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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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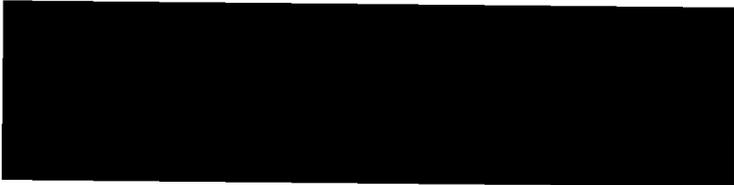
Date: **JUL 11 2011** Office: CALIFORNIA SERVICE CENTER

FILE:

IN RE: Applicant:

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:

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.

Thank you,

for Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Bolivia 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. He seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen daughter.

The director denied the Form I-601 application for a waiver, finding that the applicant failed to establish that he has been rehabilitated, or that a qualifying relative will experience extreme hardship should the present waiver application be denied. *Decision of the Director*, dated November 19, 2008.

On appeal, counsel for the applicant asserts that the applicant has shown that he has been rehabilitated, and that his daughter will suffer extreme hardship if he is not permitted to adjust his status to lawful permanent resident. *Statement from Counsel on Form I-290B*, dated December 17, 2008.

The record contains a brief from counsel; documentation in connection with the applicant's criminal conviction and traffic violations; statements from the applicant, as well as the applicant's daughter, stepsons, former wife, and the fiancée of his stepson; letters of reference from the applicant's friends and community members; a psychological evaluation of the applicant's daughter; reports on conditions in Bolivia, and; tax records for the applicant. The entire record was reviewed and considered in rendering this decision.

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.)

The record shows that, on April 8, 1991, the applicant pled guilty to burglary in the 2nd degree under New York Penal Law § 140.25. The maximum sentence for second degree burglary in New York, a class C felony, is 15 years of incarceration.

In *Matter of Silva-Trevino* the Attorney General adopted the “realistic probability” standard articulated by the Supreme Court in *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183 (2007), as an approach for determining inadmissibility under section 212(a)(2)(A)(i)(I) of the Act. See 24 I&N Dec. 687, 698 (2008). The methodology articulated by the Attorney General for determining whether a conviction is a crime involving moral turpitude requires an adjudicator to review 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. at 193). 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. . . .” *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

Several U.S. Courts have distinguished the realistic probability test articulated in *Duneas-Alvarez* in cases where “a state statute explicitly defines a crime more broadly than the generic definition” and “no ‘legal imagination,’ is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime.” *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007)(citing *Duenas-Alvarez*, 127 S.Ct. at 822). In *United States v.*

Vidal, the Ninth Circuit Court of Appeals determined that a “realistic probability” that the theft statute under which the alien was convicted would be applied to conduct that falls outside the generic definition of theft could be found in the plain text of the statute. 504 F.3d 1072, 1082 (9th Cir. 2007). The Ninth Circuit noted that “when ‘[t]he state statute’s greater breadth is evident from its text,’ a defendant may rely on the statutory language to establish the statute as overly inclusive.” *Id.* (citing to *United States v. Grisel*, 488 F.3d at 850.).

At the time of the applicant’s conviction, New York Penal Law § 140.25 provided the following:

A person is guilty of burglary in the second degree when he knowingly enters or remains unlawfully in a building with intent to commit a crime therein, and when:

1. In effecting entry or while in the building or in immediate flight therefrom, he or another participant in the crime:

(a) Is armed with explosives or a deadly weapon; or

(b) Causes physical injury to any person who is not a participant in the crime; or

(c) Uses or threatens the immediate use of a dangerous instrument; or

(d) Displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm; or

2. The building is a dwelling.

Burglary in the second degree is a class C felony.

New York Penal Law § 140.25 has a broad reach, including knowingly entering a dwelling to commit any crime. New York Penal Law § 140.25(2). Thus, New York Penal Law § 140.25 reaches knowingly entering a dwelling to commit crimes that do and do not involve moral turpitude. Burglary without an intent to commit a crime involving moral turpitude has been found to not be a crime involving moral turpitude. *Matter of M*, 2 I&N Dec. 721 (BIA 1946). Thus, it appears that New York Penal Law § 140.25 can be applied to conduct that involves moral turpitude and conduct that does not.

