



U.S. Citizenship  
and Immigration  
Services

(b)(6)

Date: **NOV 21 2014**

Office: KANSAS CITY, MISSOURI

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:

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.

Thank you,

A handwritten signature in black ink that reads "Ron Rosenberg".

Ron Rosenberg  
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Antigua and Barbuda 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 with her eight U.S. citizen children.

In a decision, dated April 18, 2014, the field officer director found the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of three counts of Employment Security Fraud in 1994. The field office found that although the record indicated that the applicant has a son with severe development disabilities and a seizure disorder, it did not establish that the applicant was the son's caretaker, noting that all documentation concerning her son was addressed to the applicant's spouse. The field office director found that the record showed that the applicant did not earn any income and thus, she could not be the caretaker for her son. The field officer director concluded that the record failed to establish that a qualifying relative of the applicant would suffer extreme hardship as a result of the applicant's inadmissibility. In addition, the field office director found that the applicant did not warrant the favorable exercise of discretion because she did not pay the required restitution in her criminal case and she has over \$18,750 in outstanding civil court judgments against her, stating that she has been sued over 71 times while she has been in the United States.

On appeal, counsel submits documentation showing that the applicant has paid the restitution and court costs in her criminal case from 1994.

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.)

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 Louissant*, 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 Louissant*, *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.”). This case arises in the Eighth Circuit, and the Eighth Circuit Court of Appeals has concurred in the foregoing method for determining whether a conviction is a crime involving moral turpitude. *See Bobadilla v. Holder*, 679 F.3d 691 (8th Cir. 2012).

The record establishes that on June 7, 1994 the applicant was convicted of three counts of Employment Security Fraud under Kansas Annotated Statutes (K.S.A.) § 44-719(a) for events which occurred in 1992 and 1993. The applicant was sentenced to 24 months probation and to pay restitution in the amount of \$2,567.00 to the Kansas Department of Human Resources.

At the time of the applicant’s conviction, K.S.A § 44-719(a) stated:

- (a) Any person who makes a false statement or representation knowing it to be false or knowingly fails to disclose a material fact, to obtain or increase any benefit or other payment under this act, either for such person or for any other person, shall be guilty of theft and shall be punished in accordance with the provisions of K.S.A. 21-3701 and amendments thereto.

The applicant’s offense involves elements of fraud and theft, both crimes which generally involve moral turpitude. *Matter of Scarpulla*, 15 I&N Dec. 139, 140-41 (BIA 1974) and *Jordan v. De George*, 341 U.S. 223, 232 (1951). The Board has held that in cases involving fraud of the government, the government need not have lost money or property in order for the crime to involve moral turpitude. *Matter of S--*, 2 I&N Dec. 225 (BIA 1944). Instead, the mere act of obstructing an important function of a department of the government by deceitful means is sufficient to find moral turpitude. *Matter of Flores*, 17 I&N Dec. at 229; *see also Matter of D--*, 9 I&N Dec. 605, 608 (BIA 1962); *Matter of E--*, 9 I&N Dec. 421, 423-24 (BIA 1961). The Board has held that a false statement in writing that the individual knows is untrue, made with the intent to mislead a public official and to interfere with that official’s duties, involves moral turpitude. *Matter of Jurado*, 24 I&N Dec. 29, 33 (BIA 2006). Finally, in regards to theft, in *Matter of V-Z-S-*, 22 I&N Dec. at 1345-46 (BIA 2000) the Board has noted that theft statutes may encompass both temporary and permanent takings, and that a theft crime involves moral turpitude “only when a permanent taking is intended.” In *Matter of Grazley*, 14 I&N Dec. 330, 333 (BIA 1973) the court held that where cash is the object of the theft, it is reasonable to assume intent to permanently deprive. Accordingly, the applicant is inadmissible

under section 212(a)(2)(A)(i)(I) of the Act for having committed crimes involving moral turpitude. The applicant does not contest her inadmissibility on appeal.

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

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 . . .

Section 212(h)(1)(A) of the Act provides that the Secretary may, in his 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 criminal convictions for which the applicant was found inadmissible occurred more than 15 years ago, a waiver is available under section 212(h)(1)(A) of the Act. Section 212(h)(1)(A) of the Act requires that the applicant's admission to the United States not be contrary to the national welfare, safety, or security of the United States, and that she has been rehabilitated.

