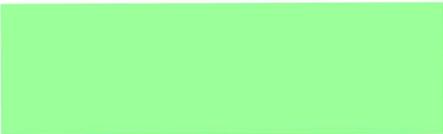




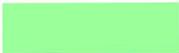
**U.S. Citizenship
and Immigration
Services**

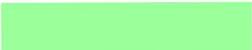
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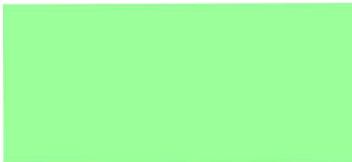
Office: DETROIT, MICHIGAN

FILE: 

IN RE: 

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h).

ON BEHALF OF APPLICANT:



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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg", with a long, sweeping underline.

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Detroit, Michigan and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Ghana and a landed immigrant in Canada who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i), for having committed crimes involving moral turpitude and for having been convicted of a crime relating to a controlled substance. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with his U.S. citizen spouse and two U.S. citizen children.

In a decision dated April 28, 2009, the field office director concluded that the applicant had failed to establish that his spouse and children would suffer extreme hardship as a result of his inadmissibility. The application was denied accordingly.

On appeal, counsel asserts that the field office director erred in finding that the applicant's spouse and children would not suffer extreme hardship. He also states that the applicant's convictions in question occurred more than 15 years ago and the applicant has been rehabilitated.

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) a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

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 *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 applicant has a long record of criminal convictions in Canada, beginning in 1991 and ending in 2000. The record indicates that the applicant was convicted of possessing 1.06 grams of marijuana under sections 3(1) and (2)(a) of the Narcotics Control Act and resisting or willfully obstructing a peace officer in the execution of his duty under section 129(a) and (e) of the Criminal Code of Canada on or about September 2, 1991. The applicant was ordered to pay a fine for these offenses. The record indicates that the applicant was convicted again of resisting or

willfully obstructing a peace officer in the execution of his duty under section 129(a) and (e) of the Criminal Code of Canada on or about September 19, 1992. The applicant was made to pay a fine for this offense. The applicant was convicted of “fraudulently personating a person” on October 18, 1992, with the intent to gain advantage for himself or another person under section 403(a) of the Criminal Code of Canada. For this offense, the applicant was imprisoned for seven days, given six months probation, and ordered to pay a fine.

On November 26, 1999 the applicant was charged with assault under section 266(a) of the Criminal Code of Canada and resisting or willfully obstructing a peace officer in the execution of his duty under section 129(a) and (e) of the Criminal Code of Canada for events that took place on or about November 21, 1999. The applicant was acquitted of the assault charge, but pled guilty to resisting or willfully obstructing a peace officer in the execution of his duty under section 129(a) and (e) of the Criminal Code of Canada. Finally, the applicant was convicted for resisting or willfully obstructing a peace officer in the execution of his duty under section 129(a) and (e) of the Criminal Code of Canada for events which occurred on or about March 3, 2000.

The applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act for his conviction for possessing 1.06 grams of marijuana under sections 3(1) and (2)(a) of the Narcotics Control Act. Because his possession conviction is for under 30 grams, he is eligible to apply for a section 212(h) waiver.

We also find that the applicant’s conviction for “fraudulently personating a person” with the intent to gain advantage for himself or another person under section 403(a) of the Criminal Code of Canada is a crime involving moral turpitude.

Section 403(a) of the Criminal Code of Canada states:

(1) Everyone commits an offence who fraudulently personates another person, living or dead,

(a) with intent to gain advantage for themselves or another person;

...

Clarification

(2) For the purposes of subsection (1), personating a person includes pretending to be the person or using the person’s identity information — whether by itself or in combination with identity information pertaining to any person — as if it pertains to the person using it.

The Board of Immigration Appeals (BIA or Board) has addressed the issue of the possession and/or use of false identity documents. In *Matter of Serna*, 20 I&N Dec. 579 (BIA 1992), the BIA held that “possession of an altered immigration document with the knowledge that it was altered, but without its use or proof of any intent to use it unlawfully, is not a crime involving moral turpitude.” 20 I&N Dec. 579, 586 (BIA 1992). The BIA noted that “criminal possession is a crime involving moral turpitude when accompanied by the intent to commit a crime involving moral

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turpitude.” *Id.* at 584. However, the BIA agreed with its holding in *Matter of Flores*, stating that the use of an altered visa would be morally turpitudinous. *Id.* at 582 (citing 17 I&N Dec. 225, 230 (BIA 1980)). In *Flores*, the BIA held that uttering and selling false or counterfeit paper related to the registry of aliens was a crime involving moral turpitude, even though intent to defraud was not an explicit statutory element. 17 I&N Dec. at 230. *See also Omagah v. Ashcroft*, 288 F.3d 254, 262 (5th Cir. 2002) (finding that crimes that do not involve fraud, but that include “dishonesty or lying as an essential element” also tend to involve moral turpitude); *see also Itani v. Ashcroft*, 298 F.3d 1213, 1216 (11th Cir. 2002) (“Generally a crime involving dishonesty or false statement is considered to be one involving moral turpitude.”). Thus, as the applicant’s conviction involved both the uttering or possession of false identity information with the intent to gain advantage from its use, we find that the conviction involved moral turpitude.

However, we do not find that the applicant’s convictions for obstructing a peace officer are crimes involving moral turpitude. Section 129(a) and (e) of the Criminal Code of Canada state:

Everyone who

(a) resists or willfully obstructs a public officer or peace officer in the execution of his duty or any person lawfully acting in aid of such an officer,

is guilty of

(e) an offence punishable on summary conviction.

Although we are not aware of a case where section 129(a) of the Criminal Code of Canada has been found to not be a crime involving moral turpitude, the crime is similar to resisting arrest, which in the absence of causing intentional harm to a police officer, has been found to not be a crime involving moral turpitude. *See United States ex rel. Zaffarano v. Corsi*, 63 F.2d 757 (2d Cir. 1933); *Ciambelli ex rel. Maranci v. Johnson*, 12 F.2d 465 (D. Mass. 1926). In *Zaffarano*, the court concluded that there is no moral turpitude inherent in “putting forth the mildest form of intentional resistance against an officer attempting to . . . apprehend or detain the accused or another.” 63 F.2d 757 (2d Cir. 1933). Thus, we find that a conviction under Section 129(a) of the Criminal Code of Canada does not involve 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. An application for admission to the United States is 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).

Since the criminal convictions for which the applicant was found inadmissible occurred more than 15 years ago, the 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 includes a letter from the applicant's spouse, a letter from the applicant's brother-in-law, a letter from the applicant, a letter from the applicant's sister-in-law, a letter from the applicant's employer, and numerous letters of recommendation from friends and other family members.

The record indicates that the applicant is a loving and supportive father and husband who cares for his two children while his wife works and furthers her education. The record also indicates that the applicant was an outstanding employee with [REDACTED] in 2009 and that all customers with the company were pleased with his services. It is noted that over 13 years have passed since the applicant has been arrested or convicted of a crime. Finally, in his statement the applicant accepts responsibility for his actions and expresses remorse for his mistakes.

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-Moralez, 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 factor in the present case is the applicant's criminal record.

The favorable factors in the present case are the hardship his wife and children would experience if he were not granted a waiver of inadmissibility; the applicant's lack of immigration violations in the United States; and the applicant's rehabilitation.

The AAO finds that the crimes 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.