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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

H2

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: OCT 27 2008

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:

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the underlying application is moot. The matter will be returned to the field office director for continued processing.

The applicant is a native and citizen of Cuba 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), in order to remain in the United States with his lawful permanent resident wife.

The applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) pursuant to the Cuban Adjustment Act on June 24, 2003. The applicant subsequently filed an Application for Waiver of Grounds of Inadmissibility (Form I-601) on May 11, 2006.

The director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the waiver application accordingly. *Decision of Director*, dated June 7, 2006.

Section 212(a)(2)(A) of the Act states in pertinent parts:

> (i) In general.— . . .[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 . . . 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-
>
> (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 record shows that the applicant pled guilty in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida on August 3, 1998 of violating section 320.26(1)(a) of the Florida Statutes (Fla. Stat.), a third degree felony punishable by a maximum term of five years. The adjudication of guilt was withheld and the applicant was sentenced to two days incarceration with a credit for two days already served.

The AAO notes that 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.)

The BIA and U.S. courts have found that it is the "inherent nature of the crime as defined by statute and interpreted by the courts and as limited and described by the record of conviction" and not the facts and circumstances of the particular person's case that determines whether the offense involves moral turpitude. *See, e.g., Matter of Short,* 20 I&N Dec. 136, 137 (BIA 1989); *Omagah v. Ashcroft,* 288 F.3d 254, 260 (5th Cir. 2002); *Goldeshtein v. INS,* 8 F.3d 645 (9th Cir. 1993). Neither the seriousness of the criminal offense nor the severity of the sentence imposed is determinative of whether a crime involves moral turpitude. *Matter of Serna,* 20 I&N Dec. 579, 581 (BIA 1992). Before one can be convicted of a crime of moral turpitude, the statute in question by its terms, must necessarily involve moral turpitude. *Matter of Esfandiary,* 16 I&N Dec. 659 (BIA 1979); *Matter of L-V-C,* 22 I&N Dec. 594, 603 (BIA 1999) (finding no moral turpitude where the "statutory provision . . . encompasses at least some violations that do not involve moral turpitude").

Where a statute is divisible (broad or multi-sectional), *see, e.g., Matter of P-,* 6 I&N Dec. 193 (BIA 1954); *Neely v. U.S.,* 300 F.2d 67 (9th Cir. 1962), the court looks to the "record of conviction" to determine if the crime involves moral turpitude. *Matter of Ajami,* 22 I&N Dec. 949, 950 (BIA 1999) (look to indictment, plea, verdict, and sentence; *Zaffarano v. Corsi,* 63 F.2d 67 757 (2d Cir. 1933); *U.S. v. Kiang,* 175 F.Supp.2d 942, 950 E.D. Mich. 2001). A narrow, specific set of documents comprises the record: "[the] charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Shepard v. U.S.,* 125 S.Ct. 1254, 1257 (2005). The Ninth Circuit has further clarified that that the charging document, or information, is not reliable where the plea was to an offense other than the one charged. *Martinez-Perez v. Gonzales,* 417 F.3rd 1022, 1028-29 (9th Cir. 2005). It is also important to note that the record of conviction does not include the arrest report. *See In re Teixeira,* 21 I&N Dec. 316, 319-20 (BIA 1996).

Fla. Stat. § 320.26 is titled "counterfeiting license plates, validation stickers, mobile home stickers, cab cards, trip permits or special temporary permits prohibited." Fla. Stat. § 320.26(1)(a) provides:

> No person shall counterfeit registration license plates, validation stickers, or mobile home stickers, or have in his or her possession any such plates or stickers; nor shall any person manufacture, sell, or dispose or registration license plates, validation stickers, or mobile home stickers in the state without first having obtained the permission and authority of the department in writing.

Counterfeiting crimes have been held to be crimes involving moral turpitude where fraudulent intent or guilty knowledge is an element of (or inherent to) the statute violated. *See generally Mukasey v. Tall,* 517 F.3d

1115, 1119-20 (9th Cir. February 27, 2008)("'willfully manufactur[ing], intentionally sell[ing], or knowingly possess[ing] for sale any counterfeit . . . mark,' is inherently fraudulent because each type of conduct 'involve[s] knowingly false representations made in order to gain something of value.'"); *see also Omagah v. Ashcroft*, 288 F.3d at 261; *Lozano-Giron v. INS*, 506 F.2d 1073, 1076 (7th Cir. 1974). However, the BIA has held that where no such intent or knowledge is an element of or inherent to the statute violated, a conviction for counterfeiting or possessing counterfeit documents is not a crime involving moral turpitude. *See Matter of K-*, 7 I&N Dec. 178 (1956).

Fla. Stat. § 320.26 is a divisible statute that can violated either by the act of counterfeiting a license plate or sticker or by mere possession of a counterfeit plate or sticker. A review of the conviction record, in particular the indictment, reveals that the applicant was charged only with possession of a counterfeit registration license plate. Although the court's order states that the applicant was found guilty of the charge of "counterfeiting motor vehicle license and registration plates or stickers," the AAO determines that the court was referencing the title of the statute violated, rather than making a finding of fact that the applicant had engaged in the act of counterfeiting. The AAO finds that because the applicant was convicted of mere possession of a counterfeit document, and fraudulent intent or knowledge of the counterfeit nature of the document possessed was not an element of or inherent to the statute violated, the applicant's conviction is not a crime involving moral turpitude. Accordingly, the applicant is not inadmissible as a result of his conviction and the director's findings regarding this conviction are withdrawn. The applicant's waiver of inadmissibility application is thus moot and the appeal will be dismissed.

ORDER: The applicant's waiver application is declared moot and the appeal is dismissed. The director shall reopen the denial of the Form I-485 application on motion and continue to process the adjustment application.