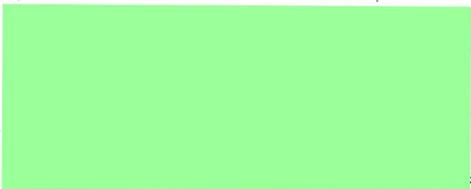


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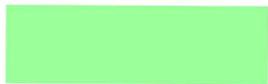
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office
20 Massachusetts Ave., N.W. MS 2090
Washington, DC 20529-2090

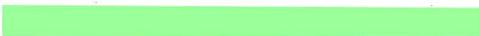


U.S. Citizenship
and Immigration
Services



DATE: **JAN 11 2013** OFFICE: SAN SALVADOR, EL SALVADOR



IN RE: 

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Sections 212(a)(9)(B)(v) and 212(h) of the Immigration and Nationality Act, 8 U.S.C. §§1182(a)(9)(B)(v) and 1182(h), and Application for Permission to Reapply for Admission into the United States after Deportation or Removal under Section 212(a)(9)(A), 8 U.S.C. § 1182(a)(9)(A)

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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 its 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-290B, 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 any 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,


f/ Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The applicant is a native and citizen of El Salvador 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; section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year; and section 212(a)(9)(A)(ii) of the Act, 8 C.F.R. § 1182(a)(9)(A)(ii), for having been ordered removed from the United States and seeking admission within ten years of his departure or removal. He seeks waivers under sections 212(a)(9)(B)(v) and 212(h) of the Act, 8 U.S.C. §§ 1182(a)(9)(B)(v) and 1182(h), and an exception under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii), in order to reside in the United States.

The Field Office Director determined that the applicant had failed to establish that the bars to his admissibility would result in extreme hardship for a qualifying relative or that he merited a favorable exercise of discretion. Accordingly, he denied the Form I-601, Application for Waiver of Ground of Excludability. Based on his denial of the Form I-601, the Field Office Director also denied the applicant's Form I-212, Application for Permission to Reapply for Admission Into the United States After Deportation or Removal, as a matter of discretion. *Decision of the Field Office Director*, dated May 11, 2011.

On appeal, the applicant's spouse states that she is experiencing financial hardship in the applicant's absence and asserts that the family home is in danger of foreclosure. She contends that the applicant is the most important part of their family and that the family needs his love, direction and guidance. *Notice of Appeal or Motion*, dated May 26, 2011; *Statement of applicant's spouse on appeal*.

The evidence of record includes, but is not limited to: statements from the applicant's spouse, daughters, stepdaughters, and a step-granddaughter; statements of support from the applicant's pastor and a business associate; evidence relating to the business previously operated by the applicant; medical records for the applicant's spouse, older daughter and step-granddaughter; and court records relating to the applicant's arrests and convictions. The entire record was reviewed and all relevant evidence considered in reaching a decision on the appeal.

Section 212(a)(2)(A)(i)(I) of the Act provides:

(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:

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

(1)(A) [I]t is established to the satisfaction of the Attorney General that–

(i) [T]he 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

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. The methodology adopted by the Attorney General consists of a three-pronged approach. 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. 24 I&N Dec. at 698 (citing *Duenas-Alvarez*, 549 U.S. at 193). 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 *Duenias-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage or “modified categorical” inquiry in which the adjudicator reviews the “record of conviction” to determine if the conviction was based on conduct involving moral turpitude. 24 I&N Dec. 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. Finally, 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.

The record reflects that the applicant was arrested multiple times for theft during the 1980s in California, as well as for spousal battery in 1990 and 1999. However, the record provides a disposition for only one of these arrests, that which resulted in the applicant’s September 27, 1984 conviction for misdemeanor Petty Theft, California Penal Code § 484, a crime involving moral turpitude. On that date, the applicant pled guilty and was sentenced to 30 days in jail, which was suspended; fined \$136; and placed on probation for 24 months.

On appeal, the applicant’s spouse states that the applicant’s 1984 theft conviction was the result of the applicant’s “recycling” of wood, aluminum and other materials to feed their family and that although it was wrong and embarrassing, it “put a roof over our heads and food on the table.” The AAO notes that if the applicant’s only conviction is for misdemeanor Petty Theft, California Penal Code § 484, he is eligible for the petty offense exception found in section 212(a)(2)(A)(ii) of the Act, which excepts from inadmissibility individuals who have committed a single crime involving moral turpitude for which the maximum sentence of imprisonment does not exceed one year and who have not been sentenced to more than six months in jail. However, the record does not demonstrate that the applicant’s 1984 conviction is his only conviction for a crime involving moral turpitude.

