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

U.S. Citizenship and Immigration Services

H2

[redacted]

FILE: [redacted] Office: PHOENIX, ARIZONA Date: APR 19 2010

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h), 8 U.S.C. § 1182(h), of the Immigration and Nationality Act.

ON BEHALF OF APPLICANT:

[redacted]

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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Michael Hammway

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Phoenix, Arizona, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the applicant is not inadmissible 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 waiver application is moot. The matter will be returned to the director for continued processing.

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 false imprisonment, a crime involving moral turpitude. The applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h). The director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director*, dated August 21, 2007.

On appeal, counsel states that the applicant was convicted of a serious crime nearly 20 years ago, and has paid his time, attended counseling sessions, and been reformed. She states that all of the immediate family members of the applicant and his wife legally reside in the United States, and his wife has no ties with Mexico. Counsel states that the applicant and his wife have three daughters, and the family members have a close relationship. She states that the applicant has steady employment in construction and is the family's main source of income. Counsel states that the applicant and his family own a house and have health benefits. She states that Mexico has widespread poverty, making it impossible for the applicant to find a job with comparable wages and benefits to the position he now holds. Counsel states that the applicant's mother is a lawful permanent resident of the United States and his father is a U.S. citizen.

The AAO will first address the finding of inadmissibility.

Section 212(a)(2) of the Act states that:

> (A)(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 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines "conviction" for immigration purposes as:

> A formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where –

(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and

(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

To determine if a crime involves moral turpitude, the Ninth Circuit Court of Appeals first applies the categorical approach. *Nunez v. Holder*, 594 F.3d 1124, 1129 (9th Cir. 2010) (citing *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 999 (9th Cir.2008). This approach requires analyzing the elements of the crime to determine whether the proscribed conduct involves moral turpitude. *Nicanor-Romero, supra* at 999. In *Nicanor-Romero*, the Ninth Circuit states that in making this determination there must be "a realistic probability, not a theoretical possibility, that the statute would be applied to reach conduct that did not involve moral turpitude. *Id.* at 1004 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). A realistic probability can be established by showing that, in at least one other case, which includes the alien's own case, the state courts applied the statute to conduct that did not involve moral turpitude. *Id.* at 1004-05. *See also Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008) (whether an offense categorically involves moral turpitude requires reviewing the criminal statute to determine if there is a "realistic probability, not a theoretical possibility," that the statute would be applied to conduct that is not morally turpitudinous).

If the crime does not categorically involve moral turpitude, then the modified categorical approach is applied. *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1161 (9th Cir. 2009). This approach requires looking to the "limited, specified set of documents" that comprise what has become known as the record of conviction—the charging document, a signed plea agreement, jury instructions, guilty pleas, transcripts of a plea proceeding and the judgment—to determine if the conviction entailed admission to, or proof of, the necessary elements of a crime involving moral turpitude. *Id.* at 1161 (citing *Fernando-Ruiz v. Gonzalez*, 466 F.3d 1121, 1132-33 (9th Cir. 2006)).

The record shows that on June 25, 1986, the applicant pled guilty to and was convicted of carrying a loaded firearm in violation of California Penal Code § 12031(a).[1] The judge suspended imposition of the applicant's sentence for two years, and ordered that he serve two years of conditional and revocable community release and five days in jail, pay a fine, and not carry a firearm without a valid permit.

The AAO is unaware of any published federal cases addressing whether the crime of carrying a loaded firearm under California law is a crime of moral turpitude. Generally, carrying a concealed

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[1] California Penal Code § 12031(a) provides that:

> A person is guilty of carrying a loaded firearm when he or she carries a loaded firearm on his or her person or in a vehicle while in any public place or on any public street in an incorporated city or in any public place or on any public street in a prohibited area of unincorporated territory.

weapon is not a crime involving moral turpitude.[2] *See U.S. ex rel. Andreacchi v. Curran*, 38 F.2d 498 (S.D.N.Y. 1926); and *Ex Parte Saraceno*, 182 F. 955 (C.C.N.Y. 1910). However, in *Matter of S-*, the BIA held that carrying a concealed and deadly weapon with intent to use it against the person of another is a crime involving moral turpitude because "the use of a dangerous weapon against the person of another is motivated by an evil, base, and vicious intent. The essence of the offense is the carrying of the dangerous weapon with a base, evil and vicious intent to injure another." 8 I&N Dec. 344, 346 (BIA 1959)(citations omitted).

