

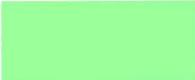
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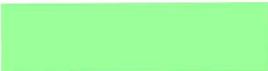
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Avenue, N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

DATE: **MAY 21 2013** OFFICE: BANGKOK

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); section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i); section 212(d)(11) of the Immigration and Nationality Act, 8 U.S.C. § 1182(d)(11)

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg", with a long horizontal flourish extending to the right.

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The applicant is a native of China and citizen of Taiwan 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 a crime involving moral turpitude. The applicant was also found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for attempting to procure admission to the United States through fraud or misrepresentation.¹ The applicant seeks a waiver of inadmissibility in order to remain in the United States with her U.S. citizen and lawful permanent resident daughters.

The Field Office Director concluded that the applicant failed to demonstrate the existence of a qualifying relative in the context of her 212(i) waiver application and denied the application accordingly. *See Decision of the Field Office Director*, dated June 29, 2012.

On appeal, counsel for the applicant asserts that the applicant is not inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act because she did not make a material or willful misrepresentation in order to procure an immigration benefit.

In support of the waiver application and appeal, the applicant submitted an affidavit, letters from her two daughters, medical documentation concerning herself and her daughter, family photographs, identity documents, financial documentation, and background information concerning Taiwan. 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.

¹ It is noted that the field office director also found the applicant to be inadmissible to the United States for alien smuggling pursuant to section 212(a)(6)(E) of the Act, 8 U.S.C. § 1182(a)(6)(E). The field office director determined that the applicant brought her daughter into the United States as a nonimmigrant, though she was actually an intending immigrant. However, the AAO finds that the record is not clear concerning this charge of inadmissibility. The applicant and the applicant's daughter both assert that the applicant's daughter entered the United States on vacation and afterwards decided to remain. It is noted that the field office director, in her decision, determined that the applicant is eligible for a section 212(d)(11) waiver for this ground of inadmissibility.

(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).

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

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 applicant was convicted of fraud in Taiwan on April 24, 1987. The applicant was sentenced to a suspended sentence of six months imprisonment and a fine. The maximum sentence for the applicant’s crime is five years imprisonment. Counsel for the applicant asserts that the applicant was not aware that she was convicted of a crime. It is noted that there is no indication in the record that the applicant’s conviction has been overturned. It is also noted that crimes that require the intent to defraud have been held, as a general rule, to involve moral turpitude. *Matter of Adetiba*, 20 I&N Dec. 506, 508 (BIA 1992). The AAO concurs with the field office director’s finding that the applicant is inadmissible pursuant to section 212(a)(2)(A)(i) of the Act for committing a crime involving moral turpitude.

Section 212(a)(6)(C) of the Act 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 applicant submitted and swore to the contents of an immigrant visa application on January 26, 2011, on which the applicant stated that she has not been charged, arrested, or convicted of any offense or crime. The record also indicates that the applicant made representations in consular interviews in 1998, 2009, and 2011 that she had not been convicted of a crime and had never been involved in any illegal or fraudulent activities. However, as noted, the record contains a criminal judgment against the applicant, dated April 24, 1987. According to this criminal judgment, the applicant was convicted of fraud and sentenced to six months imprisonment, suspended, and a fine.

Counsel for the applicant asserts that the applicant did not make a willful misrepresentation because she did not intend to defraud in her consular interview. Counsel states that the applicant believed that her record was clear and obtained a record from the Taipei City Police Department showing that she has no record of conviction in Taiwan. However, even if the applicant believed that she, after paying a fine, no longer had a fraud conviction on the criminal record, the Form DS-230, Application for Immigrant Visa and Alien Registration, asks if the applicant has *ever* been convicted of an offense of crime and also whether she has been charged or arrested for the same. The applicant asserts that she was never arrested for a charge and that she was, rather, called as a witness in a court hearing and never went back to court again. However, the record indicates that the applicant was indicted for fraud by the Prosecutors Office of Panchiao Branch of Taipei District Court and ruled not guilty after trial. After a subsequent prosecutor’s appeal, the prior judgment of not guilty was revoked by the Taiwan High Court and both the applicant and her business partner husband were subsequently convicted and sentenced. Based upon the facts in the record indicating the procedural history of the applicant’s criminal case, it is clear that the applicant was both charged and convicted of the crime of fraud and the applicant willfully

misrepresented her criminal history in stating that she had never been arrested, charged, or convicted of any crime or offense.

Counsel further asserts that the applicant did not make a material misrepresentation because she would have received a visa even if she revealed a conviction for fraud. The BIA has held that a misrepresentation made in connection with an application for visa or other documents, or for entry into the United States, is material if either:

1. the alien is excludable on the true facts, or
2. the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in proper determination that he be excluded.

Matter of S- and B-C-, 9 I&N Dec. 436, 448-449 (BIA 1960; AG 1961).

As the applicant's conviction is for a crime involving moral turpitude that does not fall within the "petty offense" exception, the applicant's conviction renders her inadmissible to the United States pursuant to section 212(a)(2)(A)(i) of the Act. Counsel for the applicant asserts that if the applicant were only charged under the section 212(a)(2)(A)(i) ground of inadmissibility, she would be eligible to demonstrate rehabilitation for her conviction since it occurred over 15 years prior to her instant appeal. Accordingly, counsel contends that the final disposition of the applicant's visa eligibility would not be affected even if she had disclosed her conviction.

The Department of State Foreign Affairs Manual states that the concealment of the possible applicability of a ground of inadmissibility may not be deemed material where the applicant is relieved of the ground of inadmissibility by operation of law. *DOS Foreign Affairs Manual*, § 40.63 N6.2(1). A distinction is drawn between section 212 provisions of the Act that provide relief automatically by operation of law and those that grant relief after an evaluation of all relevant factors. *DOS Foreign Affairs Manual*, § 40.63 N6.2(2). A fact is determined to be material if the final relief determination would depend upon an exercise in judgment. *Id.* Section 212(h)(1)(A) of the Act, the waiver statute upon which the applicant relies, requires both a determination that an applicant has been rehabilitated and that the applicant's admission would not be contrary to the national welfare, safety, or security of the United States. As such, this section of the Act does not provide an applicant with automatic relief, but rather requires judgment and an evaluation of factors. The applicant's misrepresentation concerning her fraud conviction, a conviction involving moral turpitude requiring a waiver of inadmissibility, is a material misrepresentation. As the applicant's attempt to procure entry to the United States through misrepresentation was both willful and material, the applicant is inadmissible to the United States under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i).

Section 212(i) of the Act provides:

- (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General (Secretary),

waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant who is the spouse, son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General (Secretary) that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien...

A section 212(i) waiver of the bar to admission resulting from section 212(a)(6)(C)(i) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant is not considered in section 212(i) waiver proceedings unless it causes hardship to a qualifying relative. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996). As the applicant's waiver application under 212(i) is the most restrictive of the waivers for which she is applying, her appeal will be adjudicated in accordance with this section.

The applicant has not established that she has a qualifying relative whose hardship may serve as a basis for eligibility for a waiver under sections 212(i), 212(h), or 212(a)(9)(B)(v) of the Act. As the applicant has not established extreme hardship to a qualifying family member, no purpose would be served in determining whether the applicant merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under sections 212(a)(9)(B)(v), 212(i), and 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.