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

U.S. Citizenship and Immigration Services

[redacted]

H5

Date: AUG 1 5 2011 Office: PHILADELPHIA, PA FILE: [redacted]

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under sections 212(h) and 212(i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(h) and 1182(i).

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Michael Humway

for Perry Rhew
Chief, Administrative Appeals Office

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

The record reflects that the applicant is a native of Ireland and a citizen of Ireland and the United Kingdom. He was found to be inadmissible to the United States pursuant to section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), for seeking admission into the United States by fraud or willful misrepresentation; and section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of crimes involving moral turpitude.

The field office director indicated that the applicant sought waivers of inadmissibility under sections 212(h) and 212(i) of the Act, 8 U.S.C. §§ 1182(i) and 1182(h). The field office 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. The field office director also stated that, even had the applicant demonstrated extreme hardship, the "repeated instances of fraud and willful misrepresentation in efforts to gain immigration benefits speaks very strongly against . . . a waiver of statutory grounds of inadmissibility" as a matter of discretion.

On appeal, counsel asserts that U.S. Citizenship and Immigration Services (USCIS) erred in requiring that the applicant establish extreme hardship to a qualifying relative. Counsel contends that the activities rendering the applicant inadmissible occurred more than 15 years before the filing of the application for a visa, so the applicant need only establish that his admission to the United States would not be contrary to the national welfare, safety, or security of the United States; and that he has been rehabilitated. Moreover, counsel states that the applicant established extreme hardship to his wife. Lastly, counsel contends that the applicant did not misrepresent the nature of the relationship with his former wife, and that USCIS erred in stating that the applicant is inadmissible for misrepresentation.

The AAO will first address the finding of inadmissibility.

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

> (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.

To find the applicant inadmissible under section 212(a)(6)(C)(i) of the Act, his failure to disclose his criminal record must be a material misrepresentation and by the misrepresentation he must have sought to procure admission into the United States. In *Matter of S- and B-C-*, 9 I&N Dec. 436, 447 (BIA 1960; AG 1961), the Attorney General indicate that a misrepresentation made in connection with an application for visa or other documents, or with 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 resulted in proper determination that he be excluded.

The Attorney General stated that "[w]hile a misrepresentation as to identity will generally have the effect of shutting off an investigation, so also will misrepresentations as to place of residence, prior exclusion or deportation from the United States, criminal record, Communist Party membership, etc." *Id.* at 448.

The field office director stated that the applicant failed to disclose his arrest or conviction for committing a crime involving moral turpitude in the Form I-94W, Visa Waiver Arrival Record, that he submitted on March 2, 2000.

An applicant who applies for admission pursuant to the visa waiver program must complete Form I-94W, Arrival Record. The reverse side of Form I-94W, at Part B, asks an applicant the following: "Have you ever been arrested or convicted for an offense or crime involving moral turpitude . . . ?" The applicant's criminal record discloses that in England in 1975 he had been convicted of assault occasioning actual bodily harm, assault on police, and theft by employee. The applicant does not dispute that he was aware his criminal offenses involved moral turpitude, or otherwise demonstrate that this misrepresentation was not willful. Thus, we find that the applicant is inadmissible under section 212(a)(6)(C) of the Act for failing to disclose his criminal history in the Form I-94W.

Moreover, the field officer director also found that the applicant intentionally failed to disclose his criminal history in the Form I-485, Application to Register Permanent Residence or Adjust Status, filed on July 7, 2001 and December 19, 2005.

We agree with the field office director. This form asks an applicant the following: "Have you ever, in or outside the U.S., been arrested, cited, charged, indicted, fined or imprisoned for breaking or violating any law or ordinance, excluding traffic violations?" In failing to disclose his arrest and conviction record, the applicant intentionally misrepresented his criminal record, and this material misrepresentation was made in connection with his application for adjustment of status and it had the effect of shutting off an investigation of the applicant's eligibility for benefits under the Act. We therefore find the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act.

Furthermore, the field office director stated that the applicant deliberately misrepresented his identification and did not disclose his denial of admission on March 25, 2000.

The record reflects that on February 3, 2000 the applicant was denied admission into the United States because of previously overstaying his period of authorized stay, and that on March 20, 2007 the applicant gained admission into the United States. In a sworn statement dated March 20, 2007, the applicant states that on March 25, 2000 he sought admission into the United States using an Irish passport in the name [redacted] and that he indicated in the Form I-94W that he never had been denied admission into the United States. We note that the record reflects that when the applicant attempted to gain admission into the United States on February 3, 2000, he used a British passport in the name [redacted]

In a sworn statement, the applicant indicates that he used a different passport on March 25, 2000 "[b]ecause I knew they wouldn't let me in again," and that he did not disclose that he was previously denied entry into the United States in the Form I-94W "[b]ecause I knew I would be deported again or denied entry again." We observe that the applicant asserts that his surname is both Smiley and Sullivan. However, whether or not the applicant misrepresented his surname, the record establishes that when the applicant sought admission on March 20, 2007, he intentionally failed to disclose his prior denial of admission in the Form I-94W. Thus, the applicant willfully misrepresented the material fact of his prior denial of admission and his eligibility for admission into the United States, which renders him inadmissible under section 212(a)(6)(C)(i) of the Act.

