

(b)(6)

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



U.S. Citizenship
and Immigration
Services

[REDACTED]

Date: JUN 05 2013

Office: ROME (LONDON)

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:
[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,

A handwritten signature in black ink that reads "Michael Shumway".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The applicant, a native and citizen of Hungary who resides in Ireland, 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 seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h) in order to reside in the United States with his U.S. citizen spouse and daughter and U.S. lawful permanent resident stepdaughter.

In a decision dated July 25, 2012, the District Director concluded that the applicant did not establish that a qualifying relative would suffer extreme hardship and the application for a waiver of inadmissibility was denied.

On appeal, counsel for the applicant states that the applicant's U.S. citizen spouse and the applicant's daughter and stepdaughter would suffer extreme hardship as a result of the applicant's inadmissibility.

In support of the waiver application, the record includes, but is not limited to: legal arguments by counsel for the applicant; a letter from the applicant; a letter from the applicant's spouse; letters from the applicant's adult daughters; biographical information for the applicant, his spouse and their children from prior relationships; documentation regarding the applicant's employment; documentation regarding the applicant's spouse's employment; documentation regarding the applicant's daughters; documentation regarding the applicant's coursework; country conditions information for Ireland; a letter from the applicant's physician; psychological evaluations; police clearances; and documentation concerning the applicant's immigration and 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 was reviewed and considered in rendering a decision on the appeal.

The applicant is inadmissible under section 212(a)(2) of the Act, which 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 . . . 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.) 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. 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. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability exists where, at the time of the proceeding, an “actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien’s own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude.” *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

However, 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 inquiry in which the adjudicator reviews the “record of conviction” to determine if the conviction was based on conduct involving moral turpitude. *Id.* 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.

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. However, this “does not mean that the parties would be free to present any and all evidence bearing on an alien’s conduct leading to the conviction. (citation omitted). The sole purpose of the inquiry is to ascertain the nature of the prior conviction; it is not an invitation to relitigate the conviction itself.” *Id.* at 703.

The record indicates that on September 22, 2000, before the [REDACTED] Court in Hungary, the applicant was convicted of five offenses in violation of the Hungarian Criminal Code: Offense Against Exchange Regulations, BTK 309.Ö 3 Bek. A.p; Fraudulent Misuse of Funds, BTK 317.Ö 5 Bek. A.p.; two counts of Smuggling and “Fence”¹ of Dutiable Goods, BTK 312.Ö 2 Bek. C.p.; and Offense Against Exchange Regulations, BTK 309.Ö 5 Bek. C.p. The applicant was sentenced to one

¹ The translation for this word provided by the applicant appears to be incorrect. The correct word may be “Receiving,” according to a translation of Act IV of 1978 of the Criminal Code by Legislationline. Legislationline, Act IV of 1978 of the Criminal Code, August 18, 2005, legislationline.org/download/.../id/.../84d98ff3242b74e606dcb1da83aa.pdf.

year and eight months imprisonment. The record indicates that last of the actions leading to the conviction occurred on March 13, 1998.

The applicant's convictions relate to fraud involving the establishment of a business and the importing of goods without paying the proper duties. As the applicant has not contested inadmissibility on appeal, and the record does not show the District Director's determination to be in error, we will not disturb the finding that the applicant has been convicted of a crime involving moral turpitude.

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 record indicates that the last of the activities that are the basis for the applicant's criminal conviction occurred more than 15 years ago, on March 13, 1998, he is now eligible for a waiver under section 212(h)(1)(A) of the Act. 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, a statement from the applicant's spouse, statements from family members of the applicant and his spouse, statements from the employers of the applicant and his spouse, documentation of the applicant's employment history, and police clearances from Ireland and Hungary illustrating that the applicant has had no further interactions with law enforcement regarding his behavior or actions. The record does not indicate any arrests or convictions for the applicant that are unrelated to crime that led to the applicant's inadmissibility.

In view of the record, which shows that the applicant's only convictions pertain to criminal activities performed by the applicant on or before March 13, 1998, that the applicant has not been arrested for

or convicted of any other crimes, that the applicant has sought and obtained an education and employment, that the applicant is the husband of a U.S. citizen and the father of a U.S. citizen and the stepfather of a U.S. lawful permanent resident, and that numerous individuals have attested to the moral character of the applicant, 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 discretionary matters, the alien 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). The AAO must "balance 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." *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 300 (BIA 1996) (citations omitted).

The adverse factors in the present case are the applicant's convictions in his native Hungary, as well as the applicant's overstay of his visitor visa status in 2004. The applicant 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, and the applicant's ongoing employment, and his efforts to provide for his family and move forward with his life in a positive way. The AAO finds that the applicant has established that the favorable factors in his application outweigh the unfavorable factors.

The crimes committed by the applicant are 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.

In proceedings for an 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 met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.