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



**U.S. Citizenship
and Immigration
Services**

[REDACTED]

H2

DATE: JUL 03 2012

OFFICE: BALTIMORE, MD

FILE: [REDACTED]

IN RE: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under sections 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,

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Baltimore, Maryland and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of El Salvador 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 is the son of lawful permanent residents and has three U.S. citizen children. He seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States.

The District Director concluded that the applicant had failed to establish that the bar to his admission would result in extreme hardship for a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Decision of the District Director*, dated December 10, 2009.

On appeal, counsel contends that the applicant is not inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act and, alternately, that the District Director failed to consider and meaningfully address the evidence of extreme hardship relating to the applicant's children. *Form I-290B, Notice of Appeal or Motion*, dated January 5, 2010.

The record of evidence includes, but is not limited to: counsel's brief; statements from the applicant and two of his daughters; statements of support for the applicant from his employer, his pastor and friends; a psychological evaluation of the applicant's children; country conditions information on El Salvador; earnings statements for the applicant; W-2 Wage and Tax Statements and tax returns for the applicant and his spouse; an employment letter for the applicant; and court records relating to the applicant's convictions. The entire record was reviewed and all relevant evidence considered in reaching a 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—
 - (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 the applicant was arrested for Fraudulent Use of a Social Security Card for the Purpose of Establishing a False Status, Code of Virginia § 18.2-204.1, on July 10, 1995. He pled guilty to this charge on August 9, 1996 and was given a 12-month suspended sentence and ordered to perform 40 hours of community service.¹ On August 3, 1996, the applicant was arrested for Solicitation of Prostitution, Virginia Code § 18.2-346B. On August 23, 1996, he pled guilty and was, thereafter, sentenced to 15 days in jail.

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. The methodology adopted by the Attorney General consists of a three-pronged approach. 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. 24 I&N Dec. at 698 (citing *Duenas-Alvarez*, 549 U.S. at 193). 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 or “modified categorical” inquiry in which the adjudicator reviews the “record of conviction” to determine if the conviction was based on conduct involving moral turpitude. 24 I&N Dec. 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. Finally, 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.

¹ The AAO notes that the applicant’s case was dismissed on August 9, 1996. However, under the current statutory definition of “conviction” provided at section 101(a)(48)(A) of the Act, no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). Any subsequent, rehabilitative action that overturns a state conviction, other than on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings, is ineffective to expunge a conviction for immigration purposes. *Id.* at 523, 528. In *Matter of Pickering*, the Board of Immigration Appeals reiterated that if a court vacates a conviction for reasons unrelated to a procedural or substantive defect in the underlying criminal proceedings, the alien remains “convicted” for immigration purposes. *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003). It appears from the record that the dismissal of the applicant’s conviction was based on his having completed 40 hours of community service and his participation in an Offender Aid and Rehabilitation (OAR) program. There is nothing in the record to show that the dismissal of the applicant’s case was based on a defect in the conviction or in the proceedings underlying the conviction. Thus, the applicant remains “convicted” within the meaning of section 101(a)(48)(A) of the Act.

The present case, however, arises within the jurisdiction of the Fourth Circuit Court of Appeals, which, in the recently decided *Prudencio v. Holder*, 669 F.3d 472 (4th Cir. 2012), rejected the *Silva-Trevino* framework for determining inadmissibility under section 212(a)(2)(A)(i)(I) of the Act. Instead, the Fourth Circuit chose to adhere to the categorical and modified categorical analyses developed in *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109L.Ed.2d 607 (1990) and *Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005), limiting its examination of the respondent's conviction to the statutory elements of the crime and, as necessary, to the record of conviction, which the Court specified as consisting of the charging document, the plea agreement, the plea colloquy, and any explicit findings of fact made by the trial judge since the respondent had pled guilty. Accordingly, the AAO will conduct our analysis of the applicant's criminal conviction within the framework established by *Prudencio*.

