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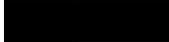
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090
**U.S. Citizenship
and Immigration
Services**

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Date: **SEP 28 2011**

Office: CALIFORNIA SERVICE CENTER

FILE: 

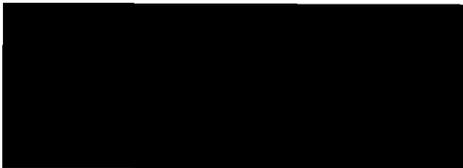
IN RE:

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,

Michael Shumway

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, California Service Center. The applicant appealed the director's decision to the Administrative Appeals Office (AAO), and the AAO dismissed the appeal. The matter is again before the AAO on motion to reconsider. The motion will be granted and the appeal will be sustained.

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)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having been convicted of a crime involving a controlled substance. The record also supports that he is 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. He seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen wife and children.

The director denied the Form I-601 application for a waiver, finding that the applicant is statutorily ineligible for a waiver due to his conviction for a controlled substance offense not relating to possession of 30 grams or less of marijuana. *Decision of the Director*, dated May 14, 2008.

On appeal, counsel for the applicant asserted that the applicant's convictions for possession of heroin and possession of narcotics equipment were vacated on July 27, 2007, and as a result they do not serve as a basis for inadmissibility under section 212(a)(2)(A)(i)(II) of the Act. The AAO found that the applicant failed to show that his convictions were vacated for a purpose that removes them from the definition of a conviction under section 101(a)(48)(A) of the Act, in that the applicant failed to show they were vacated for reasons other than a State rehabilitative statute or to ameliorate negative immigration consequences. *Decision of the AAO*, at 3, dated September 21, 2010 (citing *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999) and *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003)).

On motion, counsel asserts that the applicant's convictions were vacated and dismissed because of ineffective assistance of counsel and violation of the Sixth Amendment right to competent counsel in criminal proceedings. *Brief from Counsel on Motion*, submitted October 19, 2010. The applicant supplements the record with a Verified Petition for Post-Conviction Relief that was filed with the Municipal Court of the City of Clifton, New Jersey that served as the basis for vacating his convictions.

The record also contains, but is not limited to: a brief from counsel; documentation in connection with the applicant's son's automobile accident, medical treatment, and disability; statements from the applicant; and documentation in connection with the applicant's criminal history. The entire record was reviewed in rendering the present decision.

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

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.
- (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.)

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

The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana

(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.

Upon review, the record supports counsel's assertion that the applicant's convictions for possession of heroin and possession of narcotics equipment were vacated on July 27, 2007 pursuant to a claim of ineffective assistance of counsel. Specifically, the applicant's prior counsel for his criminal proceedings failed to advise him of the availability of a possible conditional discharge of the offenses and failed to properly advise him of defenses to the charges that could have been raised at trial. Accordingly, the applicant's convictions were vacated due to defects in the trial, and not due to a rehabilitative statute or as a remedial measure due to immigration consequences. As such, the

applicant's convictions for possession of heroin and possession of narcotics equipment may not serve as a basis for inadmissibility under section 212(a)(2)(A)(i)(II) of the Act.

The applicant has overcome the basis on which the director denied his waiver application and the AAO dismissed his subsequent appeal. However, the record reflects that the applicant has also been convicted in Florida of accessory after the fact to robbery for his conduct on August 28, 1981. This conviction has not been fully assessed in prior proceedings, and it has not been determined whether it renders the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The applicant has not submitted complete records of his conviction for accessory after the fact. The records provided do not indicate the section of law under which he was convicted. However, an April 1, 1994 Certified Record Search in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida names the charge as "Accessory – After the Fact." A complaint/arrest affidavit names the charge as "Excess. After Fact (Robbery)." At the time of the applicant's conviction, Florida Statutes § 777.03 described the crime of accessory after the fact as follows:

Accessory after the fact

Whoever, not standing in the relation of husband or wife, parent or grandparent, child or grandchild, brother or sister, by consanguinity or affinity to the offender, maintains or assists the principal or accessory before the fact, or gives the offender any other aid, knowing that he had committed a felony or been accessory thereto before the fact, with intent that he shall avoid or escape detection, arrest, trial or punishment, shall be deemed an accessory after the fact, and shall be guilty of a felony of the third degree, punishable as provided in § 775.082, § 775.083, or § 775.084.

