

PUBLIC COPY

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

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

L2

FILE: [REDACTED] Office: NEWARK, NEW JERSEY

Date: **APR 06 2009**

IN RE Applicant: [REDACTED]

APPLICATION: Application for Permanent Residence Pursuant to Section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255

ON BEHALF OF APPLICANT:
[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).


John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Field Office Director (FOD), Newark, New Jersey, who certified her decision to the Administrative Appeals Office (AAO) for review. The director's decision will be affirmed. The application will be denied.

The applicant is a native and citizen of Cuba who filed this application for adjustment of status to that of a lawful permanent resident pursuant to section 245 of the Immigration and Nationality Act (the Act). The applicant is the spouse of a U.S. citizen who has an immigrant visa number immediately available to him.

Section 245 of the Act, 8 U.S.C. § 1255, states, in pertinent part:

(a) The status of an alien who was inspected and admitted or paroled into the United States . . . may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if

- (1) the alien makes an application for such adjustment,
- (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and
- (3) an immigrant visa is immediately available to him at the time his application is filed.

A review of the record reveals the following facts and procedural history: On September 12, 1995, the applicant was paroled into the United States from Guantanamo Bay, Cuba. On August 3, 1998, the applicant was convicted of one count of grand theft of a vehicle in violation of § 812.014(2)(c)(6) of the Florida Statute, and three counts of resisting a law enforcement officer with violence in violation of § 843.01 of the Florida Statute. The applicant was sentenced to three years of probation. On July 30, 1999, the applicant was convicted of carrying a concealed weapon in violation of § 790.01(2) the Florida Statute.¹ The applicant was sentenced to 364 days in prison. On October 3, 2002, the applicant submitted a Form I-485 application to adjust his status under section 1 of the CAA. On November 18, 2005, the director denied the application, finding that the applicant had been convicted of five felonies. The director certified his decision to the AAO for review.² On May 10, 2006, the applicant filed a second I-485 application to adjust his status pursuant to section 1 of CAA, which the director of the California Service Center denied on August 11, 2006 because the applicant had been arrested for one or more controlled substances violations. On October 20, 2006, the applicant's U.S. citizen spouse filed a Form I-130, Petition for Alien Relative, on the applicant's behalf, which was approved on November 13, 2006. On December 26, 2006, the applicant filed a third I-485 application to adjust his status based upon his approved I-130 Petition.

¹ The applicant was also charged with three counts of conspiracy to traffic in cocaine; however, the applicant was not convicted on any of the counts.

² There is no record of the AAO's decision on the director's November 18, 2005 notice of certification. This decision will, therefore, apply to both the November 18, 2005 and October 3, 2008 certification notices.

On October 3, 2008, the director determined that the applicant was ineligible to adjust his status to that of a lawful permanent resident.³ The director found the applicant inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act for his 1998 convictions involving crimes of moral turpitude. The director also found the applicant inadmissible pursuant to section 212(a)(2)(C)(i) of the Act for his 1999 conviction for carrying a concealed weapon, which the director deemed had occurred while the applicant was conspiring to traffic cocaine. The director denied the application and certified her decision to the AAO for review. The director informed the applicant that he had 30 days to supplement the record with any evidence that he wished the AAO to consider.

In response to the director's notice, counsel submits a brief and the petitioner presents additional evidence. Regarding the applicant's 1999 conviction, counsel states that the applicant was not convicted of a trafficking crime and claims that the applicant was unfortunate to have been in the company of a man who had purchased drugs and had a weapon in his car. Counsel notes further that a conviction for carrying a concealed weapon is not a crime involving moral turpitude. In reference to the applicant's 1998 convictions, counsel states that, although both convictions involved moral turpitude, the director erred by not permitting the applicant to submit a Form I-601 waiver, as the applicant is eligible for such a waiver due to his marriage to a U.S. citizen and the hardship that his U.S. citizen spouse would suffer if the applicant is removed from the United States. In addition to counsel's brief, the record contains sworn statements from the petitioner and his spouse. The petitioner discusses the circumstances surrounding his arrests and the petitioner's spouse discusses the hardship she would face without the petitioner's daily presence in her life.

The AAO will first address the evidence regarding the applicant's 1999 conviction for carrying a concealed weapon. The director determined that the applicant's conviction arose from his involvement in cocaine trafficking and the petitioner disputes such a finding. As a preliminary matter, the AAO will provide the narrative from the arresting officer's report detailing what transpired when the applicant was arrested on August 18, 1998:

During the course of a narcotics investigation the DEF [the applicant] was approached due to the fact that he was believed to be with the CO DEF () who had negotiated the purchase of two (2) kilograms of cocaine. When approached the DEF removed a handgun with his right hand, throwing it under a parked vehicle. The gun was recovered and the DEF was placed under arrest.

