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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

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FILE:  Office: LOS ANGELES, CA Date:

OCT 08 2010

IN RE: Applicant: 

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:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

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Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Field Office Director, Los Angeles, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that 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 a crime involving moral turpitude. The director indicated that 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.

On appeal, the applicant contends that he owns two businesses in the United States, one of which employs his son, and that he does not know what his family will do without him in the United States.

The AAO will first address the finding of inadmissibility. 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 (Board) 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 all of 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 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 (9<sup>th</sup> Cir. 2006)).

The record shows that the applicant was arrested in California for rape of spouse on October 15, 1990. On January 11, 1994, he was arrested for inflict corporal injury on spouse/cohabitant, and for assault and battery. On February 9, 1995, he was arrested for petty theft. On March 26, 1997, the applicant was convicted under sections 23152(a) and (b) of the California Vehicle Code for driving under the influence of alcohol offenses. On April 25, 1996, he was arrested for petty theft. On January 26, 2001, the applicant was convicted for driving under the influence in violation of section 14601.2(a) of the California Vehicle Code.

We note that the record does not contain the disposition for the arrests involving corporal injury on spouse/cohabitant, assault and battery, and petty theft. To meet his burden, the applicant must, at a minimum, submit the available documents that comprise the record of conviction and show that these establish that he was not convicted of crimes 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 the applicant submitted a certificate of search by the clerk for the Superior Court of California County of Orange, which reveals that the cases for the arrests in question were destroyed and are no longer maintained pursuant to Government Code § 68152(d). We note that the arrest for rape of spouse is shown in the clerk's certificate as the offenses of inflict corporal injury on spouse/cohabitant and assault and battery. 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. Accordingly, the record of conviction for the arrests in question is insufficient to demonstrate conclusively that the applicant was convicted of a crime involving moral turpitude.

Furthermore, the applicant's driving under the influence convictions are not crimes involving moral turpitude. Simple driving under the influence is not a crime involving moral turpitude. *See Murillo-Salmeron v. INS*, 327 F.3d 898 (9<sup>th</sup> Cir. 2003).

Although not addressed by the director, the record conveys that the applicant is inadmissible under section 212(a)(6)(C) of the Act for seeking admission into the United States by fraud or willful misrepresentation.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 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."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9<sup>th</sup> Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2<sup>d</sup> Cir. 1989).

With regard to seeking admission into the United States by fraud or willful misrepresentation, section 212(a)(6)(C) of the Act provides, in pertinent part, that:

- (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

The record reflects that on August 7, 1976, the applicant sought to gain admission into the United States at the San Ysidro, California, port of entry by claiming to be a citizen of the United States. Based on his false claim to citizenship, the applicant is inadmissible under section 212(a)(6)(C) of the Act for seeking to procure admission into the United States based on the willful misrepresentation of the material fact of his identity and eligibility for admission.

Section 212(i) of the Act provides a waiver for fraud and material misrepresentation. That section states that:

- (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

A waiver of inadmissibility under section 212(i) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative.

The record before the AAO does not indicate that the applicant is eligible for a waiver. He is not the spouse or son of a United States citizen or an alien lawfully admitted for permanent residence. According to the record, the applicant's parents are deceased, and there is no indication that the applicant's spouse is a lawful permanent resident or a U.S. citizen. As such, the record does not reflect that the applicant has a qualifying relative as required by section 212(i) of the Act.

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 proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.