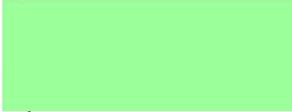




U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: **MAR 07 2013**

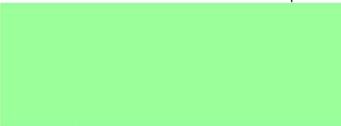
Office: VIENNA, AUSTRIA

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), and Application for Permission to Reapply for Admission into the United States after Deportation or Removal under Section 212(a)(9)(A), 8 U.S.C. § 1182(a)(9)(A)

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,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The applications were denied by the Field Office Director, Vienna, Austria and are now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Romania who was found to be inadmissible to the United States 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 committed a crime involving moral turpitude and section 212(a)(9)(A)(ii) of the Act, 8 C.F.R. § 1182(a)(9)(A)(ii), for having been ordered removed from the United States and seeking admission within ten years of his departure or removal. His spouse, son and mother are U.S. citizens. He seeks a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), and an exception under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii), in order to reside in the United States.

The Field Office Director concluded that the record did not establish that the bar to the applicant's admission would result in extreme hardship for a qualifying relative and, further, that he was not eligible for a favorable exercise of discretion. She denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. Based on the denial of the Form I-601, the Field Office Director denied the Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal, as a matter of discretion. *Decision of the Field Office Director*, dated June 29, 2011.

On appeal, counsel contends that the Field Office Director erred in finding that the applicant's inadmissibility would not result in extreme hardship for his spouse and mother. She also asserts that the applicant is eligible for a favorable exercise of discretion. *Form I-290B, Notice of Appeal or Motion*, dated July 26, 2011. Counsel submits evidence of the birth of the applicant's son.

The record includes, but is not limited to, counsel's briefs, statements from the applicant, his spouse, his mother, and his spouse's parents and siblings; medical documentation relating to the applicant's spouse and mother; psychological evaluations of the applicant's spouse and mother; statements of support from friends and family of the applicant; country conditions information on Romania; the applicant's tax returns; documentation of legal proceedings involving the applicant's mother; and court records relating to the applicant's convictions. The entire record was reviewed and all relevant information considered in reaching a decision on the appeal.

Section 212(a)(2)(A) of the Act states in pertinent part, that:

- (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 the applicant pled guilty to Using Computer to Commit A Crime, Michigan Compiled Laws (MCL) 752.797(3)(c), on January 13, 2003. He was placed on probation for one year, required to perform 100 hours of community service, and ordered to pay \$5,741.80 in

restitution and \$360 in court costs. The record also establishes that, on April 5, 2005, the applicant pled guilty to Performing Occupation without License, MCL 339.6013. He was placed ordered to pay restitution in the amount of \$3,669 and sentenced to 90 days in jail.

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 2003 conviction for using a computer to commit a crime, MCL 752.796 stated:

Sec. 6

(b)(6)

(1) A person shall not use a computer program, computer, computer system, or computer network to commit, attempt to commit, conspire to commit, or solicit another person to commit a crime.

MCL 752.797(3)(c) stated:

Sec. 7

(3) A person who violates section 6 is guilty of a crime as follows:

(c) If the underlying crime is a misdemeanor or a felony with a maximum term of imprisonment of w years or more but less than 4 years, the person is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than \$5,000.00, or both.

Several U.S. Courts have distinguished the realistic probability test articulated in *Duneas-Alvarez* in cases where “a state statute explicitly defines a crime more broadly than the generic definition” and “no ‘legal imagination,’ is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime.” *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007)(citing *Duenas-Alvarez*, 127 S.Ct. at 822). Here, the applicant has been convicted under a statute that punishes any crime requiring the use of a computer or other related technology. As a result, no legal imagination is required to conclude that MCL 752.797(3)(c) may be applied to conduct involving involve moral turpitude as well as conduct that does not. Therefore, the offense of which the applicant was convicted is not categorically a crime involving moral turpitude.

As the applicant has not been convicted of a crime categorically involving moral turpitude, the AAO has conducted the modified categorical inquiry required by *Silva-Trevino*, reviewing documentation from his record of conviction to determine the nature of his offense. We note that the January 8, 2003 Information in the applicant’s case indicates that the charge to which he pled guilty on January 13, 2003 states:

Defendant(s) . . . did use a computer program, computer, computer system, or computer network to commit, attempt to commit, conspire to commit, or solicit another to commit No Account Check, MCL 750.131A1; contrary to MCL 752.96, MSA 28.529(6), and MCL 752.797(3); MSA 28.529(7)(3)(C).

