

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

PUBLIC COPY



U.S. Citizenship
and Immigration
Services



ttz

FILE: Office: LOS ANGELES, CA Date: JUN 08 2009

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom,
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Los Angeles, California, 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 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 U.S. citizen son, U.S. citizen daughter, and lawful permanent resident spouse.

The applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) on March 15, 2000 based on an Alien Relative Petition. The applicant also filed an Application for Waiver of Grounds of Inadmissibility (Form I-601) on July 13, 2004.

The district director found the applicant inadmissible for having been convicted of Unlawful Sexual Intercourse in violation of section 261.5 of the California Penal Code (CPC). *Decision of District Director*, dated February 3, 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. *Id.*

On appeal, counsel states that the applicant has established that his qualifying relatives will suffer extreme hardship as a result of his inadmissibility and submits additional documentation. *Counsel's Brief*, dated March 3, 2006.

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

(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.

(ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or

(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 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 record shows that on June 6, 1980 the applicant was convicted of Unlawful Sexual Intercourse in violation of CPC § 261.5.

At the time of the applicant's conviction, CPC § 261.5 provided, in pertinent part:

- (a) Unlawful sexual intercourse is an act of sexual intercourse accomplished with person who is not the spouse of the perpetrator, if the person is a minor. For the purposes of this section, a "minor" is a person under the age of 18 years and an "adult" is a person who is at least 18 years of age.

The AAO notes that where a violation under CPC § 261.5 used to be a strict liability offense, the state of California recognizes a defense where the perpetrator participates in a mutual act of sexual intercourse, believing his partner to be beyond the age of consent, with reasonable grounds for such belief. *People v. Hernandez*, 39 Cal. Rptr. 361, 364 (1964). In the recently decided *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General found that it is proper to make a categorical finding that a defendant's conduct involves moral turpitude when that conduct results in a conviction on the charge of intentional sexual conduct with a person the defendant knew or should have known was a minor. The AAO further notes that because the applicant was found guilty of violating CPC § 261.5, it can be inferred that either the defense articulated in *People v. Hernandez* was never raised, because it was not reflective of the circumstances of the case, or if it was raised it was not accepted as a valid defense due to the circumstances of the case. In either situation, the finding of the court, at least implicitly, was that the applicant knew or should have known that his victim was a minor. Thus, the AAO finds that the applicant's conviction for Unlawful Sexual Intercourse under CPC § 261.5 is a crime involving moral turpitude rendering the applicant inadmissible under section 212(a)(2)(A).

The record indicates that the applicant was sentenced to 332 days in jail and served 177 days in jail. As the applicant was sentenced to more than six months imprisonment, his conviction does not qualify for the petty offense exception under Section 212(a)(2)(A)(ii)(II) 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), (B), . . . 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

The applicant's conviction was based on actions taken by the applicant in 1980. The AAO notes that an application for admission or adjustment is a "continuing" application adjudicated based on the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). There has been no final decision made on the applicant's adjustment application, so the applicant, as of today, is still seeking admission by virtue of adjustment from his current status. Thus, it has now been more than 15 years since the actions that made the applicant inadmissible occurred. The AAO finds that the applicant is eligible to be considered for a waiver under both section 212(h)(1)(A) and 212(h)(1)(B) of the Act.

The record includes a brief from counsel, statements from the applicant's children, a statement from the applicant's employer, and country condition information for Mexico. In his brief, counsel states that the applicant's spouse suffers from ongoing medical conditions due to her advanced age. *Counsel's Brief*, dated March 3, 2006. The AAO notes that the record shows that applicant's spouse to be sixty-nine years old. Counsel states that the applicant's spouse relies on the medical insurance provided by the applicant's employer and that the applicant is the sole supporter for his wife. Finally, counsel states that the documentary evidence establishes that Mexico's health care system is inadequate. *Id.* The record contains a letter from the applicant's employer, Redlands Country Club, which states that the applicant does have medical insurance for his eligible dependents through their company. *Letter from Employer*, dated February 23, 2006. The record does not contain documentation of the applicant's spouse's ongoing medical conditions.

The applicant's son states that since moving to the United States his father has worked hard to support his family, he does not communicate with his family in Mexico and that his mother depends on his father for medical insurance. *Son's Statement*, undated. The applicant's daughter also states that her father worked hard to support his family and has no contact with family in Mexico. *Daughter's Statement*, dated February 23, 2006. She states that her mother cannot work, so the applicant is the only one who takes care of her and that the family needs their father in the United States. *Id.* The AAO notes that the record shows that the applicant's son is now twenty-seven years old and the applicant's daughter is thirty-one years old. The record does not show that the applicant's children would be unable to help their mother in the applicant's absence.

The AAO also notes that the record reflects that the applicant has not been charged with any crimes since his conviction in 1980. Thus, the AAO finds that the applicant has established that his admission to the United States would not be contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated.

However, the AAO does not find that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the applicant bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

In evaluating whether section 212(h) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

See Matter of Mendez-Morales, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Id.* at 300. (Citations omitted).

The adverse factor in the present case is the applicant's conviction in 1980 for Unlawful Sexual Intercourse with a person he knew to be a minor. The record shows that the applicant was born on September 14, 1941 and he committed the acts that led to his conviction on May 27, 1980. Thus, the applicant was thirty-eight years old at the time he violated CPC § 261.5 and the victim, as explicitly stated in the statute, was at the very least, under the age of eighteen years old. The few favorable

factors presented in this case, as stated above, do not outweigh the severity of the unfavorable factor presented.

The AAO finds that the applicant has not established that the favorable factors in his application outweigh the unfavorable factors. 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 not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.