The AAO notes that under Cal. Penal Code § 12024 a person is convicted for intending to assault another with a deadly weapon.[3] Under Cal. Penal Code § 12031(a) there is no scienter requirement. The AAO knows of a prior case in which a conviction was obtained under Cal. Penal Code § 12031(a) for conduct not involving moral turpitude. In *People v. Dillard*, 154 Cal.App.3d 261, 201 Cal.Rptr. 136 (1984), the Court of Appeal upheld the conviction of the appellant, who had been convicted of carrying on his bicycle a loaded firearm that was contained in a rifle case. The appellant contended that he did not know that the rifle was loaded because his stepfather had borrowed the rifle for hunting and he had retrieved it from him a few hours before his arrest. *Id.* at 265. The Court of Appeal held that knowledge was not an element of the crime of carrying a loaded firearm in a public place, and affirmed the judgment. *Id.* at 266-67.

Therefore, the AAO cannot find that the offense described in Cal. Penal Code § 12031(a) is categorically a crime involving moral turpitude. Since a conviction for carrying a loaded firearm in a public place in violation of California Penal Code § 12031(a) is not categorically a crime involving moral turpitude, we apply the modified categorical approach and "consider whether any of a limited, specified set of documents-including the state charging document, a signed plea agreement, jury instructions, guilty pleas, transcripts of a plea proceeding and the judgment (sometimes termed 'documents of conviction')" reflect that the applicant's conviction involved an admission to, or proof of, morally turpitudinous conduct.[4] *Fernando-Ruiz v. Gonzalez*, 466 F.3d 1121, 1132-33 (9th Cir. 2006) (citation omitted). As previously discussed, there must be evidence in the record establishing an intent to assault another with a deadly or dangerous weapon for the applicant's conviction for carrying a loaded firearm in a public place to constitute a crime involving moral turpitude.

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[2] Penal Code § 12031 deals with a "loaded firearm" and not with a "pistol, revolver, or firearm capable of being concealed upon the person."

[3] Assault in California is a general intent crime. *People v. Miller*, 164 Cal.App.4th 653, 78 Cal.Rptr.3d 918 (2008).

[4] The Ninth Circuit Court of Appeals had previously reserved judgment as to whether it would follow the additional ruling of the Attorney General in *Silva-Trevino* that adjudicators may look beyond the record of conviction as part of the modified categorical inquiry. *See Marmolejo-Campos v. Holder*, 558 F.3d 903, 915 (9th Cir. 2009). The AAO interprets the holding in *Castillo-Cruz* and subsequent decisions as a refusal by the Ninth Circuit to accept the more expansive review allowed by the Attorney General, and will thus restrict its review in this case to the record of conviction only. *See, e.g., Tijani v. Holder* ___ F.3d ___, 2010 WL 816973 (9th Cir. March 11, 2010), *Ocequeda-Nunez v. Holder*, 594 F.3d 1124 (9th Cir. 2010).

To meet his burden, the applicant must, at a minimum, submit the available documents that comprise the record of conviction and show that these fail to establish that his conviction was based on conduct involving moral turpitude. To the extent such documents are unavailable, this fact must be established pursuant to the requirements in 8 C.F.R. § 103.2(b)(2). The AAO notes that in response to a request by the director for the dispositions of the applicant's convictions, the applicant submitted copies of his docket for the conviction under Cal. Penal Code § 12031(a), and a certificate of search by the clerk for the Superior Court of California County of Fresno, which did not reveal the 1986 conviction under Cal. Penal Code § 12031(a) even though the offense had been committed in Fresno, California and the search entailed the relevant information for the conviction. Thus, the applicant has established, in accordance with the requirements in 8 C.F.R. § 103.2(b)(2), that the documents comprising his record of conviction are unavailable. The submitted documents do not demonstrate that the applicant's offense of carrying a loaded weapon in a public place included an intent to assault another with his firearm. The AAO notes that the specific intent required to characterize this offense as a crime involving moral turpitude is not an element of the crime, and it is thus unlikely that documentation would exist demonstrating any procedural finding of intent. Accordingly, the AAO will not conclude, based on the record before it, that under the modified categorical approach as applied in the Ninth Circuit the applicant's conviction is a crime involving moral turpitude.

