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



**U.S. Citizenship
and Immigration
Services**

H5

[REDACTED]

DATE: **SEP 28 2012** Office: BALTIMORE, MD FILE: [REDACTED]

IN RE: Applicant: [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) under Section 212(i) of the Immigration and Nationality Act, 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.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Baltimore, Maryland, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the waiver application is unnecessary.

The applicant is a native and citizen of South Africa who was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for attempting to procure admission to the United States by fraud or willful misrepresentation of a material fact, and pursuant to 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 a crime involving moral turpitude. The applicant's spouse is a lawful permanent resident and his three children are U.S. citizens. He seeks a waiver of inadmissibility in order to reside in the United States.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated November 22, 2010.

On appeal, counsel asserts that the district director made several erroneous conclusions in his decision. *Form I-290B*, dated December 17, 2010.

The record includes, but is not limited to, counsel's letter, two social worker's evaluations, documentation regarding the applicant's criminal conviction, and the applicant's statements. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(2) 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 *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. 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.” *Silva-Trevino*, 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. *Id.* 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.

The record reflects that the applicant was convicted on November 22, 2011 of disorderly conduct under section 240.20 of the New York Penal Code and he received one year of conditional discharge and a one year order of protection.

Pursuant to section 240.20 of the New York Penal Code,

A person is guilty of disorderly conduct when, *with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof:*

1. He engages in fighting or in violent, tumultuous or threatening behavior; or

2. He makes unreasonable noise; or
3. In a public place, he uses abusive or obscene language, or makes an obscene gesture; or
4. Without lawful authority, he disturbs any lawful assembly or meeting of persons; or
5. He obstructs vehicular or pedestrian traffic; or
6. He congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse; or
7. He creates a hazardous or physically offensive condition by any act which serves no legitimate purpose.

(Emphasis added). The AAO finds that the Board of Immigration Appeals (BIA) decision in *Matter of P.* 2 I. & N. Dec. 117 (BIA 1944) is relevant to this analysis. In *Matter of P.*, the BIA stated that one of the criteria adopted to ascertain whether a particular crime involves moral turpitude is that it be accompanied by a vicious motive or corrupt mind. "It is in the intent that moral turpitude inheres." *Id.* at 121. In this case, the intent required to be convicted of disorderly conduct is the *intent to inconvenience, annoy, alarm or recklessly create a risk.* The statute does not outline a requirement that the act of disorderly conduct show a vicious motive or a corrupt mind, as referenced in *Matter of P.* The AAO finds that the applicant has not been convicted of a crime involving moral turpitude and therefore, he is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act and does not require a waiver under section 212(h) of the Act.

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.

Section 212(i) of the Act provides 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.

The district director found that the applicant failed to disclose his April 21, 2002 arrest in New York for criminal possession of a forged instrument in the first degree, assault in the third degree and false person in his April 20, 2010 sworn statement before an immigration officer in relation to his adjustment of status application. The record reflects that the applicant was actually arraigned on charges of assault in the third degree under section 120.00 of the New York Penal Code, menacing in the third degree under section 120.15 of the New York Penal Code, harassment in the second degree under section 240.26 of the New York Penal Code, and endangering the welfare of a child under section 260.10 of the New York Penal Code. The record reflects that the applicant was subsequently convicted of only disorderly conduct under section 240.20 of the New York Penal Code. The AAO notes again that this is not a crime involving moral turpitude and would not render the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The test of whether a misrepresentation is material was restated by the United States Supreme Court in the context of a proceeding to revoke naturalization. *See Kungys v. U.S.*, 485 U.S. 759 (1988). The court held in *Kungys* that the false statements must be shown to have been predictably capable of affecting the decisions of the decision-making body for them to be material. A misrepresentation made in connection with an application for a visa or other document, or in connection with an entry into the United States, has a natural tendency to influence the decision on the person's case, if either:

- the alien is inadmissible/removable/ineligible on the true facts; or
- the misrepresentation tends to cut off a line of inquiry, which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he or she is inadmissible.

See Matter of S- and B-C-, 9 I&N Dec. 436 (BIA 1961). The record reflects the applicant's failed to disclose his criminal background during his adjustment of status interview and sworn statement. However, he would not be inadmissible based on the true facts as he was not convicted of a crime involving moral turpitude. In addition, his misrepresentation would not have cut off a line of inquiry which might well have resulted in a proper determination that he is inadmissible. The AAO finds that his misrepresentation was not material and he is therefore not inadmissible under section 212(a)(6)(C)(i) of the Act. As such, he does not need a waiver under section 212(i) of the Act. The appeal will be dismissed as the waiver application is unnecessary.

ORDER: The appeal is dismissed as the waiver application is unnecessary.