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

U.S. Citizenship and Immigration Services

H2

[redacted]

DATE: DEC 28 2012 OFFICE: MIAMI, FLORIDA File: [redacted]

IN RE: Applicant: [redacted]

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:

[redacted]

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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting Field Office Director, Miami (Kendall), Florida and is now before the Administrative Appeals Office (AAO) on appeal. 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)(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 seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen spouse and grandson.

The Acting Field Office Director concluded that the applicant failed to establish that he has been rehabilitated sufficient to warrant consideration for a waiver under section 212(h)(1)(A) of the Act, that extreme hardship would be imposed on a qualifying relative, or that he merits a favorable exercise of discretion, and denied the Application for Waiver of Grounds of Inadmissibility accordingly. *See Decision of the Acting Field Office Director,* dated April 29, 2011.

On appeal counsel asserts that: (1) while the applicant has been involved in numerous "incidents" over the past 15 years, none have resulted in convictions for crimes involving moral turpitude, which counsel suggests is an indication of rehabilitation; (2) the adjudicator placed too much emphasis on the facts contained in the arrest reports which counsel claims are not part of the record of conviction; (3) not enough emphasis was placed on the applicant's favorable equities; and (4) the evidence in the whole establishes that the applicant's spouse will suffer extreme hardship. *See Form I-290B, Notice of Appeal or Motion,* received May 27, 2011.

The record contains, but is not limited to: Form I-290B and counsel's appeal brief and earlier brief in support of a waiver; various immigration applications and petitions; a hardship affidavit; a psychiatric evaluation; letters of character reference and support; a temporary custody order; divorce, marriage and birth certificates and family photos; mortgage and other billing statements; tax returns and earnings records; Cuba country conditions documents; and the applicant's criminal record. The entire record was reviewed and considered in rendering this 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 –
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> (I) a crime involving moral turpitude (other than a purely political *offense) or an attempt or conspiracy to commit such a crime* . . . is inadmissible.
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> . . .
>
> (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.)

The Eleventh Circuit Court of Appeals uses a traditional categorical and modified categorical framework approach to crimes involving moral turpitude. *See Fajardo v. Attorney General*, 659 F.3d 1301 (11th Cir. 2011). The Eleventh Circuit has applied the "realistic probability" test in other aggravated felony cases. *See, e.g., U.S. v. Rainer*, 616 F.3d 1212, 1214 (11th Cir. 2010). If a statute expressly punishes certain conduct, then the possibility that the statute will be applied to this conduct is not merely theoretical or the result of "legal imagination." Rather, there is a "realistic probability" that the statute encompasses such conduct, regardless of whether a case

exists in which the statute was actually applied to it. *See Accardo v. U.S. Atty Gen.*, 634 F.3d 1333, 1337 (11th Cir. 2011); *U.S. v. Jennings*, 515 F.3d 980 (9th Cir. 2008); *Mendieta-Robles v. Gonzales*, 226 Fed. Appx. 564 (6th Cir. 2007); *U.S. v. Vidal*, 504 F.3d 1072 (9th Cir. 2007); *U. S. v. Grisel*, 488 F.3d 844 (9th Cir. 2007); *U.S. v. Madera*, 521 F.Supp.2d 149 (D. Conn. 2007).

The record shows that the applicant has a lengthy criminal record extending over decades in both Cuba and the United States. He has been arrested by police more than 40 times and while his most recent conviction for a crime involving moral turpitude occurred more than 15 years ago, his entire criminal history up until the present will be properly considered in terms of whether he has been rehabilitated and whether he warrants a favorable exercise of discretion. The applicant was first convicted in July 1979 in Cuba for Burglary with Forced Entry. He was a minor at the time and was reportedly never sentenced. The applicant's convictions in Miami-Dade County, Florida include: a September 17, 1986 conviction for Burglary of an Unoccupied Dwelling, for his conduct on August 28, 1986; a November 3, 1987 conviction for Carrying a Concealed Weapon, for his conduct on January 4, 1987; a January 1988 conviction for Marijuana Possession (less than 20 grams) and Resisting Arrest without Violence, for his conduct on January 16, 1988; an October 20, 1992 conviction for Alcohol/Open Container/Vehicle, for his conduct on October 16, 1992; and a November 16, 1997 conviction for Trespass After Warning, for his conduct on November 14, 1997. Based on his September 17, 1986 conviction for burglary, the applicant was determined to be inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude.

