



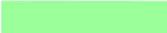
U.S. Citizenship  
and Immigration  
Services

(b)(6)



Date: **MAR 08 2013**

Office: CIUDAD JUAREZ

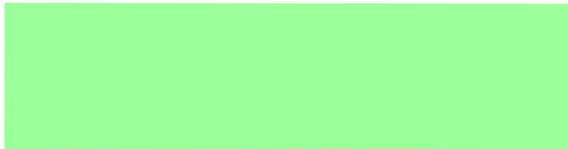
FILE: 

IN RE:

Applicant: 

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:

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 AAO inappropriately applied the law 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 with the field office or service center that originally decided your case by filing a Form I-190B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

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

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 Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude and section 212(a)(2)(B) of the Act, 8 U.S.C. § 1182(a)(2)(B), for having been convicted of two or more offenses for which the aggregate sentences to confinement were five years or more. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his U.S. citizen wife, U.S. citizen father, and U.S. Lawful Permanent Resident (LPR) mother.

On January 15, 2010, the applicant filed a Form I-601, Application for Waiver of Grounds of Inadmissibility. In a decision dated October 21, 2010, the field office director denied the Form I-601 application for a waiver, finding that the applicant failed to establish that his qualifying relatives would experience extreme hardship as a consequence of his inadmissibility.

On appeal, counsel for the applicant contends that the applicant's convictions are not "violent or dangerous" crimes under 8 C.F.R. § 212.7(d) and that the applicant is therefore not subject to the heightened hardship standard. Counsel states that even were the AAO to find the applicant subject to the regulation at 8 C.F.R. § 212.7(d), the record evidence establishes that the applicant's qualifying relatives are experiencing exceptionally and extremely unusual hardship as a consequence of his inadmissibility. Counsel also contends that the evidence outlining financial, emotional, psychological, and significant health difficulties demonstrates extreme hardship to the applicant's qualifying relatives. Counsel submitted additional evidence on appeal to support this assertion, including the applicant's father's complete medical record.

The record contains, but is not limited to: counsel's brief; the applicant's statement; support statements from the applicant's family members; medical reports; speech evaluation reports; country conditions documentation; a marriage certificate; copies of birth certificates; documentation regarding the applicant's administrative removal proceeding; and documentation regarding the applicant's criminal history.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record has been reviewed and considered in rendering a decision on the appeal.

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

(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.

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.)

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.

In the present case, the record reflects that on May 29, 1985, the applicant was convicted in the 70th District Court of Ector County, Texas, of forgery in violation of section 32.21 of the Texas Penal Code. The applicant was sentenced to probation for a term of two years. Texas Penal Code § 32.21 provides, in pertinent part, that “a person commits an offense if he forges a writing with intent to defraud another.” For purposes of section 32.21 of the Texas Penal Code, the term “forge” means:

- (A) to alter, make, complete, execute, or authenticate any writing so that it purports:
  - (i) to be the act of another who did not authorize that act;
  - (ii) to have been executed at a time or place or in a numbered sequence other than was in fact the case; or
  - (iii) to be a copy of an original when no such original existed;
- (B) to issue, transfer, register the transfer of, pass, publish, or otherwise utter a writing that is forged within the meaning of Paragraph (A); or
- (C) to possess a writing that is forged within the meaning of Paragraph (A) with intent to utter it in a manner specified in Paragraph (B).

Section 32.21 of the Texas Penal Code is violated when the offender has the “intent to defraud” by uttering, executing, possessing, or delivering a fictitious writing. It has generally been held that forgery, in all its degrees, involves an intent to defraud, and is thus a crime of moral turpitude. See *United States ex rel. McKenzie v. Savoretti*, 200 F.2d 546 (5th Cir. 1952); *Matter of Seda*, 17 I&N Dec. 550, 552 (BIA 1980) (finding that a conviction for forgery in violation of the Code of Georgia including “intent to defraud” as an element of the offense is a crime involving moral turpitude). The United States Supreme Court in *Jordan v. De George* concluded that “[w]hatever else the phrase ‘crime involving moral turpitude’ may mean in peripheral cases, the decided cases make it plain that crimes in which fraud was an ingredient have always been regarded as involving moral turpitude. . . . Fraud is the touchstone by which this case should be judged. The phrase ‘crime involving moral turpitude’ has without exception been construed to embrace fraudulent conduct.” 341 U.S. 223, 232 (1951). Therefore, the applicant’s offense is categorically a crime involving moral turpitude that renders him inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The applicant does not contest his inadmissibility resulting from this conviction on appeal.