At the time of the applicant's 1996 conviction for Fraudulent Use of a Social Security Card for the Purpose of Establishing a False Status, Virginia Statutes (Va. St.) § 18.2-204.1B stated:

It shall be unlawful for any person to possess, sell or transfer any document for the purpose of establishing a false status, occupation, membership, license or identity for himself or any other person.

On appeal, counsel contends that Va. St. § 18.2-204.1B is not categorically a crime involving moral turpitude as it punishes not only the selling or transfer of a false document, but also the simple possession of a false document without its use or proof of any intent to use it unlawfully. In support of this assertion, counsel cites *Matter of Serna*, 20 I&N Dec. 579 (BIA 1992), in which the Board of Immigration Appeals (BIA) held that possession of a fraudulent document without use or proof of intent to use it is not a crime involving moral turpitude. Counsel further states that as the documentation that would comprise the applicant's record of conviction has been destroyed by the court pursuant to Va. St. §16.1-69.55, no modified categorical inquiry can be conducted and the applicant's conviction pursuant to Va. St. § 18.2-204.1B cannot be found to be a conviction for a crime involving moral turpitude.

The AAO is unaware of any published federal cases addressing the issue of whether the crime of establishing a false status under Virginia law is a crime of moral turpitude. However, we note that offenses involving fraud or the intent to defraud have long been held to constitute crimes involving moral turpitude. *Jordan v. De George*, 341 U.S. 223, 232 (1951); see also *Matter of Mclean*, 12 I&N Dec. 551, 552 (BIA 1967). We also observe that the BIA has determined that even where fraud is not specifically proscribed in a statute, it may be "so inextricably woven into the statute as to clearly be an ingredient of the crime." *Matter of Flores*, 17 I&N Dec. 225, 228 (BIA 1980)(holding that the respondent's conviction for uttering or selling false or counterfeit paper relating to registry of aliens was a crime involving moral turpitude although intent to defraud was not an element of the crime).

By its terms, Va. St. § 18.2-204.1B applies to the possession, selling or transfer of legitimate documents, as well as altered or counterfeit ones. What it punishes is the possession, sale or transfer of documents, valid or not, for the purpose of establishing something false, be it a false status, occupation, membership, license or identity. Accordingly, counsel's assertion that among the offenses punished by Va. St. § 18.2-204.1 is the simple possession of a fraudulent document reflects a misreading of the statutory language. Relying on the reasoning in *Flores*, we find that because any

conviction under Va. St. § 18.2-204.1 requires proof of a specific intent to use a document for a false purpose, the applicant's conviction is a conviction for a crime that categorically involves moral turpitude.

At the time of the applicant's 1996 conviction for Solicitation of Prostitution, Va. St. § 18.2-346B stated:

Any person who offers money or its equivalent to another for the purpose of engaging in sexual acts . . . and thereafter does any substantial act in furtherance thereof shall be guilty of solicitation of prostitution and shall be guilty of a Class 1 misdemeanor.

Counsel contends that the applicant's conviction for prostitution is not a conviction for a crime involving moral turpitude and references previous unpublished AAO decisions in which we have found that soliciting prosecution is not a crime involving moral turpitude. The AAO acknowledges that we have previously reached this conclusion in several prior decisions, noting the absence of any legal authority to the contrary. However, this is no longer the case.

The Ninth Circuit Court of Appeals in *Rohit v. Holder*, 670 F.3d 1085 (9th Cr. 2012) recently considered whether California (Cal.) Penal Code § 647(b), which prohibits disorderly conduct involving prostitution, is categorically a crime involving moral turpitude. In reviewing a BIA decision, which had found the offense punished by Cal. Penal Code § 647(b) to be a crime involving moral turpitude, the Ninth Circuit took note of the BIA's precedential decisions in *Matter of W*, 4 I&N Dec. 401 (practicing prostitution) and *Matter of Lambert*, 11 I&N Dec. 340 (BIA 1965) (securing another for prostitution), which had found prostitution to be a crime involving moral turpitude, stating:

We hold that soliciting an act of prostitution is not significantly less 'base, vile, and depraved' than engaging in an act of prostitution. Solicitation is the direct precursor to the act. A person who solicits an act of prostitution does not become appreciably more morally turpitudinous when the other party accepts or the two engage in the act. The base act is the intended result of the base request or offer.