At the time of the applicant’s conviction, MCL 750.131a(1) stated:

A person shall not, with intent to defraud, make, draw, utter, or deliver any check, draft, or order for the payment of money, to apply on an account or otherwise, upon

any bank or other depository, if at the time of making, drawing, uttering or delivering the check, draft, or order he or she does not have an account in or credit with the bank or other depository for the payment of the check, draft, or order upon presentation. A person who violates this subsection is guilty of a felony, punishable by imprisonment for not more than 2 years, or by a fine of not more than \$500.00, or both.

Crimes involving fraud or the intent to defraud have long been held to constitute crimes involving moral turpitude. *Jordan v. De George*, 341 U.S. 223, 232 (1951); *see also Matter of Mclean*, 12 I. & N. Dec. 551, 552 (BIA 1967). The Board of Immigration Appeals (BIA) has also determined that even where fraud is not specifically proscribed in a statute, it may be “so inextricably woven into the statute as to clearly be an ingredient of the crime.” *Matter of Flores*, 17 I&N Dec. 225, 228 (BIA 1980) (holding that the respondent’s conviction for uttering or selling false or counterfeit paper relating to registry of aliens was a crime involving moral turpitude although intent to defraud was not an element of the crime). In the present case, the applicant’s record of conviction establishes that offense underlying his conviction pursuant to MCL 752.797(3)(c) involved an intent to defraud on his part. Therefore, his conviction under MCL 752.797(3)(c) is found to be for a crime involving moral turpitude.<sup>1</sup> The applicant does not contest this finding.

A waiver of a section 212(a)(2)(A)(i)(I) inadmissibility is found in section 212(h) of the Act, which states in pertinent part:

(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)(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 . . . .

A waiver of inadmissibility under section 212(h)(1)(B) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, the U.S. citizen or lawfully resident spouse, parent or child of an applicant. The qualifying relatives in this proceeding are the applicant’s U.S. citizen spouse, son and mother. Accordingly, hardship to the applicant or other family members will be considered only insofar as it results in hardship to these individuals. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and United States Citizenship and Immigration Services (USCIS) then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996).

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<sup>1</sup> In that the applicant’s admission to the United States is barred by his conviction under MCL 752.797(3)(c), the AAO finds it unnecessary to consider whether his conviction pursuant to MCL 339.601(3) is also a crime involving moral turpitude.

Extreme hardship is “not a definable term of fixed and inflexible content or meaning,” but “necessarily depends upon the facts and circumstances peculiar to each case.” *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, the BIA provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative’s family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative’s ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. *Id.* The BIA added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The BIA has also held that the common or typical results of removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one’s present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. See generally *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm’r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the BIA has made it clear that “[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists.” *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator “must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation.” *Id.*

The actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. See, e.g., *Matter of Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. See *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); but see *Matter of Ngai*, 19 I&N Dec. at 247

(separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

On appeal, counsel states that separation from the applicant has resulted in extreme emotional hardship for his spouse. She asserts that the applicant's spouse is suffering from a major depressive disorder as a result of the applicant's absence, noting that three separate psychological evaluations of the applicant's spouse, covering a period of four years, have been submitted for the record. Counsel points to the results from the most recent psychological testing instruments administered to the applicant's spouse as proof of "the pervasive, ubiquitous, and consistent nature of her symptoms." She contends that 15 percent of those diagnosed with severe major depressive disorder commit suicide and that the prolonged state of the applicant's spouse's depression could well prove fatal.

In June 19, 2007 and December 4, 2010 statements, the applicant's spouse asserts that she has a long history of medical problems, having been diagnosed with anemia in high school and has had ongoing problems with fainting, dizziness and low blood pressure ever since. She also states that she has recently experienced pains at night that are so sharp that she loses consciousness and that she is currently being evaluated to determine whether she is experiencing seizures. The applicant's spouse further indicates that she has been informed that she has masses on her ovaries.

In support of the above claims, the record contains three psychological evaluations of the applicant's spouse, dated September 12, 2006, June 17, 2007, and July 2, 2010, prepared by licensed psychologist Dr. [REDACTED]. All three of the evaluations find the applicant's spouse to be suffering from Major Depressive Disorder, Single Episode, Severe without Psychotic Features, based on Dr. [REDACTED] clinical observations of the applicant's spouse and the results of the psychological tests he has administered to her. In his July 2, 2010 evaluation, Dr. [REDACTED] indicates that he administered a third set of psychological tests to the applicant's spouse – the Depression and Anxiety Stress Scales, the Beck Anxiety Inventory, and the Minnesota Multiphasic Personality Inventory – and conducted a third clinical interview with her. He reports that the applicant's spouse continues to suffer from the clinical symptoms of depression and anxiety, which are directly related to the applicant's immigration situation and their resulting separation. He finds that she continues to meet the diagnostic criteria for Major Depressive Disorder, Single Episode, Severe without Psychotic Features and indicates that, as on previous occasions, he has advised her to seek professional counseling services.