The record further reflects that on June 6, 1988, the applicant was convicted in the District Court of Ector County, Texas, of attempted burglary of a building in violation of section 30.02 of the Texas Penal Code. The applicant was sentenced to confinement in the Texas Department of Corrections for a term of two years. Texas Penal Code § 30.02 provides, in pertinent part, that:

- a) A person commits an offense if, without the effective consent of the owner, the person:

(b)(6)

- (1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony, theft, or an assault; or
- (2) remains concealed, with intent to commit a felony, theft, or an assault, in a building or habitation; or
- (3) enters a building or habitation and commits or attempts to commit a felony, theft, or an assault.

At the outset, the AAO notes that it is well established that for immigration purposes, with respect to moral turpitude there is no distinction between the commission of the substantive crime and the attempt to commit it. *Matter of Vo*, 25 I&N Dec. 426, 428 (BIA 2011); *Matter of Katsanis*, 14 I&N Dec. 266, 269 (BIA 1973); *Matter of Awaijane*, 14 I&N Dec. 117, 118-19 (BIA 1972); see also *Matter of Davis*, 20 I&N Dec. 536, 545 (BIA 1992), modified on other grounds, *Matter of Yanez*, 23 I&N Dec. 390, 396 (BIA 2002). An attempt involves the specific intent to commit the substantive crime, and if commission of the substantive crime involves moral turpitude, then so does the attempt, because moral turpitude inheres in the intent. *Matter of Katsanis*, 14 I&N Dec. at 269.

The Board has noted that one of the determinative factors in assessing whether burglary involves moral turpitude is whether the crime intended to be committed at the time of entry or prior to the breaking out involves moral turpitude. *Matter of M-*, 2 I&N Dec. 721, 723 (BIA 1946). For example, the BIA has held that burglary with intent to commit theft is a crime involving moral turpitude. See *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982). In *Matter of Moore*, the BIA noted that since moral turpitude inheres in the intent, the crime of breaking and entering with intent to commit larceny involves moral turpitude. 13 I&N Dec. 711, 712 (BIA 1971). Conversely, the Second Circuit Court of Appeals held in *Wala v. Mukasey* that burglary with intent to commit larceny is not a crime involving moral turpitude where there was no intent to deprive the victim permanently of his property. 511 F.3d 102, 110 (2d Cir. 2007). Significantly, the AAO notes that in *Matter of Louissaint*, 24 I&N Dec. 754, 759 (BIA 2009), the Board held that "moral turpitude is inherent in the act of burglary of an occupied dwelling itself and the respondent's unlawful entry into the dwelling of another with the intent to commit *any crime* therein is a crime involving moral turpitude." Thus, based solely on the statutory language, it appears that Texas Penal Code § 30.02 hypothetically encompasses conduct that involves moral turpitude and conduct that does not.

However, in accordance with the *Silva-Trevino* methodology, the AAO must determine if an actual case exists in which these criminal statutes were applied to conduct that did not involve moral turpitude. The applicant has not presented and the AAO is unaware of any prior case in which a conviction has been obtained under the Texas Penal Code § 30.02 for conduct not involving moral turpitude. Further, the record does not establish that this statute was applied to conduct not involving moral turpitude in the applicant's own criminal case. The AAO notes that the record contains a copy of the judgment of conviction from the Ector County District Court, but does not contain other documents comprising the record of conviction, such as the indictment, jury instructions, a signed guilty plea, and the plea transcript. Therefore, the AAO must find the applicant's June 6, 1988 conviction for attempted burglary under the Texas Penal Code § 30.02 to be a crime involving moral turpitude that renders him inadmissible under section 212(a)(2)(A)(i)(I) of

the Act. The applicant does not contest inadmissibility resulting from this conviction on appeal.