The applicant does not contest whether he has been convicted of a crime involving moral turpitude, or whether he is inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The AAO will not engage in detailed analysis of the applicant's convictions, as 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 . . . .
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> (1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that –
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> (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.

The applicant's most recent conviction for a crime involving moral turpitude, for burglary of an unoccupied dwelling, occurred on or about September 17, 1986, more than 26 years ago. His single controlled substance conviction occurred in or about January 1988, over 24 years ago. As his culpable conduct that renders him inadmissible under section 212(a)(2)(A) of the Act took place more than 15 years ago, he meets the requirement of section 212(h)(1)(A)(i) of the Act.

The record shows, however, that while the applicant's most recent conviction that renders him inadmissible occurred in or about January 1988, he continued to engage in criminal activity thereafter for many more years. As noted previously, the applicant was convicted in October 1992 for Alcohol/Open Container/Vehicle, and in November 1997 for Trespass After Warning. Moreover, in addition to accruing two subsequent criminal convictions, the applicant has been arrested by police 33 times since September 1986. Counsel correctly notes that an individual is innocent until proven guilty and that the majority of the applicant's arrests did not result in convictions. Counsel also notes that many of the 33 arrests were for traffic-related violations (including multiple DUIs and multiple incidents of driving with a revoked/suspended/restricted license). The applicant was also arrested multiple times since September 1986 for marijuana/paraphernalia possession (including one for marijuana possession and burglary), in addition to arrests for loitering and prowling and for burglary, trespassing and petty larceny. However, the applicant's most recent criminal conviction (for trespass after warning) occurred in November 1997, more than 15 years ago. So while it is clear that the applicant was far from rehabilitated during at least the first 11 years following his most recent conviction for a crime involving moral turpitude, the record shows that he has not been convicted of a crime involving moral turpitude or any other crime in more than 15 years. Counsel also correctly notes that while the applicant was arrested or cited in September 2002 and March 2009 for a commercial vehicle violation and running a business without a license, he was not prosecuted or convicted.

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. While the applicant's multiple convictions are significant and cannot be condoned, the record does not show that he has engaged in violent or dangerous behavior during the last 15 years. The record does not show that the applicant has engaged in criminal activity during the last 15 years. The record does not show that the applicant was ever a public charge over his more than 30 years residing in the United

States since 1980. 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 during the last 15 years. The record shows that while he has an extensive criminal record over several decades, he has conducted himself well during the last 15 years. The applicant married his U.S. citizen spouse in November 1999 and raised her children from a previous marriage as his own. The record shows that the applicant and his spouse have been granted custody of their 7-year-old grandson (the son of the applicant's spouse's son from a prior marriage) and that the boy considers them his natural parents. The record shows that the applicant owns a home in the United States and is current on his mortgage and has established, owns and operates his own roofing business for which he has always paid taxes. The record shows that the applicant's family loves him, that he provides necessary emotional, physical and economic support for his U.S. citizen spouse and grandchild and that he is considered an essential part of the community by numerous individuals who have submitted letters of character reference and support on his behalf. 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 include the applicant's lengthy and extensive criminal record extending over decades. The positive factors in this case include hardship to the applicant's U.S. citizen spouse as a result of his inadmissibility; that the applicant has not been convicted of a crime involving moral turpitude since 1986 - more than 26 years ago, or a controlled substance offense since 1988 - in more than 24 years; that the applicant has not been convicted of any crime since November 1997 – more than 15 years ago; that he has married and raised his spouse's children from a previous marriage as his own; that he has been awarded custody of his spouse's 7-year-old grandson whom he is currently raising as his own; that he owns a home in the United States and faithfully pays his mortgage; that he owns and operates a business in the United States and faithfully pays his taxes; that he has earned the respect of numerous individuals who have attested to his good character and essential presence in the community. 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 appeal is sustained. The application is approved.