

Identifying data deleted to
prevent clearly unwarranted
invasion of personal

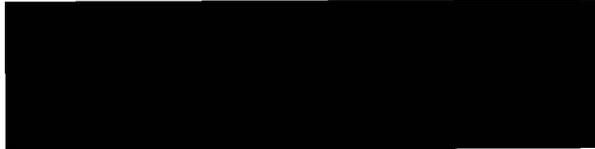
U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

hr



FILE:

Office: CHICAGO

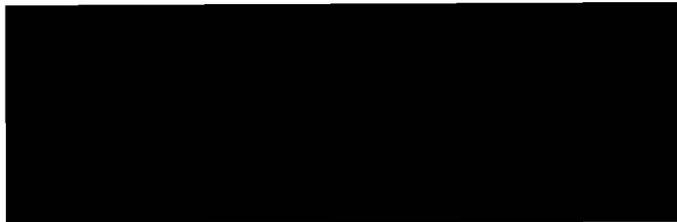
Date: OCT 27 2008

IN RE:



PETITION: 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 PETITIONER:



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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Chicago, Illinois, 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 Mexico who was found to be inadmissible to the United States 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), for having been convicted of crimes involving moral turpitude. The applicant is the spouse of a U.S. citizen and seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), so that he may reside in the United States with his wife.

The district director found that the applicant was inadmissible under section 212(a)(2)(A)(i)(I) of the Act due to a conviction for burglary in Texas in January 1984 and for having admitted the essential elements of criminal sexual conduct to a police officer in Michigan on November 5, 1986. *Decision of the District Director*, dated November 2, 2005. The district director noted that the applicant has never expressed remorse for the latter crime, which he also determined was a violation of the terms of the applicant's parole for his burglary conviction. *Id.* The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative, or that positive factors warranted a favorable exercise of discretion, and denied the waiver application accordingly. *Id.*

On appeal, counsel asserts that the applicant has consistently denied that he committed or admitted committing acts in 1986 that constituted the elements of criminal sexual conduct under Michigan law. *Attachment to Form I-290B*. Counsel observes that the applicant never pled guilty to the charge of criminal sexual conduct and the charge was dismissed in court. *Id.* Counsel also notes that the applicant has stated that he was not fluent in English in 1986 and had substantial difficulty understanding the questions asked him by the police officer who questioned him. *Id.* Counsel contends that finding the applicant inadmissible on the basis of the police officer's statement is a violation of the fifth and fourteenth amendment to the Constitution of the United States. *Id.* Counsel summarizes the evidence of extreme hardship submitted by the applicant and asserts that this evidence is sufficient to demonstrate that the applicant's wife would suffer extreme hardship if the waiver application is denied. *Id.*

Section 212(a)(2)(A) of the Act states 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 . . . or an attempt or conspiracy to commit such a crime . . . is inadmissible.

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). 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).

The record shows that the applicant’s conviction for burglary is not a crime involving moral turpitude. The record reflects that the applicant pled guilty on January 27, 1984 in the Fourth Criminal District Court of Dallas County, Texas to Burglary of a Building, a second degree felony. The applicant was sentenced to three years incarceration, but the sentence was suspended in favor of three years probation. Burglary has been held to be a crime involving moral turpitude where it involves breaking and entering with intent to commit larceny or another crime involving moral turpitude. *See Matter of R-*, 1 I&N Dec. 540 (BIA 1943). However, where no intent to commit a crime involving moral turpitude is required by the statute, burglary has been held not to be a crime involving moral turpitude. *See Matter of M-*, 2 I&N Dec. 721 (BIA 1946). Although the record of conviction does not indicate the statutory provision under which the applicant was convicted, the offense of burglary under Texas law is defined in section 30.02 of the Texas Penal Code (T.P.C.). At the time of the applicant’s conviction, T.P.C. § 30.02 provided, in pertinent part:

- (a) A person commits an offense if, 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

(b) Except as provided in Subsection (d) of this section, an offense under this section is a felony of the second degree. . . .

T.P.C. § 30.02 is a divisible statute, as it provides for conviction of burglary on the basis of a showing of intent to commit only one of the following: a felony, theft or an assault. The record of conviction does not indicate which intent the applicant possessed. The AAO notes that theft offenses are generally considered crimes involving moral turpitude. See *Matter of Garcia*, 11 I&N Dec. 521 (BIA 1966); see also *Matter of V-*, 2 I&N Dec. 340 (BIA 1940), *Matter of V- I-*, 3 I&N Dec. 571 (BIA 1949). However, simple assault has been held not to be a crime involving moral turpitude. See *In re Fualaau*, 21 I&N Dec. 475 (BIA 1996) (conviction for assault in the third degree for “intentionally, knowingly or recklessly caus[ing] bodily injury to another person” was not a crime involving moral turpitude in the absence of the requirement of a reckless state of mind coupled with the infliction of serious bodily injury or other aggravating factors such as use of a weapon); see also *Matter of Perez-Contreras*, 20 I&N Dec. 615 (conviction for assault in the third degree resulting in bodily harm under Washington law was not a crime involving moral turpitude where intentional or reckless conduct was excluded from the statutory definition of the crime.); *Matter of Short*, 20 I&N Dec. 136 (assault with intent to commit any felony was not necessarily a crime involving moral turpitude absent showing that underlying felony was a crime involving moral turpitude); *In re B*, 5 I&N Dec. 538 (BIA 1953) (simple assault committed “knowingly” on a prison guard is not a crime involving moral turpitude); *In re O*, 4 I&N Dec 301 (BIA 1951). Under section 22.01 of the T.P.C., as constituted at the time of the applicant’s offense, assault was defined as follows:

(a) A person commits an offense if the person:

(1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person’s spouse;

(2) intentionally or knowingly threatens another with imminent bodily injury, including the person’s spouse; or

(3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.