The record also indicates that the applicant was convicted on or about August 10, 1994, April 21, 1995, and September 21, 1998, of driving while intoxicated in violation of section 49.04 of the Texas Penal Code. That section provides, in pertinent part, that "a person commits an offense if the person is intoxicated while operating a motor vehicle in a public place." For purposes of section 49.04 of the Texas Penal Code, the term "intoxicated" is defined in section 49.01(2) as:

- (A) not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body;
- or
- (B) having an alcohol concentration of 0.08 or more.

The AAO has reviewed the elements of the above-mentioned driving offenses and finds that none of them are crimes involving moral turpitude. In *Matter of Torres-Varela*, the Board held that simple driving under the influence of alcohol does not constitute a crime involving moral turpitude, as it is a marginal crime that does not include aggravating factors. 23 I&N Dec. 78, 85 (BIA 2001); *see also Matter of Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999) (simple driving while intoxicated would not likely be a crime involving moral turpitude). Additionally, the Board in *Torres-Varela* clarified that nonturpitudinous conduct is not rendered turpitudinous through multiple convictions for the same offense. 23 I&N Dec. at 85. Accordingly, the applicant's convictions for driving under the influence do not render him inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

Nevertheless, the applicant remains inadmissible as an alien having been convicted of a crime involving moral turpitude for his 1985 forgery conviction and his 1988 conviction for attempted burglary of a building. The applicant does not dispute these findings on appeal.

The record reflects that the applicant also is inadmissible under section 212(a)(2)(B) of the Act, which provides that:

(B) Multiple criminal convictions

Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

Here, the applicant was convicted of five offenses: forgery, attempted burglary of a building, and three driving while intoxicated convictions. The record indicates that the Ector County District Court sentenced the applicant to two years imprisonment for the forgery offense and five years confinement for the September 21, 1998 driving while intoxicated offense. Accordingly, the

applicant's convictions render him inadmissible under section 212(a)(2)(B) of the Act. The applicant does not dispute his inadmissibility on appeal.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the field office does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis). A discretionary waiver of these criminal grounds of inadmissibility is available under section 212(h) of the Act, 8 U.S.C. § 1182(h) if:

(1)(A) in the case of any immigrant it is established to the satisfaction of the Attorney General 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

No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.

In the present matter, the record reflects that the applicant was previously admitted to the United States as an alien lawfully admitted for permanent residence on June 19, 1978. On May 29, 1985, the applicant was convicted of forgery. On June 6, 1988, the applicant was convicted in the District Court of Ector County, Texas, of attempted burglary of a building. On October 21, 1998, the applicant was served with a Notice to Appear (Form I-862) charging him with removability under section 237(a)(2)(A)(iii) of the Act as an alien who, at any time after admission, has been convicted of an aggravated felony as defined in section 101(a)(43) of the Act. In a decision dated November 3, 1998, Immigration Judge [REDACTED] sustained the aggravated felony ground of removability and ordered the applicant removed from the United States. On the same date, the applicant was physically removed from the United States to Mexico pursuant to a Warrant of Removal/Deportation (Form I-205).

The AAO notes that since the applicant was placed in removal proceedings on October 21, 1998, more than two years after the enactment date of the September 30, 1996 amendments to section 212(h) of the Immigration and Nationality Act, he is subject to the restrictions precluding a grant of a waiver to any alien admitted as a lawful permanent resident who has been convicted of an aggravated felony. See *Matter of Pineda-Castellanos*, 21 I&N Dec. 1017, 1018 (BIA 1997) (noting that the amendment applies to any alien who is in immigration proceedings as of September 30, 1996).

