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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

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Date:

MAY 05 2011

Office: NEW YORK

FILE:



IN RE:

Applicant:



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:



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 of the New York District Office, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of the Philippines 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 committed 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), in order to reside in the United States with his lawful permanent resident spouse and three U.S. citizen children.

The director concluded that the applicant had failed to establish that his to admission would impose extreme hardship on his qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Denial Notice*, dated August 7, 2009.

On appeal, counsel asserts that since the applicant's conviction occurred over 15 years ago, he does not have to establish extreme hardship to his family members. Counsel contends that the applicant should be granted a waiver because he is not a threat to the national welfare, safety or security of the United States, and he has been rehabilitated. *Appeal Brief*, dated September 10, 2009.

In support of the application, the record contains, but is not limited to, the applicant's conviction records, the applicant's marriage certificate, the applicant's children's birth certificates, financial documentation, evidence that the applicant is registered to practice law in New York, and letters of support from the applicant's family and friends. The entire record was reviewed and considered in arriving at a decision on the appeal.

Section 212(a)(2)(A)(i) 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 . . . 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 applicant was convicted in the District Court of the Southern District of New York on December 18, 1989 “by a jury following a four-day trial on five counts of conspiring to defraud the United States and the United States Department of Justice, Immigration and Naturalization Service (“INS”), to file false statements with the INS, and to obstruct INS proceedings, in violation of 18 U.S.C. § 371; of knowingly preparing and filing false forms with the INS, in violation of 18 U.S.C. §§ 2, 1001; and of knowingly obstructing INS proceedings, in violation of 18 U.S.C. §§ 2, 1505.” *United States v. Bejasa*, 904 F.2d 137, 138 (2nd Cir. 1990). The applicant was placed on concurrent three-year terms of probation, with the condition that he performs 100 hours of community service, and pays a \$10,000 fine. *Id.*

At the time of the applicant’s conviction, 18 U.S.C. § 371 provided:

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 under this title or imprisoned not more than five years, or both.

Title 18 U.S.C. § 371 is divisible because it “creates two crimes, first, a conspiracy to commit an offense against the United States, and, second, a conspiracy to defraud the United States in any manner or for any purpose.” *Matter of E*, 9 I&N Dec. 421, 423 (BIA 1961). A conspiracy to commit an offense involves moral turpitude if the substantive offense involves moral turpitude. 9 I&N Dec. 421, 423. For example, in *Matter of Gaglioti*, the BIA found that the alien’s conviction for conspiracy to establish gaming devices did not involve moral turpitude because the underlying offense did not involve moral turpitude. 10 I. & N. Dec. 719 (BIA 1964).

In the instant matter, the conviction record reflects that the applicant was convicted of *conspiring to defraud* the United States and the United States Department of Justice, Immigration and Naturalization Service (INS) by filing false statements with the INS and obstructing INS proceedings. *See Conviction Record*, Case No. CR-88-00967-03). Fraud has, as a general rule, been held to involve moral turpitude. The U.S. Supreme Court in *Jordan v. De George* found:

Whatever else the phrase ‘crime involving moral turpitude’ may mean in peripheral cases, the decided cases make it plain that crimes in which fraud was an ingredient have always been regarded as involving moral turpitude. . . . Fraud is the touchstone by which this case should be judged. The phrase ‘crime involving moral turpitude’ has without exception been construed to embrace fraudulent conduct.

341 U.S. 223, 232 (1951). Furthermore, the BIA in *Matter of E* held that, "Conspiracy to defraud the United States under 18 U.S.C. 371 by impeding, obstructing and attempting to defeat the lawful functions of an agency of the United States is a crime involving moral turpitude." 9 I&N Dec. at 427. Therefore, the applicant's conviction under section 18 U.S.C. § 371 is for a crime involving moral turpitude, and he is inadmissible under section 212(a)(2)(A)(i)(I) of the Act.¹ The applicant does not contest his inadmissibility on appeal.

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

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 . . .

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 conviction for which the applicant was found inadmissible occurred more than 15 years ago, it is waivable 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 has been "readmitted to the practice of law and is still in good standing." Counsel states that the applicant is the owner of a "primary residence as well as a

¹ The AAO notes that because the applicant's conviction under 18 U.S.C. § 371 has been found to be a crime involving moral turpitude, no purpose would be served in determining if his other convictions also involved moral turpitude.

vacation home.” Counsel notes that the applicant is “married to a physician” and has “three successful United States citizen children.” Counsel states that the applicant “raised his children on a day-to-day basis” prior to being readmitted to the bar. Counsel states that the applicant “currently runs his own successful law practice and he pay his taxes.” Counsel notes that the applicant volunteers with the Boy Scouts of America, made several donations to Xavier High School, and “has received awards and certificates of appreciation from Our Lady of Mercy Church.” *Appeal Brief*, dated September 10, 2009.