Lastly, the AAO notes that the field office director discussed the applicant's prior marriage to and the inconsistencies in the evidence regarding their relationship. Even though the field office director characterized the inconsistencies as misrepresentations, the field office director concluded that they failed to establish inadmissibility under either section 212 of the Act or ineligibility for approval of an immigrant petition under section 204(c) of the Act.

The field office director also found the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of committing crimes involving moral turpitude.

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.

The Board of Immigration Appeals (Board) 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 determining whether a crime involves moral turpitude, the Third Circuit Court of Appeals, per *Jean-Louis v. Holder*, makes a categorical inquiry, which consists of looking "to the elements of the

statutory offense . . . to ascertain that least culpable conduct hypothetically necessary to sustain a conviction under the statute." 582 F.3d 462, 465-66 (3rd Cir. 2009). This "inquiry concludes when we determine whether the least culpable conduct sufficient to sustain conviction under the statute "fits" within the requirements of a CIMT." *Id.* at 470.

However, if the "statute of conviction contains disjunctive elements, some of which are sufficient for conviction of [a CIMT] and other of which are not . . . [an adjudicator] examin[es] the record of conviction for the narrow purpose of determining the specific subpart under which the defendant was convicted." *Id.* at 466. This is true "even where clear sectional divisions do not delineate the statutory variations." *Id.* In so doing, an adjudicator may only look at the formal record of conviction. *Id.*

The record conveys that the applicant was convicted of assault occasioning actual bodily harm under section 47 of the Offenses Against the Person Act 1861. That section states:

> Whosoever shall be convicted upon an Indictment of any Assault occasioning actual bodily Harm shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for the Term of Three Years, or to be imprisoned for any Term not exceeding Two Years, with or without Hard Labour; and whosoever shall be convicted upon an Indictment for a common Assault shall be liable, at the Discretion of the Court, to be imprisoned for any Term not exceeding One Year, with or without Hard Labour.

Section 47 has two distinct offenses: assault occasioning actual bodily harm and common assault. We note that the *mens rea* for battery is satisfied by the intentional or reckless application of force to another person. *See R v. Benson George Venna*, (1976) QB 421, 61 Cr. App. Rep. 310, (1975).

The Board determined that assault and battery offenses involve moral turpitude where there is an aggravating factor such as the use of deadly weapon, the intentional infliction of serious bodily injury, and bodily harm upon individuals deserving of special protection such as a child, domestic partner, or a peace officer. *See In re Sanudo*, 23 I&N Dec. 968 (BIA 2006).

In *Matter of Fualaau* the Board addressed whether assault in the third degree under the Hawaii Revised Statutes is a crime involving moral turpitude. 21 I&N Dec. 274, 477 (BIA 1996). In *Fualaau*, the respondent's conviction for third-degree assault was for recklessly causing bodily injury to another person. *Id.* at 476. Under Hawaiian law, a person "recklessly" causes an injury when he "consciously disregards a substantial and unjustifiable risk." *Id.* The Board stated that, "In order for an assault of the nature at issue in this case to be deemed a crime involving moral turpitude, the element of a reckless state of mind must be coupled with an offense involving the infliction of serious bodily injury." The Board concluded that the respondent's crime was similar to a simple assault, and was not morally turpitudinous. *Id.* at 478. We note that the Board found that the convicting statute did not have as an element the death of another person, the use of a deadly weapon, or any other aggravating circumstance.

Section 47 of the Offenses Against the Person Act 1861 describes the following injuries as normally being prosecuted: loss or breaking of tooth or teeth; temporary loss of sensory functions, which may

include loss of consciousness; extensive or multiple bruising; displaced broken nose; minor fractures; minor, but not merely superficial, cuts of a sort probably requiring medical treatment (e.g. stitches); psychiatric injury that is more than mere emotions such as fear, distress or panic.

It appears that Article 47 encompasses conduct that is not morally turpitudinous. In *R v Savage,* 1992) UKHL 1, (1992) 4 All ER 698, (1991) 94 Cr App R 193, (1992) 1 AC 699, the House of Lords found that the appellant's act of intentionally throwing beer over a person constituted an assault. The House of Lords stated that it was not necessary to determine how the glass came to be broken and the victim's wrist thereby cut because the jury found that it was the appellant's handling of the glass which caused the victim's "actual bodily harm." We note that the jury could not determine whether the glass was intentionally or accidently released by Mrs. [redacted]

The least culpable conduct sufficient to sustain conviction under the statute is simple assault (such as the throwing of beer over a person), which does not fit within the requirements of a crime involving moral turpitude. Therefore, under the least culpable conduct test, the crime of assault occasioning actual bodily harm under section 47 of the Offenses Against the Person Act 1861 does not qualify as a crime of moral turpitude.

