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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

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Date: JUL 06 2011

Office: PHILADELPHIA, PA

FILE: [REDACTED]

IN RE: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B).

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 Field Office Director, Philadelphia, Pennsylvania. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of the Dominican Republic who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than 180 days, but less than one year and seeking readmission within three years of his last departure from the United States. The applicant is the spouse of a U.S. citizen and has three U.S. citizen children. He seeks a waiver of inadmissibility in order to reside in the United States.

In a decision dated November 25, 2008, the field office director found that the applicant failed to establish extreme hardship to his U.S. citizen spouse as a result of his inadmissibility and denied the waiver accordingly.

In a Notice of Appeal to the AAO, dated December 19, 2008, counsel states that the applicant's waiver was erroneously denied and that the field office director should have found extreme hardship.

Section 212(a)(9)(B) of the Act provides:

(B) Aliens Unlawfully Present.-

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . prior to the commencement of proceedings under section 235(b)(1) or section 240, and again seeks admission within 3 years of the date of such alien's departure or removal, . . . is inadmissible.

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

(v) Waiver. - The Attorney General [Secretary] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or 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 such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

The record indicates that the applicant entered the United States without inspection on October 15, 1988. On January 28, 1998, the applicant filed an Application to Register Permanent Residence or

Adjust Status (Form I-485). On April 19, 2001, the applicant was issued Authorization for Parole of an Alien into the United States (Form I-512) and subsequently used the advance parole authorization to depart the United States in May 2001, entering the Dominican Republic on May 29, 2001. The applicant then reentered the United States on July 10, 2001.

The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary] as a period of stay for purposes of determining bars to admission under section 212(a)(9)(B)(i)(I) and (II) of the Act. *See Memorandum on Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act*, dated May 6, 2009. The applicant accrued unlawful presence from April 1, 1997, the date of enactment of unlawful presence provisions under the Act, until January 28, 1998, the date of his proper filing of the Form I-485. The applicant was, therefore, inadmissible to the United States under section 212(a)(9)(B)(i)(I) of the Act for being unlawfully present in the United States for a period of more than 180 days. Pursuant to section 212(a)(9)(B)(i)(I), the applicant was barred from again seeking admission within three years of the date of his departure.

The AAO notes that an application for admission or adjustment of status is considered a “continuing” application and “admissibility is determined on the basis of the facts and the law at the time the application is finally considered.” *Matter of Alarcon*, 20 I.&N. Dec. 557, 562 (BIA 1992) (citations omitted). The applicant’s departure occurred in 2001. It has now been more than three years since the departure that made the inadmissibility issue arise in his application. A clear reading of the law reveals that the applicant is no longer inadmissible under section 212(a)(9)(B)(i)(I) of the Act. The AAO notes that in 2008, when the field office director issued her decision, the applicant was not inadmissible under section 212(a)(9)(B)(i)(I) of the Act. The applicant does not require a waiver of inadmissibility under 212(a)(9)(B)(v) of the Act.

Although the record indicates that the applicant is not longer inadmissible under 212(a)(9)(B)(i)(I) of the Act, the record does indicate that he is inadmissible under section 212(a)(2)(A) of the Act.

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.

(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 determining whether a crime involves moral turpitude, the Third Circuit Court of Appeals, per *Jean-Louis v. Holder*, 582 F.3d 462 (3rd Cir. 2009), 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.” *Id.* at 465-66. The “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 shows that on August 26, 1993 in Bergen County, New Jersey the applicant was charged with receiving stolen property in violation of New Jersey Stat. Ann. § 2C:20-7 and unlawful taking by means of conveyance under § 2C:20-10B. On September 9, 1994, the applicant was convicted of receiving stolen property in violation of New Jersey Stat. Ann. § 2C:20-7 with the second charge being dismissed. The applicant was sentenced to 22 days in prison and two years probation. The applicant, who was born on September 16, 1967, was 25 years old at the time he committed the crimes that resulted in his arrest.

New Jersey Stat. Ann. § 2C:20-7 provides:

A person is guilty of theft if he knowingly receives or brings into this State movable property of another knowing that it has been stolen, or believing that it is probably stolen. It is an affirmative defense that the property was received with purpose to restore it to the owner.

New Jersey Stat. Ann. § 2C:20-3a. provides that “[a] person is guilty of theft if he unlawfully takes, or exercises unlawful control over, immovable property of another with purpose to deprive him thereof.”

