

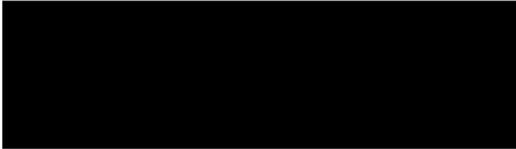
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

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FILE: [REDACTED] Office: BANGKOK, THAILAND

Date: JUL 26 2011

IN RE: [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)

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 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 Shumway*  
for Perry Rhew  
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Taiwan who was found to be inadmissible to the United States pursuant to 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 committed a crime involving moral turpitude. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h). The district director determined that the applicant had established extreme hardship to a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) as a matter of discretion..

On appeal, it is asserted that that the applicant was ill-advised by her attorney to plead guilty to criminal charges brought against her for misappropriation.<sup>1</sup> It is claimed that in her role as a cashier at Jinou Girls High School the applicant was forced to perform job duties that she did not understand, and was unaware of engaging in any wrongdoing in her job. It is suggested that Taiwan's political climate affected the charges brought against her, particularly because she is an "outsider." It is stated that that the school returned the equivalent of \$72,000 to the applicant, plus \$860 in interest, because she attempted to balance the school's account with her own money. It is claimed that the applicant was the victim of political persecution and was not competent in her job, but did not have "evil intent or corruption of the mind." Further, it is indicated that the applicant did not understand the ramification of her plea, and was unable to use her hearing aid in court. It is maintained that the applicant's elderly parents would greatly benefit from her admission to the United States. Finally, it is asserted that that the applicant mismarked her Form DS-230 Part II in genuine belief that she did not have a criminal record, given that there was no trial other than the guilty plea. It is claimed that the applicant does not read, speak, or write in the English language and so would have had no comprehension of the form.

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.

Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines "conviction" for immigration purposes as:

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<sup>1</sup> The AAO takes note that [REDACTED] is not an attorney or authorized representative. In rendering the decision, the AAO will consider [REDACTED] submissions, but the decision will be issued only to the applicant.

A formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where –

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

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.)

To determine if a crime involves moral turpitude, the Ninth Circuit Court of Appeals first applies the categorical approach. *Nunez v. Holder*, 594 F.3d 1124, 1129 (9<sup>th</sup> Cir. 2010) (citing *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 999 (9<sup>th</sup> Cir.2008)). This approach requires analyzing the elements of the crime to determine whether all of the proscribed conduct involves moral turpitude. *Nicanor-Romero*, *supra* at 999. In *Nicanor-Romero*, the Ninth Circuit states that in making this determination there must be "a realistic probability, not a theoretical possibility, that the statute would be applied to reach conduct that did not involve moral turpitude. *Id.* at 1004 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability can be established by showing that, in at least one other case, which includes the alien's own case, the state courts applied the statute to conduct that did not involve moral turpitude. *Id.* at 1004-05. *See also Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008) (whether an offense categorically involves moral turpitude requires reviewing the criminal statute to determine if there is a "realistic probability, not a theoretical possibility," that the statute would be applied to conduct that is not morally turpitudinous).

If the crime does not categorically involve moral turpitude, then the modified categorical approach is applied. *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1161 (9<sup>th</sup> Cir. 2009). This approach requires looking to the "limited, specified set of documents" that comprise what has become known as the

record of conviction—the charging document, a signed plea agreement, jury instructions, guilty pleas, transcripts of a plea proceeding and the judgment—to determine if the conviction entailed admission to, or proof of, the necessary elements of a crime involving moral turpitude. *Id.* at 1161 (citing *Fernando-Ruiz v. Gonzalez*, 466 F.3d 1121, 1132-33 (9<sup>th</sup> Cir. 2006)).

The criminal judgment from the Taiwan Taipei District Court states that the Criminal Code of the Republic of China involved in the case is Article 215, which states that, “A person who engages in business, in a matter likely to cause injury to the public or to another makes an entry which such person knows to be false into the official documents in his charge shall be punished with imprisonment for not more than three years.” The criminal judgment reflects that the applicant and [REDACTED] “committed misappropriation in the performance of duties.” The judgment states that the applicant “misappropriated a thing which she possessed in performance of duties with intent to possess it unlawfully . . . and . . . managed the affairs of another with intent to procure an illegal benefit for a third person and . . . acted contrary to his [sic] duties and thereby caused loss to the property of such principal.” The court suspended for four years her sentence of ten months imprisonment, and placed her on probation for four years. We note that the applicant stated in the December 3, 2008 letter that she was “accused of misappropriation of public funds.” She indicates that “I was required to save all the petty cash of the Dean’s Office to my private account while the interest is public-owned.” The police criminal record certificate certifies that the applicant was convicted of the offenses of misappropriation and breach of trust.