The record contains supporting letters from the applicant’s spouse and children, which demonstrate their strong family bond with their father and interests in keeping their family unified. *See Affidavit from [REDACTED]* dated February 26, 2007, *Affidavit from [REDACTED]*, dated March 5, 2007, and *Affidavit from [REDACTED]* dated February 27, 2007. The record also contains numerous supporting letters from the applicant’s brother, brother-in-law and friends attesting to the applicant’s good moral character. The record further reflects that the applicant has been readmitted to practice law in New York, is engaged in his community, and has volunteered with several organizations. *See New York State Unified Court System Attorney Database, Special Service Award, Migration and Refugee Services of the United States Catholic Conference, Letter from the Forest Hills Gardens Corporation, and Letters from the Boy Scouts of America.* Finally, the record shows that the applicant and his spouse are financially secure, earning a joint income of \$240,000.00 in 2008. *See 2008 IRS Tax Return Transcript.*

The applicant presented the foregoing documentation as a means of establishing that his 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. However, a waiver under section 212(h)(1)(A) of the Act is a matter of discretion, and we find that the applicant has not established that the grant of relief in the exercise of discretion would be warranted in his case.

In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957). 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.” *Matter of Mendez*, 21 I&N Dec. 296, 300 (BIA 1996)(Citations omitted).

The equities in the applicant’s case - including his financial stability, family and community ties in the United States, and the passage of 21 years since his conviction - are outweighed by the adverse factors. The negative factors include his conviction for five counts of conspiring to defraud the United States and the United States Department of Justice, Immigration and Naturalization Service (INS), to file false statements with the INS, and to obstruct INS proceedings, in violation of 18 U.S.C. § 371; of knowingly preparing and filing false forms with the INS, in violation of 18 U.S.C. §§ 2, 1001; and of knowingly obstructing INS proceedings, in violation of 18 U.S.C. §§ 2, 1505.

The applicant’s conviction stems from his involvement “in a scheme to defraud the United States and the INS by obtaining ‘sham’ divorces and marriages for Filipinos in the United States who sought permanent resident alien status (a “green card”).” *United States v. Bejasa*, 904 F.2d at 138. Marriage fraud is considered a serious violation of the immigration laws, and the applicant’s

involvement in fraud as an attorney threatens the integrity of the administration of immigration laws by the agency from which he now seeks a favorable exercise of discretion. As observed by the Sixth Circuit Court of Appeals,

[N]either the courts nor . . . [the BIA] have been lenient toward aliens who have flouted our immigration laws by engaging in fraudulent marriages to United States citizens or lawful permanent residents. Congress has emphatically expressed its disapproval of such conduct by the enactment of section 204(c) of the Act, 8 U.S.C. § 1154(c), which precludes from immediate relative or preference status any alien who has previously been accorded a nonquota or preference status on the basis of a marriage which has been determined to have been entered into for the purpose of evading the immigration laws.

Dallo v. INS, 765 F.2d 581, 587 n.7 (6th Cir. 1985).

The applicant's involvement in perpetrating fraud before this agency violated his ethical obligation as an attorney to uphold the laws of the United States. We find that "marriage fraud is certainly not a 'victimless crime.' Those who engage in it unfairly cut in front of those aliens lawfully waiting in line to emigrate here. This kind of marriage fraud undermines the sovereign power of the United States to control who may be allowed resident status." *Azizi v. Thornburgh*, 908 F.2d 1130, 1140 (2nd Cir. 1990)(dissenting opinion). The AAO considers the applicant's involvement in a marriage fraud ring to be an egregious offense that is contrary to the national interests of the United States.

Finally, the record reflects that the applicant was previously granted permanent resident status. On January 25, 1998, the applicant's permanent resident status was rescinded after it was determined that the applicant adjusted to permanent resident status "on September 8, 1986 based on an invalid labor certification and invalid visa petition under Section 245 of the Immigration and Nationality Act." *Notice of Intent to Rescind*, dated November 20, 1987. We consider the recession of the applicant's permanent residence as an additional adverse factor in this case.

In conclusion, given the nature of the applicant's offense, "we do not find that his equities are sufficient to counterbalance its seriousness." *Matter of Mendez*, 21 I&N Dec. at 304. Therefore, we find that the applicant has not established that the grant of relief in the exercise of discretion would be warranted in his case.

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. 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.