

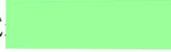


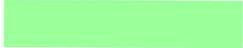
U.S. Citizenship
and Immigration
Services

(b)(6)

Date: **NOV 25 2014**

Office: NEW YORK, NY

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:

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,

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

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, New York, and a subsequent appeal was dismissed by the Administrative Appeals Office (AAO) on appeal. The appeal is now before the AAO on motion. The motion will be granted and the appeal dismissed.

The applicant is a native and citizen of Lebanon who was found to be inadmissible under 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 committing crimes involving moral turpitude. The applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h). In a decision, dated, May 16, 2011, the district director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On appeal, counsel stated that the applicant pled guilty to the crime of conspiracy (18 U.S.C. § 1349) to commit fraud and swindles (18 U.S.C. 1341), and health care fraud (18 U.S.C. § 1347). Counsel disputed the district director's determination that the applicant's wife and child would not experience extreme hardship if the applicant was removed from the United States.

In our decision, dated August 8, 2011, we found that the record established that the applicant's wife and daughter would suffer extreme hardship as a result of separation and as a result of relocating to Lebanon. However, we indicated that the applicant had failed to show that he warranted a favorable exercise of discretion. Accordingly, the appeal was dismissed.

On motion, dated September 1, 2011 and received by the AAO on June 13, 2014, counsel asserts that our previous decision was in error. He states that the applicant does not require a waiver because his conviction is not for a deportable offense. He submits court documentation indicating that the applicant's criminal involvement was minimal, that the court stated his conviction would not be a basis for deportation, and that the restitution in his case involved a little over \$5,000. Counsel states that the hardship factors in this case should not have been so easily dismissed in regards to discretion. He submits additional documentation and case law in support of his motion.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). The applicant's motion meets the requirements of a motion to reconsider because counsel has stated his reasons for reconsideration, has provided additional documentation, and previous AAO decisions supporting his assertions.

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 . . . 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 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 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.”).

The record reflects that on November 7, 2007 the applicant pled guilty to violation of 18 U.S.C. 1349, conspiracy to commit offenses under 18 U.S.C. §§ 1341 (frauds and swindles), and 1347 (health care fraud) for events that ended in May of 2006. His sentence included three years of probation, three months of home detention, and compliance with the order of restitution in the amount of \$5,269.09.

Counsel’s assertion that the U.S. Attorney in the applicant’s criminal case indicated that the applicant would not be deported for his conviction is unfounded. In a letter, dated September 7, 2007, the U.S. Attorney stated that the government was unable to offer an opinion as to whether the applicant would be deported from the United States as a result of his conviction and that in the Second Circuit the possibility of deportation is not something the court can consider when determining what sentence to impose. Moreover, U.S. Citizenship and Immigration Services is not bound by immigration determinations made by U.S. Attorneys in letters regarding the sentencing of a defendant. The applicant’s conviction under 18 U.S.C. § 1347 is a crime involving moral turpitude.

Conspiracy has been found to be a crime involving moral turpitude where the objective of the conspiracy is a crime of moral turpitude. *See, e.g., Jordan v. De George*, 341 U.S. 223 (1951). 18 U.S.C. § 1347 punishes a person for “knowingly and willfully” executing, or attempting to execute, “a scheme or artifice to (1) defraud any health care benefit program; or (2) obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by . . . any health care benefit program.” The punishment for violation of section 1347 is imprisonment for not more than ten years or a fine, or both. *See* 18 U.S.C. § 1347.

In *Matter of Serna*, 20 I&N Dec. 579, 583-84 (BIA 1992), the Board stated that intent to defraud involves moral turpitude. Moreover, in *Matter of Flores*, 17 I&N Dec. 225, 228 (BIA 1980), the Board stated that where fraud is inherent in an offense, it is not necessary for the statute to expressly require intent to defraud as an element of the crime. Thus, the prescribed conduct under 18 U.S.C. § 1347 involves moral turpitude. We affirm the previous decision that the applicant requires a waiver for his inadmissibility under 212(a)(2)(A)(i)(I) of the Act as a result of his criminal conviction for health care fraud.

The waiver for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act is found under section 212(h) of the Act. That section 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 –

. . .

(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 section 212(h) waiver of the bar to admission resulting from violation of section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant is not a consideration under the statute and will be considered only to the extent that it results in hardship to a qualifying relative. The qualifying relatives in this case are the applicant's wife and child. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996).

Our previous decision addressed the issue of extreme hardship and found that the applicant had established that his wife and daughter would suffer extreme hardship as a result of relocating to Lebanon and as a result of separation from the applicant. We will not disturb this finding and will turn to the issue of whether the applicant warrants a favorable exercise of discretion.

In *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996), the Board stated that once eligibility for a waiver is established, it is but one of the favorable factors to be considered in determining whether the Secretary should exercise discretion in favor of the waiver. Furthermore, the Board stated that:

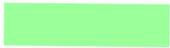
In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence 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).

Id. at 301.

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).

As previously stated, the adverse factor in the instant case is the applicant's federal criminal convictions in November 2007 for conspiring to commit health care fraud and frauds and swindles. The indictment in the applicant's case indicates that he participated in a scheme to defraud Medicaid, and that from November 2005 to January 2006, the scheme "resulted in the fraudulent issuance and renewal of approximately 150 Medicaid cards, and the defrauding of the Medicaid program of approximately \$1.3 million." On motion, counsel submits a letter from the U.S. Attorney in the applicant's criminal case, indicating that the government did not object to a determination that the applicant played a minor role in the fraud scheme given that the government was only able to prove that he obtained a Medicaid card for one other individual. However, the same letter indicates that other evidence in the criminal investigation indicates that the applicant played a significant role in the fraud scheme. The investigation included evidence that he facilitated the success of the overall scheme by purchasing a Medicaid card not only for himself, but for another Medicaid card buyer, and, notebooks seized in the investigation indicate that other members of the applicant's family received Medicaid cards as part of the fraud scheme.

The favorable factors in the applicant's case are the extreme hardship to the applicant's wife and daughter, the applicant's family ties in the United States, the applicant's completion of probation, and his authorized employment beginning in 2009. We previously indicated that the asserted



hardship factors to the applicant's spouse and daughter were the emotional and financial hardships of having to remain in the United States without the applicant. The applicant also demonstrated extreme hardship to his wife and daughter if they joined him to live in Lebanon.

On motion, we again find that the unfavorable factors in the applicant's case outweigh the favorable factors in the applicant's case. The applicant's criminal conviction is a significant factor to be considered. The crime committed by the applicant defrauded a government run social benefit program and the losses to this program, approximately 1.3 million, cannot be recovered. The positive factors of the extreme hardship his wife and daughter would face if he was not granted a waiver, his employment, and his lack of any other criminal record since 2007 are not outweighed by this conviction. Thus, the favorable exercise of discretion is not warranted.

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 not met that burden. Accordingly, the motion will be granted and the appeal will be dismissed.

ORDER: The motion is granted and the appeal dismissed.