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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: JAN 04 2012 Office: MIAMI 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,

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Miami, 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 crimes involving moral turpitude. He seeks a waiver of inadmissibility in order to reside in the United States with his lawful permanent resident wife and U.S. citizen daughter.

The field office 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 Field Office Director*, dated July 17, 2009.

On appeal, counsel for the applicant asserts that the applicant's U.S. citizen daughter will suffer hardship should she reside in Cuba. *Statement from Counsel on Form I-290B*, dated August 18, 2009.

The record contains, but is not limited to: a brief from counsel; a copy of medical records for the applicant's daughter; a copy of the applicant's daughter's birth certificate; a letter from the applicant's employer; a copy of the applicant's marriage license; and documentation in connection with the applicant's criminal history. The entire record was reviewed and considered in rendering this decision.

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.

(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 present case falls within the jurisdiction of the Eleventh Circuit Court of Appeals. In evaluating whether an offense constitutes a crime involving moral turpitude, the Eleventh Circuit employs the categorical and modified categorical approach. *Sanchez-Fajardo v. U.S. Atty. Gen.*, 659 F.3d 1303, 1305-06 (11th Cir. 2011). “To determine whether a conviction for a particular crime constitutes a conviction of a crime involving moral turpitude, both [the Eleventh Circuit] and the BIA have historically looked to ‘the inherent nature of the offense, as defined in the relevant statute’” *Id.* at 1305. “If the statutory definition of a crime encompasses some conduct that categorically would be grounds for removal as well as other conduct that would not, then the record of conviction—i.e., the charging document, plea, verdict, and sentence—may also be considered.” *Id.* (citing *Jaggernaut v. U.S. Att’y Gen.*, 432 F.3d 1346, 1354–55 (11th Cir.2005)).

The Eleventh Circuit has rejected the methodology adopted by the Attorney General in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008). 659 F.3d at 1308-11. While the Attorney General determined that assessing whether a crime involves moral turpitude may include looking beyond the record of conviction, the Eleventh Circuit has stated that “[w]hether a crime involves the depravity or fraud necessary to be one of moral turpitude depends upon the inherent nature of the offense, as defined in the relevant statute, rather than the circumstances surrounding a defendant's particular conduct.” *Itani v. Ashcroft*, 298 F.3d 1213, 1215–16 (11th Cir. 2002). In *Sanchez-Fajardo*, the Eleventh Circuit affirmed its reasoning in *Vuksanovic v. U.S. Attorney General*, 439 F.3d 1308, 1311 (11th Cir.2006), stating that “the determination that a crime involves moral turpitude is made categorically based on the statutory definition or nature of the crime, not the ‘specific conduct predicated a particular conviction.’” 659 F.3d at 1308-09.

The record shows that the applicant has been convicted of multiple crimes in Florida, including: burglary of an unoccupied dwelling under Florida Statutes § 810.02 and possession of burglary tools under Florida Statutes § 810.06 for his conduct on or about May 15, 1994; resisting an officer without violence under Florida Statutes § 843.02 and burglary of an unoccupied dwelling under Florida Statutes § 810.02 for his conduct on or about May 27, 1994; burglary of an unoccupied structure under Florida Statutes § 810.02(4)A, grand theft 3rd degree under Florida Statutes § 812.014(2)(C)1, and criminal mischief under Florida Statutes § 806.13(1)(B)2 for his conduct on or about August 28, 1996; and offenses of driving under the influence of alcohol in 1991 and 1995.

At the time of the applicant's conviction for grand theft, Florida Statutes § 812.014 stated:

(1) A person commits theft if he knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:

(a) Deprive the other person of a right to the property or a benefit therefrom.

(b) Appropriate the property to his own use or to the use of any person not entitled thereto.

...

(2) (c) It is grand theft of the third degree and a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if the property stolen is:

1. Valued at \$300 or more, but less than \$5,000.

The BIA has determined that to constitute a crime involving moral turpitude, a theft offense must require the intent to permanently take another person's property. *See Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973) ("Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended."). The AAO notes that the Florida statute under which the applicant was convicted is divisible because it may be violated by either permanently or temporarily depriving another person of the right or benefit of that person's property. In examining the record of the applicant's conviction, the indictment shows that the applicant was charged with theft of a fax machine and/or computer "with the intent to deprive said owner or custodian of a right to the said property or a benefit therefrom, or to appropriate the same to said defendant's own use or to the use of a person not entitled thereto." The AAO finds the indictment sufficient to support that the applicant was charged under the portion of Florida Statutes § 812.014 that contemplates a permanent taking of property. The applicant has not asserted or shown otherwise. Thus, the applicant's offense under Florida Statutes § 812.014 constitutes a crime involving moral turpitude.