New Jersey Stat. Ann. § 2C:20-1a states that to deprive another of his or her property means:

- (1) to withhold or cause to be withheld property of another permanently or for so extended a period as to appropriate a substantial portion of its economic value ... or
- (2) to dispose or cause disposal of the property so as to make it unlikely that the owner will recover it.

In determining whether theft is a crime of moral turpitude, the Board of Immigration Appeals (BIA) considers “whether there was an intention to permanently deprive the owner of his property.” See *In re Jurado-Delgado*, 24 I&N Dec. 29, 33 (BIA 2006). New Jersey Stat. Ann. § 2C:20-1a defines the term “deprive” to include withholding property of another permanently or for an extended period so “as to appropriate a substantial portion of its economic value” or “to dispose or cause disposal of the property so as to make it unlikely that the owner will recover it.” In view of the fact that the affirmative statutory defense to the crime of receiving stolen property is “that the property was received with purpose to restore it to the owner,” the AAO finds that the term “deprive” under New Jersey Stat. Ann. § 2C:20-1a indicates an intention to permanently deprive an owner of his property. Thus, the AAO finds that the offense of which the applicant was convicted under New Jersey Stat. Ann. § 2C:20-7 involves moral turpitude, as that statute does not cover temporary takings, as we interpret that term with regards to moral turpitude. The AAO notes that the applicant has not submitted documentation to indicate that this conviction qualifies for the petty offense exception.

The record indicates that on January 1, 1994 the applicant was arrested and charged with driving while under the influence in violation of New Jersey Stat. Ann. § 39:4-50. On March 16, 1995 the applicant pled guilty to this charge, was fined, and had his license suspended for six months.

The AAO notes that the Board of Immigration Appeals (BIA) has found that a simple driving while under the influence conviction does not amount to a crime involving moral turpitude. *In Re Lopez-Meza*, *Id.* 3423 (BIA Dec. 21, 1999). See also, *Matter of Torres-Varela*, 23 I. & N. Dec. 78 (BIA 2001).

The record also indicates that on February 23, 1999 the applicant was arrested for criminal possession of a controlled substance, criminally using drug paraphernalia, and unlawful possession of marijuana in violation of New York Penal Law (NYPL) § 220.03, § 220.50, and § 221.05. However, on April 26, 1999, in relation to these charges, the applicant pled guilty to harassment in violation of NYPL § 240.26. He was sentenced to one year conditional discharge and three days of community service.

NYPL § 240.26, Harassment in the second degree, states in pertinent part:

A person is guilty of harassment in the second degree when, with intent to harass, annoy or alarm another person:

1. He or she strikes, shoves, kicks or otherwise subjects such other person to physical contact, or attempts or threatens to do the same; or
2. He or she follows a person in or about a public place or places; or
3. He or she engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose.

The AAO notes that the record is not clear as to which section of NYPL § 240.26 the applicant's was convicted under, so the AAO will look to whether any of the three sections involve a crime involving moral turpitude. The AAO finds that part of NYPL § 240.26(1) describes acts which are akin to simple assault or battery and that it is well established that as a general rule, simple assault or battery is not deemed to involve moral turpitude for purposes of the immigration laws. *Matter of Fualaau*, 21 I&N Dec. 475, 477 (BIA 1996). The AAO notes that this general rule does not apply where an assault or battery necessarily involved some aggravating dimension, such as the use of a deadly weapon or serious bodily harm. *See, e.g., Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988), *Matter of Goodalle*, 12 I. & N. Dec. 106 (BIA 1967), *Matter of S-*, 5 I. & N. Dec. 668 (BIA 1954), and *Nguyen v. Reno*, 211 F.3d 692 (1st Cir. 2000). The AAO notes that nowhere in NYPL § 240.26(1) does it state that a conviction for this crime would involve bodily injury or the use of a deadly weapon.

