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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

PUBLIC COPY

[Redacted]

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FILE:

[Redacted]

Office: ATLANTA, GA

Date: JAN 04 2011

IN RE:

Applicant:

[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 **REVISED** decision of the Administrative Appeals Office (AAO) in your case. After further review, a significant typographical error was discovered in the prior decision issued by the AAO. 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.

Thank you,

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Atlanta, Georgia and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Honduras 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 a crime involving moral turpitude. The applicant is the spouse and daughter of U.S. citizens and the mother of a lawful permanent resident. She seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States.

The Field Office Director found that the applicant had failed to establish that the bar to her admission would impose extreme hardship on a qualifying relative and denied the Application for Waiver of Ground of Excludability (Form I-601) accordingly. *Field Office Director's decision*, dated July 9, 2009.

On appeal, counsel contends that the record establishes that the applicant's spouse, mother and son will experience extreme hardship if the applicant is returned to Honduras. *Form I-290B, Notice of Appeal or Motion*, dated August 5, 2009.

In support of the application, the record contains, but is not limited to, counsel's brief; statements from the applicant, her spouse, her mother and her son; letters of support from friends of the applicant and the pastor at her church; country conditions materials on Honduras; documentation concerning the applicant and her spouse's financial obligations; earnings statements for the applicant; documentation relating to the applicant's newly incorporated business; medical statements concerning the applicant's mother; records of the applicant's contributions to her church; and court documents relating to the applicant's 1995 conviction. The entire record was reviewed and all relevant evidence considered in arriving at a decision on the appeal.

Section 212(a)(2)(A) of the Act states, in pertinent part:

- (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.

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), (B), . . . of subsection (a)(2) . . . if –

(1)(A) [I]t is established to the satisfaction of the Attorney General that-

- (i) [T]he 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

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.)

The record reflects that on February 7, 1995, the applicant pled guilty to one count of conspiracy under 18 U.S.C. § 371, which states:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

In *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining inadmissibility under section 212(a)(2)(i)(I) of the Act, adopting the “realistic probability” standard used by the Supreme Court in *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183 (2007). The methodology requires an adjudicator to review the criminal statute at issue to determine if there is a “realistic probability, not a theoretical possibility,” that the statute could be

applied to reach conduct that does not involve moral turpitude. 24 I&N Dec. 687, 698 (A.G. 2008)(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 has been 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.

In the present case, the applicant has been convicted of conspiring to commit a crime pursuant to 8 U.S.C. § 371, a statute that not only punishes conspiracy to defraud the United States but conspiracy to commit any criminal offense. Considering the unlimited range of offenses covered by its language, the AAO finds that 8 U.S.C. § 371 cannot but encompass conduct that involves moral turpitude and conduct that does not, and will review the record of conviction and, if necessary, other relevant evidence, to determine whether the applicant’s conspiracy conviction bars her admission to the United States. The AAO notes that any crime involving conspiracy is a crime involving moral turpitude if the underlying offense is a crime involving moral turpitude. *Matter of Short* 20 I&N Dec. 136 (BIA 1989).

The record of conviction in the present matter consists solely of the judgment entered against the applicant on September 20, 1995, which indicates that the applicant’s conviction under 18 U.S.C. § 371 was for Conspiracy to Possess and Sell Counterfeit Currency. The AAO notes that the crime of possession and sale of counterfeit currency has been prosecuted under both 18 U.S.C. § 472 and 18 U.S.C. § 473, and will, therefore, consider both statutes in reaching a conclusion regarding the nature of the applicant’s crime.

At the time of the applicant’s conviction, these statutes read as follows:

18 U.S.C. § 472

Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in

possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined under this title or imprisoned not more than 15 years, or both.

18 U.S.C. § 473

Whoever buys, sells, exchanges, transfers, receives, or delivers any false, forged, counterfeited, or altered obligation or other security of the United States, with the intent that the same be passed, published, or used as true and genuine, shall be fined not more than \$5,000 or imprisoned not more than ten years, or both.

