and the record reflects that the applicant and his wife married on August 17, 2002. As previously stated, the applicant's wife on appeal avers that the applicant is a good father and husband. There is no documentation in the record indicating that the applicant has any other convictions since his violation of Cal. Penal Code § 114, which occurred in October 1995. In view of the record, which shows that the applicant has not committed any other crimes since October 1995, and is commended for his good character, the AAO finds that the record demonstrates that the applicant's admission to the United States is not contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated, as required by section 212(h)(1)(A)(ii) and (iii) of the Act.

In *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996), the Board stated that once eligibility for a waiver is established, it is one of the favorable factors to be considered in determining whether the Secretary should exercise discretion in favor of the waiver. Furthermore, the Board stated that:

In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long

duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

Id. at 301.

The AAO must then, “[B]alance the adverse factors evidencing an alien’s undesirability as a permanent resident with the social and humane considerations presented on the alien’s behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country.” *Id.* at 300. (Citations omitted).

The adverse factor in the present case is the criminal conviction of “use of false documents” and any unauthorized employment. The favorable factors in the present case are the positive reference regarding the applicant’s character by his spouse, and the passage of 15 years since the criminal conviction that rendered the applicant inadmissible to the United States. The AAO finds that the crime committed by the applicant is serious in nature, nevertheless, when taken together, we find the favorable factors in the present case outweigh the adverse factor, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility rests with the applicant. *See* section 291 of the Act. Here, the applicant has now met that burden. Accordingly, the appeal will be sustained and the waiver application will be approved.

ORDER: The appeal is sustained.