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Office of Administrative Appeals MS 2090
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U.S. Citizenship
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FILE:

Office: CHICAGO, IL

Date:

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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.

Perry Rhew
Chief, Administrative Appeals Office

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

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 a crime involving moral turpitude. The applicant is the spouse of a U.S. citizen and has two U.S. citizen children. He 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 family.

In a decision dated February 15, 2006, the acting district director found that the applicant did not demonstrate that his inadmissibility would result in extreme hardship to his qualifying relatives.

The AAO notes that the record indicates that the applicant's adjustment application was previously denied and then re-opened. The applicant's adjustment application was denied for lack of prosecution on May 18, 2001 and then reopened on July 5, 2001. After two Requests for Evidence were sent to the applicant with no response, the application was again denied on May 28, 2004. On June 28, 2004, the applicant's current counsel filed a Motion to Re-open with the required documentation and on June 22, 2004 the application was reopened. On February 15, 2006, the same day the applicant's waiver application was denied, the acting district director denied the applicant's adjustment application before the applicant had an opportunity to file an appeal.

In a Notice of Appeal to the AAO dated March 15, 2006 counsel states that the acting district director erred as a matter of fact and law in denying the applicant's waiver application.

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.)

In the recently decided *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. First, in evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a “realistic probability, not a theoretical possibility,” that the statute would be applied to reach conduct that does not involve moral turpitude. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability exists where, at the time of the proceeding, an “actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien’s own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude.” *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

However, if a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, “the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude.” 24 I&N Dec. at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage inquiry in which the adjudicator reviews the “record of conviction” to determine if the conviction was based on conduct involving moral turpitude. *Id.* at 698-699, 703-704, 708. The record of conviction consists

of documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.* at 698, 704, 708.

If review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. 24 I&N Dec. at 699-704, 708-709. However, this “does not mean that the parties would be free to present any and all evidence bearing on an alien’s conduct leading to the conviction. (citation omitted). The sole purpose of the inquiry is to ascertain the nature of the prior conviction; it is not an invitation to relitigate the conviction itself.” *Id.* at 703.

The record reflects that on May 4, 1989 the applicant was convicted in the Circuit Court of Cook County, Illinois for Burglary for events that occurred on December 5, 1988. He was sentenced to three years probation.

According to Chapter 720, Act 5, section 19-1 of the Illinois Compiled Statutes:

- (a) A person commits burglary when without authority he knowingly enters or without authority remains within a building, house trailer, 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. This offense shall not include the offenses set out in Section 4-102 of the Illinois Vehicle Code.

The Board of Immigration Appeals (BIA) has ruled that burglary is a crime involving moral turpitude only if the crime the perpetrator intended to commit after breaking into a building involved moral turpitude. *See Matter of M-*, 2 I&N Dec. 721 (BIA, AG 1946). The statute under which the applicant was convicted indicates that the applicant was found guilty of intending to commit a felony or theft. The AAO notes that the statute under which the applicant was convicted is a divisible statute violated by either committing a felony, which may or may not be a crime involving moral turpitude, or committing theft, which also may or may not be a crime involving moral turpitude.¹

However, in accordance with *Silva-Trevino*, the AAO must determine if an actual case exists in which the criminal statute was applied to conduct that did not involve moral turpitude. The applicant has not presented and the AAO is unaware of any prior case, including the applicant’s own case, in which a conviction has been obtained under 720 ILCS 5/19-1(a) for conduct not involving moral turpitude. The record of conviction and other evidence in the record is inconclusive as to whether the applicant was convicted for violating the statute based on conduct that did not involve moral turpitude. Therefore, in light of the standard set forth in *Silva-Trevino*, the AAO must determine that the applicant’s conviction under 720 ILCS 5/19-1(a) is categorically a crime

¹ The BIA has determined that to constitute a crime involving moral turpitude, a theft offense must require the intent to permanently take another person’s property. *See Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973) (“Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended.”).

involving moral turpitude absent evidence that a prior case exists in which the statute was applied to conduct not involving moral turpitude.

On June 19, 2009, the AAO sent the applicant a Request for Further Evidence allowing the applicant to submit evidence of a prior case, which could have included evidence related to his own case, in which was applied to conduct not involving moral turpitude.

In a letter dated September 3, 2009, the applicant, through counsel submitted additional evidence of hardship. No further evidence regarding the applicant's criminal conviction was submitted, thus the AAO must find that the applicant's conviction is a crime 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 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 stated above, the applicant's conviction was based on actions taken by the applicant in 1988. 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). The applicant, as of today, is still seeking admission by virtue of his application for 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 for a waiver under section 212(h)(1)(A) of Act.

The AAO notes that the record reflects that the applicant has not been convicted of any crimes since his conviction in 1989. The record indicates that the applicant has a five-year-old daughter and a nineteen-year-old daughter who are U.S. citizens. The record states that he has a brother who is a

U.S. citizen and a sister who is a lawful permanent resident. The record also shows that the applicant helps to support his daughters and has been employed by [REDACTED] since 1999. The applicant states that his oldest daughter is from a previous relationship, that she is suffering from manic depression, and her mother is being treated for abusing drugs and is on public assistance. *Applicant's Statement*, dated November 14, 2004.

The documentation submitted in response to the Request for Further Evidence establishes that the applicant's spouse is disabled, is no longer able to work, and is economically dependent on the applicant. The applicant's spouse has also been diagnosed with a vitamin B12 deficiency and scattered white matter was found on her brain. The record indicates that these health issues are in addition to her existing medical conditions of cervical and spinal stenosis and degenerative disc disease. The record includes numerous medical records and affidavits establishing the applicant's spouse's current medical condition.

The AAO finds that the record establishes that the applicant has been rehabilitated and the record does not establish that the admission of the applicant to the United States would be "contrary to the national welfare, safety, or security of the United States." The applicant has not been convicted of a crime since 1989, he has been steadily employed, and he helps in supporting his family's financial needs. Thus, the record reflects that the applicant meets the requirements for waiver of his grounds of inadmissibility under section 212(h)(1)(A) of the Act.

The AAO additionally finds 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)(1)(B) 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 1989 for Burglary. The favorable factors in the present case are the support the applicant provides to his family, the applicant’s record of employment, and the applicant’s lack of a criminal record or offense since 1989.

The AAO finds that the applicant has 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 now met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.