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 present case arises in the Eleventh Circuit. The AAO is not aware of any Federal court or administrative decisions that address whether a conviction under Florida Statutes § 777.03 constitutes a crime involving moral turpitude. In *In re Batista-Hernandez*, 21 I. & N. Dec. 955, 960 (BIA 1997), the BIA found that an offense of accessory after the fact was distinct from the crime to which the offender was an accessory, stating:

[I]nasmuch as the crime of accessory after the fact, by its nature, takes place after the completion of the principal crime, it therefore does not require any planning and involvement in the principal . . . crime. . . . [T]he crime of accessory after the fact differs from aiding and abetting, as well as various inchoate crimes, because the accessory does not aid in the commission of the offense. In contrast to . . . various inchoate crimes . . . , the nature of being an accessory after the fact lies essentially in obstructing justice and preventing the arrest of the offender. The accessory after the fact offense is therefore more akin to the crime of misprision, which also requires, as an integral element, that the defendant, with full knowledge of the felony, take an affirmative step to conceal the crime.

Id. (citations omitted).

The Ninth Circuit has agreed with this interpretation of the offense of accessory after the fact. *Verdugo-Gonzalez v. Holder*, 581 F.3d 1059, 1062 (9th Cir. 2009)(stating “[t]he offense of being an accessory after the fact has been identified as different from and outside the generic definition [of the underlying offense] because an accessory after the fact, someone who subsequently helped the primary wrongdoer, does not necessarily aid in the commission of the underlying offense.”). However, the First Circuit found that an individual was guilty of a crime involving moral turpitude when he pled guilty to accessory after fact, based on the observation that his plea established that he knew he was assisting someone who committed an intentional murder. *Cabral v. I.N.S.*, 15 F.3d 193, 196-7 (1st Cir. 1994). The BIA has previously found that an individual convicted for accessory to manslaughter after the fact had been convicted of a crime involving moral turpitude because manslaughter is a crime involving moral turpitude. *Matter of Sanchez-Marin*, 11 I&N Dec. 264 (BIA 1965).

Accordingly, the AAO requires information and documentation in connection with the applicant’s conviction under Florida Statutes § 777.03 in order to determine whether it constitutes a crime

involving moral turpitude. From the documentation provided by the applicant, the AAO can discern that he was convicted as an accessory after the fact to robbery. Yet, the record contains no further official documentation. The applicant provided a statement in which he discussed the events that led to his conviction, yet his account is not sufficient to make a determination that his crime is not a crime involving moral turpitude. We noted that the underlying crime, robbery, has generally been found to be a crime involving moral turpitude. *See, e.g., Matter of Martin*, 18 I&N Dec. 226 (BIA 1982). In proceedings for an application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361.

Accordingly, the applicant has not shown that he is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act. However, the waiver application will be approved as a matter of discretion under section 212(h)(1)(A) of the Act.

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

The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana

(2) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that –

- (iv) . . . 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,
- (v) 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
- (vi) 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's conduct that led to his conviction for accessory after the fact occurred on August 28, 1981. As his culpable conduct took place over 15 years ago, 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. Section 212(h)(1)(A)(ii) of the Act. The record does not show that the applicant has engaged in violent or dangerous behavior at any time. The record does not show that the applicant has engaged in criminal activity since his conduct in 1981. The applicant has not been a public charge since his arrival in approximately 1960. Accordingly, the applicant has shown that he meets the requirement of section 212(h)(1)(A)(ii) of the Act.

The applicant has shown by a preponderance of the evidence that he has been rehabilitated. Section 212(h)(1)(A)(iii) of the Act. As discussed above, there is no evidence that he has engaged in criminal activity since 1981, in approximately 30 years. The record supports that he has conducted himself well during the last 30 years, including engaging in consistent employment as a bookkeeper, cultivating a close family unit, and caring for his disabled adult son. The record does not reflect that the applicant has a propensity to engage in further criminal activity. 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.

In determining whether the applicant warrants a favorable exercise of discretion under section 212(h) of the Act, the Secretary must weigh positive and negative factors in the present case.

The negative factors in this case consist of the following:

The applicant has been convicted of the crime of accessory after the fact to robbery.

The positive factors in this case include:

The applicant has not been convicted of a crime in approximately 30 years, and he has conducted himself well since that time. The applicant has resided in the United States since 1960, and he has significant ties to the country including his U.S. citizen wife and three U.S. citizen children, which supports that he would endure significant hardship should he now depart. The applicant has provided documentation to show that his adult son was involved in a serious automobile accident which left him disabled and unable to care for himself. The record supports that the applicant and his wife care for his disabled son, which is testament to the applicant's good character.

While the applicant's criminal activity cannot be condoned, the positive factors in this case outweigh the negative factors.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met his burden that he merits approval of his application.

ORDER: The motion is granted and the appeal is sustained.