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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Ave. NW MS 2090
Washington, DC 20529-2090
**U.S. Citizenship
and Immigration
Services**



H5

[Redacted]

DATE: **APR 19 2012** OFFICE: NEW YORK (GARDEN CITY) FILE: [Redacted]

IN RE: [Redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Immigration and Nationality Act (INA) section 212(i); 8 U.S.C. § 1182(i)

ON BEHALF OF APPLICANT:
[Redacted]

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.

Thank you,

Michael Shumway
for Perry Rhew, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, New York, New York, and is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn as the applicant is not inadmissible under INA § 212(a)(6)(C)(i), and the matter will be remanded to the director for evaluation of inadmissibility under INA § 212(a)(2)(A)(i).

The applicant, a native and citizen of Guyana, was found inadmissible under INA § 212(a)(6)(C)(i), 8 U.S.C. § 1182(a)(6)(C)(i), for fraud or misrepresentation due to his failure to disclose his arrest and conviction for Operating a Vehicle Impaired by Alcohol during his 1997 adjustment of status interview. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by his U.S. citizen wife. The applicant seeks a waiver of inadmissibility pursuant to INA § 212(i), 8 U.S.C. § 1182(i) based on extreme hardship to his U.S. citizen wife and his lawful permanent resident father.

On May 28, 2008, the director concluded that the hardship that the applicant's U.S. citizen wife would suffer did not rise to the level of extreme as required by the statute.

On appeal, counsel for the applicant asserts that the applicant did not intend to deceive an immigration official when he stated in 1997 at his adjustment of status interview that he had not been arrested. Counsel also states that the applicant's U.S. citizen spouse and lawful permanent resident father would suffer extreme hardship if the applicant were not permitted to remain in the United States.

In support of the waiver application, the record includes, but is not limited to, letters from the applicant and his wife, a letter from a Hindu priest, a letter from the applicant's spouse's physician, a letter from the applicant's father, medical assistance documents for the applicant's father, letters from additional family members, evidence of the applicant's completion of an alcohol and drug abuse rehabilitative program, documentation of the applicant's and his spouse's employment, utility bills and bank statements for the applicant and his spouse, biographical information for the applicant and his U.S. citizen spouse, and records concerning the applicant's arrest history and immigration history in the United States.

The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record was reviewed and considered in rendering a decision on the appeal. The AAO will first address the question of whether the applicant is admissible to the United States.

The director determined that the applicant was inadmissible under INA § 212(a)(6)(C), which 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.

A misrepresentation is generally material only if by making it the alien received a benefit for which he would not otherwise have been eligible. *See Kungys v. United States*, 485 U.S. 759 (1988); *see also Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998); *Matter of Martinez-Lopez*, 10 I&N Dec. 409 (BIA 1962; AG 1964). A misrepresentation or concealment must be shown by clear, unequivocal, and convincing evidence to be predictably capable of affecting, which is, having a natural tendency to affect, the official decision in order to be considered material. *Kungys* at 771-72. 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).

The director found that due to the applicant's failure to disclose that he had been arrested and convicted of Operation of a Motor Vehicle Impaired by Alcohol during an adjustment of status interview on April 10, 1997, he was inadmissible under INA § 212(a)(6)(C) for willfully misrepresenting a material fact. The decision of the director states that the applicant was asked under oath if he had ever been arrested and that he responded that he had not been arrested. The AAO notes that there is no sworn statement or official record in the file of the applicant's statement under oath. The record does establish that on May 17, 1994, the applicant pled guilty to New York Vehicle and Traffic Law (NY VTL) § 1192.1 (01)(I), Operation of a Motor Vehicle Impaired by Alcohol, was sentenced to either 15 days in jail or a fine of \$300, and his license was suspended for 90 days. A simple DUI conviction, however, does not constitute a crime involving moral turpitude. *In re Lopez-Meza*, 22 I & N Dec. 1188, 1193 (BIA 1999); *see also Matter of Torres-Varela*, 23 I. & N. Dec. 78 (BIA 2001). Because the applicant's 1994 arrest and conviction did not render him inadmissible to the United States, the AAO concludes that the applicant would not have been ineligible to adjust status on this ground even had he revealed the arrest and conviction at his adjustment of status interview. Consequently, we find that the applicant's misrepresentation is not material and the applicant is not inadmissible under INA § 212(a)(6)(C)(i) for a willful misrepresentation of a material fact.