The submitted Misdemeanor Infraction and Sentence Minute Order and Docket Entry reflects that on July 19, 1989, the applicant pled *nolo contendre* to and was convicted of misdemeanor false imprisonment in violation of California Penal Code § 236. The judge sentenced him to a three-year conditional probation and 365 days in custody, which term of custody was suspended except for 45 days.

False imprisonment under Cal. Penal Code § 236 "is the unlawful violation of the personal liberty of another." Without more, the conduct described in section 236 is a misdemeanor offense, punishable "by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in the county jail for not more than one year, or by both that fine and imprisonment." Cal. Penal Code § 237(a). If the offense is "effected by violence, menace, fraud, or deceit," then it is elevated to a felony and "shall be punishable by imprisonment in the state prison." *Id.*

The AAO is unaware of any published federal cases addressing whether the crime of false imprisonment under California law is a crime of moral turpitude. However, in *People v. Cornelio*, 207 Cal.App.3d 1580, 255 Cal.Rptr. 775 (1989), the court stated that the addition of one or more of the elements of violence, menace, fraud or deceit to the simple violation of personal liberty of another makes the crime one involving moral turpitude. The AAO finds this ruling persuasive. In the present case, because the applicant was convicted of simple violation of personal liberty without one or more of the elements of violence, menace, fraud, or deceit, and because an account of the crime provided by the applicant is consistent with the lesser offense of which he was convicted, we find that the applicant's conviction is not a crime involving moral turpitude.

On November 4, 1992, the applicant pled guilty to buying or receiving stolen property in violation of California Penal Code § 496.1.[5] The judge suspended imposition of judgment for three years; and

[5] California Penal Code § 496.1 provides that:

ordered the return of the weapon to the rightful owner, payment of a fine, and service of a 365-day jail term, which was to be suspended except for 45 days.

The Ninth Circuit Court of Appeals addressed the issue of whether Cal. Penal Code § 496(a) constitutes a crime involving moral turpitude in the recent case *Castillo-Cruz v. Holder*, 581 F.3d 1154 (9th Cir. 2009). The Court determined that Cal. Penal Code § 496(a) does not require a perpetrator to have the intent to permanently deprive the owner of his or her property, but rather permits conviction for intent to deprive the owner of his or her property temporarily. *Id.* at 1160-1161. The Court applied the methodology articulated in *Duenas-Alvarez* for a determination of whether there is a "realistic probability" that Cal. Penal Code § 496(a) would be applied to conduct that does not involve moral turpitude. 581 F.3d at 1161. The Court concluded that lower courts have upheld convictions under Cal. Penal Code § 496(a) in cases where there was no intent to permanently deprive, and as such, a conviction under the statute is not categorically a crime of moral turpitude. *Id.* The Court held that the alien's conviction was not a crime involving moral turpitude under the modified categorical analysis because the government conceded that there was no evidence in the record establishing that his offense involved an intent to deprive the owner of possession permanently. *Id.* It is noted that the court apparently reviewed only the record of conviction in making this determination. *Id.*

Since a conviction for buying or receiving stolen property in violation of California Penal Code § 496.1 is not categorically a crime involving moral turpitude, we apply the modified categorical approach and review the record of conviction to determine if the applicant's conviction under this statute was for morally turpitudinous conduct, which would be an intent to permanently deprive the owner of possession of property. As stated above, to meet his burden, the applicant must, at a minimum, submit the available documents that comprise the record of conviction and show that these fail to establish that his conviction was based on conduct involving moral turpitude. To the extent such documents are unavailable, this fact must be established pursuant to the requirements in 8 C.F.R. § 103.2(b)(2). The AAO notes that in response to a request by the director for the dispositions of the applicant's convictions, the applicant submitted copies of his docket for the conviction under Cal. Penal Code § 496.1, and certificate of search by the clerk of the Superior Court of California County of Fresno, which certificate states that the file for the conviction under Cal. Penal Code § 496.1 was destroyed. Thus, he has established, pursuant to the requirements in 8 C.F.R. § 103.2(b)(2), that the documents comprising his record of conviction are unavailable. Accordingly, the AAO will not conclude, based on the record before it, that under the modified categorical approach as applied in the Ninth Circuit the applicant's crime involved moral turpitude.

> Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in a state prison, or in a county jail for not more than one year.

Based on the record, the AAO finds that the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The waiver filed pursuant to section 212(h) of the Act is therefore moot. As the applicant is not required to file a waiver application, the appeal of the denial of the waiver will be dismissed.

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. The applicant has met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed as the waiver application is moot.