Dr. [REDACTED] also indicates in his most recent evaluation, that the applicant's spouse reported continuing problems with her health, indicating that she is seeing a neurologist, Dr. [REDACTED] for testing and treatment. He also indicates that the applicant's spouse informed him that masses have been found on her ovaries.

The record also contains a birth certificate and a U.S. Department of State Consular Report of Birth Abroad, which establish that the applicant's spouse gave birth to a son in Hungary on September 28, 2011.

The AAO notes the preceding claims and evidence and, while we do not find the record to support all of the statements made regarding the applicant's medical problems, we, nevertheless, find sufficient evidence to establish that continued separation from the applicant would result in extreme hardship for his spouse.

Counsel asserts that relocation to Romania would result in extreme hardship for the applicant's spouse as a result of her "high degree of acculturation" to the United States and her inability to speak Romanian. To establish that starting a new life in Romania would result in significant hardship for the applicant's spouse, counsel points to the decision in *Matter of Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) in which the BIA found that a 15-year-old child who was not fluent in Chinese, had spent her formative years in the United States and was integrated into the American lifestyle would experience extreme hardship if she relocated to Taiwan with her parents. Counsel states that the applicant's spouse presents an even more compelling case as she, at 25-years-of-age, is much more acculturated to the United States than the 15-year-old child in *Kao and Lin*. She further notes that while in *Kao and Lin*, the child was relocating with her family, the applicant's spouse would be leaving her parents and siblings behind in the United States. Counsel also states that while the 15-year-old child in *Kao and Lin* had never been to Taiwan, the applicant's spouse has actually visited Romania and hates it, finding the culture of the applicant's village to be restrictive and threatening. She reports that the applicant's spouse has been punched in the stomach on a bus by a male passenger and that she has been threatened with physical and sexual assault by villagers.

Counsel also maintains that the applicant's spouse's lack of Romanian language skills would result in financial hardship as she would be unable to obtain employment. Even if she were to find employment, counsel asserts, she and the applicant who is employed as an unskilled worker would earn the equivalent of \$400 per month, which would place them below the U.S. poverty line of \$14,560 for a family of two.

Counsel further asserts that the applicant's spouse suffers from poor health and would not be able to obtain medical care in Romania. As proof, counsel notes that the applicant's spouse has suffered two miscarriages in Romania and that she was unable to obtain medical assistance on these occasions as there are no doctors in the applicant's village. She also notes that when the applicant suffered a head injury, he had to hitchhike to another city for medical treatment.

As previously discussed, the record contains statements from the applicant's spouse, dated June 19, 2007 and December 4, 2010, in which she indicates that she has a long history of medical problems, having been diagnosed with anemia in high school and has had ongoing problems with fainting, dizziness and low blood pressure ever since. Most recently, the applicant's spouse states, she has experienced pain at night that results in a loss of consciousness. She states that she is currently being evaluated to determine whether she is experiencing seizures and that she has also been informed that she has masses on her ovaries.

In her June 19, 2007 statement, the applicant's spouse asserts that she has no family in Romania, does not know the language and that it would be hard to practice her religion because the church in the applicant's village belongs to another faith. She also states that she suffered a miscarriage in

December 2006, that no medical help or medication was available in the village where the applicant's lives and that she had no way to get to the nearest city for treatment. The applicant's spouse further recounts that during a visit to the applicant, she had an allergic reaction to a cabbage and had to hitchhike to the city where a doctor treated her with medication that had expired. She states that she had to go to seven different pharmacies before she was able to obtain the medicines the doctor prescribed.

The record contains a copy of the U.S. Department of State's Country Specific Information on Romania, dated January 10, 2011, which indicates that Romanian medical care is generally not up to Western standards and that basic medical supplies are limited, especially outside major cities. It also states that sanitary conditions in hospitals vary, and that nursing care and assistance from orderlies is often absent in hospitals.

