U. S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

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[redacted]

Date: JAN 19 2012 Office: TEGUCIGALPA FILE: [redacted]

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h), 212(i), and 212(a)(9)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h), 1182(i), and 1182(a)(9)(B).

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.

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,

Michael Humway

for Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Nicaragua 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 crimes involving moral turpitude. The applicant was also found inadmissible pursuant to section 212(a)(6)(C)(ii) of the Act, 8 U.S.C. § 1182(a)(6)(C)(ii), for having made a false claim to U.S. citizenship on an I-9 Form and pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking readmission within ten years of her last departure from the United States. Finally, the applicant was found to be inadmissible under section 212(a)(6)(B) of the Act, 8 U.S.C. § 1182(a)(6)(B) of the Act for failing to attend her removal proceedings. The applicant seeks a waiver of inadmissibility in order to remain in the United States with her U.S. citizen spouse.

In a decision, dated June 24, 2009, the field office director found the applicant statutorily ineligible for a waiver as an applicant who made a false claim to U.S. citizenship after 1996. He also found that in regards to her inadmissibilities for unlawful presence and convictions for crimes involving moral turpitude, the applicant failed to establish extreme hardship or that she merits a waiver as a matter of discretion. The application was denied accordingly.

On appeal, counsel states that the field office director erroneously concluded that the applicant was inadmissible for her criminal convictions by analyzing whether these convictions were for crimes involving moral turpitude under the method outlined in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008). Counsel asserts that the applicant should not be subject to *Matter of Silva-Trevino* because her conviction occurred before the decision was written. Counsel also asserts that the applicant has shown that her qualifying relative would suffer extreme hardship as a result of her inadmissibility. Counsel states further that the field office director erroneously concluded that the applicant was subject to the ten year "permanent" bar under section 212(a)(9)(C) of the Act. He states that the decision on the applicant's waiver application (Form I-601) does not mention or focus on the application for permission to reapply for admission (Form I-212), which was filed with the waiver application.

In regards to counsel's reference to the applicant's Form I-212, when an inadmissible alien files both the Form I-601 and the Form I-212, the *Adjudicator's Field Manual* provides the following guidance:

> Chapter 43 Consent to Reapply After Deportation or Removal
>
> 43.2 Adjudication Processes:
>
> > (d) Of course, an alien might be applying for both consent to reapply and a waiver of inadmissibility, provided the particular ground(s) of inadmissibility applying to the alien are waivable. If the alien has filed both applications (Forms I-212 and I-601), adjudicate the waiver application first. If the Form I-601 waiver is approved, then consider the

> Form I-212 on its merits; if the Form I-601 is denied (and the decision is final), deny the Form I-212 since its approval would serve no purpose.

In that the field office director determined that the applicant was not eligible for a waiver of inadmissibility under the Act and denied her Form I-601, no purpose would have been served in granting her application for permission to reapply for admission. *See Matter of Martinez-Torres,* 10 I&N Dec. 776 (reg. Comm. 1964). Likewise, as we find the applicant inadmissible on grounds that cannot be waived, no purpose is served in addressing her application for permission to reapply for admission.

The record indicates that the applicant entered the United States without inspection in February 2003, was apprehended, and placed in removal proceedings. On March 9, 2004, the applicant failed to appear at her removal proceeding and was ordered removed in absentia by the immigration judge. On December 13, 2006 the applicant married a U.S. citizen and on October 12, 2007, an Alien Relative Petition (Form I-130) for the applicant was approved. On July 30, 2007, the applicant was arrested by Immigration and Customs Enforcement (ICE) officers. She was removed from the United States to Nicaragua on February 21, 2008. The record indicates that the applicant has remained in Nicaragua since her 2008 departure.

The record shows that while in the United States, the applicant was convicted in the United States District Court for the Northern District of Iowa on January 17, 2008 of three counts of using false identification to obtain employment in violation of 18 U.S.C. § 1546(a) and three counts of using a false social security number to obtain employment under 18 U.S.C. § 408(a)(7)(B). The applicant was sentenced to time served on each count (approximately 5 months) and was transferred into the custody of the U.S. Marshal for processing into ICE custody.

The AAO will first address the applicant's inadmissibility under Section 212(a)(6)(C) of the Act.

Section 212(a)(6)(C) of the Act, Misrepresentation, provides, in pertinent part, that:

> (i) In General –
>
> Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.
>
> (ii) Falsely Claiming Citizenship
>
> (I) In General –
>
> Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this Act (including section 274A) or any other Federal or State law is inadmissible.