Thus, T.P.C. § 30.02 encompasses at least one violation, entering a building with intent to commit simple assault (assault not involving reckless intent, bodily injury, use of a weapon or any other aggravating factors), that does not involve moral turpitude. There is insufficient evidence in the record to show that the applicant violated T.P.C. § 30.02 by engaging in criminal activity involving moral turpitude. Therefore, the applicant’s conviction for burglary is not a crime involving moral turpitude that renders the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act, and the district director’s finding to the contrary must be withdrawn.

The applicant is also not inadmissible for admitting the essential elements of criminal sexual misconduct, a crime involving moral turpitude. The record reflects that the applicant was arrested on September 25, 1986 by Officer Mike Thompson of the Coldwater, Michigan Police Department and charged with criminal sexual conduct in violation of section 750.520d(1)(c) of Michigan Criminal Law. Officer Thompson submitted an affidavit in which he alleged the following:

Affiant says he interviewed [REDACTED] who agreed to talk to affiant after having been read his Miranda Warning Rights. Affiant says [REDACTED] told him he knew [REDACTED] was home alone and that he had walked into the unlocked house and went into [REDACTED] bedroom. [REDACTED] stated that [REDACTED] was asleep and that he started kissing her on the leg and side. Affiant asked if he inserted his tongue inside her vaginal area and [REDACTED] replied yes.

Presumably on the basis of this statement by Officer Thompson, the district director found that the applicant had admitted the essential elements of the crime of criminal sexual conduct, a crime involving moral turpitude. As stated above, the applicant has disputed that he made such admissions to Officer Thompson and that he committed the acts alleged by Officer Thompson in his affidavit. The record reflects that the charge of criminal sexual conduct was dismissed without prejudice by the District Court for the County of Branch, Michigan on the basis that the alleged victim had not been subpoenaed. There is no evidence in the record that the charge was ever reinstated.

The BIA has consistently followed the precedent it established in *Matter of K*, 7 I&N Dec. 594 (BIA 1957), for determining the “validity” of an admission for purposes of inadmissibility under section 212(a)(2)(A)(i) of the Act (formerly section 212(a)(9)). The BIA held that a “valid admission of a crime for immigration purposes requires that the alien be given an adequate definition of the crime, including all essential elements, and that it be explained in understandable terms,” a rule intended to insure “that the alien would receive fair play and to preclude any possible later claim by him that he had been unwittingly entrapped into admitting the commission of a crime involving moral turpitude.” *Id.* at 597. It is further noted that the BIA held that the admission at issue in that case, which was made to a police officer and included in a sworn statement signed by the alien, could not be considered an admission of acts constituting the essential elements of a crime involving moral turpitude because the notification requirement had not been met. *Id.* at 596-97. In the present case, there is no evidence showing that Officer Thompson provided the applicant with an adequate definition of the crime, including all essential elements, in understandable terms. It is also noted that there is no other statement by the applicant in the record in which he admits to the crime of criminal sexual conduct or acts that constituted the essential elements of that crime. The applicant pled not guilty and the charge was dismissed. Therefore, the AAO finds that the applicant is not inadmissible under section 212(a)(2)(A)(i) of the Act as a consequence of allegations made by Officer Thompson in his affidavit, and the district director’s finding to the contrary must be withdrawn.

The record also reflects that the applicant was convicted on July 21, 1980 in the County of Dallas, Texas of driving while intoxicated and sentenced to three days confinement. However, a simple driving while intoxicated offense is not a crime involving moral turpitude. *See In re Lopez-Meza* Interim Dec. 3423 (BIA 1999); *see also Matter of Torres-Varela*, 23 I&N Dec 78 (BIA 2001).

Accordingly, as the applicant is not inadmissible for having committed crimes involving moral turpitude, the applicant’s waiver of inadmissibility application is moot and the appeal will be dismissed.

Even if the applicant were inadmissible as determined by the district director, he would be eligible for a waiver of inadmissibility under section 212(h)(1)(A) of the Act. 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) . . . 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

As the applicant's criminal activities occurred more than 15 years ago, the district director erred in basing his decision on section 212(h)(1)(B) of the Act and failing to consider the eligibility of the applicant for a waiver under section 212(h)(1)(A). The record reflects that the applicant has not been charged with any additional crimes since his arrest in 1986, which is sufficient evidence that he has been rehabilitated and that his admission to the United States would not be "contrary to the national welfare, safety, or security of the United States." The AAO also notes other positive factors in the case, which include hardship to the applicant's wife, the applicant's employment and his religious activities. The unfavorable factors presented in the application are the applicant's convictions. Although no criminal activity can be condoned, the applicant has established that the favorable factors in his application outweigh the unfavorable factors. The district director's denial of the waiver application on the ground that he had not met the requirements of section 212(h) was thus improper.

In discretionary matters, the applicant bears the full burden of proving his eligibility for discretionary relief. *See Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976). Here, the applicant has now met that burden.

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