In *Matter of Robinson*, 16 I&N Dec. 762 (BIA 1979), the Board addressed the respondent’s contention that the crime of misapplication of funds contrary to 18 U.S.C. § 657 does not involve moral turpitude because the convicting statute does not include the element of fraud. 16 I&N Dec. 762 at 763-764. The Board stated that it previously held in *Matter of Batten*, 11 I&N Dec. 271 (BIA 1965), that “a crime charging the defendant with misapplication of funds includes the element of intent to defraud and, therefore, involves moral turpitude despite omission of the element of intent from the statute.” *Id.* Thus, the Board held that the respondent’s conviction under 18 U.S.C. § 657 for willful misapplication of funds from a savings and loan association is morally turpitudinous because it is similar to the crime of dealing with embezzlement from banks in violation of 18 U.S.C. § 656, which it held to involve moral turpitude in *Batten*. *Id.*

The AAO finds that the applicant’s offense of misappropriation of public funds and breach of trust, by placing petty cash in her private account and then using the funds in that account to procure an illegal benefit for a third person involves moral turpitude, rendering her inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

It is asserted that the applicant is not guilty of the offense of which she was convicted because she did not know that her financial transactions, as directed by the school principal, were improper. It is further asserted that in her role as a cashier at [REDACTED] the applicant was forced to perform job duties that she did not understand, and was not aware of engaging in any wrongdoing in her job. It is maintained that that the applicant had worked at the school “in the capacity as that of school scheduler from August 1975 to August 2000[,] which entailed her to schedule students for

various classes, tutoring and other events.” Lastly, it is asserted that the school returned the equivalent of \$72,000 to the applicant, plus \$860 in interest, because she attempted to balance the school’s account with her own money.

The immigrant visa application shows that the applicant had worked for many years (from August 1975 to February 2002) as a bookkeeper for the school. The applicant declares in the letter dated December 3, 2008 that she was promoted to the team leader of cashier group in 2000, and that she was required to save all the petty cash of the Dean’s office to her private account and that was according to the tradition of her school. She states in the DS-230 Part II that:

The Dean’s Office has been doing in this way that deposited the small amount of money to personal account, so that the Principal can use the money to pay various kinds of expenses flexibly. When it’s my turn to be a secretary, I reported to the Principal, that I am concerned about depositing money to my personal account. The Principal wanted me to follow the convention and asked me not to worry, he promised me that he would sign every single bill of expenditure. Two Principals successively wanted me to follow the previous way of handling and deposit [sinc] money.

The applicant appears to state that she was innocent of the offense of misappropriation because she was convicted for having followed past accounting practices. However, the criminal judgment states that Article 215 of the Criminal Code of the Republic of China was applicable to the criminal case. Thus, the applicant would have been convicted of making an entry that she knew to be false in official documents under her charge. Moreover, the applicant admitted that she knew that she should not have deposited the school’s money into her personal account, and the criminal judgment states that the applicant “confessed guilt” to having committed the offense of misappropriation. Finally, even if the applicant sought to balance the school’s account with her own money, the criminal charges are clear in that she was convicted for misappropriation of funds for having deposited the school’s money into her personal account and for concealing that act by making a false entry in official documents under her charge.

It is asserted that the applicant was the victim of political persecution and that Taiwan’s political climate affected the charges against her, particularly because she is an “outsider.” It is alleged that the applicant was the victim of political persecution and did not have “evil intent or corruption of the mind.” It is asserted that the applicant was not afforded due process during the criminal proceedings, that she did not understand the ramification of her plea, and was unable to use her hearing aid in court.

Based on the evidence in the record, the AAO cannot make a determination as to whether the criminal charge against the applicant was politically motivated, and even if it was, how this had any bearing on her criminal conviction given that she pled guilty to the crime of misappropriation and breach of trust and the facts indicate that she did in fact commit this offense. Furthermore, the AAO

cannot make any determination based on the record before it as to whether the applicant was coerced by the judge into pleading guilty to the offenses of which she was convicted.

We observe that the Board held in *In Re Max Alejandro Madrigal-Calvo*, 21 I&N Dec. 323, 327 (BIA 1996), that collateral attacks on a conviction do not operate to negate the finality of the conviction unless and until the conviction is overturned. (citations omitted). A collateral attack on a judgment of conviction cannot be entertained “unless the judgment is void on its face,” and “it is improper to go behind the judicial record to determine the guilt or innocence of an alien.” *Id.*

The director determined that the applicant demonstrated extreme hardship to a qualifying relative, her parents, as required under section 212(h) of the Act.