The applicant has two theft by employee convictions. Chapter 60 of the Theft Act 1968 provides that:

> Basic definition of theft.
> 1.-(1) A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it; and "thief" and "steal" shall be construed accordingly.
>
> (2) It is immaterial whether the appropriation is made with a view to gain, or is made for the thief's own benefit.
>
> (3) The five following sections of this Act shall have effect as regards the interpretation and operation of this section (and, except as otherwise provided by this Act, shall apply only for purposes of this section).
>
> "Dishonesty."
> 2.-(1) A person's appropriation of property belonging to another is not to be regarded as dishonest-
>
> (a) if he appropriates the property in the belief that he has in law the right to deprive the other of it, on behalf of himself or of a third person ; or
>
> (b) if he appropriates the property in the belief that he would have the other's consent if the other knew of the appropriation and the circumstances of it ; or
>
> (c) (except where the property came to him as trustee or personal representative) if he appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps.

> (2) A person's appropriation of property belonging to another may be dishonest notwithstanding that he is willing to pay for the property.
>
> "Appropriates."
> 3.-(1) Any assumption by a person of the rights of an owner amounts to an appropriation, and this includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as owner.
>
> (2) Where property or a right or interest in property is or purports to be transferred for value to a person acting in good faith, no later assumption by him of rights which he believed himself to be acquiring shall, by reason of any defect in the transferor's title, amount to theft of the property.
>
> . . .
>
> "With the intention of permanently depriving the other of it."
> 6.-(1)A person appropriating property belonging to another without meaning the other permanently to lose the thing itself is nevertheless to be regarded as having the intention of permanently depriving the other of it if his intention is to treat the thing as his own to dispose of regardless of the other's rights; and a borrowing or lending of it may amount to so treating it if, but only if, the borrowing or lending is for a period and in circumstances making it equivalent to an outright taking or disposal.
>
> (2)Without prejudice to the generality of subsection (1) above, where a person, having possession or control (lawfully or not) of property belonging to another, parts with the property under a condition as to its return which he may not be able to perform, this (if done for purposes of his own and without the other's authority) amounts to treating the property as his own to dispose of regardless of the other's rights.

A plain reading of chapter 60 of the Theft Act 1968 shows that it can be violated by dishonestly appropriating property belonging to another person with the intention of permanently depriving the person of his or her property; or by appropriating property belonging to another without meaning the other permanently to lose the property, but the person treats the property as his own to dispose of regardless of the other's rights; or by borrowing or lending another person's property, without the person's authority, such that it is equivalent to an outright taking or disposal.

We note that the Board has determined that to constitute a crime involving moral turpitude, a theft offense must require "an intention to intention to permanently deprive the owner of his property." *See In re Jurado-Delgado*, 24 I&N Dec. 29, 33 (BIA 2006). Nevertheless, we do not believe that the Board's decisions stand for the principle that any taking of property, so long as the perpetrator has the intent to relinquish the property at any time in the future, necessarily lacks the requisite mens rea to constitute a crime involving moral turpitude. For instance, an individual that takes property and then sells or otherwise disposes of it as though he owns it, has the intent to permanently deprive the owner of the value of and rights to the property. We interpret a temporary deprivation not involving moral turpitude as one evincing the intent to keep the property only for a short and discrete period of

time, such that the value of the property is not materially diminished and no significant infringement of the owner's rights occurs.

Even assuming, *arguendo*, that conviction may be obtained under Chapter 60 of the Theft Act 1968 for takings that are interpreted as temporary for immigration purposes, a modified categorical inquiry may demonstrate that the applicant was convicted under the portion of the statute that applies unequivocally to permanent takings. The full record of conviction for this offense is not in the record, and we note that the applicant has not disputed on appeal that this offense was a crime involving moral turpitude. The applicant has not established that the documents comprising the record of conviction are unavailable. *See* 8 C.F.R. § 103.2(b)(2). The "rap" sheet from the British National Identification Service does not provide any information about the nature of the applicant's theft conviction other than basic information. Thus, the applicant has not established, in conformity with the requirements in 8 C.F.R. § 103.2(b)(2), that the documents comprising his record of conviction are unavailable. The submitted rap sheet does not demonstrate that the applicant's offense of theft was not a crime involving moral turpitude, and the applicant has not disputed the finding that it was such a crime. Accordingly, we find the applicant's conviction of theft is a crime involving moral turpitude.