The legacy Immigration and Naturalization Service (INS) General Counsel's Office addressed in an April 30, 1991 published legal opinion the issue of whether an applicant who presents counterfeit

documents in completing an Employment Eligibility Verification Form (Form I-9) is subject to inadmissibility for misrepresentation under former section 212(a)(19) (now section 212(a)(6)(C)(i)) of the Act. The legal opinion provides:

> For two reasons, we conclude that an alien's false statements on Form I-9 do not render the alien subject to exclusion under Section 212(a)(19) of the Act. First, an alien who falsifies a Form I-9 does not make the false statements before a United States government official authorized to grant visas or other immigration benefits. Secondly, while the decision of the Service to grant an alien authority to accept employment is a benefit under the INA, an employer's decision to hire any particular individual involves a private employment contract. Thus, false statements on Form I-9 are not for the purpose of obtaining a benefit under the INA and, therefore, cannot form the basis for exclusion of an alien pursuant to Section 212(a)(19) of the Act.

Penalties for misrepresentations by an unauthorized alien on an Employment Eligibility Verification Form (Form I-9), No. 91-39, 2 (April 30, 1991).

Similarly, the Board of Immigration Appeals (BIA) concurring opinion in *Matter of Cervantes-Gonzalez* noted:

> The majority's language may be misinterpreted as suggesting that using the fraudulent passport to obtain employment is obtaining a benefit under the Act. Although the use or possession of such document is punishable under section 274C of the Act, 8 U.S.C. § 1324c (1994 & Supp. II 1996), working in the United States is not 'a benefit provided under this Act,' and we have specifically held that a violation of section 274C and fraud or misrepresentation under section 212(a)(6)(C)(i) of the Act are not equivalent.

22 I&N Dec. 560, 571 (BIA 1999)(citations omitted).

However, with regard to a false claim of U.S. citizenship, the United States Courts of Appeals for the Tenth and Eighth Circuits have concluded that employment can be properly deemed a "purpose or benefit under the Act" in the context of applying section 212(a)(6)(C)(ii) of the Act. Specifically, when an applicant has made a false claim of U.S. citizenship for the purpose of obtaining employment with a private employer, he may properly be deemed inadmissible under section 212(a)(6)(C)(ii) of the Act. *Rogriguez v. Mukasey*, 519 F.3d 773, 777 (8th Cir. 2008)(stating that "the explicit reference to [U.S.C.] § 1324a [section 274A of the Act] in [U.S.C.] § 1182(a)(6)(C)(ii)(I) [section 212(a)(6)(C)(ii)(I) of the Act] indicates that private employment is a purpose or benefit of the Act."); *Kechkar v. Gonzales*, 500 F.3d 1080, 1084 (10th 2007)(finding that "[i]t appears self-evident that an alien who misrepresents citizenship to obtain private employment does so, at the very least, for the purpose of evading § 1324a(a)(1)(A)'s prohibition on a person or other entity knowingly hiring aliens who are not authorized to work in this country.").

Section 274A of the Act renders it unlawful for an employer to hire an alien without authorization from USCIS; thus section 212(a)(6)(C)(ii) of the Act specifically contemplates false claims of U.S. citizenship for the purpose of employment in the United States.

In the present matter, the applicant represented herself to be either a U.S. citizen or national on a Form I-9 in an effort to gain employment in the United States, and we will not disturb the director's finding of inadmissibility under section 212(a)(6)(C)(ii) of the Act.

We will now address the applicant's inadmissibility under section 212(a)(2)(A)(i)(I) of the Act for having committed crimes involving moral turpitude.

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.)

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.

As stated above, the record shows that the applicant was convicted in the United States District Court for the Northern District of Iowa on January 17, 2008 of three counts of using false identification to obtain employment in violation of 18 U.S.C. § 1546(a) and three counts of using a false social security number to obtain employment under 18 U.S.C. § 408(a)(7)(B).

At the time of the applicant's conviction, 18 U.S.C. § 1546 provided, in pertinent part:

> Fraud and misuse of visas, permits, and other documents
>
> (a) Whoever knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, or utters, uses, attempts to use, possesses, obtains, accepts, or receives any such visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States,

knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained; or

Whoever, except under direction of the Attorney General or the Commissioner of the Immigration and Naturalization Service, or other proper officer, knowingly possesses any blank permit, or engraves, sells, brings into the United States, or has in his control or possession any plate in the likeness of a plate designed for the printing of permits, or makes any print, photograph, or impression in the likeness of any immigrant or nonimmigrant visa, permit or other document required for entry into the United States, or has in his possession a distinctive paper which has been adopted by the Attorney General or the Commissioner of the Immigration and Naturalization Service for the printing of such visas, permits, or documents; or

Whoever, when applying for an immigrant or nonimmigrant visa, permit, or other document required for entry into the United States, or for admission to the United States personates another, or falsely appears in the name of a deceased individual, or evades or attempts to evade the immigration laws by appearing under an assumed or fictitious name without disclosing his true identity, or sells or otherwise disposes of, or offers to sell or otherwise dispose of, or utters, such visa, permit, or other document, to any person not authorized by law to receive such document; or

Whoever knowingly makes under oath, or as permitted under penalty of perjury under section 1746 of title 28, United States Code, knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document which contains any such false statement or which fails to contain any reasonable basis in law or fact--

Shall be fined under this title or imprisoned not more than 25 years (if the offense was committed to facilitate an act of international terrorism (as defined in section 2331 of this title)), 20 years (if the offense was committed to facilitate a drug trafficking crime (as defined in section 929(a) of this title)), 10 years (in the case of the first or second such offense, if the offense was not committed to facility [FN1] such an act of international terrorism or a drug trafficking crime), or 15 years (in the case of any other offense), or both.