In *Matter of Mendez-Morales*, 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. Furthermore, the Board stated that:

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).

*Id.* at 301.

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).

We note that the director indicates that the record reflects that the applicant misrepresented material facts in her application for an immigrant visa. The director asserts that this is a ground of inadmissibility under section 212(a)(6)(C) of the Act, which is a negative factor to be weighed against the applicant.

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.

The director found that the applicant failed to disclose in the Form DS-230 Part II, Application for Immigrant Visa and Alien Registration, submitted December 28, 2007, that she had been convicted on March 15, 2007 of committing a crime involving moral turpitude.

An applicant who applies for an immigrant visa must complete Part II of the Form DS-230. Part II asks if the alien is within any class of aliens that are ineligible to receive a visa, with Question 30 asking if the alien is “[s]n alien convicted of, or who admits having committed, a crime involving moral turpitude . . .” Although the applicant did not provide an affirmative response to question 30, the applicant did indicate at question 31 that she had been “charged, arrested or convicted” of an offense or crime, and she provided an explanation of her criminal offense. Therefore, we find that the applicant’s response to question 30 was not a willful misrepresentation in that she clearly had no intention in concealing the conviction on the application.

However, the record shows that on October 4, 2008 the applicant sought to procure admission to the United States as a B-2 nonimmigrant visitor for pleasure at the port of entry at Los Angeles, California, after she was found to be inadmissible to the United States for having committed a crime involving moral turpitude. However, we note that the Chief of Immigrant Visa Unit in the Consular Section in Taiwan had issued a letter dated March 20, 2008 to the applicant, stating that “you have been found ineligible under Section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act, which prohibits the admission of any alien who has been convicted of a crime of moral turpitude.” The letter further states, “On March 15, 2007 you were sentenced by the Taipei District Court for committing an offense of misappropriation, a crime involving moral turpitude. Your conviction makes you ineligible for a visa to the United States.”

Upon seeking admission on October 4, 2008, the applicant was referred for further inspection based on information in government records concerning her conviction. Only after being questioned about this information did she admit to having been convicted of misappropriation in Taiwan. Thus, we find that the applicant sought admission into the United States by willfully misrepresenting the material fact of her criminal history and eligibility for admission into the United States.

In addition, we observe that the applicant willfully misrepresented her criminal history when she applied for a nonimmigrant visa in July 2007. The applicant stated in the record of sworn dated October 4, 2008, that when she applied for a nonimmigrant visa in 2007 she did not disclose her conviction to the consular officer because “I was told by the Courts that once I paid the \$200,000.00 fine my record would be expunged. I honestly thought I had a clean record.”

A person who applies for a nonimmigrant visa must complete Form DS-156. Question 38 asks, "Have you ever been arrested or convicted for any offense or crime, even though subject of a pardon, amnesty or other similar legal action?" Even though the applicant stated that she did not disclose her conviction while applying for the nonimmigrant visa, it is clear that such a disclosure is required in the nonimmigrant visa application Form DS-156, and she did disclose her conviction later on her immigrant visa application. That disclosure contradicts the applicant's testimony that she believed she did not have a criminal record that required disclosure.

We thus find the applicant is inadmissible to the United States under section 212(a)(6)(C) of the Act for willfully misrepresenting the material fact of her criminal history and eligibility for admission into the United States when she sought to enter the United States on October 4, 2008 and when she applied for a nonimmigrant visa in July 2007.

Thus, we find that the adverse factors in the instant case include not only the applicant's criminal conviction for misappropriation in 2007, but also her violations of U.S. immigration laws in making willful misrepresentations about her conviction in 2007 and 2008, the most recent being the most egregious in nature because the applicant had been notified of her inadmissibility for her criminal conviction.

The favorable factors are the extreme hardship to the applicant's parents, who have serious health problems as described in the submitted medical records, and the applicant's history of steady employment.

When we consider and balance the favorable factors against the adverse factors, we find that the adverse factors outweigh the favorable factors. We also give negative weight to the fact that the events that constitute adverse factors in this case occurred recently, that they demonstrate a lack of honesty and a disregard for the law on the applicant's part, and that the applicant has sought to diminish her offenses rather than express remorse for her actions. Therefore, we find that the grant of relief in the exercise of discretion is not warranted in this case.

In proceedings for application for waiver of grounds of inadmissibility under section 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.