We have found that the applicant's theft by employee offense involves moral turpitude, rendering him inadmissible under section 212(a)(2)(A)(i)(I) of the Act. Thus, we need not determine whether the offense of assault on police involves moral turpitude.

Section 212(i) of the Act provides a waiver for fraud and material misrepresentation. That section states that:

> (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 alien 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 waiver of inadmissibility under section 212(i) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant or his children can be considered only insofar as it results in hardship to a qualifying relative. The applicant's wife and mother are the only qualifying relatives in this case. If extreme hardship to a qualifying relative is established, USCIS then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296, 301 (BIA 1996).

Likewise, there is waiver for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act, which is found in 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) . . . 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

(ii) the alien has been rehabilitated . . .

Section 212(h)(1)(A) of the Act provides that the Attorney General 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. Since the applicant's convictions occurred in 1975, which is more than 15 years ago, they are waivable under section 212(h)(1)(A)(i) of the Act.

In rendering this decision, the AAO will consider all of the evidence in the record as it relates to the applicant's section 212(h) and 212(i) waivers. The record contains letters, birth certificates, medical records, income tax records, invoices, and other documentation.

In the affidavit dated April 23, 2007, the applicant's wife states that she and the applicant bought a house in April 2005 and married in November 2005. She conveys that they had started to live together in September 2002. The applicant's wife asserts that she works full time as a senior claims coordinator for Independence Blue Cross and has worked in her field for 20 years. She states that her mother is staying with her because her apartment caught fire. She indicates that her mother has health problems, hypertension, glaucoma, cataracts, and wears a colostomy bag; and her sister was diagnosed with a bi-polar disability. The applicant's wife avers that she handles the finances of her mother and sister and would not be able to assist either of them without the applicant. Further, she states that she does not drive and never had a license, so the applicant provides their transportation and helps with cooking and other household duties. The applicant's wife states that the applicant contributes 50 percent of their income and that she would have to sell their house without his contribution. Lastly, the applicant's wife conveys that the applicant was diagnosed with prostate cancer in March 2005, and was treated with radiation and is monitored every six months. She maintains that the applicant has helped many people through his work with Alcoholics Anonymous for the past nine years.

We note that [redacted] states in the letter dated February 20, 2009, that the applicant's wife continues to struggle with anxiety and depression and probable bipolar depression. Dr. [redacted] conveys that the applicant's wife "will be dramatically impacted in a negative way if she loses her husband, [redacted] to deportation. In addition to the emotional distress, Carol is also unable to

drive due to her psychiatric illness and depends on her husband for transportation." Medical records reflect that the applicant's wife has been treated by Dr. for anxiety since January 2006.

Income tax records reflect the applicant and his wife's gross income as $93,856 in 2008, with the applicant contributing approximately 50 percent to that income. The monthly budget lists total fixed and variable expenses of the applicant's household, of which supporting documentation is provided, as $5,626; and the applicant and his wife's total monthly income as $4,906.

The hardship factors asserted in the present case are the emotional and financial hardship to the applicant's wife as a result of separation from her husband. We find that the applicant's wife's claim of financial hardship is consistent with the submitted income tax records, the monthly budget, and invoices; and the claim of emotional hardship is in accord with Dr. letter, and the applicant's medical records. In view of this evidence, which shows that the applicant's wife has a history of anxiety and depression and is dependent on her husband for both emotional and financial support, we find that the applicant has demonstrated that his wife will experience extreme hardship if she remains in the United States without him.

The applicant makes no claim and presents no evidence of extreme hardship to his wife if she joins him to live in England.

Regardless, we concur with the director that the waiver application should be denied in the exercise of discretion based on the adverse factors in the case, which are the applicant's significant and repeated violations of the United States' immigration laws over the course of many years, and his criminal offenses. *Matter of Mendez-Moralez,* 21 I&N Dec. 296, 301 (BIA 1996).

We find that the adverse factors in the instant case include not only the applicant's criminal convictions, but also his many violations of U.S. immigration laws in making willful misrepresentations about his criminal history and identity in March 2007, December 2005, March 2005, July 2001, and March 2000. The applicant's deceitful manner of gaining admission to the United States and of seeking benefits under the immigration laws, coupled with his criminal convictions, demonstrates a complete disregard for the law and a lack of honesty.

When we consider and balance the adverse factors in this case, the applicant's crimes and his significant violations of immigration laws, against the favorable factors such as the applicant's close relationship with his wife, the hardship she would experience if the application is denied, and his volunteerism, we find that the adverse factors clearly outweigh the favorable factors and that the grant of relief in the exercise of discretion is not warranted.

In proceedings for application for waiver of grounds of inadmissibility under sections 212(i) and 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.