The Board of Immigration Appeals (Board) has found convictions under both 18 U.S.C. § 472 and 18 U.S.C. § 473 to be crimes involving moral turpitude. In *Matter of Martinez*, the BIA held that “[a] necessary element for a conviction under 18 U.S.C. § 473 is intent to defraud and in a crime in which fraud is an ingredient, moral turpitude attaches.” 16 I&N Dec. 336, 337 (BIA 1977). In *Matter of Parodi*, the Board similarly found that fraud was a “specifically stated element” of the respondent’s conviction under 18 U.S.C. § 472 and that “moral turpitude was thus correctly attached to that crime.” 17 I&N Dec. 608, 611 n. 3 (BIA 1980). Accordingly, the applicant’s conviction for Conspiracy to Possess and Sell Counterfeit Currency is a conviction for a crime involving moral turpitude and bars her admission to the United States under section 212(a)(2)(A)(i)(I) of the Act. The applicant does not contest this finding.

The AAO now turns to a consideration of the record and whether it establishes the applicant’s eligibility for a waiver under section 212(h) of the Act.

In her July 9, 2009 decision, the Field Office Director correctly considered the applicant’s waiver application solely in relation to the requirements of section 212(h)(1)(B) of the Act. However, the AAO finds that the applicant has since become eligible for waiver consideration under section 212(h)(1)(A) of the Act as the offense on which her conviction is based occurred in September 1994, more than 15 years prior to the date of her application for adjustment of status.

The AAO notes that an application for admission or adjustment of status is considered 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) (citations omitted). The issue the Board addressed in *Matter of Alarcon* was whether the respondent, who had been found inadmissible for a crimes involving moral turpitude and had not disputed this finding on appeal, was eligible for a waiver as a consequence of amendments to the waiver provisions of section 212(h) of the Act enacted during the pendency of his appeal. *Id.* at 559-62. Based on the rationale that an application for adjustment of status is a continuing application and that “a final administrative decision does not exist until the Board renders its decision,” the Board held that the waiver provisions in effect at the time of the Board’s decision applied to the respondent. *Id.* at 562-63. As the issue disputed in *Matter of Alarcon* was the availability of a waiver, and not the respondent’s inadmissibility in the first instance, we conclude that the principles articulated by the Board are of equal application to adjustment and waiver applications, to the extent both address the issue of admissibility.

Thus, where the basis for denying an applicant's adjustment application is inadmissibility that can be waived under section 212(h) of the Act, and an appeal of the denial of the applicant's waiver application is pending before the AAO, we deem the adjustment and waiver applications to be continuing applications, and no final administrative decision regarding the applicant's admissibility exists until we have rendered our decision. Therefore, in the present case, as the applicant's offense predates the AAO's consideration of her appeal by more than 16 years, we will consider the applicant's eligibility for a waiver under 212(h)(1)(A) of the Act.

In order to be eligible for a section 212(h)(1)(A) waiver, the applicant must demonstrate that her admission to the United States would not be contrary to its national welfare, safety, or security and that she is rehabilitated. There is no indication in the record that the applicant has ever been involved in conduct or activities that would be contrary to the safety or security of the United States or that she has engaged in any activity contrary to its welfare since she committed the crime that resulted in her conviction.¹

The record includes a September 21, 1998 letter from the United States Probation Office, United States District Court, Ocala, Florida that indicates the applicant successfully completed her period of supervised release on September 19, 1998. It also contains letters from the applicant's pastor, her church's administrator and fellow parishioners that address her character and note her active participation in their church's life, as well as documentation of the applicant's church contributions in the years 2000, 2002, 2005, 2008 and 2009. Based on the evidence before it, the AAO finds that admitting the applicant would not be contrary to the national welfare, safety, or security of the United States and that she is rehabilitated.

The granting of a 212(h) waiver is discretionary in nature. In the present case, the mitigating factors that support the granting of the waiver application include the applicant's U.S. citizen spouse and mother, and her lawful permanent resident son; the general hardship that her family would experience as a result of her removal, as evidenced by their individual statements; her mother's medical conditions; her periods of lawful employment in the United States; her incorporation of a start-up business in 2009; the absence of a criminal record in the United States since 1994; her financial support of the churches she has attended; and the esteem in which she is held by the parishioners and pastor of the church she currently attends. The unfavorable factors are the applicant's 1995 criminal conviction and her periods of unlawful residence and employment in the United States.

We do not condone the crime committed by the applicant. Nevertheless, we find that, taken together, the favorable factors in the present case outweigh the adverse factors and that a favorable exercise of discretion is warranted.

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 met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.

¹ A review of the record indicates that, following her arrest on counterfeiting charges, the applicant was also charged with a violation of the conditions of her bail. This charge was subsequently dismissed and will not be considered.