The record establishes that the applicant has eight U.S. citizen children and has been living in the United States since 1982. The record indicates that the applicant owns her own catering business and has no other criminal convictions since her convictions in 1994. The record establishes that as of May 2014, the applicant has paid all restitution to the Kansas Department of Human Resources. In addition, the record indicates throughout that the applicant is a devoted mother to her children. We do acknowledge the documentation in the record indicating that the applicant has outstanding debts that require payment. However, these court documents indicate that these debts are held by the applicant and her spouse, who she is currently separated from as a result of suffering 20 years of

abuse, and/or they were incurred as a result of medical bills stemming from her son's severe disability. Given these circumstance, we do not find that the applicant's outstanding debts are reflective of her admission being contrary to the national welfare, safety, or security of the United States or that she has not been rehabilitated. Thus, we find that the record shows the applicant's admission to the United States is not contrary to the national welfare, safety, or security of the United States and that she has been rehabilitated, as required by section 212(h)(1)(A) of the Act.

*Matter of Marin*, 16 I & N Dec. 581 (BIA 1978), involving a section 212(c) waiver, is used in waiver cases as guidance for balancing favorable and unfavorable factors and this cross application of standards is supported by the Board of Immigration Appeals (BIA). In *Matter of Mendez-Moralez*, the BIA, assessing the exercise of discretion under section 212(h) of the Act, stated:

We find this use of *Matter of Marin*, *supra*, as a general guide to be appropriate. For the most part, it is prudent to avoid cross application, as between different types of relief, of particular principles or standards for the exercise of discretion. *Id.* However, our reference to *Matter of Marin*, *supra*, is only for the purpose of the approach taken in that case regarding the balancing of favorable and unfavorable factors within the context of the relief being sought under section 212(h)(1)(B) of the Act. *See, e.g., Palmer v. INS*, 4 F.3d 482 (7th Cir.1993) (balancing of discretionary factors under section 212(h)). We find this guidance to be helpful and applicable, given that both forms of relief address the question of whether aliens with criminal records should be admitted to the United States and allowed to reside in this country permanently.

*Matter of Mendez-Moralez* at 300.

In *Matter of Mendez-Moralez*, in evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the BIA stated that:

The factors adverse to the applicant 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, recency and seriousness, and the presence of other evidence indicative of an 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 the alien began his 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 and service to 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). . . .

*Id.* at 301.

The BIA further states that upon review of the record as a whole, a balancing of the equities and adverse matters must be made to determine whether discretion should be favorably exercised. The equities that the applicant for section 212(h)(1)(B) relief must bring forward to establish that he merits a favorable exercise of administrative discretion will depend in each case on the nature and circumstances of the ground of exclusion sought to be waived and on the presence of any additional adverse matters, and as the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence. *Id.* at 301.

The applicant has established that the favorable factors in her application outweigh the unfavorable factors. The favorable factors in the applicant's case include: her family ties to the United States, her length of residence in the United States, her lack of any criminal record since 1994, and her role as a loving and devoted mother of eight U.S. citizen children. The unfavorable factors in the applicant's case include her criminal convictions and unpaid debts.

Given the specific circumstances in the applicant's case, it is appropriate to take into consideration the broader context of the applicant's current situation. The record establishes through affidavits and police reports that the applicant suffered through an emotionally and physically abusive marriage for over 20 years. A letter from a women's shelter, dated February 18, 2014, states that the applicant has separated from her abusive husband and has been staying in the shelter since December 13, 2013. The record also establishes that the applicant is the mother of nine U.S. citizen children. She states that she raised eight of these children, but was forced by her husband to give her first child up for adoption. The record establishes that one of the applicant's sons was born premature; suffers from severe mental retardation, autism, and seizure disorder; and the applicant has been his primary caretaker for his entire life. The field office director stated in her decision that the record did not establish that the applicant was her son's caretaker. This statement is not supported by the record. The record contains four medical letters pertaining to the applicant's son dated from 2004 to 2012. In each letter, the applicant's mother is either addressed directly or there is written indication that she received a copy of the letter. Three of the letters are from her son's neurologist to her son's primary care physician and in two of the letters the neurologist mentions that the mother brought the child into the office and the mother asked questions about her son's care. The record clearly indicates through these documents and other affidavits in the record that the applicant is a loving and caring mother to her children. In considering the record in its entirety, we find that the positive factors outweigh the negative factors in this case and a positive exercise of discretion is appropriate.

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 now met that burden. Accordingly, the appeal will be sustained.

**ORDER:** The appeal is sustained.