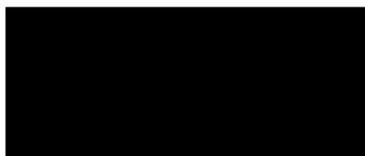


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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090
**U.S. Citizenship
and Immigration
Services**



H2

Date: **OCT 03 2011**

Office: CHICAGO, IL

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)

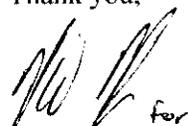
ON BEHALF OF APPLICANT:



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.

Thank you,


Perry Rhew

Chief, Administrative Appeals Office

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

The applicant is a native and citizen of South Korea 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's spouse and two children are U.S. citizens. He seeks a waiver of inadmissibility in order to reside in the United States.

The district director found that the applicant had failed to establish extreme hardship to a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *District Director's Decision*, dated August 6, 2008.

On appeal, counsel states that the decision contained errors of law and fact. *Form I-290*, received September 5, 2008.

The record includes, but is not limited to, counsel's brief, the applicant's spouse's statements, the applicant's children's mother's statement, the applicant's statement, criminal documents for the applicant and birth certificates for the applicant's children. The entire record was reviewed and considered in arriving at 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.

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. *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. Finally, in all such inquiries, the burden is on the alien to establish “clearly and beyond doubt” that he is “not inadmissible.” *Id.* at 709 (citing *Kirong v. Mukasey*, 529 F.3d 800 (8th Cir. 2008)).

The record reflects that the applicant was convicted of battery (Class A misdemeanor) on December 22, 1999 under Indiana Code 35-42-2-1(a)(1)(A). This section states:

Sec. 1. (a) A person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery, a Class B misdemeanor. However, the offense is:

(1) a Class A misdemeanor if:

(A) it results in bodily injury to any other person...

The Board of Immigration Appeals (BIA) has held that simple battery is not a crime involving moral turpitude. *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006). Therefore, the AAO finds that the applicant’s conviction for battery under Indiana Code 35-42-2-1(a)(1)(A) does not render him inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The record also reflects that the applicant was convicted on January 22, 1996 of theft in Indiana. Indiana Code 35-43-4-2(a) at the time of the applicant’s conviction stated:

A person who knowingly or intentionally exerts unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use, commits theft, a Class D felony. However, the offense is a Class C felony if the fair market value of the property is at least one hundred thousand dollars (\$100,000).

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].”). However, a 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 the prior Indiana Code 35-43-4-2(a) does not define whether the intent to deprive is permanent or temporary in nature. The AAO is not aware of a case in which Indiana Code 35-43-4-2(a) has been applied to a temporary taking. The AAO notes that the record reflects that the applicant took a gun from his employer, an act which indicates intent to permanently deprive. There is insufficient evidence that he intended to return the gun when he took it, therefore, the AAO finds that his intent was to permanently deprive his employer of the gun. As such, he committed a crime involved moral turpitude and he is inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Act.

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) . . . 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 . . .

In examining whether the applicant is eligible for a waiver, the AAO will assess whether he meets the requirements of section 212(h)(1)(A) of the Act. The record reflects that the activity resulting in the applicant's convictions occurred prior to May 3, 1995, the date of his arrest. 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 date of

the Form I-485 decision is the date of the final decision, which in this case, must await the AAO's finding regarding the applicant's eligibility for a waiver of inadmissibility. As the activities for which the applicant is inadmissible occurred more than 15 years before the date of his adjustment of status "application", he meets the requirement of section 212(h)(1)(A)(i) of the Act.