....

[T]here is no meaningful distinction that would lead us to conclude that engaging in an act of prostitution is a crime of moral turpitude but that soliciting or agreeing to engage in an act of prostitution is not

Rohit v. Holder, 670 F.3d 1085, 1089-90 (9th Cir. 2012).

Having found prostitution and the solicitation thereof to always involves sexual exploitation, the Ninth Circuit concluded that Cal. Penal Code § 647(b) does not prohibit any conduct that does not also satisfy the generic definition of conduct involving moral turpitude.

The AAO finds the Ninth Circuit's reasoning in *Rohit* to be persuasive in the present matter. Accordingly, the applicant's conviction for Solicitation of Prostitution pursuant to Va. St. § 18.2-346B is a conviction for a crime involving moral turpitude.

As the record establishes that the applicant has been convicted of two crimes involving moral turpitude, he is inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act and must seek a waiver under section 212(h) of the Act.

Section 212(h) of the Act states:

(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)(A) [I]t is established to the satisfaction of the Attorney General that–

(i) [T]he 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

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).

In order to be eligible for a section 212(h)(1)(A) waiver, the applicant must demonstrate that his admission to the United States would not be contrary to its national welfare, safety, or security and that he is rehabilitated. There is no indication in the record that the applicant has ever been involved in conduct or activities that would be contrary to the safety or security of the United States. There is also no reason to conclude that his admission would negatively affect the national welfare.

The AAO further finds that the applicant has been rehabilitated. In reaching this determination, we have taken note of the applicant's July 20, 2009 statement in which he expresses regret for his past mistakes and indicates that he is raising his daughters to be law-abiding and productive citizens “in a stable home environment with spiritual guidance from [his] church.” We have further reviewed the statements written by his two older daughters who describe the love and guidance that have been provided them by their parents; the statement from [redacted] who indicates that the applicant is a “joy” as an employee, as he is trustworthy,

loyal, and hard-working; and the statement from the applicant's pastor [REDACTED] who describes him as an active member of the church, as well as a deacon, and indicates that he has found the applicant to be responsible, honest, hard-working, and dedicated to his family, the church and the community. Statements from [REDACTED] friends of the applicant, describe him as responsible and honest, a good person, a good father and a good worker. Based on these positive assessments of the applicant's character, his commitment to his family, his work ethic and his involvement with his church and community, the AAO finds the record to establish that the applicant has been rehabilitated, thereby satisfying the waiver requirements of section 212(h)(1)(A) of the Act.

As the applicant has satisfied the statutory requirements of section 212(h)(1)(A) of the Act, we will consider whether he also merits a favorable exercise of discretion under section 212(h)(2) of the Act.

In the present case, the mitigating factors that support the granting of the waiver application include the applicant's U.S. citizen children; his lawful permanent resident parents and sister, the general hardship that the applicant's family members would experience as a result of his removal, the applicant's youth at the time he committed the offenses that bar his admission; the absence of a criminal record since his 1996 arrest for prostitution; the continuing Temporary Protected Status designation for El Salvador; the applicant's lawful employment since 2001 and the esteem in which he is held by his family, his employer, his pastor and his friends. The unfavorable factors are the applicant's two convictions for which he seeks a waiver; his entry without inspection, albeit at 14 years of age; and his subsequent periods of unlawful residence and employment in the United States. While we do not condone the crimes or immigration violations committed by the applicant, we find that, taken together, the favorable factors in the present case outweigh the adverse factors such that a favorable exercise of discretion is warranted.

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 met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.