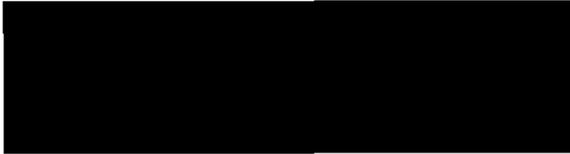


U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



H₂

Date: OCT 04 2012

Office: LONDON

FILE: 

IN RE: 

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

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,

Perry Rhew,
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, London, England. An appeal of the denial was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on motion. The motion will be granted and the underlying application is approved.

The applicant, a native and citizen of the United Kingdom, was found inadmissible 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 a crime involving moral turpitude. The applicant was also found to be inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for fraud or willful misrepresentation of a material fact. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), and section 212(i) of the Act, 8 U.S.C. § 1182(i) in order to reside in the United States with his U.S. lawful permanent resident spouse.

The Field Office Director concluded that the hardship that the applicant's U.S. lawful permanent resident spouse would suffer did not rise to the level of extreme as required by the statute. The applicant appealed that decision and the AAO dismissed that appeal on July 7, 2011, finding that the applicant failed to establish extreme hardship to his lawful permanent resident spouse. The applicant filed a motion to reopen and reconsider the AAO decision.

On motion, counsel asks the AAO to reconsider the decision concerning the applicant's inadmissibility under 212(a)(6)(C)(i) of the Act and also submits new evidence in support of the application asking the AAO to reopen the prior decision.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The applicant was found to be inadmissible under section 212(a)(6)(C) of the Act, which provides, in pertinent part:

(i)...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.

...

The Field Office Director determined that the applicant was inadmissible under section 212(a)(6)(C)(i) of the Act as a result of fraud or misrepresentation in connection with the applicant's failure to indicate that he had been convicted of a crime involving moral turpitude on multiple occasions when he entered the United States on the visa waiver program using Form I-94W, which specifically asks if the applicant has been convicted of a crime involving moral turpitude. On

motion, counsel for the applicant states that the applicant did not willfully misrepresent a material fact because he did not have knowledge that his criminal record qualified as having been arrested or convicted of a crime involving moral turpitude and he did not knowingly misrepresent his record. We must turn to whether the record demonstrates, considering the specific facts of this case, that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act based on his completion of Form I-94W, where he answered “no” to the question on the I-94W which asks, in pertinent part, “have you ever been arrested or convicted of an offense or crime involving moral turpitude...?”

U.S. Citizenship and Immigration Services interprets the term “willfully” as knowingly and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the factual claims are true. In order to find the element of willfulness, it must be determined that the alien was fully aware of the nature of the information sought and knowingly, intentionally, and deliberately misrepresented material facts. *See generally Matter of G-G-*, 7 I&N Dec. 161 (BIA 1956). To be willful, a misrepresentation must be made with knowledge of its falsity. 7 I&N Dec. at 164. To determine whether a misrepresentation was willful, we examine the circumstances as they existed at the time of the misrepresentation, and we “closely scrutinize the factual basis” of a finding of inadmissibility for fraud or misrepresentation because such a finding “perpetually bars an alien from admission.” *Matter of Y-G-*, 20 I&N Dec. 794, 796-97 (BIA 1994) (citing *Matter of Shirdel*, 19 I&N Dec. 33, 34-35 (BIA 1984)); *see also Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28-29 (BIA 1979). With relevance to the present matter, we acknowledge that the term “moral turpitude” is not in common usage, and it is unlikely that the average person is aware of its meaning and application in U.S. immigration law. Nevertheless, as the burden is on the applicant to establish that he or she is not inadmissible, the applicant has the burden of showing that any misrepresentation was, in fact, not willful. *See* section 291 of the Act, 8 U.S.C. § 1361.

