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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**

#2

[REDACTED]

DATE: APR 13 2012 Office: OAKLAND PARK, FL

FILE: [REDACTED]

IN RE: Applicant: [REDACTED]

APPLICATIONS: 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:

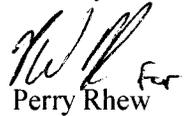
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INSTRUCTIONS:

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,


Perry Rhew

Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Oakland Park, Florida, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that 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 committed a crime involving moral turpitude. The applicant's spouse and three children are U.S. citizens. 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 family.

The field office director found that the applicant failed to establish that extreme hardship would be imposed on his qualifying relatives and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the Field Office Director*, dated August 13, 2009.

On appeal, counsel asserts that the applicant's spouse would experience extreme hardship and the field office director relied on details of an arrest for which the applicant was acquitted. *Brief in Support of Appeal*, dated October 9, 2009.

The record includes, but is not limited to, counsel's brief, medical records for the applicant's spouse, letters of support and country conditions information. 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 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...or an attempt or conspiracy to commit such a crime...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.)

The record reflects that on October 17, 1996 and April 30, 1998, the applicant was convicted of battery on a law enforcement officer in violation of Florida Statutes § 784.03 and § 784.07, and of resisting an officer with violence under Florida Statutes § 843.01.

Section 784.03 of the Florida Statutes provides, in pertinent part:

(1)(a) The offense of battery occurs when a person:

1. Actually and intentionally touches or strikes another person against the will of the other; or
2. Intentionally causes bodily harm to another person.

Florida Statutes § 784.07 is violated by “knowingly committing an assault or battery upon a law enforcement officer.”

Florida Statutes § 843.01 provides, in pertinent part, that “[w]hoever knowingly and willfully resists, obstructs, or opposes any officer . . . by offering or doing violence to the person of such officer . . . is guilty of a felony of the third degree”

The AAO notes that assault on a law enforcement officer has been found to be a crime involving moral turpitude where the perpetrator knows the victim to be a law enforcement officer performing his official duty and the assault results in bodily injury to the officer. *See Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988) (distinguishing cases in which knowledge of the police officer’s status was not an element of the crime and where bodily injury or other aggravating factors were not present to elevate offense beyond “simple” assault); *see also Matter of O-*, 4 I&N Dec. 301 (BIA 1951) (German law involving an assault on a police officer was not a crime involving moral turpitude because knowledge that the person assaulted was a police officer engaged in the performance of his duties was not an element of the crime); *Matter of B-*, 5 I&N Dec. 538 (BIA 1953) (as modified by *Matter of Danesh*, *supra*) (assault on prison guard not a crime involving moral turpitude because offense charged appeared to be only “simple” assault and no bodily injury was alleged); *Ciambelli ex rel. Maranci v. Johnson*, 12 F.2d 465 (D. Mass 1926) (assault on an officer was not a crime involving moral turpitude in spite of fact that defendant was armed with a razor because the razor was not used in the assault).

The Florida Supreme Court has ruled that the phrase “knowingly and willfully resists, obstructs, or opposes any officer” in Florida Statutes § 843.01 imposes a requirement that a defendant have knowledge of the officer’s status as a law enforcement officer. *See Polite v. State of Florida*, 973 So.2d 1107, 1112 (Fla. 2007). The Florida Supreme Court has also ruled that knowledge of the officer’s status is an element of the crime of battery upon a law enforcement officer under Florida Statutes § 784.07. *See Street v. State*, 383 So.2d 900, 901 (Fla. 1980).

However, the AAO notes that Florida Statutes § 843.01 is violated by either “offering” to do violence, or by “doing” violence, and there is no requirement that the victim suffer bodily injury. Similarly, Florida Statutes § 784.07 is violated by either intentionally touching or striking an officer against his will or by

intentionally causing bodily harm to an officer. Based solely on the statutory language, it appears that Florida Statutes §§ 843.01 and 784.07 encompass conduct that involves moral turpitude and conduct that does not. Therefore, the AAO cannot find that the offenses described in Florida Statutes §§ 843.01 and 784.07 are categorically crimes involving moral turpitude. The AAO must therefore review the record of conviction to determine if the applicant's conviction under these statutes was for morally turpitudinous conduct.