The AAO finds that parts of NYPL § 240.26(1) and all of NYPL § 240.26(2) and (3) describe acts which are most closely akin to harassment. The AAO is unaware of any published federal cases addressing whether the described crime of harassment is a crime involving moral turpitude. However, the AAO is aware of a case where aggravated stalking under Michigan law, Mich. Comp. Laws Ann. § 750.411i(2)(c), was held to involve moral turpitude – *Matter of Ajami*, 22 I&N Dec. 949, 952 (BIA July 13, 1999). The AAO recognizes that the applicant was not convicted of aggravated stalking, but this case is relevant in that the Michigan statute at issue defines harassment in a way similar to NYPL § 240.26 and *Matter of Ajami* discusses the elements generally needed to find that a crime like harassment is a crime involving moral turpitude. In *Matter of Ajami* the Michigan statute defined harassment as conduct directed toward a victim that includes, but is not limited to, repeated or continued unconsented contact, that would cause a reasonable individual to suffer emotional distress, and that actually causes the victim to suffer emotional distress. The statute states that harassment does not include conduct that serves a legitimate purpose. Mich. Comp. Laws Ann. § 750.411i(1)(b). As stated above, the Michigan statute's definition of harassment is similar to the conduct described in NYPL § 240.26. In finding that the Michigan statute for aggravated stalking was a crime involving moral turpitude the Board emphasized that the perpetrators conduct must involve threats of bodily injury or death and cause the victim to feel great fear. *Id.* The Board also stated that they have previously found that threatening behavior can be an element of a crime involving moral turpitude. *See Matter of B-*, 6 I&N Dec. 98 (BIA 1954) (involving usury by intimidation and threats of bodily harm); *Matter of C-*, 5 I&N Dec. 370 (BIA 1953) (involving

threats to take property by force); *Matter of G-T-*, 4 I&N Dec. 446 (BIA 1951) (involving the sending of threatening letters with the intent to extort money); *Matter of F-*, 3 I&N Dec. 361 (C.O. 1948; BIA 1949) (involving the mailing of menacing letters that demanded property and threatened violence to the recipient). *Id.* The AAO notes that in the applicant's case, NYPL § 240.26 does not include threatening acts that would cause bodily injury, but only refers to physical contact. In addition, the statute uses language like "alarm" or "seriously annoy" to describe the mental state of the victim and does not go so far as to require that the victim suffer great fear. Thus, we cannot find that the "least culpable conduct hypothetically necessary to sustain a conviction under the statute" involves moral turpitude. Consequently, we find that the applicant's conviction for harassment under NYPL § 240.26 does not constitute a crime involving moral turpitude.

Section 212(h) of the Act provides, in pertinent part:

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 . . . ; and

(2) the Attorney General [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

Section 212(h)(1)(A) of the Act provides that the Secretary may, in her discretion, waive the application of subparagraph (A)(i)(I) of subsection (a)(2) if the activities for which the applicant is inadmissible occurred more than 15 years before the date of the applicant's application for a visa, admission, or adjustment of status. The AAO notes that an application for admission or adjustment of status is considered a "continuing" application and "admissibility is determined on the basis of the facts and the law at the time the application is finally considered." *Matter of Alarcon*, 20 I.&N. Dec. 557, 562 (BIA 1992) (citations omitted).

Since the criminal conviction for which the applicant was found inadmissible occurred in 1993 or more than 15 years ago, his inadmissibility can be waived under section 212(h)(1)(A) of the Act.

Section 212(h)(1)(A) 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 he has been rehabilitated. The applicant has submitted documentation to demonstrate that he satisfies these requirements.

The record reflects that the applicant has not been charged with any additional crimes since his conviction in 1999. The record includes a letter from the applicant's mother stating that the applicant is a hard worker and that all of his family members are now living in the United States, including five siblings. The record also includes an evaluation of the applicant's family, dated June 16, 2008, from a [REDACTED] states that since the applicant immigrated to the United States in 1988 he has learned to speak English fluently, and that he has a barber's license and currently works in his brother's barber shop. [REDACTED] also states that prior to working as a barber the applicant was a mechanic, but after hurting his back in 2007 he could no longer perform that type of work. [REDACTED] states that the applicant is extremely devoted to his family and that they attend church regularly. The AAO notes that the applicant's spouse also submits a statement asserting that the applicant is genuine, reliable, and loving.

The AAO finds that the record reflects that the applicant meets the requirements for a waiver of his grounds of inadmissibility under section 212(h)(1)(A) of the Act.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y*, 7 I&N Dec. 582 (BIA 1957).

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).

See Matter of Mendez-Morales, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance 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 entry into the United States without inspection, his unlawful presence in the United States, and his criminal convictions in 1993, 1994, and 1999.

The favorable factors in the present case are the applicant's extensive family ties to the United States, including his mother, spouse, three minor children, and five siblings; the affidavit from the applicant's spouse, the statement from the applicant's mother, and the evaluation from [REDACTED] stating that the applicant is a devoted husband and hard worker; and the lack of a criminal record or offense since 1999.

The AAO finds that the crimes and immigration violations committed by the applicant are serious in nature and cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.