



U.S. Citizenship
and Immigration
Services



H2

Date: NOV 02 2012

Office: MIAMI

FILE: [REDACTED]

IN RE: Applicant: [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 AAO inappropriately applied the law 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 with the field office or service center that originally decided your case by filing a Form I-190B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting 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)(II), for having been convicted of crimes involving moral turpitude. The applicant 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 with his U.S. citizen mother and three U.S. citizen children.

In a decision dated September 28, 2010, the acting field office director denied the Form I-601 application for a waiver in the exercise of discretion, finding that the applicant's criminal history shows that he is not rehabilitated and that he continues to pose a threat to society.

On appeal, the applicant asserts that the director erred in finding that he is not rehabilitated and in not considering whether his U.S. citizen mother and children would suffer extreme hardship if he is denied admission to the United States. The applicant further asserts that the evidence outlining medical and emotional difficulties demonstrate extreme hardship to his U.S. citizen mother and his U.S. citizen son, [REDACTED] who has been diagnosed with autism.

The record contains, but is not limited to: the applicant's brief; copies of the birth certificates of the applicant's three children; affidavits from some of the applicant's family members and friends; medical records for the applicant's mother and son; and documentation regarding the applicant's criminal history.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record has been reviewed and considered in rendering a decision on the appeal.

Section 212(a)(2)(A) of the Act provides, 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, or

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.)

This case arises 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. Att’y 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. Att’y Gen.*, 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.

Here, the applicant submitted a document from the Clerk of the Circuit and County Court of the Eleventh Judicial Circuit of Florida certifying that a search of the relevant state criminal records revealed that the applicant was convicted on February 23, 1999 of disorderly conduct, a second degree misdemeanor. In the same, the clerk of the court noted that pursuant to Rule 2.075 of the Florida Rules of Court, the requirement for retaining the records of misdemeanor cases is five years from the disposition date. Since more than five years have passed from the date of the applicant’s disorderly conduct conviction, the record of conviction is unavailable. However, the AAO notes that disorderly conduct is codified in Florida Statutes § 877.03. That section provides, in pertinent part, that:

Whoever commits such acts as are of a nature to corrupt the public morals, or outrage the sense of public decency, or affect the peace and quiet of persons who may witness them, or engages in brawling or fighting, or engages in such conduct as to constitute a

breach of the peace or disorderly conduct, shall be guilty of a misdemeanor of the second degree.

The AAO notes that the BIA's decision in *Matter of P-*, 2 I&N Dec. 117 (BIA 1944) is relevant to this categorical analysis. In *Matter of P-*, the BIA stated that one of the criteria to ascertain whether a particular crime involves moral turpitude is that the reprehensible act be accompanied by a vicious motive or corrupt mind. "It is in the intent that moral turpitude inheres." *Id.* at 121. Here, the statute does not require evil intent and it does not appear that it is essential that the act be accompanied by a vicious motive or corrupt mind. Because disorderly conduct is not a crime involving moral turpitude where evil intent is not necessarily involved, *see Matter of S-*, 5 I&N Dec. 576 (1953); *Matter of Mueller*, 11 I&N Dec. 268 (BIA 1965), the applicant's 1999 conviction for disorderly conduct under Florida Statutes § 877.03 does not constitute a crime involving moral turpitude.

The record further indicates that on or about April 10, 1995, the applicant was convicted of numerous crimes in Florida, including: multiple counts of burglary of an unoccupied structure under Florida Statutes § 810.02(3); multiple counts of grand theft under Florida Statutes § 812.014(1)(2)(c); one count of petit theft under Florida Statutes § 812.014(2)(D); dealing in stolen property under Florida Statutes § 812.019; and giving false verification of ownership to a pawnbroker under Florida Statutes § 538.04(4). The director found the applicant was inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of crimes involving moral turpitude. As the applicant has not disputed inadmissibility regarding the criminal convictions from April 10, 1995 on appeal, and the record does not show the finding to be erroneous, the AAO will not disturb the finding of the director.

