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



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



H2

DATE: JUL 28 2012 OFFICE: ATLANTA, GA 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:



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,

A handwritten signature in cursive script that reads "Michael Shumway".

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Atlanta, Georgia and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and a citizen of Belize 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. He is the son of a U.S. citizen mother and is married to a U.S. citizen with U.S. citizen children. The applicant seeks a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h) in order to remain in the United States.

The Field Office Director concluded that the applicant had failed to establish that the bar to his admission would impose extreme hardship on a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Field Office Director's Decision*, dated March 28, 2011.

On appeal, counsel asserts that the Field Office Director erred by finding that the applicant's inadmissibility would not result in extreme hardship for his qualifying relatives. *Form I-290B, Notice of Appeal or Motion*, dated April 25, 2011.

The record of proceeding includes, but is not limited to, the following evidence: counsel's briefs; statements from the applicant, his spouse, his mother and his daughter; medical records and prescriptions relating to the applicant's mother; tax returns and W-2 Wage and Tax Statements; letters of support from the applicant's former work supervisor, family members, the applicant's son's kindergarten teacher and the director of the school attended by the applicant's son; country conditions information on Belize; and court records relating to the applicant's arrests and convictions. The entire record was reviewed and all relevant evidence considered in reaching a decision on the appeal.

Section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), states in pertinent part:

(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 record reflects that on April 9, 1991, the applicant was arrested on charges of Possession of Stolen Vehicle, Illinois Statutes (IL ST) Chapter (CH) 95 1/2 § 4-103a(1); Burglary, IL ST CH 38 § 19-1(a); and Theft, IL ST CH 38 § 16-1(a)(1). Court documents appear to indicate that while these charges were initially stricken off, they were superseded by direct indictments that resulted in the

applicant's convictions for Burglary and Theft on January 13, 1992. The charge of Possession of Stolen Vehicle was again stricken off but reinstated on February 10, 1994, resulting in the applicant's conviction. He was sentenced to probation and fined. On July 14, 1994, the applicant pled guilty to Resisting a Peace Officer, 720 ILCS 5/31-1, and was sentenced to nine days in jail. On November 19, 1996, he pled guilty to Aggravated Fleeing from Police Officer, 720 ILCS 5/11-204.1, for which he was sentenced to one year of probation and 40 hours of community service, and ordered to pay a \$500 fine.

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. 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.

At the time of the applicant's 1992 conviction for theft, IL ST CH 38 §16-1(a)(1) stated:

Theft. (a) A person commits theft when he knowingly:

(1) Obtains or exerts unauthorized control over property of the owner ;

At the time of the applicant's 1992 conviction for burglary, IL ST CH 39 § 19-1(a) stated:

(a) A person commits burglary when without authority he knowingly enters or without authority remains within a building, housetrailer, watercraft, aircraft, motor vehicle as defined in The Illinois Vehicle Code . . . with intent to commit therein a felony or theft. This offense shall not include . . . the offense of residential burglary .

...
The Board of Immigration Appeals (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."). In *People v. Harden*, 42 Ill.2d 301, 303 (1969), the Supreme Court of Illinois stated that theft is committed when a person knowingly obtains or exerts unauthorized control over property of the owner, and intends to deprive the owner permanently of the use or benefit of the property. Accordingly, the AAO finds that a conviction for theft under IL ST CH 38 §16-1(a)(1) requires the intent to permanently take another person's property and is, therefore, categorically a crime involving moral turpitude.

We also find the applicant's violation of IL ST CH 39 § 19-1(a) to be a crime involving moral turpitude. In the December 2, 2008 brief filed in support of the applicant's prior waiver application, counsel indicates that the applicant's burglary offense is crime involving moral turpitude based on *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982), in which the BIA observed that burglary with the intent to commit theft is a crime involving moral turpitude. In light of counsel's statement, the AAO finds the record to establish that the applicant's burglary offense was committed with the intent to commit theft. Accordingly, the applicant's conviction for burglary is a conviction for a crime involving moral turpitude.

In 1994, the applicant was convicted of Possession of Stolen Vehicle, IL ST CH 95 1/2 § 4-103(a)(1), which stated:

(a) It is a violation of this Chapter for:

(1) A person not entitled to the possession of a vehicle or essential part of a vehicle to receive, possess, conceal, sell, dispose, or transfer it, knowing it to have been stolen or converted; additionally the General Assembly finds that the acquisition and disposition of vehicles and their essential parts are strictly controlled by law and that

such acquisitions and dispositions are reflected by documents of title, uniform invoices, rental contracts, leasing agreements and bills of sale. It may be inferred, therefore that a person exercising exclusive unexplained possession over a stolen or converted vehicle or an essential part of a stolen or converted vehicle has knowledge that such vehicle or essential part is stolen or converted, regardless of whether the date on which such vehicle or essential part was stolen is recent or remote

