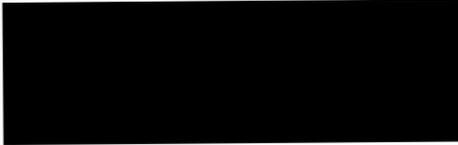




U.S. Citizenship
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Office: CHICAGO, ILLINOIS

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APPLICATION:

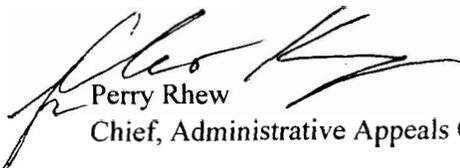
Application for Waiver of Ground of Inadmissibility under section 212(h) of the
Immigration and Nationality Act, 8 U.S.C. § 1182(h)

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.


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Chicago, Illinois, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a 35-year-old 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 crimes 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 wife.

The director found that the applicant failed to establish extreme hardship to his spouse, and denied the application accordingly. *Decision of the Director*, dated May 22, 2007. On appeal, the applicant contends through counsel that denial of the waiver would result in extreme hardship to his U.S. citizen wife. *See Form I-290B, Notice of Appeal*, filed June 20, 2007; *Brief on Appeal*.

The record contains, *inter alia*, a copy of the couple's marriage certificate, indicating that they were married on November 23, 2002, in Illinois; a letter from the applicant's wife's therapist, dated March 1, 2008; affidavits from the applicant and his wife in support of the waiver application; financial statements and tax documents; real estate documents; a letter from the applicant's employer; photographs of the couple; documentation related to the applicant's 1995 convictions; and a brief in support of the appeal.

The AAO reviews these proceedings de novo. *See* 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."). The entire record was reviewed and considered in rendering this decision on appeal.

The record shows that on October 7, 1994, the applicant was charged with six counts of burglary in violation of chapter 720, Section 5/19-1(a) of the Illinois Compiled Statutes, as amended. *See Multiple Count Complaint/Information*. The applicant was also charged with possession of burglary tools in violation of chapter 720, Section 5/19-2 of the Illinois Compiled Statutes, as amended. *Id.* On April 28, 1995, the Sixteenth Judicial Circuit Court, Kane County, Illinois, convicted the applicant of five counts of burglary and one count of possession of burglary tools. *See Judgment Order*, Case No. 94 CF 1842, dated Apr. 28, 1995. The Court sentenced the applicant to five years of imprisonment, and ordered restitution in the amount of \$348.10. *Judgment Order*, dated Apr. 19, 1995.

The evidence in the record supports the director's determination that the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act, which provides in pertinent part:

Except as provided in clause (ii), any 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 (Board) has “observed that moral 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.” *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992). In order to determine whether a conviction involves moral turpitude, the decision-maker must “look first to the statute of conviction rather than to the specific facts of the alien’s crime.” *Matter of Silva-Trevino*, 24 I&N Dec. 687, 688 (A.G. 2008). Burglary offenses may or may not involve moral turpitude, depending on whether the crime intended to be committed at the time of entry involves moral turpitude. *Matter of M-*, 2 I&N Dec. 721, 723 (BIA 1946); *Matter of S-*, 6 I&N Dec. 769 (BIA 1955) (holding that possession of burglary tools is not a crime involving moral turpitude unless accompanied by an intent to use the tools to commit a crime involving moral turpitude). Further, the Board has held that “[o]rdinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended.” *Matter of Grazley*, 14 I&N Dec. 330, 333 (BIA 1973).

At the time of the applicant’s convictions in 1995, chapter 720, Section 5/19-1(a) of the Illinois Compiled Statutes, as amended, provided, in pertinent part:

§ 19-1. Burglary. (a) A person commits burglary when without authority he knowingly enters or without authority remains within a building, housetrailer, watercraft, aircraft, motor vehicle as defined in The Illinois Vehicle Code, railroad car, or any part thereof, with intent to commit therein a felony or theft.

