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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

PUBLIC COPY

[redacted]

Date: JAN 3 0 2012 Office: ACCRA, GHANA FILE: [redacted]

IN RE: [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:

SELF-REPRESENTED

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 Shumway

for Perry Rhew
Chief, Administrative Appeals Office

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

The applicant, a native and citizen of Nigeria, was admitted to the United States as a lawful permanent resident on August 22, 1989. As a result of a criminal conviction for Healthcare Fraud and Aiding and Abetting the applicant was placed in removal proceedings and ordered removed to Nigeria on November 1, 2001. The applicant waived his right to appeal and departed the United States on January 31, 2002. In applying for an immigrant visa based on an Alien Relative Petition filed by his daughter the applicant was found to be inadmissible to the United States under 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. The applicant is applying for a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his U.S. citizen wife and children.

In a decision, dated June 12, 2009, the field office director found that there was no waiver of the applicant's inadmissibility under section 212(a)(2)(A)(i)(I) of the Act because the applicant had been convicted of an aggravated felony after he obtained legal permanent residence. The field office director states that as there is no waiver available the application must be denied. In addition, the field office director also stated that the applicant's waiver application would not have been granted because he failed to present independent evidence of extreme hardship to a qualifying relative.

In a Notice of Appeal to the AAO (Form I-290B), dated July 10, 2009, the applicant states that although he does not find the field office director's decision erroneous, any law that does not allow for the consideration of restitution, reconciliation, or extenuating circumstances must be challenged. He states that hardship was denied based on lack of independent evidence, so he is submitting a psychological report from a licensed professional.

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.

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 September 20, 2000 the applicant was convicted in the United States District Court Northern District of Texas of one count of healthcare fraud and aiding and abetting in violation of 18 U.S.C. §§ 1347 & 2. The applicant was sentenced to 5 years imprisonment and five years supervised release, and ordered to pay restitution in the amount of $31,028.41.

At the time of the applicant's conviction, 18 U.S.C. § 1347 provided:

> Whoever knowingly and willfully executes, or attempts to execute, a scheme or artifice—
>
> (1) to defraud any health care benefit program; or
>
> (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program,
>
> in connection with the delivery of or payment for health care benefits, items, or services, shall be fined under this title or imprisoned not more than 10 years, or both. If the violation results in serious bodily injury (as defined in section 1365 of this title), such person shall be fined under this title or imprisoned not more than 20 years, or both; and if the violation results in death, such person shall be fined under this title, or imprisoned for any term of years or for life, or both.

Fraud has, as a general rule, been held to involve moral turpitude. The U.S. Supreme Court in *Jordan v. De George* concluded that "Whatever else the phrase 'crime involving moral turpitude' may mean in peripheral cases, the decided cases make it plain that crimes in which fraud was an ingredient have always been regarded as involving moral turpitude. . . . Fraud is the touchstone by which this case should be judged. The phrase 'crime involving moral turpitude' has without exception been construed to embrace fraudulent conduct." 341 U.S. 223, 232 (1951). Therefore, the AAO concurs that the applicant's conviction for healthcare fraud is a crime involving moral turpitude. The applicant does not contest this determination on appeal.

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), (B), . . . of subsection (a)(2) . . . if –
>
> . . . .
>
> (1) (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. . . .
>
> No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than seven years immediately preceding the date of initiation of proceedings to remove the alien from the United States. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.

In considering whether the respondent's conviction is an aggravated felony, we first apply the "formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." *Taylor v. United States*, 495 U.S. 575, 601 (1990). First, we will look to the statute under which the alien was convicted and compare its elements to the relevant definition of aggravated felony set out in section 101(a)(43) of the Act, 8 U.S.C. § 1101(a)(43). Under this categorical approach, an offense qualifies as an aggravated felony if and only if the full range of conduct covered by the criminal statute falls within the meaning of that term. *Id.*

However, if the criminal statute of conviction could be applied to conduct that would constitute an aggravated felony and conduct that would not, we then see if there is "a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime." *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). In applying this approach, the alien "may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues." *Id.*

If the alien demonstrates a "realistic probability" that the statute would be applied to conduct that falls outside the generic definition of the crime, we then apply a modified categorical approach. Under the modified categorical approach, we conduct a limited examination of documents in the record of conviction to determine if there is sufficient evidence to conclude that the alien was convicted of the elements of the generically defined crime. *Shepard v. U.S.*, 544 U.S. 13 (2005). These documents include the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the transcript of plea proceedings. 544 U.S. at 26.

Section 101(a)(43)(M)(i) of the Act, 8 U.S.C. § 1101(a)(43)(M)(i), includes as an aggravated felony an offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000. As reflected in the language of 18 U.S.C. § 1347, to prove healthcare fraud, the evidence must establish beyond a reasonable doubt that the perpetrator (1) defrauded a health care benefit program; or (2) obtained, by means of false or fraudulent pretenses, representations, or promises, any money or property owned by, or under the custody or control of, a health care benefit program. Therefore, the crime that the applicant was convicted of involved fraud or deceit within the meaning of section 101(a)(43)(M)(i) of the Act. *See Valansi v. Ashcroft,* 278 F.3d 203, 210 (3rd Cir. 2002).

Having established that the crime the applicant was convicted of categorically involves fraud or deceit within the meaning of section 101(a)(43)(M)(i) of the Act, the record also reflects that the victim of the applicant's crime sustained a loss in excess of $10,000. The record indicates that the applicant was required to pay restitution under the Mandatory Victim Restitution Act of 1996 in the amount of 31,028.41. Thus, the AAO finds that the applicant's conviction for healthcare fraud is an aggravated felony under section 101(a)(43)(M)(i) of the Act. The applicant is ineligible for a waiver under section 212(h) of the Act because he committed this crime subsequent to his admission to the United States as a lawful permanent resident. Since the applicant is ineligible for a waiver, the AAO need not address whether the applicant's qualifying relatives will suffer extreme hardship as a result of his inadmissibility.

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.