The record indicates that the U.S. embassy in San Salvador attempted to obtain dispositions for the applicant’s other arrests from the relevant U.S. authorities, but was informed either that no record had been found or that records for the relevant period had been destroyed. While we acknowledge the impediments to providing dispositions for arrests that occurred 13 to 30 years previously, the burden of proof in establishing admissibility in this matter rests entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Therefore, without dispositions for all of the applicant’s arrests for theft and battery, the AAO cannot conclude that the applicant is not inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act.

Section 212(a)(9)(B) states in pertinent part:

(B) Aliens Unlawfully Present.-

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

- (I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . and again seeks admission within 3 years of the date of such alien's departure or removal, or
- (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

Section 212(a)(9)(B)(v) of the Act provides for a waiver of section 212(a)(9)(B)(i) inadmissibility as follows:

The Attorney General [now Secretary of Homeland Security] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established . . . that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

The record reflects that the applicant testified to the consular officer who conducted his immigrant visa interview that he had entered the United States without inspection in 1980 and had remained until 1989. He also informed the consular officer that he had returned to the United States in 1991, again entering without inspection. Additional evidence in the record indicates that, on February 8, 1994, the applicant was ordered removed by an immigration judge, but that he remained in the United States. On January 9, 2006, he filed the Form I-687, Application for Status as a Temporary Resident Under Section 245A of the INA, which was denied by United States Citizenship and Immigration Services (USCIS) on September 24, 2007. The applicant departed the United States in January 2009.

Based on this history, the applicant accrued unlawful presence from April 1, 1997, the effective date of the unlawful presence provisions under the Act, until he filed the Form I-687 on January 9, 2006. He accrued a second period of unlawful presence beginning on September 25, 2007, the day after USCIS denied the Form I-687, which ended with his departure from the United States in January 2009. As the applicant's unlawful presence in the United States exceeds one year and he is seeking admission within ten years of his 2009 departure, he is inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act.

A waiver of inadmissibility under section 212(a)(9)(B)(v) or section 212(h) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, defined by section 212(h) as the U.S. citizen or lawfully resident spouse, parent or child of the applicant and by section 212(a)(9)(B)(v) as the U.S. citizen or lawfully resident spouse or parent of the applicant. While the applicant's children are qualifying relatives for the purposes of a section 212(h) waiver proceeding, the fact that he must also establish eligibility for a waiver under 212(a)(9)(B)(v) of the Act, the more restrictive of the two waiver provisions, requires him to establish extreme hardship to a U.S. citizen

[REDACTED]

or lawful permanent resident spouse or parent. In the present case, the applicant claims hardship to his U.S. citizen spouse, [REDACTED]. However, while the applicant has submitted a Declaration and Registration of Informal Marriage – Harris County, Texas to establish his relationship to [REDACTED] other evidence in the record raises questions as to whether the applicant and [REDACTED] are legally married.

The record contains a January 11, 2008 Declaration and Registration of Informal Marriage – Harris County, Texas between the applicant and [REDACTED] in which both parties swore before the County Clerk of Harris County Texas that as of December 15, 1980, they had agreed to be married, had lived together as husband and wife, and had not since that date been married to any other person. The record also contains a copy of an Authorization and Certificate of Confidential Marriage that indicates the applicant married a [REDACTED] in Inglewood, California on April 16, 1983. Nothing in the record indicates that this marriage had been legally terminated at the time the applicant and [REDACTED] signed the 2008 declaration recognizing their common-law marriage. Accordingly, based on the evidence before us, we do not find the 2008 Declaration and Registration of Informal Marriage to establish [REDACTED] as the applicant's spouse and, therefore, a qualifying relative in this proceeding.

The record does not reliably establish that the applicant has a spouse on whom he may base a waiver application under section 212(a)(9)(B)(v) of the Act. Accordingly, he has not established that he is eligible to apply for a waiver of his inadmissibility under section 212(a)(9)(B)(i)(II) of the Act. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

The Field Office Director also denied the applicant's Form I-212 in the same decision as a matter of discretion. The AAO notes that *Matter of Martinez-Torres*, 10 I&N Dec. 776 (Reg. Comm. 1964) held that an application for permission to reapply for admission is denied in the exercise of discretion, to an alien who is mandatorily inadmissible to the United States under another section of the Act. As the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act and is not eligible for to file a section 212(a)(9)(B)(v) waiver, the AAO finds no purpose would be served in considering the Form I-212.

In proceedings for waivers of and exceptions to the grounds of inadmissibility, the burden of proving eligibility remains entirely 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.