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) (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 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 the applicant's most recent conviction for a crime involving moral turpitude occurred on or about April 10, 1995. As the conduct underlying the conviction took place over 15 years ago, he meets the requirement of section 212(h)(1)(A)(i) of the Act, 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 at the time of admission. *Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992). Section 212(h)(1)(A) of the Act requires that the applicant's admission to the United States not be contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated.

In his brief on appeal, the applicant states that he regrets the criminal acts and indiscretions of his younger days and that he is sorry for the crimes he committed. He states that since the birth of his oldest son, [REDACTED], he has not committed any further criminal offenses. Finally, he states that he is now committed to making a better life for his children and is focused on taking care of his mother, who resides with him and has been diagnosed with multiple medical conditions.

The applicant's mother states that her son understands the harm and suffering he has brought to his family as a result of his past criminal activities. She further states that the applicant regrets his criminal past and has taken affirmative steps to not repeat such conduct. She asserts that the applicant is a loving father who is deeply involved in his children's upbringing. The applicant's mother also asserts that he unconditionally supports her and that he has taken care of her when she has fallen ill.

The other letters submitted as part of the record from the applicant's family members and friends all indicate that the applicant is very supportive of his mother and children and that he is a dedicated father.

Based on the evidence before it, the AAO finds that the applicant has shown that he has been rehabilitated. As noted above, there is no evidence that the applicant has been convicted of crimes involving moral turpitude since 1995, in over 17 years. The AAO notes that the applicant's criminal activity was concentrated between the ages of 19 and 20, with an additional conviction for disorderly conduct when he was 23 years old.¹ The record supports the applicant's assertion that he has not committed any further criminal offenses since the birth of his oldest son. Moreover, the record supports that the applicant has rehabilitated himself since his concentrated period of criminal activity, and has turned his efforts towards his employment as a truck driver and his family. The record does not reflect that the applicant has a propensity to engage in further criminal activity. Rather, the record supports the applicant's assertions that he is remorseful, that he accepts responsibility for his crimes, and that he is resolved not to repeat such conduct. Additionally, the

¹ A review of the record indicates that, following his conviction for disorderly conduct, the applicant was arrested on November 9, 1999 for the offense of carrying a concealed firearm. The charge was not prosecuted and, therefore, will not be considered.

record reflects that the applicant's U.S. citizen mother and U.S. citizen son have special medical needs. Accordingly, the applicant has shown that he meets the requirement of section 212(h)(1)(A)(iii) of the Act.

The AAO further finds that the record supports a finding that the applicant's admission to the United States would not be contrary to the national welfare, safety, or security of the United States. The record does not reflect that the applicant has been involved in conduct or activities that would be *contrary to the safety or security of the United States since he committed the crimes that resulted in his convictions*. Moreover, the record does not support that the applicant presents a risk of engaging in violent behavior. Furthermore, though the record reveals that the applicant has been cited several times for traffic infractions, we do not deem these citations to establish sufficiently serious conduct to contradict the claim that the applicant's admission would not be contrary to the safety or security of the United States. Accordingly, the applicant has shown that he meets the requirements of section 212(h)(1)(A)(ii).

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 are: the applicant's criminal convictions, including burglary and grand theft offenses that call into question his moral character; and the applicant's multiple traffic infractions and citations. The positive factors in this case are: the applicant's residence in the United States for 26 years; the applicant's substantial family ties in the United States, including his U.S. citizen mother and U.S. citizen children; his mother's medical conditions; his son's medical condition; the general hardship that his mother and children would encounter as a result of his removal; and the absence of a criminal record in the United States since 1999.

Here, the applicant's criminal history constitutes a significant negative factor. The applicant's offenses of burglary, grand theft, and dealing in stolen property are a serious concern regarding his character and respect for the laws of the United States, particularly because he committed multiple criminal offenses in a short span. Nevertheless, the AAO finds that taken together, the positive factors in this case outweigh the negative factors, such that a favorable exercise of discretion is warranted.

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. Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.