The applicant states that the crime for which he was convicted and which is in fact a crime involving moral turpitude had occurred 28 years prior to his completion of the Form I-94W and he did not have knowledge that it was a crime that he was required to report on the Form I-94W. The applicant states that he “had no intention of misleading anybody.” The applicant states that because his conviction in the United Kingdom had not affected his life “in any sort of way” and because he had not consulted with an immigration attorney, he did not know that this conviction was a crime involving moral turpitude. Under the specific facts of this case, namely the length of time since the conviction and the applicant’s plausible explanation for his misunderstanding of the question on the Form I-94W, the AAO finds that the applicant did not “willfully” misrepresent a material fact to procure admission to the United States. As such, the AAO finds that the applicant is not inadmissible under section 212(a)(6)(C)(i) of the Act.

The applicant, however, remains inadmissible under section 212(a)(2) of the Act, which provides, in pertinent part:

(A)(i) Except as provided in clause (ii), any 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...
is inadmissible.

The record demonstrates that the applicant was convicted of two counts of obtaining property by deception in the United Kingdom on September 3, 1984. At the time of the applicant's convictions, obtaining property by deception was a theft offense addressed in the United Kingdom Theft Act of 1968. The AAO previously determined that the applicant's conviction was a crime involving moral turpitude and the applicant does not contest his inadmissibility under this section of the Act.

Section 212(h) of the Act provides, in pertinent parts:

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
- (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; or

...

Section 212(h)(1)(A) of the Act provides that the Secretary may, in her discretion, waive the application of subparagraph (A)(i)(I) of subsection (a)(2) if 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. An application for admission to the United States is 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).

Since the activities that are the basis for the applicant's criminal conviction occurred more than 15 years ago, on September 3, 1984, he is eligible for a waiver under section 212(h)(1)(A) of the Act. 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. Evidence in the record to establish the applicant's eligibility under section 212(h)(1)(A)(ii) and (iii) of the Act consists of a statement from the applicant's spouse, a statement from the applicant, statements from family members of the applicant, financial records for the applicant, and police clearance records for the applicant. The record does not indicate any arrests or convictions for the applicant since September 3, 1984.

In view of the record, which shows that the applicant has not been convicted of any crimes since 1984 and has worked hard to support his family and contribute to his community, the AAO finds that the applicant has provided sufficient evidence to demonstrate that his admission to the United States is not contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated, as required by section 212(h)(1)(A)(ii) and (iii) of the Act.

Demonstrating that his admission to the United States is not contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated, as required by section 212(h)(1)(A)(ii) and (iii) of the Act, is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Id.* For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Id.* at 299. The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

In *Matter of Mendez-Moralez*, in evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the BIA stated that:

The factors adverse to the applicant 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, recency and seriousness, and the presence of other evidence indicative of an 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 the alien began his 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 and service to 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 BIA further states that upon review of the record as a whole, a balancing of the equities and adverse matters must be made to determine whether discretion should be favorably exercised. The equities that the applicant must bring forward to establish a favorable exercise of administrative discretion is merited will depend in each case on the nature and circumstances of the ground of inadmissibility sought to be waived and on the presence of any additional adverse matters, and as the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence. *Id.* at 301.

The adverse factor in the present case is the applicant's conviction for obtaining property by deception in 1984. He has no other known criminal or immigration violations. The favorable factors in the present case are the applicant's family ties to the United States, the hardship to his lawful permanent resident spouse if the application were denied, and the applicant's acceptance of responsibility for his actions. The AAO finds that the applicant has established that the favorable factors in his application outweigh the unfavorable factors.

The crime committed by the applicant is very serious in nature and cannot be condoned. Nonetheless, the AAO finds that the applicant has established that the favorable factors in his application outweigh the unfavorable factors. Therefore, a favorable exercise of the Secretary's discretion is warranted.

The applicant has provided evidence of new facts that illustrate his eligibility for a waiver of inadmissibility under section 212(h). Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish he is eligible for the benefit sought. After a careful review of the record, the AAO finds that in the present motion, the applicant has met his burden.

ORDER: The motion to reopen and reconsider is granted and the underlying application is approved.