For the applicant's convictions, the information documents reflect that the applicant was charged with "actually and intentionally touching or striking said person against said person's will..." The record reflects that he was convicted under Florida Statutes § 784.031(a)(1), which does not required bodily injury. The applicant's convictions for battery on a law enforcement officer and resisting an officer with violence are therefore not crimes involving moral turpitude.

The applicant was also convicted of criminal possession of stolen property in the second degree on January 17, 1977 under New York Penal Code Section 165.52, which states in pertinent part:

A person is guilty of criminal possession of stolen property in the second degree when he knowingly possesses stolen property, with intent to benefit himself or a person other than an owner thereof or to impede the recovery by an owner thereof, and when the value of the property exceeds fifty thousand dollars.

For an individual to be convicted of second degree criminal possession of stolen property under New York Penal Law § 165.52, a defendant must "knowingly possesses stolen property, with intent to benefit himself or a person other than an owner thereof or to impede the recovery by an owner thereof. . . ." In *Michel v. INS*, 206 F.3d 253, 263-64 (2d Cir. 2000), the Second Circuit Court of Appeals affirmed the Board of Immigration Appeal's determination that fifth-degree criminal possession of stolen property in violation of New York Penal Law § 165.40 is categorically a crime involving moral turpitude. The Court concluded that "all violations of New York Penal Law § 165.40 are, by their nature, morally turpitudinous because knowledge is a requisite element of section 165.40 and corrupt scienter is the touchstone of moral turpitude." *Michel v. INS*, at 263. The knowledge referred to is knowledge that the property is stolen. *See id.* Accordingly, the AAO finds that the applicant's conviction is a crime involving moral turpitude. The applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act on this basis.

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 January 17, 1977, the date of his conviction. 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 reflects 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 laborer. *Applicant's Form I-485*, received May 11, 2006. There is no indication that the applicant has ever relied on the government for financial assistance. There is no indication that the applicant is involved with terrorist-related activities or poses other national security issues. However, since the applicant's conviction in 1977 for criminal possession of stolen property, he has been convicted several times. On November 16, 1989, the applicant was convicted of obstructing a police officer/fireman. On August 2, 1994, the applicant was convicted of resisting/obstruction without violence. On October 17, 1996 and April 30, 1998, the applicant was convicted of battery on a law enforcement officer and of resisting an officer with violence. On March 25, 1998, the applicant was convicted of improper exhibition of a dangerous weapon or firearm. In addition, the applicant has been arrested on numerous occasions over a 35 year period, but no action was taken, the cases were dismissed or he was acquitted. These arrests are detailed in the field office director's decision and include, but are not limited to, rape, assault with intent to rape, aggravated assault, two DUIs, criminal mischief, threat to a public servant, disorderly intoxication, disorderly conduct and carrying a concealed weapon. Accordingly, the applicant has not shown that he meets the requirement of section 212(h)(1)(A)(ii) of the Act as he is a safety concern.

The applicant has not shown by a preponderance of the evidence that he has been rehabilitated per section 212(h)(1)(A)(iii) of the Act. Although the record includes letters attesting to the applicant's character, they do not establish rehabilitation in light of his lengthy and serious criminal history discussed above. Accordingly, the applicant has not shown that he meets the requirement of section 212(h)(1)(A)(iii) of the Act.

Based on the foregoing, the applicant has not shown that he is eligible for a waiver under section 212(h)(1)(A) of the Act, as he has not met the requirements in sections 212(h)(1)(A)(ii) and 212(h)(1)(A)(iii) of the Act. As such, no purpose would be served in a discretionary analysis under section 212(h)(1)(A) of the Act or in adjudicating a waiver under section 212(h)(1)(B) of the Act, as it would be denied as a matter of discretion due to lack of rehabilitation.

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 not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.