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



**U.S. Citizenship  
and Immigration  
Services**

H2

FILE:

Office: SAN DIEGO, CALIFORNIA

Date: APR 19 2010

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

*Michael Shumway*

for Perry Rhew,  
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).

The applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on an approved Form I-140, Immigrant Petition for Alien Worker. The applicant also filed an Application for Waiver of Grounds of Inadmissibility (Form I-601). The director concluded that the applicant had failed to establish that he has a qualifying relative, as required by section 212(h) of the Act, and denied the waiver application accordingly. In addition, the director found the applicant's crime to be a felony for which a waiver is not available. *Decision of District Director Denying Form I-601*, dated July 31, 2009.

On appeal, counsel asserts that the applicant is eligible for a waiver of inadmissibility as a matter of law, and that the applicant is the father of two U.S. citizen children. Counsel submits birth certificates reflecting that the applicant's daughter and son were born in the United States.

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.

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.)

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 (9<sup>th</sup> Cir. 2010) (citing *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 999 (9<sup>th</sup> 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 (9<sup>th</sup> Cir. 2009). This approach requires looking to the "limited, specified set of documents" that comprise 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.*

The record shows that on July 9, 1991, the applicant pled guilty to and was convicted of "lewd and lascivious acts" in violation Cal. Penal Code § 288(a), which crime is a felony. The applicant, who was born on June 1, 1958, was 32 years old at the time he committed the crime that resulted in his arrest. The imposition of the applicant's sentence was suspended for eight years, he was granted probation under the supervision of a probation officer, was committed to the custody of the sheriff for 116 days, and was ordered to register pursuant to Cal. Penal Code § 290. At the time of the applicant's conviction, Cal. Penal Code § 288(a) provided:

Any person who willfully and lewdly commits any lewd or lascivious act including any of the acts constituting other crimes provided for in Part 1 of this code upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child, shall be guilty of a felony and shall be punished by imprisonment in the state prison for a term of three, six, or eight years.

The Ninth Circuit Court of Appeals states in *Nicanor-Romero v. Mukasey*, 523 F.3d 992 (9<sup>th</sup> Cir. 2008) that it has consistently held that sexual offenses generally involve moral turpitude as such offenses fall within the category of crimes "involving grave acts of baseness or depravity," and that by their very nature sexual offenses involve moral turpitude. *Id.* at 1012-1013. In *Grageda v. INS*, 12 F.3d 919, 922 (9<sup>th</sup> Cir.1993), a child abuse case, the Ninth Circuit states that "it is the combination of the base or depraved act and the willfulness of the action that makes the crime one of moral turpitude." *Id.* at 922. In *Schoeps v. Carmichael*, 177 F.2d 391, 394 (9<sup>th</sup> Cir.1949), the Ninth

Circuit found that lewd and lascivious conduct in violation of Cal. Penal Code § 288(a) was a crime involving moral turpitude. *Id.* at 394. Furthermore, in support of the determination that violation of Cal. Penal Code § 288(a) involves moral turpitude, in *Shumate v. Newland*, 75 F.Supp.2d 1076 (1999), the court states that the application of section 288(a) is limited to “lewd or lascivious act[s]” performed with the specific intent of “arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child.” *Id.* at 1085. Thus, section 288(a) requires the conjunction of a specific type of act and a well-defined mental state, and the jury instructions require finding “a union or joint operation of act or conduct and a certain specific intent in the mind of the perpetrator.” *Id.* Furthermore, the AAO notes that the victim was the applicant’s stepdaughter, who was 13 years old at the time of the offense. Consequently, the AAO finds that violation of Cal. Penal Code § 288(a) categorically involves moral turpitude as the offense requires “the combination of the base or depraved act and the willfulness of the action that makes the crime one of moral turpitude.”

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 . . .

Section 212(h)(1)(A) of the Act provides that the Attorney General may, in his discretion, waive the application of subparagraph (A)(i)(I) of subsection (a)(2) if 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. Since the criminal conviction for which the applicant was found inadmissible occurred in 1990, which is more than 15 years ago, it is waivable under section 212(h)(1)(A)(i) of the Act.

Section 212(h)(1)(A)(ii) and (iii) of the Act requires that the applicant’s admission to the United States not be contrary to the national welfare, safety, or security of the United States; and that the applicant establish his rehabilitation. Evidence in the record to establish the applicant’s eligibility

under section 212(h)(1)(A)(ii) and (iii) of the Act consists of letters, wage statements, financial records, and a prior AAO decision. The letter dated April 2, 2009 by the applicant's stepdaughter, who was the victim of his crime, describes the incident leading to the applicant's arrest. The applicant's stepdaughter conveys that the applicant is a good father who assists her by driving her children to school. Collectively, the other letters in the record commend the applicant's character, indicating that he is hardworking, trustworthy, helpful to others, and dedicated to his family. The AAO notes that the applicant has provided no documentation in which he expresses remorse for his crime. Although the applicant provided a prior AAO case dealing with a conviction under Cal. Penal Code § 288(a) and a 212(h)(1)(A) waiver to establish that the instant waiver should be granted, the facts in the prior AAO case are distinguishable from those presented here. The applicant in the prior case was dismissed by the court under Cal. Penal Code § 2403.4, and he had expressed remorse for his crime. Although the applicant here has provided letters praising his character, he has not expressed any remorse for his crime, and he was not granted relief under Cal. Penal Code § 2403.4. In view of the nature of the applicant's crime, he has not provided sufficient evidence to demonstrate that his admission to the United States is not contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated, as required by section 212(h)(1)(A)(ii) and (iii) of the Act.

The AAO notes that the director erred by stating that no waiver is available to the applicant because his crime is a felony involving moral turpitude. However, the AAO notes that pursuant to 8 C.F.R. § 212.7(d), if an alien is inadmissible under section 212(a)(2) of the Act for committing a violent or dangerous crime, such as the crime committed here by the applicant, the favorable exercise of discretion in granting a waiver of inadmissibility is limited to extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of the adjustment of status or immigrant visa application would result in exceptional and extremely unusual hardship.<sup>1</sup> Furthermore, in view of the gravity of the alien's underlying criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act. *See* 8 C.F.R. § 212.7(d).

Because the applicant is statutorily ineligible for relief, no purpose is served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval 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.

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<sup>1</sup> *See Mejia v. Gonzales*, 499 F.3d 991, 995-99 (9th Cir.2007) (violation of Cal. Penal Code § 288(a) is a violent or dangerous crime under 8 C.F.R. § 212.7(d)).