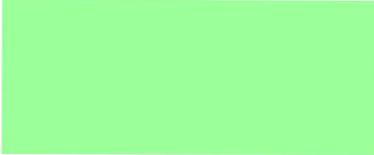




U.S. Citizenship
and Immigration
Services

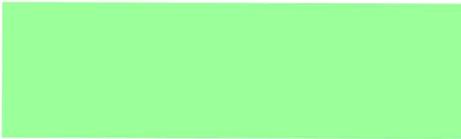
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DATE: **AUG 01 2014**

OFFICE: NEBRASKA SERVICE CENTER

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:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

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

The applicant, a native and citizen of India, was admitted to the United States as a lawful permanent resident on April 18, 2000. As a result of his criminal convictions, the applicant was placed in removal proceedings and ordered removed to India on April 7, 2004. The applicant departed the United States on May 4, 2004. In applying for an immigrant visa based on a Form I-130, Petition for Alien Relative, that his daughter filed on his behalf, the applicant 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 been convicted of conspiracies to commit a crime involving moral turpitude. The applicant is applying for a waiver under 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 wife, daughter, and son.

The applicant's convictions also are defined as aggravated felonies in sections 101(a)(43)(S) and (a)(43)(U) of the Act. See 8 U.S.C. §§1101(a)(43)(S), (a)(43)(U). At the time of the applicant's offenses, the applicant was a lawful permanent resident of the United States. Based on the applicant's status as a lawful permanent resident who had been convicted of two conspiracies to commit a crime that was determined to be an aggravated felony under section 237(A)(2)(iii) of the Act, the Director found that the applicant was ineligible for a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h), and that as a result, the applicant was not eligible for admission into the United States after removal. The Director denied the applicant's I-601, Application for Waiver of Grounds of Inadmissibility (Form I-601). *Form I-601 Decision*, dated September 26, 2013.

On appeal, the applicant asserts that it is extremely hard for his U.S. citizen spouse to live apart from him due to her depression and high blood pressure, and it also is hard for her to live in India due to her medical condition. *Form I-290B, Notice of Appeal or Motion* (Form I-290B), dated October 12, 2013.

In support of the waiver application, the record includes, but is not limited to: the applicant's conviction records; affidavits by the applicant and his daughter; letters of support; documents establishing identity and relationships; airline, employment, financial, and medical documents; and a police clearance letter. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(2)(A) of the Act provides, in relevant 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.

In assessing whether a conviction is a crime involving moral turpitude, the adjudicator must first

“determine what law, or portion of law, was violated.” *Matter of Esfandiary*, 16 I&N Dec. 659, 660 (BIA 1979). The adjudicator engages in a categorical inquiry, considering the “inherent nature of the crime as defined by statute and interpreted by the courts,” not the underlying facts of the criminal offense. *Matter of Short*, 20 I&N Dec. 136, 137 (BIA 1989); see also *Matter of Louissaint*, 24 I&N Dec. 754, 757 (BIA 2009) (citing *Taylor v. United States*, 495 U.S. 575, 599-600 (1990)). If the statute “defines a crime in which turpitude necessarily inheres, then the conviction is for a crime involving moral turpitude.” *Matter of Short*, *supra*, at 137.

Where the statute includes some offenses involving moral turpitude and some which do not – where there is a *realistic probability* that the statute would be applied to conduct not involving moral turpitude – the adjudicator looks to the record of conviction to determine the offense for which the applicant was convicted. See *Matter of Guevara Alfaro*, 25 I&N Dec. 417, 421 (citing *Matter of Silva-Trevino*, 24 I&N Dec. 687, 689-90, 696-99 (A.G. 2008)); see also *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability, as opposed to a theoretical possibility, exists where there is an actual prior case, possibly the applicant’s own case, in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. *Matter of Silva-Trevino*, *supra*, at 708. The record of conviction is a narrow, specific set of documents which includes the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Matter of Louissaint*, *supra*, at 757; see also *Shepard v. U.S.*, 544 U.S. 13, 16 (2005) (finding that the record of conviction is limited to the “charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.”)

If review of the record of conviction is inconclusive, an adjudicator may consider “probative evidence beyond the record of conviction” to resolve whether the offense constitutes a crime involving moral turpitude. *Matter of Guevara Alfaro*, *supra*, at 422 (citing *Matter of Silva-Trevino*, *supra*, at 690, 699-704, 709). However, 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.” *Matter of Silva-Trevino*, *supra*, at 703; see also *Matter of Ahortalejo-Guzman*, 25 I&N Dec. 465, 468 (BIA 2011) (an adjudicator may not “undermine plea agreements by going behind a conviction to use sources outside the record of conviction to determine that an alien was convicted of a more serious turpitudinous offense.”)

The record reflects that on January 9, 2004, the applicant was convicted in the United States District Court, Northern District of California, of two counts of conspiracy in violation of 18 U.S.C. § 371. The applicant was sentenced to 12 months and 1 day imprisonment and 3 years of supervised release, and he also was ordered to pay restitution in the amount of \$200.

At the time of the applicant’s convictions, 18 U.S.C. § 371, Conspiracy to Commit Offense or to Defraud the United States, provided:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Title 18 U.S.C. § 371 is divisible because it “creates two crimes, first, a conspiracy to commit an offense against the United States, and, second, a conspiracy to defraud the United States in any manner or for any purpose.” *Matter of E*, 9 I&N Dec. 421, 423 (BIA 1961). A conspiracy to commit an offense involves moral turpitude only if the substantive offense involves moral turpitude. 9 I&N Dec. 421, 423. For example, in *Matter of Gaglioti*, the Board of Immigration Appeals (BIA) found that the alien’s conviction for conspiracy to establish gaming devices did not involve moral turpitude because the underlying offense did not involve moral turpitude. 10 I &N Dec. 719 (BIA 1964).