The Fifth Circuit Court of Appeals in *Omagah v. Ashcroft* noted that 8 U.S.C. § 1546 encompasses both crimes which involve moral turpitude and those which do not because it punishes a spectrum of offenses, including "(1) simple, knowing possession of illegal documents, (2) possession of illegal documents with an intent to use them, and (3) forgery of illegal documents." 288 F.3d 254, 261 (5th Cir. 2002). The BIA in *Matter of Serna* addressed whether the first offense – simple, knowing possession of illegal documents – constitutes morally turpitudinous conduct, and held, "the crime of possession of an altered immigration document with the knowledge that it was altered, but without its use or proof of any intent to use it unlawfully, is not a crime involving moral turpitude." 20 I&N Dec. 579, 586 (BIA 1992). In *Omagah*, the Fifth Circuit addressed the second offense on the spectrum – possession of illegal documents with an intent to use them – and noted that it found

reasonable "the BIA's decision to classify, as moral turpitude, conspiracy to possess illegal immigration documents with the intent to defraud the government." 228 F.3d at 261.

Since a conviction under 8 U.S.C. § 1546 is not categorically a crime involving moral turpitude, we will engage in a second-stage inquiry and review the "record of conviction" to determine if the conviction was based on conduct involving moral turpitude. *Matter of Silva-Trevino*, 24 I&N Dec. 687, 698-699, 703-704, 708 (A.G. 2008). 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. 24 I&N Dec. at 698, 704, 708. The record in the instant case contains the judgment of conviction, which reflects that the applicant was convicted of the "using false identification to obtain employment" in violation of 8 U.S.C. § 1546. Consequently, the AAO finds that the applicant is inadmissible to the United States for having committed at least three crimes of moral turpitude. As such no purpose would be served in discussing whether the applicant's convictions under 18 U.S.C. § 408(a)(7)(B) are also crimes involving moral turpitude.

The AAO finds that the applicant's argument that *Matter of Silva-Trevino* should not be applied retroactively is not supported by case law. In *Silva-Trevino* itself, the Attorney General applied the newly articulated analytical framework retroactively to the respondent's conviction, and the BIA has applied the decision in this manner as well. *See Matter of Guevara-Alfaro*, 25 I&N Dec. 417 (BIA 2011). In general, 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). Counsel has argued that *Silva-Trevino* is wrongly decided, but the AAO lacks the authority to overrule it, as "determination and ruling by the Attorney General with respect to all questions of law shall be controlling" over the Secretary of Homeland Security, through whom the AAO derives its authority. INA § 103(a)(1).

In regards to the applicant's inadmissibility for unlawful presence under section 212(a)(9)(B) of the Act the record indicates that the applicant entered the United States without inspection in 2003. The applicant remained in the United States until February 21, 2008. Therefore, the applicant accrued unlawful presence from when she entered the United States in 2003 until February 21, 2008, the date she departed the United States. In applying for an immigrant visa, the applicant is seeking admission within 10 years of her 2008 departure from the United States. Therefore, the applicant is inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

> (B) Aliens Unlawfully Present.-
>
> > (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-
> >
> > . . . .
> >
> > (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the

> date of such alien's departure or removal from the United States, is inadmissible.

In regards to counsel's assertions regarding inadmissibility under section 212(a)(9)(C), we find that the applicant is not subject to this section of the Act nor did the field office director find that she was subject to section 212(a)(9)(C).

However, the applicant does find that the applicant is currently subject to section 212(a)(6)(B) of the Act for failing to attend her removal proceedings which does not provide for a waiver of inadmissibility.

Section 212(a)(6)(B) of the Act states:

> (B) Failure to attend removal proceeding.-Any alien who without reasonable cause fails or refuses to attend or remain in attendance at a proceeding to determine the alien's inadmissibility or deportability and who seeks admission to the United States within 5 years of such alien's subsequent departure or removal is inadmissible.

As stated above, the applicant entered the United States without inspection in February 2003, was apprehended, and placed in removal proceedings. On March 9, 2004, the applicant failed to appear at her removal proceeding and was ordered removed in absentia by the immigration judge. The applicant did not depart the United States until February 21, 2008. Thus, the applicant is inadmissible under section 212(a)(6)(B) of the Act until February 21, 2013 with no eligibility for a waiver of this ground of inadmissibility.

Thus, as the applicant is currently inadmissible under section 212(a)(6)(B) of the Act for having failed to appear at her removal proceeding and under 212(a)(6)(C)(ii) of the Act for having made a false claim to U.S. citizenship, she is not eligible for a waiver and no purpose would be served in discussing her eligibility for a waiver for her other grounds of inadmissibility.

In proceedings for application for waiver of grounds of inadmissibility, 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.