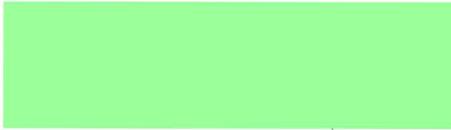




U.S. Citizenship  
and Immigration  
Services

(b)(6)



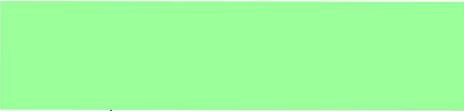
DATE: FEB 25 2013 OFFICE: MIAMI

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)

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.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, 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 any 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,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Field Office Director, Miami, Florida, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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)(I), for having committed 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.

The Field Office Director concluded that the applicant did not merit a favorable exercise of discretion, and denied the application accordingly. *See Decision of the Field Office Director*, dated July 9, 2010.

On appeal, counsel for the applicant asserts that the applicant has submitted evidence demonstrating his rehabilitation following his crimes of moral turpitude.

In support of the waiver application and appeal, the applicant submitted identity documents, letters of support, letters from the applicant's father, a letter from the applicant's church, country conditions reports concerning Cuba, and the applicant's criminal records. The entire record was reviewed and considered in rendering 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.

(ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such

crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

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 present case falls 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. *Fajardo v. U.S. Atty. Gen.*, 659 F.3d 1303, 1305-06 (11<sup>th</sup> 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 *Jaggernauth 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). *Fajardo v. U.S. Atty. Gen.*, 659 F.3d 1303, 1308-11 (11<sup>th</sup> Cir. 2011). 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 *Fajardo v. U.S. Atty. Gen.*, the Eleventh Circuit affirmed its reasoning in *Vuksanovic v. U.S. Attorney General*, 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.” *Fajardo v. U.S. Atty. Gen.* 659 F.3d at 1308-09.

(b)(6)

The record reflects that on October 24, 1986, the applicant was convicted of two counts of sexual battery, pursuant to 794.011(2) of the Florida Statutes, in the Circuit Court of the Eleventh Judicial Circuit of Florida, Dade County. The applicant was also convicted of petit larceny/theft on May 24, 1989, pursuant to section 312.014 of the Florida Statutes, in the same court.

The field office director found the applicant to inadmissible for having been convicted of crimes involving moral turpitude. The applicant has not disputed this determination on appeal. As the applicant has not disputed inadmissibility on appeal and the record does not show the field office director's finding of inadmissibility to be erroneous, the AAO will not disturb the director's inadmissibility finding.<sup>1</sup>

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 that–

(i) the alien is inadmissible only under subparagraph (D)(i) or (D)(ii) of such subsection or 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 . . . .

As the applicant's convictions that render him inadmissible took place over 15 years prior to the date of the applicant's instant appeal, he is eligible to apply for a waiver pursuant to section 212(h)(1)(A) of the Act. On appeal, counsel for the applicant asserts that the applicant has demonstrated rehabilitation, as he has committed no crimes aside from traffic violations since the

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<sup>1</sup> As such, the AAO will not make a determination as to whether any other of the applicant's convictions constitute crimes involving moral turpitude.

year 1990. In addition to the applicant's sexual battery and petty larceny convictions, he was also convicted of attempted burglary of structure on June 7, 1990. The record reflects that the applicant's traffic violations include reckless driving and driving with a suspended license. Counsel notes that the applicant was a minor, though tried as an adult, at the time he committed his sexual battery offenses.

Counsel asserts that the applicant has been residing in the United States since March 6, 1980 and has committed no crimes involving moral turpitude in over 20 years. The record contains a letter of support from the applicant's church indicating that the applicant is an active member. The record also contains letters of support stating that the applicant is trustworthy, honest, and hardworking. The applicant's now-deceased U.S. citizen father submitted a letter in support of the applicant's waiver application, asserting that the applicant took care of him through his medical ailments and provided him with financial support. It is noted that the applicant's Form G-325A indicates that he is disabled and the record reflects that the applicant receives public assistance.

Even if the AAO found that this applicant had demonstrated rehabilitation pursuant to section 212(h)(1)(A) of the Act, he would still be required to demonstrate that the denial of his application would result in exceptional and extremely unusual hardship. The applicant has been convicted of two counts of sexual battery pursuant to section 794.011(2) of the Florida Statutes, dangerous and violent crimes.

8 C.F.R. § 212.7(d) provides, in pertinent part:

Criminal grounds of inadmissibility involving dangerous or violent crimes. The Attorney General [Secretary], in general, will not favorably exercise discretion under section 212(h)(2) of the Act . . .in cases involving violent or dangerous crimes, except...in cases in which the alien clearly demonstrates that the denial of the application for adjustment of status or an immigrant visa or admission as an immigrant would result in exceptional and extremely unusual hardship. . . .

Section 794.011(2) of the Florida Code, in pertinent part, provides:

- (a) A person 18 years of age or older who commits sexual battery upon, or in an attempt to commit sexual battery injures the sexual organs of, a person less than 12 years of age commits a capital felony
- (b) A person less than 18 years of age who commits sexual battery upon, or in an attempt to commit sexual battery injures the sexual organs of, a person less than 12 years of age commits a life felony,

The applicant was 17 years of age at the time of his arrest for sexual battery and the record indicates that his victim was 11 years of age or younger. The Florida Code, in section 794.011(1)(h) defines sexual battery as oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual battery does not include an act done for a bona fide medical purpose.