Chapter 720, Section 5/19-2 of the Illinois Compiled Statutes, as amended, provided:

§ 19-2. Possession of Burglary Tools. (a) A person commits the offense of possession of burglary tools when he possesses any key, tool, instrument, device, or any explosive, suitable for use in breaking into a building, housetrailer, watercraft, aircraft, motor vehicle as defined in The Illinois Vehicle Code, railroad car, or any depository designed for the safekeeping of property, or any part thereof, with intent to enter any such place and with intent to commit therein a felony or theft.

The above statutory provisions are divisible because they encompass offenses that may or may not involve moral turpitude. See *Matter of M-*, 2 I&N Dec. at 723; *Matter of Grazley*, 14 I&N Dec. at 333. The applicant has not presented, and the AAO is unaware of, any prior case in which a conviction has been obtained under chapter 720, Sections 5/19-1(a) or 5/19-2 of the Illinois Compiled Statutes, as amended, for conduct not involving moral turpitude. Nevertheless, in accordance with the language of *Silva-Trevino*, the AAO will review the record to determine if the statute was applied to conduct not involving moral turpitude in the applicant’s own criminal case.

Here, the criminal complaint charged that on or about October 7, 1994, the applicant entered six motor vehicles with the intent to commit therein a theft, and that he possessed two screwdrivers, a flashlight, gloves and wire snips suitable for use in breaking into a motor vehicle, with the intent to enter any such place with the intent to commit therein a theft. *See Multiple Count Complaint/Information*. The Illinois theft statute requires an intent to deprive an owner permanently of the use or benefit of property. *See* Chapter 720, Section 5/16-1 of the Illinois Compiled Statutes, as amended. Accordingly, the AAO concludes that the applicant is inadmissible under section 212(a)(2)(A) of the Act for his crimes involving moral turpitude.

Beyond the decision of the director, the record shows that the applicant also is inadmissible under section 212(a)(2)(B) of the Act which provides:

(B) Multiple criminal convictions

Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

Here, the applicant was convicted of two offenses: burglary and possession of burglary tools. *See Judgment Order*, dated Apr. 28, 1995. The Court sentenced the applicant to five years of imprisonment. *Id.* Accordingly, the applicant's convictions render him inadmissible under section 212(a)(2)(B) of the Act.

A discretionary waiver of these criminal grounds of inadmissibility is available under section 212(h) of the Act, 8 U.S.C. § 1182(h) if:

(1)(A) in the case of any immigrant it is established to the satisfaction of the Attorney General 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 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 record supports a determination that the applicant has met the requirements for a waiver under section 212(h)(1)(A) of the Act. First, the applicant's offenses were committed on October 7, 1994, more than 15 years ago. Second, the record contains no evidence that the applicant's admission to the United States would be contrary to U.S. national welfare, safety, or security. Third, the record supports a finding of rehabilitation given the applicant's lack of criminal activity for the past 15 years; his steady work history, *see Letter from [REDACTED]* dated Jan. 25, 2006 (noting that the applicant has been an employee in good standing since July, 1998); his payment of taxes, *see Tax Records*; his marriage to [REDACTED] in 2002, *see Marriage Certificate*; and his home ownership, *see Real Estate Documents*.

The AAO also finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the alien bears the burden of proving that positive factors are not outweighed by adverse factors. *See Matter of Coelho*, 20 I&N Dec. 464, 467 (BIA 1992). The adverse factors in this case are the criminal offenses for which the applicant seeks a waiver, as well as his entry without inspection in 1988. **The favorable and mitigating factors in this case include:** the applicant's significant ties to his U.S. citizen spouse in the United States; the evidence of hardship to the applicant's spouse if he is removed, *see Letter from Therapist*; the applicant's residence in the United States since he was 14 years old; and the factors supporting the finding of rehabilitation, *see Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996) (setting forth relevant factors).

The AAO finds that although the offenses committed by the applicant are serious, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

The director denied the applicant's Form I-485, Application to Adjust Status, solely on the basis of his denial of the applicant's Form I-601. Because the appeal of the waiver application will be sustained, there remains no basis, in the present record, for the denial of the adjustment application. Accordingly, the director should reopen the adjustment application pursuant to the regulation at 8 C.F.R. § 103.5(a)(5)(i), and issue a new decision.

ORDER: The appeal is sustained. The case is returned to the director for further action on the applicant's adjustment application in accordance with the foregoing decision.