In the instant matter, the record reflects that, in violation of 18 U.S.C. 371, the applicant was convicted of Conspiracy to Submit False Asylum Applications and Conspiracy to Obstruct, Influence and Impede Official Proceedings. *See Judgment in a Criminal Case for Case # CR-03-004102 PJH*, dated January 7, 2004. Fraud has, as a general rule, been held to involve moral turpitude. The U.S. Supreme Court in *Jordan v. De George* concluded, “Whatever else the phrase ‘crime involving moral turpitude’ may mean in peripheral cases, the decided cases make it plain that crimes in which fraud was an ingredient have always been regarded as involving moral turpitude. . . . Fraud is the touchstone by which this case should be judged. The phrase ‘crime involving moral turpitude’ has without exception been construed to embrace fraudulent conduct.” 341 U.S. 223, 232 (1951). Therefore, the applicant’s conviction for conspiracy to submit false asylum applications under 18 U.S.C. § 371 is a crime involving moral turpitude.

Additionally, the BIA in *Matter of E* held: “Conspiracy to defraud the United States under 18 U.S.C. § 371 by impeding, obstructing and attempting to defeat the lawful functions of an agency of the United States is a crime involving moral turpitude.” 9 I&N Dec. at 427; *see Vartelas v. Holder*, 620 F.3d 108 (2d Cir. 2010), *rev’d and remanded on other grounds*, *Vartelas v. Holder*, 132 S.Ct. 1479 (U.S. 2012). Therefore, the applicant’s conviction for conspiracy to obstruct, influence, and impede official proceedings under 18 U.S.C. § 371 is a crime involving moral turpitude.

The applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act, and he needs a waiver under section 212(h) of the Act. The applicant does not contest this determination.

Section 212(h) of the Act provides, in relevant part:

(h) The Attorney General [now Secretary of Homeland Security, “Secretary”] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), . . . 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 [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 and

(2) the [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status. . . .

No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than seven years immediately preceding the date of initiation of proceedings to remove the alien from the United States. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.

The applicant also does not contest the determination that he was convicted of an aggravated felony, and the record shows that throughout his immigration proceedings, he has been found to have been convicted of an aggravated felony as defined in sections 101(a)(43)(S) and (a)(43)(U) of the Act, 8 U.S.C. §§ 101(a)(43)(S), (a)(43)(U) (“aggravated felony” includes conspiring to obstruct justice, perjury, subornation of perjury, or bribery of a witness for which the term of imprisonment is at least one year). The record further shows that after being admitted as a lawful permanent resident, the applicant was removed from the United States as a deportable alien pursuant to section 237(a)(2)(A)(iii) of the Act for having been convicted of an aggravated felony, as defined in sections 101(a)(43)(S) and (a)(43)(U) of the Act. Here the applicant was admitted as a lawful permanent resident on April 18, 2000. Because the applicant was subsequently convicted on January 9, 2004 of an aggravated felony, he is statutorily ineligible for a waiver under section 212(h) of the Act. Section 212(h) of the Act “bar[s] relief for any alien who has been convicted of an aggravated felony after acquiring lawful permanent resident status, without regard to the manner in which such status was acquired.” *Matter of Rodriguez*, 25 I&N Dec. 784, 789 (BIA 2012).

The applicant does not reside within the territorial limits of the United States and any of the circuits that have so interpreted section 212(h) of the Act. When in removal proceedings, a petition for review is filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. *See* 8 U.S.C. § 1252. In the applicant's case, removal proceedings have been completed. The present appeal is not part of or a continuation of the applicant's removal proceedings, but rather is an appeal of an application filed after the conclusion of the applicant's removal proceedings while the applicant resides abroad. In cases in which an applicant resides overseas, such as in the present case, we apply the decisions of the BIA for uniformity and consistency in our decisions. Accordingly, in view of *Matter of Rodriguez*, in which the BIA held that section 212(h) relief is unavailable to any alien who has been convicted of an aggravated felony subsequent to acquiring lawful permanent resident status, regardless of the manner in which such

status was acquired, the applicant in the instant case is statutorily ineligible for relief under section 212(h) of the Act as he was convicted of an aggravated felony.

As the applicant is statutorily ineligible for a waiver of inadmissibility under section 212(h) of the Act, the applicant's Form I-601 application cannot be approved.

Moreover, the applicant's criminal activities constitute serious violations of immigration law. The presentence investigation report states, in relevant part:

With respect to [the applicant], the Court found that there was evidence that he assisted [the co-defendant] post-arrest in committing crimes. There was a significant amount of evidence seized[,] indicating an ongoing immigration consulting business and a continuation of the asylum fraud operation. . . . [The applicant] provided a written statement which acknowledges that he participated in rehearsing with clients the content of their asylum applications and declarations, which he knew were generally false. He admitted to having interpreted their stories to the court even though he knew they were not true stories. . . . The evidence established that there were more than six and less than 24 false documents submitted.

As such, the record indicates that the applicant was involved with multiple instances of ongoing immigration fraud and obstruction of justice from May 24, 2002 through April 18, 2003. The record does not contain sufficient evidence demonstrating that, in light of these criminal activities, a favorable exercise of discretion is warranted. Thus, were the applicant able to establish extreme hardship to his U.S. citizen wife, son, and daughter as a result of a denial of his waiver request, we do not find the favorable factors in the present matter to outweigh the negative ones, and thus, we would not favorably exercise the Secretary's discretion.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.