We note that the director expressly found the applicant inadmissible only under section § 212(a)(6)(C)(i) of the Act. However, the record illustrates that over the course of a decade and a half, the applicant was arrested nine additional times. Section 212(a)(2)(A) of the Act states in pertinent 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.

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 *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.

On October 15, 1997, the applicant was arrested and charged with Assault, New York Penal Law (NYPL) § 120.00. On December 18, 1997, the applicant was arrested and charged with Menacing, NYPL § 120.14. On March 2, 1999, the applicant was arrested and charged again with

Assault, NYPL § 120.00, and also with Harassment, NYPL § 240.26. On June 28, 1999, the applicant was arrested and charged with Assault, NYPL § 120.00; Harassment, NYPL § 240.26; and Resisting Arrest, NYPL § 240.26. On March 5, 2001, the applicant was arrested and charged with Assault, NYPL § 120.00 and Harassment, NYPL § 240.26. The record indicates that the charges were dismissed for those arrests.

The record also indicates that on April 25, 2005, the applicant was arrested and charged under NY VTL §§ 509.1 (Operating of a Motor Vehicle by an Unlicensed Driver), 511.1 (Aggravated unlicensed operation of a motor vehicle in the third degree), 375.1 (Equipment Violation). He pled guilty to Operating a Motor Vehicle by an Unlicensed Driver, NY VTL § 509.1 and a \$75 dollar fine was imposed and paid. These traffic offenses do not render the applicant inadmissible.

On February 17, 2005, however, the applicant was convicted of Vehicular Assault in the Second Degree, NYPL § 120.03, a class E felony, upon a plea of guilty. On that same day he was convicted of Driving While Intoxicated, NY VTL § 1192.3 (03). In relation to the Vehicular Assault conviction, he was sentenced to five years of probation. In connection with the Driving While Intoxicated conviction, he was sentenced to probation for three years, a \$500 fine, and his license was revoked.

Although the record contains court dispositions for the applicant's convictions, it is not clear that these are the only available documents comprising the records of conviction. We note also that under *Matter of Silva-Trevino*, inquiry into whether an applicant's convictions are crimes involving moral turpitude is not limited to the record of conviction, but may extend to any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question where the record of conviction is inconclusive. We also note that if the applicant is found inadmissible under INA § 212(a)(2)(A)(i), and any of his crimes are also deemed to be violent or dangerous crimes, he is subject to the discretionary standard found at 8 C.F.R. § 212.7(d).

Because it has not been established that the applicant is inadmissible under INA § 212(a)(6)(C)(i) of the Act, the waiver application is unnecessary for that ground of inadmissibility, and we need not reach the issue of whether the district director correctly assessed hardship to the applicant's spouse under section 212(i) of the Act. Because the director did not address possible inadmissibility under section 212(a)(2)(A)(i), we remand the case for such a determination. Should the director find no inadmissibility under INA § 212(a)(2)(A)(i), the director will reopen and continue processing of the applicant's Form I-485. Should the director find inadmissibility under INA § 212(a)(2)(A)(i), the director will issue a new decision on the applicant's Form I-601 application detailing the finding of inadmissibility and assessing whether the applicant warrants a waiver of this inadmissibility. The director will provide the applicant with an opportunity to present new evidence and argument related to inadmissibility, hardship and discretionary factors. If the Form I-601 decision is adverse to the applicant, it shall be certified for review to the AAO.

ORDER: The director's determination of inadmissibility under INA § 212(a)(6)(C)(i) is withdrawn, and the matter is remanded to the director for further proceedings consistent with this decision.