As the full range of conduct proscribed by the statute in question does not constitute a crime involving moral turpitude, we will apply the modified categorical approach and engage in a second-stage inquiry by reviewing the record of conviction to determine if the conviction was based on conduct involving moral turpitude. *Silva-Trevino* 24 I&N Dec. at 698-699, 703-704, 708. The applicant has submitted minimal documentation regarding his conviction, and the AAO is limited to assessing a brief document that only lists the crime, the date of conviction, and the sentence, without describing the underlying conduct for which he was convicted. Thus, the applicant has not presented sufficient evidence to show whether he committed burglary with an intent to commit a crime involving moral turpitude. Thus, it is not established that he was erroneously deemed inadmissible under section

212(a)(2)(A)(i)(I) of the Act. Further, the applicant does not contest his inadmissibility on appeal. Accordingly, he requires a waiver under section 212(h) of the Act.

Section 212(h) of the Act provides, in pertinent part, that:

The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana

(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 . . . ; and

(2) the Attorney General [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

In examining whether the applicant is eligible for a waiver, the AAO will assess whether he meets the requirements of section 212(h)(1)(A) of the Act. The applicant's conviction for which he is inadmissible occurred on April 8, 1991, and the conduct for which he was convicted took place prior to that date. As this conduct took place over 15 years ago, he meets the requirement of section 212(h)(1)(A)(i) of the Act.

In analyzing whether admitting the applicant would be contrary to the national welfare, safety, or security of the United States, the AAO finds that the applicant has posed a safety risk to the public in the past. Specifically, the record shows that he was found to be a habitual traffic offender in 1998, with multiple violations including speeding and driving with a canceled, revoked, or suspended license.

State of Florida Transcript of Driver Record, dated December 17, 1999. The applicant was arrested on September 6, 2002 for driving a motorcycle without a license endorsement at a rate of speed of 105 miles per hour in a 65 miles per hour zone. He was further cited for driving with an expired license on July 7, 2005.

Counsel contests the director's raising the applicant's driving history in the context of section 212(h)(1)(A) of the Act. However, the AAO finds an examination of the applicant's regard for the safety of others to be relevant, and his prior moving violations raise concern. Yet, his last recorded offense in 2005 consisted of driving without a license which is an administrative violation and does not, by itself, constitute a risk to others. Documentation relating to the previous offense of driving a motorcycle without a license shows that he was traveling at a rate of speed of 105 miles per hour. This action reflects disregard for public safety. However, the record does not show that the applicant has committed such an offense since September 2002, in over eight years. While the applicant's driving history is relevant and a matter of concern, we find that it does not show that admitting the applicant would be contrary to the national welfare, safety, or security of the United States. Accordingly, the applicant has shown that he meets the requirement of section 212(h)(1)(A)(ii) of the Act.

The applicant has shown by a preponderance of the evidence that he has been rehabilitated. Section 212(h)(1)(A)(iii) of the Act. As discussed above, there is no evidence that he has engaged in criminal activity since his conviction in 1991. Counsel correctly notes that the applicant's arrest for burglary in 1994 did not result in a conviction and does not serve as evidence that the applicant engaged in criminal conduct. Also discussed above, the applicant's traffic violations raise concern regarding his conduct and respect for the laws of the United States, but it does not demonstrate a lack of rehabilitation for unrelated prior criminal conduct. Further, the record contains significant evidence that the applicant has conducted himself well in many respects, including engaging in employment with the same employer since 1998, paying taxes, and caring for and supporting his daughter and stepchildren. The record does not reflect that the applicant has a propensity to engage in further criminal activity. Accordingly, the applicant has shown that he meets the requirement of section 212(h)(1)(A)(iii) of the Act.

Based on the foregoing, the applicant has shown that he is eligible for consideration for a waiver under section 212(h)(1)(A) of the Act.

In determining whether the applicant warrants a favorable exercise of discretion under section 212(h) of the Act, the Secretary must weigh positive and negative factors in the present case.

The negative factors in this case consist of the following:

The applicant was convicted of burglary in 1991. The applicant has committed many traffic violations, some of which show a disregard for the safety of others. The applicant remained in the United States without a legal immigration status for approximately 30 years.

The positive factors in this case include the following:

The applicant has family ties to the United States, including his U.S. citizen daughter and stepchildren; the applicant's U.S. citizen daughter would experience significant hardship should the applicant depart the United States; the applicant has not been convicted of a crime in approximately 20 years; the applicant engages in consistent, long-term employment and pays taxes; the applicant provides emotional and economic support for his U.S. citizen children; numerous community members laud the applicant's good moral character, honesty, and dedication as a parent.

The applicant's criminal act and poor driving record cannot be condoned. His lengthy stay in the United States without a legal status shows a lack of regard for the laws of the United States. However, the significant positive factors in this case outweigh the negative factors.

In proceedings for an 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. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met his burden that he merits approval of his application.

ORDER: The appeal is sustained.