(b)(6)

The AAO notes that the words “violent” and “dangerous” and the phrase “violent or dangerous crimes” are not further defined in the regulation, and the AAO is aware of no precedent decision or other authority containing a definition of these terms as used in 8 C.F.R. § 212.7(d). A similar phrase, “crime of violence,” is found in section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F). It provides that a “crime of violence,” as defined under 18 U.S.C. § 16, for which the term of imprisonment is at least one year, is an aggravated felony. As such, “crime of violence” is limited to those crimes specifically listed in 18 U.S.C. § 16. It is not a generic term with application to any crime involving violence, as that term may be commonly defined. That the DOJ chose not to use the language of section 101(a)(43)(F) of the Act or 18 U.S.C. § 16 in promulgating 8 C.F.R. § 212.7(d) indicates that “violent or dangerous crimes” and “crime of violence” are not synonymous. The Department of Justice clarified the relationship between these distinct terms in the interim final rule codifying 8 C.F.R. § 212.7(d):

[I]n general, individuals convicted of aggravated felonies would not warrant the Attorney General's use of this discretion. In fact, the proposed regulations stated that even if the applicant can meet the "exceptional and extremely unusual hardship" standard for the exercise of discretion, depending upon the severity of the offense, this might "still be insufficient" to obtain the waiver. See 67 FR at 45407. That language would substantially limit the circumstances under which an individual convicted of an aggravated felony would be granted a waiver as a matter of discretion. Therefore, the Department believes that this language achieves the goal of the commenter while not unduly constraining the Attorney General's discretion to render waiver decisions on a case-by-case basis.

67 Fed. Reg. 78675, 78677-78 (December 26, 2002).

Therefore, the fact that a conviction constitutes an aggravated felony under the Act may be indicative that an alien has also been convicted of a violent or dangerous crime, but it is not dispositive. Decisions to deny waiver applications on the basis of discretion under 8 C.F.R. § 212.7(d) are made on a factual “case-by-case basis.” The AAO interprets the phrase “violent or dangerous crimes” in accordance with the plain or common meaning of its terms, consistent with any published precedent decisions addressing discretionary denials under 8 C.F.R. § 212.7(d) or the standard originally set forth in *Matter of Jean*. Given that the applicant’s crimes involve an actual physical attack, the AAO finds that the applicant’s convictions render him subject to the heightened discretion standard of 8 C.F.R. § 212.7(d).

Accordingly, the applicant must show that “extraordinary circumstances” warrant approval of the waiver. 8 C.F.R. § 212.7(d). Extraordinary circumstances may exist in cases involving national security or foreign policy considerations, or if the denial of the applicant’s admission would result in exceptional and extremely unusual hardship. *Id.* Finding no evidence of foreign policy, national security, or other extraordinary equities, the AAO will consider whether the applicant has “clearly demonstrate[d] that the denial of . . . admission as an immigrant would result in exceptional and extremely unusual hardship” to a qualifying relative. *Id.*

The record reflects that the applicant's qualifying relative for his Form I-601 waiver application was his U.S. citizen father. The applicant's father has since passed away and there is no indication that the applicant has any other qualifying relatives in the context of this application. Section 204(l) of the Act states that aliens who reside in the United States at the time of the death of a qualifying relative and who continue to reside in the United States will have applications related to adjustment of status adjudicated notwithstanding the death of their qualifying relative if the alien is:

- (A) the beneficiary of a pending or approved petition for classification as an immediate relative (as described in section 201(b)(2)(A)(i));
- (B) the beneficiary of a pending or approved petition for classification under section 203 (a) or (d);
- (C) a derivative beneficiary of a pending or approved petition for classification under section 203(b) (as described in section 203(d));
- (D) the beneficiary of a pending or approved refugee/asylee relative petition under section 207 or 208;
- (E) an alien admitted in 'T' nonimmigrant status as described in section 101(a)(15)(T)(ii) or in 'U' nonimmigrant status as described in section 01(a)(15)(U)(ii); or
- (F) an asylee (as described in section 208(b)(3)).

The applicant filed an adjustment of status pursuant to his eligibility under the Cuban Adjustment Act of November 2, 1966 and there is no indication that he has status or pending petitions as contemplated by section 204(l). As the applicant has not demonstrated his eligibility under section 204(l) of the Act, his father is not a qualifying relative in the context of this application and the applicant is unable to demonstrate exceptional and extremely unusual hardship to his father in accordance with 8 C.F.R. § 212.7(d).

In this case, the record does not contain evidence to demonstrate that denial of the present waiver application would result in exceptional and extremely unusual hardship. The AAO therefore finds that the applicant has failed to establish the requisite level of hardship. In addition, the record does not demonstrate any extraordinary circumstances that would merit waiver approval under 8 C.F.R. § 212.7(d). As the applicant has not established that he merits approval of his waiver under this section, no purpose would be served in determining whether the applicant has demonstrated rehabilitation or merits this waiver as a matter of discretion<sup>2</sup>.

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<sup>2</sup> It is noted that this applicant would also require an Application for Permission to Reapply for Admission Into the United States After Deportation or Removal, Form I-212, based upon his order of exclusion from the United States dated June 19, 1992.

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. 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.