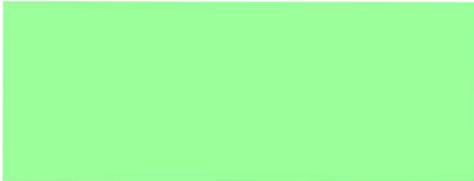




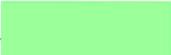
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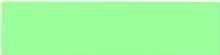
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Date: **MAR 09 2013**

Office: LONDON

FILE: 

IN RE: Applicant: 

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 8 U.S.C. § 1182(i), respectively

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The applicant is a native and citizen of the United Kingdom who was found to be inadmissible under 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 been convicted of crimes involving moral turpitude; and section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for seeking admission into the United States by fraud or willful misrepresentation. The director indicated that the applicant sought a waiver of inadmissibility pursuant to sections 212(h) and 212(i) of the Act, 8 U.S.C. § 1182(h) and 8 U.S.C. § 1182(i), respectively. The 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, the applicant asserts in the letter dated March 24, 2012 that “the only mitigation in [his] stealing money is that it was from a public body and not any individual who could have been harmed by that action.” The applicant declares that after he was fired from his job he was self-employed, setting up a system for people to exchange videotape movies they owned. He asserts that he listed for a small commission the exchange of “blue movies” made by Hollywood and German film studios because people wanted to exchange them. The applicant states that the police came to visit about thefts he committed and saw he was sending blue movies by mail. The applicant asserts that his offenses were combined into a single court appearance and he was sentenced to two years in prison, and was released after one year and placed on license (was free but could be recalled if another crime is committed). The applicant contends that while in prison he decided he needed to change his life and take care of his family, so he learned about computers. The applicant states that he met his present wife from maintaining web sites. He declares that it has been 17 years since his imprisonment and that he has stayed out of trouble and supported his dependents. The applicant contends that his wife’s health has deteriorated and that she needs his help.

We will first address the finding of inadmissibility. 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.)

The record reflects that on March 25, 1994, the applicant was found guilty and convicted of the following offenses:

CRIME	SENTENCE
• Having obscene article for publication for gain (5 counts)	6 months imprisonment for each count (concurrent)
• Sending obscene article by post	6 months imprisonment (concurrent)
• Obtaining pecuniary advantage by deception	18 months imprisonment (concurrent)
• False accounting or furnishing false information Relating to accounts (8 counts)	18 months imprisonment for each count (concurrent)
• Theft by employee (10 counts)	18 months imprisonment for each count (concurrent)

The certification from the officer of the Crown Court at Derby dated June 11, 2010 states that the applicant was sentenced to a total sentence of two years imprisonment for his offenses.

The applicant asserts that his offenses of having obscene article for publication for gain and sending obscene article by involved pornographic movies and are not crimes of moral turpitude. He contends:

[A] crime which would outrage the average person would be something such as rape or blackmail and that they would not consider the possession of pornographic videos in the same light. Whether a particular individual considers such movies distasteful, they are all made within the law and were openly sold in their countries of manufacture. It was not, even then, a matter of more than confiscation to own them in the United Kingdom. So as it seemed unlikely any entire community would be outraged by my actions . . .

The applicant states in the waiver application that he was convicted of sending pornographic movies through the post in his "capacity as a link between those who wished to exchange their videos with others, which was at the time illegal in the UK," but that it was not illegal to possess pornographic movies.

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.

The Obscene Publications Act 1959 provides:

- (1) For the purposes of this Act an article shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.
- (2) In this Act “article” means any description of article containing or embodying matter to be read or looked at or both, any sound record, and any film or other record of a picture or pictures.
- (3) For the purposes of this Act a person publishes an article who—
 - (a) distributes, circulates, sells, lets on hire, gives, or lends it, or who offers it for sale or for letting on hire; or

(b) in the case of an article containing or embodying matter to be looked at or a record, shows, plays or projects it . . .

(4) For the purposes of this Act a person also publishes an article to the extent that any matter recorded on it is included by him in a programme included in a programme service.

(5) Where the inclusion of any matter in a programme so included would, if that matter were recorded matter, constitute the publication of an obscene article for the purposes of this Act by virtue of subsection (4) above, this Act shall have effect in relation to the inclusion of that matter in that programme as if it were recorded matter.

(6) In this section “programme” and “programme service” have the same meaning as in the Broadcasting Act 1990.

2 Prohibition of publication of obscene matter.

(1) Subject as hereinafter provided, any person who, whether for gain or not, publishes an obscene article or who has an obscene article for publication for gain (whether gain to himself or gain to another) shall be liable—

(a) on summary conviction to a fine not exceeding one hundred pounds or to imprisonment for a term not exceeding six months;

(b) on conviction on indictment to a fine or to imprisonment for a term not exceeding three years or both.