The record does not reflect that admitting the applicant would be contrary to the national welfare, safety, or security of the United States per section 212(h)(1)(A)(i) of the Act. The record reflects that the applicant is working as a painter. *Applicant's Form G-325*, dated June 30, 2008. There is no indication that the applicant has ever relied on the government for financial assistance. The record reflects that the applicant has several driving violations (no valid license and no insurance, arrest date April 5, 1994, fine and court costs; no valid license, arrest dated July 17, 1994, fine and court costs; no valid license and driving while suspended and false/fictitious plates, arrest date January 8, 1995, fine and court costs; driving while suspended and no valid driver's license, arrest date May 5, 1996, fines, license suspended, 60 days in jail-suspended but 5 days PACT; driving while intoxicated, arrest date January 16, 1998, one year in jail all but 30 days PACT suspended, fine, court costs, one year probation, PCADOS evaluation and recommended treatment; and habitual traffic offender, arrest dated August 29, 2000, convicted on October 24, 2001, two years probation, monetary penalties and eight days PCJ). The applicant was convicted of battery on December 22, 1999 and he received probation, 30 days PACT with fee and other fees.

The applicant had probation revocation hearings on July 15, 1996 (failure to report, sentenced to 30 days in jail), December 3, 1997 (failed marijuana drug test, failure to pay restitution and delinquent weekender fees; sentenced to 5 days PACT, payment of restitution and weekender fees), and February 6, 1998 (failure to perform community service, failure to pay restitution fees, failure to report and unauthorized relocation to Florida; 5 days PACT converted to jail time plus 5 days of jail).

The applicant had probation revocation petitions filed on September 16, 1996 (failure to perform community service, admitted violation on November 25, 1996 and sentencing taken under advisement), February 25, 1998 (re-arrest violation of January 16, 1998, failure to appear at April 15, 1998 hearing, bench warrant issued, arrested on June 22, 1998 and hearing held on June 23, 1998, sentence to 1.5 years in the Department of Correction, judgment lien entered for restitution and probation fees, probation revoked, and released from incarceration on January 19, 1999) and October 24, 2000 (failure to complete PACT and pay fee, failed to appear at January 3, 2001 hearing and warrant issued, arrested on warrant on July 28, 2001, addendums filed on January 24, 2002 and July 10, 2002 for re-arrest violations).

There is no indication that the applicant is involved with terrorist-related activities or poses other security issues.

The applicant has shown by a preponderance of the evidence that he has been rehabilitated per section 212(h)(1)(A)(iii) of the Act. The AAO notes the numerous criminal issues as detailed above. However, it notes that the applicant has not been charged with any offense in over 10 years. The AAO also notes that the majority of the applicant's criminal issues were related to traffic offenses

and they were committed at a relatively young age. The record reflects that he currently has zero points on his driving record. The record reflects that the applicant has been a supportive spouse and father to his two children. The applicant's children's mother states that the applicant has changed his life and their children have a special bond with the applicant. The applicant's spouse states that the applicant is a wonderful man and a great father. The applicant's sister, who was the victim in the battery case, has written a statement in support of her brother in which she states that the applicant has turned his life around and takes care of his family. The record includes several other letters in support of the applicant and his good character. The AAO notes that the applicant has had a history of negative behavior, but his positive behavior over the past decade reflects rehabilitation. The AAO notes that in finding rehabilitation, it is looking at the specific facts of this case. Accordingly, the applicant has shown that he meets the requirement of section 212(h)(1)(A)(iii) of the Act.

Based on the foregoing, the applicant has shown that he is eligible for consideration for a waiver under section 212(h)(1)(A) of the Act.

The granting of the waiver is discretionary in nature. The favorable factors include the applicant's U.S. citizen spouse and two children, hardship to his family, and lack of a criminal record since the aforementioned convictions.

The unfavorable factors include the applicant's criminal convictions, unauthorized period of stay and unauthorized employment. The AAO finds that the applicant's unauthorized period of stay is mitigated by the fact that he was brought to the United States as a young child without status.

Although the applicant's criminal history is serious and cannot be condoned, the AAO finds that the applicant has established that the favorable factors in his application outweigh the unfavorable factors.

In discretionary matters, the applicant bears the full burden of proving his eligibility for discretionary relief. *See Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976). Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained. The application is approved.