The BIA has maintained that the determinative factor in assessing whether burglary involves moral turpitude is whether the crime intended to be committed at the time of entry or prior to the breaking

out involves moral turpitude. *Matter of M-*, 2 I&N Dec. 721, 723 (BIA 1946). For example, the BIA has held that burglary with intent to commit theft is a crime involving moral turpitude. *See Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982). The charging document for the applicant's April 28, 1996 conduct reflects that he committed burglary with the intent to commit theft and/or criminal mischief, and he in fact did commit grand theft. As the applicant's act of grand theft under Florida Statutes § 812.014 constitutes a crime involving moral turpitude, the applicant was convicted for burglary with the intent to commit a crime involving moral turpitude, and his burglary offense also constitutes a crime involving moral turpitude. Based on his convictions for burglary and grand theft for his conduct on or about April 28, 1996, the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act and he requires a waiver under section 212(h) of the Act. Therefore, the AAO need not engage in detailed analysis to determine if his other convictions constitute crimes involving moral turpitude. The applicant does not contest his inadmissibility on appeal.

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.

The applicant's most recent conviction resulted from his conduct on or about August 28, 1996. As his culpable conduct took place over 15 years ago, he meets the requirement of section 212(h)(1)(A)(i) of the Act, and the AAO will assess his eligibility for a waiver under the additional requirements of section 212(h)(1)(A) of the Act. An application for admission or adjustment is a "continuing" application, and inadmissibility is adjudicated on the basis of the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992).

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 noted above, there is no evidence that he has engaged in criminal activity since 1996, in over 15 years. The AAO finds it significant that the applicant's criminal activity in the United States was concentrated between his entry at age 26 and his last conviction at age 29. He is presently age 45, and the record shows that he has conducted himself well during the last 15 years. A letter from an employer for the applicant provided that he continued to be an excellent employee from his start date on January 2, 1998 until the date of the letter over six years later, April 22, 2004. In a brief submitted with Form I-601, counsel asserted that the applicant is close with his wife, and that he is the primary source of economic support for their household. The applicant's U.S. citizen daughter was born on September 2, 2008, and she has special medical needs. The record supports that the applicant has rehabilitated himself since his concentrated period of criminal activity, and turned his efforts toward his employment and family. 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.

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 shows that the applicant was charged with two assault offenses, in 1992 and 1993, yet these charges were not prosecuted. The AAO does not find that the applicant presents a risk of engaging in violent behavior. The AAO takes notice of the applicant's two convictions for driving under the influence of alcohol, in 1991 and 1995. However, as discussed above, the applicant has reformed himself since his period of criminal activity, and these two convictions occurred during that time. The record supports that the applicant has discontinued the irresponsible use of alcohol, and he does not present a safety risk to others in the United States. It is further noted that the applicant has not been a public charge since his arrival in 1991. Accordingly, the applicant has shown that he meets the requirement of section 212(h)(1)(A)(ii) 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 multiple crimes, including driving under the influence of alcohol, as well as burglary and theft offenses that call into question his moral character. The

applicant entered the United States without inspection, contrary to the immigration laws of the United States.

The positive factors in this case include:

The applicant's U.S. citizen daughter has special medical needs, and she will benefit from residing in the United States with the applicant. The record supports that the applicant has engaged in consistent employment to support himself and his family. The applicant has substantial family ties to the United States, including his wife and daughter. The applicant has not been convicted of a crime since 1996, in over 15 years. The AAO acknowledges that conditions in Cuba are significantly less favorable than those in the United States, and the applicant, his wife, and daughter would face hardship should they reside there.

Applicant's criminal history constitutes a significant negative factor in the present matter. The applicant's offenses of burglary and theft are a serious concern regarding his character and respect for the laws of the United States, particularly given that he committed multiple offenses in a short span and resisted arrest. Instances of driving under the influence of alcohol represent a dangerous lack of regard for the safety of others. However, after examining the record, the AAO is persuaded that the applicant has rehabilitated himself in the past 15 years such that he no longer has a propensity to engage in criminal activity of any kind. The AAO also acknowledges that the applicant entered the United States without inspection in an effort to flee harsh conditions and treatment in Cuba. While the applicant's criminal activity and violation of U.S. immigration law 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.