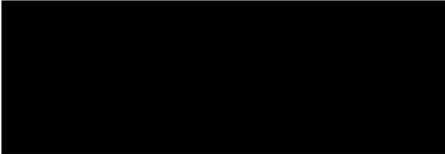


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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090
U.S. Citizenship
and Immigration
Services



H2

Date: **APR 05 2012** 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.

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 Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal.

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)(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 record also supports that the applicant is inadmissible to the United States pursuant to section 212(a)(2)(C)(i) of the Act, 8 U.S.C. § 1182(a)(2)(C)(i), for having been involved in the illicit trafficking in a controlled substance, and section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having been convicted of a crime involving a controlled substance.¹ He seeks a waiver of inadmissibility in order to reside in the United States with his lawful permanent resident wife, U.S. Citizen children, and lawful permanent resident parents.

The director denied the Form I-601 application for a waiver, finding that the applicant failed to establish extreme hardship to a qualifying relative. *Decision of the Director*, dated April 14, 2009.

On appeal, counsel for the applicant asserts that the applicant's qualifying family members will suffer extreme hardship should the present waiver application be denied. *Statement from Counsel with Form I-290B*, dated May 8, 2009.

The record contains, but is not limited to: briefs from counsel; reports on conditions in Cuba; documentation relating to the applicant's business activities and taxes; documentation relating to the applicant's property ownership; documentation of the applicant's children's academic activities; and documentation regarding the applicant's criminal history. The entire record was reviewed and considered in rendering this 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

¹ The director did not indicate that the applicant is inadmissible under sections 212(a)(2)(C)(i) and 212(a)(2)(A)(i)(II) of the Act. The applicant's conviction that renders him inadmissible under these sections occurred after the date of the director's decision. Further, an application that fails to comply with the technical requirements of the law may be denied by the AAO even if the field office does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a de novo basis).

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).

...

(C) Controlled Substance Traffickers - Any alien who the consular officer or the Attorney General knows or has reason to believe--

- (i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so . . . is inadmissible.

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 record shows that on October 3, 1995 the applicant received the equivalent of a conviction for grand theft under Florida Statutes § 812.014 in the Circuit Court of the 16th Judicial Circuit of Florida in and for ██████████ for which he was sentenced to two years of probation. On or about December 5, 1997, the applicant’s probation was suspended and he was sentenced to six months of incarceration for a violation of the terms of his probation.² On appeal, the applicant concedes that he was convicted of a crime involving moral turpitude, and he does not contest that he is inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The record also shows that, in February 2010, the applicant was convicted of possession of a controlled substance with intent to sell, distribute, or dispense. The applicant is currently serving a federal prison sentence for this offense. This conviction renders the applicant inadmissible under section 212(a)(2)(C)(i) of the Act for engaging in the illicit trafficking in a controlled substance. There is no waiver available under the Act for inadmissibility under this section.

The applicant’s February 2010 conviction also renders him inadmissible under section 212(a)(2)(A)(i)(II) of the Act for having been convicted of a crime involving a controlled substance. An applicant may only be considered for a waiver of inadmissibility under section 212(a)(2)(A)(i)(II) of the Act if he was convicted of a single controlled substance offense that relates to simple possession of 30 grams or less of marijuana. Section 212(h) of the Act. As the record supports that the applicant’s controlled substance conviction involved possession with intent to sell, distribute, or dispense, he is not eligible for consideration for a waiver under section 212(h) of the Act.

Due to his inadmissibility under sections 212(a)(2)(A)(i)(II) and 212(a)(2)(C)(i) of the Act, the applicant is statutorily barred from admission to the United States. No purpose is served in assessing whether the applicant’s relatives would experience extreme hardship upon denial of the waiver application, or whether the applicant warrants a favorable exercise of discretion.

On January 30, 2012, the AAO issued a notice of intent to dismiss the appeal to the applicant’s counsel and the applicant at his last known address of record, providing the applicant the above information and affording him 30 days within which to respond. The AAO clearly notified the applicant that failure to respond would result in dismissal of the appeal for the above-stated reasons. As of the date of this decision, the AAO has not received further correspondence from the applicant or counsel. Accordingly, the appeal will be dismissed.

² It is noted that the applicant's actions that constituted violations of his probation involved failure to make proper, timely reports to his probation officer, and failure to appear when instructed. The fact that he was penalized for these violations does not constitute an additional conviction for a crime involving moral turpitude.

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. In this case, the applicant has not met his burden to show that he is eligible for a waiver due to his inadmissibility under sections 212(a)(2)(A)(i)(II) and 212(a)(2)(C)(i) of the Act.

ORDER: The appeal is dismissed.