In *Matter of D-*, 1 I&N Dec. 190 (BIA 1942), the Board analyzed whether violation of 18 U.S.C. § 334, which criminalized mailing an obscene letter, is a crime involving moral turpitude. That section provides:

Every obscene, lewd, or lascivious, and every filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character * * * is hereby declared to be nonmailable matter * * *. Whoever shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be nonmailable, * * * shall be fined not more than \$5,000, or imprisoned not more than 5 years, or both. * * *

1 I&N Dec. 190 at 191.

The Board determined that a crime involves moral turpitude when “its nature is such that it manifests upon the part of its perpetrator personal depravity or baseness” or “the act is accompanied by a vicious motive or corrupt mind.” 1 I&N Dec. 190 at 193-195. The Board concluded that the offense of mailing an obscene letter is not accompanied by a vicious motive or a corrupt mind, or an act of baseness or depravity, and is therefore not a crime involving moral turpitude. *Id.* at 195.

However, *In Re Olquin-Rufino*, 23 I&N Dec. 896 (BIA 2006), the Board held that the offense of possession of child pornography is morally reprehensible and intrinsically wrong and is a crime involving moral turpitude.

In light of *Matter of D-*, there is a “realistic probability, not a theoretical possibility,” that by its terms, possession of obscene articles with a view to publication for gain and sending or procuring dispatch of obscene publication in post would be applied to reach conduct that does not involve moral turpitude. However, even if the statute has been applied to conduct that does not involve moral turpitude, the applicant must then demonstrate, as part of the second and third stages of the inquiry, that his own conviction did not involve moral turpitude. 24 I&N Dec. 703-704.

The applicant has submitted a letter from an officer of the Crown Court at Derby stating he was convicted of “having obscene article for publication for gain” and “sending obscene article by post,” but the letter does not provide additional details about the nature of the offenses. To establish the crime does not involve moral turpitude, the applicant must submit the available documents comprising the record of conviction, and to the extent the documents are unavailable, this fact must be established pursuant to the requirements in 8 C.F.R. § 103.2(b)(2). The applicant has not established in accordance with the requirements in 8 C.F.R. § 103.2(b)(2) that the documents comprising his record of conviction are unavailable, and the submitted letter does not demonstrate that the applicant's offenses of “having obscene article for publication for gain” and “sending obscene article by post” are not crimes involving moral turpitude. Furthermore, the applicant has not provided a detailed account of his crimes, or presented sufficient credible evidence outside the record of conviction to establish the specific conduct for which he was convicted and thereby resolve the moral turpitude question. Accordingly, the AAO will not conclude, based on the record before it, that under the modified categorical approach the applicant's conviction was not for a crime involving moral turpitude.

The applicant does not dispute that obtaining pecuniary advantage by deception, false accounting or furnishing false information, and theft by employee are crimes involving moral turpitude, and the record does not show the finding of inadmissibility to be erroneous, we will therefore not disturb the finding of the director.

The director determined that the applicant was inadmissible for misrepresentation.

Section 212(a)(6)(C) of the Act provides:

- (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.

U.S. Citizenship and Immigration Services interprets the term “willfully” as knowingly and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the factual claims are true. In order to find the element of willfulness, it must be determined that the alien was fully aware of the nature of the information sought and knowingly, intentionally, and deliberately misrepresented material facts. See generally *Matter of G-G-*, 7 I&N Dec. 161 (BIA 1956). To be willful, a misrepresentation must be made with knowledge of its falsity. 7 I&N Dec. at 164. To determine whether a misrepresentation was willful, we examine the circumstances as they existed at the time of the misrepresentation, and we “closely scrutinize the factual basis” of a finding of inadmissibility for fraud or misrepresentation because such a finding “perpetually bars an alien from

admission.” *Matter of Y-G-*, 20 I&N Dec. 794, 796-97 (BIA 1994) (citing *Matter of Shirdel*, 19 I&N Dec. 33, 34-35 (BIA 1984)); see also *Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28-29 (BIA 1979). With relevance to the present matter, we acknowledge that the term “moral turpitude” is not in common usage, and it is unlikely that the average person is aware of its meaning and application in U.S. immigration law. Nevertheless, as the burden is on the applicant to establish that he or she is not inadmissible, the applicant has the burden of showing that any misrepresentation was, in fact, not willful. See section 291 of the Act, 8 U.S.C. § 1361.

The director stated that the applicant applied for admission to the United States under the Visa Waiver Program on five separate occasions (April 7, 2006, August 5, 2006, November 22, 2006, November 20, 2007, and April 28, 2009) and failed to disclose on the Form I-94W, Arrival Record, his crimes. 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 . . . ?” Upon arrival at a U.S. port of entry, the Custom Border Patrol Officer (CBP) determines whether the traveler seeking admission under VWP is ineligible to enter the United States, or is inadmissible based on the information submitted in the I-94W form, or information elicited during an admissibility interview.

The applicant asserts that he did not know his convictions for possession of obscene articles with a view to publication for gain and sending or procuring dispatch of obscene publication in post are crimes involving moral turpitude. The applicant declares in the March 24, 2012 letter:

When it came to visiting America, I read what information I could online from the US Government web site and it appeared that the only grounds for not using the Visa Waiver Programme might be the aspect of moral turpitude. But it seemed to me that a crime which would outrage the average person would be something such as rape or blackmail and that they would not consider the possession of pornographic videos in the same light. Whether a particular individual considers such movies distasteful, they are all made within the law and were openly sold in their countries of manufacture. It was not, even then, a matter of more than confiscation to own them in the United Kingdom. So as it seemed unlikely any entire community would be outraged by my actions, and as I had also not been in prison for five years, it appeared that I could use the VWP in good faith.