In considering whether the respondent's conviction is an aggravated felony, we first apply the "formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." *Taylor v. United States*, 495 U.S. 575, 601 (1990). First, we will look to the statute under which the alien was convicted and compare its elements to the relevant definition of aggravated felony set out in section 101(a)(43) of the Act, 8 U.S.C. § 1101(a)(43). Under this categorical approach, an offense qualifies as an aggravated felony if and only if the full range of conduct covered by the criminal statute falls within the meaning of that term. *Id.*

However, if the criminal statute of conviction could be applied to conduct that would constitute an aggravated felony and conduct that would not, we then see if there is "a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime." *Gonzalez v. Duenas-Alvarez*, 549 U.S. at 193. In applying this approach, the alien "may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues." *Id.*

If the alien demonstrates a "realistic probability" that the statute would be applied to conduct that falls outside the generic definition of the crime, we then apply a modified categorical approach. Under the modified categorical approach, we conduct a limited examination of documents in the record of conviction to determine if there is sufficient evidence to conclude that the alien was convicted of the elements of the generically defined crime. *Shepard v. U.S.*, 544 U.S. 13 (2005). These documents include the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the transcript of plea proceedings. 544 U.S. at 26.

Section 101(a)(43)(G) of the Act, 8 U.S.C. § 1101(a)(43)(U), includes as an aggravated felony, "[a] burglary offense for which the term of imprisonment is at least one year." Section 101(a)(43)(U) of the Act, 8 U.S.C. § 1101(a)(43)(U) adds that that an attempt or conspiracy to commit any of the listed offenses, including a burglary offense, also qualifies as an aggravated felony.

In *Matter of Perez*, 22 I&N Dec. 1325 (BIA 2000), the Board noted that in determining whether a burglary offense is an aggravated felony, immigration adjudicators should follow the "burglary offense" definition provided by the United States Supreme Court in *Taylor v. United States*. *Id.* at 1327. In *Taylor*, the Supreme Court found that the basic elements of burglary are unlawful or unprivileged entry into, or remaining in, a building or other structure with the intent to commit a crime. See *Taylor v. United States*, 495 U.S. at 598; *Matter of Perez*, 21 I&N Dec. at 1327. The Fifth Circuit Court of Appeals, the jurisdiction in which the applicant resided prior to his removal,

adopted the *Taylor* definition in interpreting the term “burglary offense” in the case of *Lopez-Elias v. Reno*, 209 F.3d 788 (5th Cir. 2000). Under Texas law, a person commits burglary when, without the effective consent of the owner, the person:

- (1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony, theft, or an assault; or
- (2) remains concealed, with intent to commit a felony, theft, or an assault, in a building or habitation; or
- (3) enters a building or habitation and commits or attempts to commit a felony, theft, or an assault.

Texas Penal Code § 30.02. The Texas burglary statute thus employs the same elements the Board of Immigration Appeals and the Supreme Court has used to define the term “burglary offense” for immigration purposes: unprivileged entry into, or remaining in, a building or other structure; with the intent to commit a crime. Additionally, the record reflects that the applicant was convicted of an attempt under section 15.01 of the Texas Penal Code; that is, the applicant, with specific criminal intent, committed an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended. Furthermore, the judgment of conviction clearly reflects that the applicant was sentenced to a two-year term of imprisonment for this offense. The applicant’s attempted burglary of a building offense thus categorically falls within the definition of an “aggravated felony” as set forth in section 101(a)(43)(U) of the Act. Since the applicant’s attempted burglary of a building offense constitutes an aggravated felony under section 101(a)(43)(U) of the Act, the AAO need not determine at this time whether this offense is also an aggravated felony under sections 101(a)(43)(F) or (G) of the Act. Consequently, the applicant’s conviction under section 30.02 of the Texas Penal Code after being admitted as a lawful permanent resident statutorily bars him from section 212(h) relief. Since the applicant is ineligible for a waiver of inadmissibility, no purpose would be served in addressing claims of hardship or determining whether the applicant merits a waiver as a matter of discretion.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(h) and of the Act, the burden of proving eligibility rests with the applicant. See section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.