Also found in the record is a November 5, 2007 statement from a Dr. [REDACTED] at the [REDACTED] in Romania, which indicates he previously treated the applicant's spouse for acute rash with angio edema and prescribed medication. A November 11, 2010 statement from Dr. [REDACTED] indicates that the applicant's spouse has suffered two miscarriages, both of which occurred in Romania, and that she should remain in the United States in the event of a subsequent pregnancy because of the increased risk of another miscarriage. A translated statement from [REDACTED], dated October 25, 2010, indicates that she was with the applicant's spouse at the time of her first miscarriage and that the applicant's spouse did not receive any medical care because no doctor was available in the village. [REDACTED] also states that the public transportation system was not available and that there was no taxi to move the applicant's spouse to the closest medical center, which was 40 km away. Dr. [REDACTED] July 2, 2010 evaluation of the applicant's spouse, as previously discussed, indicates that she reported experiencing fainting spells and that she is seeing a neurologist, Dr. [REDACTED] for testing and treatment. He also reports that masses have been found on the applicant's spouse's ovaries.

In his June 17, 2007 evaluation of the applicant's spouse, Dr. [REDACTED] reports that he interviewed her upon her return from Romania where she had been living with the applicant. He indicates that at the time of this interview, the applicant's spouse was continuing to manifest the depressive symptoms he had identified at the time of his 2006 evaluation and notes that the time away from her family, her inability to speak Romanian, her lack of understanding of Romanian culture and her isolation on the applicant's grandparents' farm were placing stress on her marriage. Dr. [REDACTED] also reports that the applicant's spouse was suffering from panic attacks and was anemic, that she often fainted and had also experienced dizziness and trembling. He states that he administered the Minnesota Multiphasic Personality Inventory and the Social Readjustment Rating Scale and Questionnaire to the applicant's spouse, which along with his clinical interview formed the basis for his conclusions.

Having reviewed the record, we do not find all of the applicant's claims to be documented by the record. Nevertheless, we conclude that there is sufficient evidence in the record to establish that relocation to Romania would result in extreme hardship for the applicant's spouse.

As the applicant has established statutorily eligibility for a waiver under section 212(h) of the Act, the AAO will consider whether he is also eligible for a favorable exercise 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 . . . 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).

*See Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then "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." *Id.* at 300. (Citations omitted).

The adverse factors in the applicant's case are the 2003 conviction for Using Computer to Commit A Crime that bars his admission to the United States, as well as that for Performing Occupation without License; his overstay of his 1993 B-2 visitor's visa; his periods of unlawful presence and employment in the United States; and his failure to comply with a 2002 grant of voluntary departure. The mitigating factors include the applicant's U.S. citizen spouse, child and mother; the extreme hardship his spouse would experience if the waiver application is denied; his youth at the time of his 1993 violation of the terms of his B-2 visitor's visa; his payment of taxes; the absence of any criminal record in Romania; and the ten years that have passed since the events that led to his conviction for a crime involving moral turpitude.

The AAO acknowledges the negative factors in this case. Nevertheless, we find 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 Form I-601 will be approved.

The AAO notes that in her June 29, 2011 decision, the Field Office Director denied the applicant's Form I-212 as a matter of discretion, based solely on the denial of the Form I-601. As the AAO has

now found the applicant to be eligible for a waiver of inadmissibility under section 212(h) of the Act, we will withdraw the Field Office Director's decision on the Form I-212 and render a new decision.

Section 212(a)(9)(A) of the Act states:

Aliens previously removed.-

(A) Certain aliens previously removed.-

(i) Arriving aliens.-Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(ii) Other aliens.- Any alien not described in clause (i) who-

(I) has been ordered removed under section 240 or any other provision of law, or

(II) departed the United States while an order of removal was outstanding, and seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an aliens convicted of an aggravated felony) is inadmissible.

(iii) Exception.- Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the aliens' reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney General [now, Secretary, Department of Homeland Security] has consented to the aliens' reapplying for admission.

On September 18, 2002, the BIA ordered the applicant and his mother removed from the United States, granting them voluntary departure for a period of 30 days. The applicant did not depart the United States within the 30 days, thereby turning the grant of voluntary departure into a final order of removal. He left the United States on April 19, 2005, executing the order of removal. As such, the applicant is inadmissible under section 212(a)(9)(A)(ii)(II) of the Act and must request permission to reapply for admission.

A grant of permission to reapply for admission is a discretionary decision based on the weighing of negative and positive factors. The AAO has found the applicant to warrant a favorable exercise of

discretion in relation to the adjudication of the Form I-601. For the reasons stated in that finding, the AAO concludes that the applicant's Form I-212 should also be approved as a matter of discretion.

In inadmissibility proceedings, the burden of proving eligibility remains entirely with the applicant. See section 291 of the Act, 8 U.S.C. § 1361. In discretionary matters, the applicant bears the full burden of proving his or her eligibility for discretionary relief. See *Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976). Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

**ORDER:** The appeal is sustained. The Form I-601 and the Form I-212 are approved.