This was apparently confirmed when the American agent who interviewed me before boarding the flight to America had no problems after consulting his computer. Nor did the Immigration Officer when I arrived. I knew that post- 9/11, US Authorities had access to British police records and I also had heard that people were often refused entry when they arrived in America because they had a record for taking drugs and similar things. So it appeared that my past history was not something which did require a visa and I based future visits upon this belief. This was reinforced when a new form was introduced which required a person to be cleared for entry into American 48 hours before the flight time.

In addition, the applicant states in the waiver application that he was convicted for sending pornographic movies through the post in his "capacity as a link between those who wished to exchange their videos with others, which was at the time illegal in the UK," but that it was not illegal to possess pornographic movies. The applicant asserts that he had no intent to deceive in using the VWP because he believed that a crime involving moral turpitude "would be something such as kidnapping, rape, blackmail or along those lines."

The applicant contends that he was aware based on information from an U.S. government website that a person convicted of a crime involving moral turpitude is ineligible for the VWP, but that his crimes do not involve moral turpitude because they are not crimes such as kidnapping, rape, and blackmail, which he believes are crimes involving moral turpitude. The applicant argues that his belief that his crimes do not involve moral turpitude was reinforced when, prior to boarding his flight he was interviewed by an inspector who consulted his computer, and when he was inspected by an immigration officer upon his arrival at a U.S. port of entry. He states that his belief was further supported based on his awareness that U.S. authorities had access to British police records for he heard people were refused entry "because they had a record for taking drugs and similar things," as well as on the new form requiring a person be cleared for entry into the United States 48 hours before flight time. There is no evidence in the record that on the five occasions the applicant sought admission into the United States that he was asked by the inspecting officer at the U.S. port of entry whether he ever was arrested for *any* crimes. As the applicant's account is not contradicted by the record before the AAO, and there is insufficient evidence in which to find the applicant intentionally did not disclose his criminal convictions, we find the applicant is not inadmissible under section 212(a)(6)(C)(i) of the Act for seeking admission into the United States by fraud or willful misrepresentation.

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) . . . 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 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. An application for admission or adjustment is a "continuing" application, adjudicated on the basis of the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992). Since the activities for which the alien is inadmissible occurred on March 25, 1994, which is more than 15 years ago, his crimes are waivable under section 212(h)(1)(A) of the Act.

Section 212(h)(1)(A)(ii) and (iii) 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 the applicant establish his rehabilitation. Evidence in the record to establish the applicant's eligibility under section 212(h)(1)(A)(ii) and (iii) of the Act consists of a letter from his wife. The applicant's wife asserts in the letter dated March 4, 2012 that she depends on her husband for financial assistance, and that he has been supporting her for almost five years. The record contains statements reflecting the applicant has provided ongoing financial support to his wife from November 2010 until March 2012. The applicant asserts in the letter dated May 28, 2009 that he made mistakes in the past and has learned from them, and wants to take care of his family. The applicant contends that he has stayed out of trouble since his imprisonment 17 years old, and is self-employed working with computers. In view of the evidence in the record, the AAO finds that the applicant's evidence demonstrates that his admission to the United States is not contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated, as required by section 212(h)(1)(A)(ii) and (iii) of the Act.

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 one of the favorable factors to be considered in determining whether the Secretary should exercise discretion in favor of the waiver. The AAO must "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).

The adverse factors in the present case are the applicant's criminal convictions. The favorable factors are the fact that the applicant has not been convicted of any crimes for the past 17 years, his close relationship with his wife, and the financial support he has provided to her. However, the favorable factors are to be weighed against the applicant's serious criminal record as well as his attempt to rationalize or lessen his crimes, which is indicative of bad character. In the letter dated March 24, 2012, the applicant states that he stole money from his employer, and "the only mitigation in [his] stealing money is that it was from a public body and not any individual who could have been harmed by that action." He states that after he was fired from his job he was unable to find new work, and attempted to become self-employed by setting up a system for people to exchange videotape movies they owned. He asserts that people wanted to exchange blue movies so he "made a second mistake

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in agreeing to list those as well.” The applicant claimed that when the police came to his house to inquire about the thefts he committed, they discovered he was sending videos by mail. This is inconsistent with the applicant’s assertion at the visa interview, as he stated that in 1994 he attempted to set up an adult pornography business from his home, and stole money from his employer when the business did not get off the ground.

When the applicant’s convictions are considered together with evidence indicative of bad character, we find the favorable factors in the present case are outweighed by the adverse factors, such that a favorable exercise of discretion is not warranted. Accordingly, the appeal will be dismissed.

In proceedings for application for waiver of grounds of inadmissibility under sections 212(h) and 212(i) of the Act, the burden of proving eligibility rests with the applicant. *See* section 291 of the Act. Here, the applicant has now met that burden. Accordingly, the appeal will be dismissed and the waiver application will be denied.

ORDER: The appeal is dismissed.