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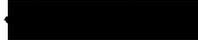
**U.S. Citizenship
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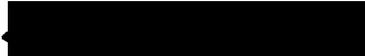


Office: DENVER, COLORADO

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AUG 16 2005

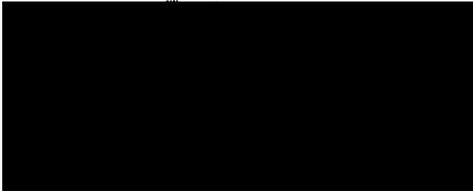
IN RE:



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:



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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Interim District Director, Denver, Colorado and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the applicant is not admissible under 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) and the relevant waiver application is therefore moot.

The record reflects that the applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude (first degree criminal trespass). The record indicates that the applicant has a U.S. citizen spouse and two U.S. citizen children. The applicant seeks a waiver of inadmissibility in order to reside with his family in the United States.

The interim district director found that based on the evidence in the record, the applicant had failed to establish extreme hardship to his U.S. citizen spouse or children. The application was denied accordingly. *Decision of the Interim District Director*, dated November 18, 2003.

On appeal, counsel asserts that the applicant is not inadmissible as he did not commit a crime involving moral turpitude. *Form I-290B*, dated December 22, 2003. Counsel asserts that if the applicant's crime is considered a crime involving moral turpitude, the interim district director applied the wrong legal standard and failed to consider the applicant's positive equities. *Id.*

The record contains a brief and evidence of the qualifying relationships, conditions in Mexico, economic hardship, rehabilitation, good moral character and emotional hardship. The record also includes numerous affidavits and letters. The entire record was reviewed and considered in arriving at a decision on the appeal.

Section 212(a)(2)(A) of the Act states in pertinent part, that:

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

(h) The Attorney General [now, Secretary, Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) . . . if –

....

- (1)(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.

The applicant has been convicted of several crimes including harassment, driving under the influence, failure to show proof/financial responsibility and first degree criminal trespass. The interim district director determined that the applicant's conviction for criminal trespass renders him inadmissible under section 212(a)(2)(A) of the Act.

Counsel asserts that harassment, driving under the influence and failure to show proof/financial responsibility are not crimes involving moral turpitude. *Brief in Support of Appeal*, at 4, dated January 15, 2004. However, the interim district director made no findings of moral turpitude for any of these crimes. The AAO agrees with the interim district director in regard to the lack of moral turpitude in these crimes.

Counsel also asserts that criminal trespass is not necessarily a crime involving moral turpitude. *Brief in Support of Appeal*, at 7.

The 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.

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).

The applicant plead guilty to criminal trespass under section 18-4-502 of the Colorado Revised Statutes Annotated which states in pertinent part:

A person commits the crime of first degree criminal trespass if such person knowingly and unlawfully enters or remains in a dwelling of another or if such person enters any motor vehicle with intent to commit a crime therein. First degree criminal trespass is a class 5 felony.

Counsel states that the relevant statute is divisible, including trespass to a dwelling or trespass to a vehicle. *Brief in Support of Appeal*, at 7. The Board of Immigration Appeals ("the Board") has held that the courts and immigration authorities may look to the record of conviction if the statute under which an alien is convicted includes some offenses which involve moral turpitude and others which do not, in order to determine the offense for which the alien was convicted. *See Matter of Short*, 20 I&N Dec. 136 (BIA 1989). The applicant's record of conviction includes the charging document which states that the applicant feloniously and knowingly entered the motor vehicle of the victim with the intent to commit a crime therein. *See Charging Document*, attached to Guilty Plea dated August 24, 1993. The record of conviction does not provide any information on the crime that he intended to commit. *Brief in Support of Appeal*, at 7. Counsel, citing *Matter of Short*, contends that there must be a finding that the felony intended as a result of the unlawful entry involves moral turpitude. *Id.* In *Matter of Short*, the Board dealt with an "assault with intent

to commit any felony” statute and determined that the record of conviction should be looked at in determining whether the underlying felony involved moral turpitude. *See Matter of Short*, at 141. Counsel contends that the applicant’s record of conviction does not include a finding that the applicant’s underlying felony involved turpitude. *Brief in Support of Appeal*, at 7,8.

In *Matter of Esfandiary*, the respondent was convicted of malicious trespass. *Matter of Esfandiary*, 16 I&N Dec. 659 (BIA 1979). The BIA determined the portion of the law which was violated, from the record of conviction, and it included the charge of breaking into a dwelling with intent to commit a misdemeanor, to wit: petit larceny. *Id.* at 661. The BIA stated that petit larceny is a crime involving moral turpitude, therefore, the respondent’s conviction for malicious trespass was a crime involving moral turpitude. *Id.*

Counsel indicates that the police reports state that the applicant may have been trying to steal car stereos. *Brief in Support of Appeal*, at 8. Counsel cites *Matter of Teixeira*, 21 I. & N. Dec. 316 (BIA 1996) which states that although a police report concerning circumstances of arrest that is not part of a record of conviction is appropriately admitted into evidence for the purpose of considering an application for discretionary relief, it should not be considered for the purpose of determining deportability where the Act mandates a focus on a criminal conviction, rather than on conduct. *Matter of Short* includes the indictment, plea, verdict, and sentence in its definition of the record of conviction. *Matter of Short*, at 137-38.

Furthermore, counsel states that an arrest report does not tell us which charges the prosecution chose to pursue nor which of those charges actually resulted in a conviction. *Brief in Support of Appeal*, at 8.

The AAO can only base its decision on prior case law and the record of conviction as defined by the Board. The relevant statute in this case refers to knowingly entering a vehicle with the intent to commit a crime therein. There is no mention in the statute of what crime(s) are being referred to and no mention in the record of conviction of the actual underlying crime. Case law states that in order to find a crime involving moral turpitude in these situations, the underlying crime must involve moral turpitude. Based on the record, the AAO finds that the applicant did not commit a crime involving moral turpitude and is not inadmissible under section 212(a)(2)(A) of the Act. The waiver filed pursuant to section 212(h) of the Act is therefore moot.

In proceedings for application for waiver of grounds of inadmissibility under section 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. Here, the applicant is not required to file the waiver. Accordingly, the appeal will be dismissed as moot.

ORDER: The appeal is dismissed.