The AAO notes that numerous courts have found that possessing, transporting, and receiving stolen goods with the knowledge that the goods are stolen is a crime involving moral turpitude. *Michel v. INS*, 206 F.3d 253 (2nd Cir. 2000) (New York Statute involved knowing possession of stolen property, with the intention to benefit himself or a person other than the owner or to impede the recovery by the owner); *Wadman v. INS*, 329 F.2d 812 (9th Cir. 1964); *Matter of A-*, 7 I. & N. Dec. 626 (BIA 1957) (knowledge, as an essential element of the crime, is implied (Article 648, Italian Penal code)); *Matter of De La Nues*, 18 I. & N. Dec. 140 (BIA 1981), § 22-2205 District of Columbia Code; *Accord De Leon-Reynoso v. Ashcroft*, 293 F.3d 633 (3rd Cir. 2002) (receiving stolen property in violation of Pennsylvania statute required subjective belief property was stolen, and therefore, is a crime involving moral turpitude); *U.S. v. Castro*, 26 F.3d 557 (5th Cir. 1994) (receiving stolen autos). *Matter of Fernandez*, 14 I. & N. Dec. 24 (BIA 1972) (transporting forgery securities in interstate commerce in violation of 18 U.S.C. § 2314 held to be a crime involving moral turpitude). See also, *Matter of Acosta*, 14 I. & N. Dec. 338 (BIA 1973) (transporting forgery securities in foreign commerce). In the present case, the applicant's conviction under IL ST CH 95 1/2 § 4-103(a)(1) required him to know that the vehicle in his possession was stolen. Therefore, we find that his conviction for Possession of a Stolen Vehicle is categorically a crime involving moral turpitude.

At the time of the applicant's 1996 conviction for Aggravated Fleeing or Attempt to Elude a Police Officer, 625 Illinois Consolidated Statutes (ILCS) § 5/11-204.1 stated:

(a) The offense of aggravated fleeing or attempting to elude a police officer is committed by any driver or operator of a motor vehicle who flees or attempts to elude a police officer, after being given a visual or audible signal by a police officer in the manner prescribed in subsection (a) of Section 11-204 of this Code, and such flight or attempt to elude:

- (1) is at a rate of speed at least 21 miles per hour over the legal speed limit; and
- (2) causes bodily injury to any individual or causes damage in excess of \$300 to private property.

The AAO notes that the Seventh Circuit Court of Appeals (7th Circuit), the jurisdiction within which this case arises, has found a violation of 625 ILCS 5/11-204.1 to be a crime involving moral turpitude. In *Mei v. Ashcroft*, 393 F.3d 737, 742 (7th Cir. 2004), the 7th Circuit stated:

[A] person who deliberately flees at a high speed from an officer who, the fleer knows, wants him to stop, thus deliberately flouting lawful authority and endangering the officer, other drivers, passengers, and pedestrians, is deliberately engaged in seriously wrongful behavior He may not want to endanger anyone, but he has to know that he is greatly increasing the risk of an accident . . . and is doing so as a consequence of his deliberate and improper decision to ignore a lawful order of the police. We conclude, therefore, that aggravated fleeing is indeed a crime involving moral turpitude.

In that the record establishes that the applicant has been convicted of at least four crimes involving moral turpitude, the AAO finds that he is inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act. On appeal, counsel acknowledges the applicant's inadmissibility under section 212(a)(2)(A)(i)(I) of the Act.

The waiver for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act is found under section 212(h) of the Act, which provides:

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if -

(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

(ii) 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 observes that the Field Office Director appropriately considered the applicant's waiver application under section 212(h)(1)(B) of the Act. However, 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). Therefore, as the applicant's offenses predate the AAO's consideration of his appeal by more than 15 years, we will consider him for a waiver under 212(h)(1)(A) of the Act.

In establishing eligibility 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. The AAO finds nothing in the record to demonstrate that the applicant has been or is involved in conduct or activities that would be contrary to the safety or security of the United States or that he has engaged in any activity contrary to its welfare since the events that led to his 1996 conviction for Aggravated Fleeing or Attempt to Elude a Police Officer. We also note that the record contains statements of support from the individual who previously supervised the applicant at his place of employment, the applicant's son's kindergarten teacher, the director of the school attended by the applicant's son, and a number of the applicant's family members. These statements attest to the applicant's integrity and sense of responsibility, his work ethic and his commitment to his family, particularly his children. Also included in the record is an October 5, 2010 affidavit in which the applicant expresses remorse for the actions that led to his criminal convictions. Based on the evidence before us, we conclude that the applicant's admission would not be contrary to the national welfare, safety, or security of the United States and that he is rehabilitated. Accordingly, he is statutorily eligible for a waiver under section 212(h)(1)(A) of the Act.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the applicant bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

Id. at 301.

The AAO must then, "[B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to

determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country. “ *Id.* at 300. (Citations omitted).

The adverse factors in the present case are the applicant’s criminal convictions for which he now seeks a waiver and his long-term unlawful residence and employment in the United States. The mitigating factors here are the applicant’s U.S. citizen mother, spouse and children; his mother’s health problems; the general hardship to his family members if the waiver application is denied; his youth at the time he committed the offenses that bar his admission to the United States; the more than 15 years that have passed since his last conviction; and the previously noted statements submitted in support of the waiver application.

While the AAO finds the offenses committed by the applicant to be serious in nature, we conclude that, when taken together, the mitigating factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility rests with the applicant. *See* section 291 of the Act. Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.