The record indicates that the applicant was initially charged with carrying a concealed weapon along with three counts of conspiracy to traffic in cocaine; however, he only pled guilty to and was convicted of the charge of carrying a concealed weapon. In the statement that he submitted in response to the director's certification notice, the applicant states the following about the incident:

That day, I was eating at a restaurant with a group of my friends. Once we left the restaurant we headed towards our car and were about to leave when the driver noticed that police officers

³ The director's decision indicates that the applicant applied to adjust his status pursuant to section 1 of the Cuban Adjustment Act of 1996, not section 245 of the Immigration and Nationality Act. As the approval of an application under either statute requires the applicant to be admissible to the United States, the director's error is harmless.

were approaching. He quickly told me that there was a gun in the glove compartment and that he wanted me to throw it away. Without weighing my options, I did as I was asked and I disposed of the gun. The police officer found the gun and assumed it was mine and I was arrested as a result. . . . The police officers also found cocaine in the car. I did not know that there were any illegal substances in the vehicle that I was riding in, had I known, I would have never been involved. . . .

Section 212(a)(2) of the Act states:

(C) Controlled substance traffickers- Any alien who the consular officer or the Attorney General knows or has reason to believe—

(i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so; or

(ii) is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity, is inadmissible.

The applicant's statement regarding his arrest on August 18, 1998 is not entirely consistent with the police report that was prepared on the same day. The police report indicates that the applicant was with the "co-defendant," [REDACTED] at the time of his arrest. The records of the applicant's conviction indicate that only he and [REDACTED] were charged with carrying a concealed weapon and conspiracy to traffic cocaine. The applicant claims, however, that he and a "group" of his friends were in the car when the police officers approached. The applicant does not explain why, if he was one in a group of individuals, no one else was listed on the police report as being present at the scene or charged along with him and [REDACTED]. Additionally, the applicant claims that he was inside a car in a parking lot when the police officers approached. In contrast, the police report indicates the location of the arrest as "NW 82ND Ave. & Approx 62st [sic] (Roadside)." The police officer's description of the location of the arrest relates to an area off to the side of a road, not a parking lot of a restaurant. The inconsistencies between the applicant's statement and the police report fail to show that, as counsel claims, the applicant was merely an innocent bystander. The arrest report is reasonable, substantial and probative evidence, and can be relied upon to determine whether the applicant is inadmissible pursuant to section 212(a)(2)(C)(i) of the Act .

Counsel states that the applicant was not convicted of a trafficking crime, which is correct. Nevertheless, an applicant may be found inadmissible, despite a conviction, if an officer of USICS "has reason to believe" that the applicant was a "knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical." Here, the police report indicates that the applicant and [REDACTED] were being watched during the course of a narcotics investigation, and that the amount of the controlled substance the police found was quite large – two kilograms. There is sufficient evidence to find that the applicant was a knowing aider, abettor, assister, conspirator or colluder with [REDACTED] in the illicit trafficking of a controlled substance. Although the applicant was not convicted of the conspiracy to

traffic cocaine charges filed against him, the applicant is subject to the provisions of section 212(a)(2)(C)(i) of the Act for which there is no waiver of inadmissibility.

The second issue to address involves the applicant's two convictions in 1998, which the director determined were crimes involving moral turpitude.

A crime involving moral turpitude must involve both reprehensible conduct and some degree of scienter, be it specific intent, deliberateness, willfulness or recklessness. *Matter of Silva-Trevino*, 24 I&N Dec. 687, 689 n.1, 706 (A.G. 2008).

When determining whether a crime involves moral turpitude, the statute under which the conviction occurred controls. See *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186 (2007)(citing *Taylor v. United States*, 495 U.S. 575, 599-600 (1990)); *Matter of Louissaint*, 24 I&N Dec. 754, 757 (BIA 2009); *Matter of Silva-Trevino*, 24 I&N Dec. at 696. A categorical analysis of the elements of the statute of conviction also includes an examination of the law of the convicting jurisdiction to determine if there is a "realistic probability" that the statute would be applied to conduct that does not involve moral turpitude. *Matter of Louissaint*, 24 I&N Dec. at 757 (citing *Matter of Silva-Trevino*, 24 I&N Dec. at 698). Such a realistic probability exists when there is an actual case in which the criminal statute was applied to conduct that did not involve moral turpitude. *Id.* If no realistic probability exists that the statute of conviction would be applied to conduct that does not involve moral turpitude, then convictions under the statute may categorically be treated as crimes involving moral turpitude. *Matter of Silva-Trevino*, 24 I&N Dec. at 697.

The record shows that the applicant was convicted in Dade County, Florida, on August 3, 1998 of once count of grand theft of a vehicle in violation of § 812.014(2)(c)(6) of the Florida Statute, and three counts of resisting a law enforcement officer with violence in violation of § 843.01 of the Florida Statute. The applicant was placed on probation for a period of three years.

At the time of the applicant's conviction for grand theft of a vehicle, Florida Statute § 812.014(2)(c)(6) provided, in pertinent part:

(1) A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:

(a) Deprive the other person of a right to the property or a benefit from the property.

(b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.

(2) . . .

(c) It is grand theft of the third degree and a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if the property stolen is:

(6) A motor vehicle, except as provided in paragraph (a).

The AAO notes that the statute under which the applicant was convicted is a divisible statute violated by either permanently or temporarily depriving another person of the right or benefit of that person's property. To constitute a crime involving moral turpitude, a theft offense must require the intent to permanently take another person's property. See *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973) ("Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended.").

The documents comprising the record of conviction are inconclusive as to whether the applicant acted with intent to permanently or temporarily deprive another person of that person's property. There is no police report for this incident, and the AAO cannot rely upon the applicant's statement alone in which he claims that the theft of the vehicle was only temporary because he borrowed the car to run an errand.⁴ As the applicant was not provided an opportunity to present more probative evidence regarding his conviction before the director denied the application, the AAO cannot conclude that the applicant's conviction under Florida Statute § 812.014 was for conduct involving moral turpitude.

At the time of the applicant's conviction on three counts of resisting an officer with violence, Florida Statute § 843.01 provided, in pertinent part, that "[w]hoever knowingly and willfully resists, obstructs, or opposes any officer . . . by offering or doing violence to the person of such officer . . . is guilty of a felony of the third degree"

Assault on a law enforcement officer has been found to be a crime involving moral turpitude where the perpetrator knows the victim to be a law enforcement officer performing his official duty and the assault results in bodily injury to the officer. See *Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988) (distinguishing cases in which knowledge of the police officer's status was not an element of the crime and where bodily injury or other aggravating factors were not present to elevate offense beyond "simple" assault); see also *Matter of O-*, 4 I&N Dec. 301 (BIA 1951) (German law involving an assault on a police officer was not a crime involving moral turpitude because knowledge that the person assaulted was a police officer engaged in the performance of his duties was not an element of the crime); *Matter of B-*, 5 I&N Dec. 538 (BIA 1953) (as modified by *Matter of Danesh, supra.*) (assault on prison guard not a crime involving moral turpitude because offense charged appeared to be only "simple" assault and no bodily injury was alleged); *Ciambelli ex rel. Maranci v. Johnson*, 12 F.2d 465 (D. Mass 1926) (assault on an officer was not a crime involving moral turpitude in spite of fact that defendant was armed with a razor because the razor was not used in the assault).

The Florida Supreme Court has ruled that the phrase "knowingly and willfully resists, obstructs, or opposes any officer" in Florida Statute § 843.01 imposes a requirement that a defendant have knowledge of the officer's status as a law enforcement officer. See *Polite v. State of Florida*, 973 So.2d 1107, 1112 (Fla. 2007). However, the AAO notes that Florida Statute § 843.01 is violated by either "offering" to do violence, or by "doing" violence, and there is no requirement that the victim suffer bodily injury. Thus, based solely on the statutory language, it appears that Florida Statute § 843.01 encompasses (hypothetically) conduct that involves moral turpitude and conduct that does not. The AAO is aware of a prior case in which Florida Statute § 843.01 has been applied to conduct

⁴ The AAO notes that, in his statement, the applicant refers to borrowing "his" friend's vehicle to run an errand. The applicant was, however, charged with theft of a motor vehicle belong to a female – [REDACTED] There is no explanation for this inconsistency.

not involving moral turpitude. In *Wright v. State*, 681 So.2d 852, 853-54 (Fla. 5th Dist. App. 1996), the court found that the state was not required to prove that the appellant, who had denied under oath that he had hit, kicked or otherwise resisted the officers apprehending him, had actually struck either of the officers because evidence that he “struggled, kicked, and flailed his arms and legs was sufficient to show that he offered to do violence to the officers within the meaning of section 843.01.” The AAO cannot find, therefore, that the offense described in Florida Statute §843.01 is categorically a crime involving moral turpitude.

Like the applicant’s conviction for grand theft, the documents comprising the record of conviction for resisting an officer with violence are inconclusive as to whether the applicant caused bodily injury to the officer(s) who arrested him. There is no arrest report or any other documentation relating to this issue other than the applicant’s statement. As the applicant was not provided an opportunity to present more probative evidence surrounding his arrest, the AAO cannot conclude that the applicant’s conviction under Florida Statute § 843.01 was for conduct involving moral turpitude.

Although the record as it is presently constituted does not support a finding that the applicant was convicted of one or more crimes involving moral turpitude, no purpose would be served in remanding the matter to the director for further inquiry into the applicant’s 1998 convictions for grand theft and resisting an officer with violence because the applicant is inadmissible under section 212(a)(2)(C)(i) as an aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in a controlled or listed substance or chemical. Therefore, the AAO affirms the director’s decision to deny the application.

ORDER: The director's decision is affirmed. The application is denied.