

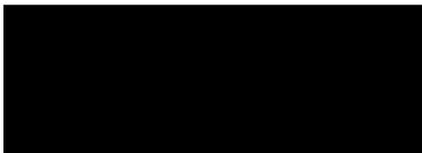
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



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



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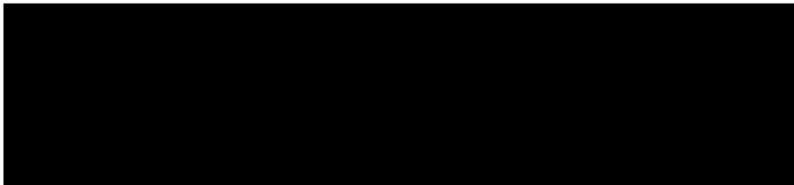
Date: Office: SAN FRANCISCO

JUL 25 2011

IN RE: Applicant: [REDACTED]

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.

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, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the field office director, San Francisco, California, and is now before the Administrative Appeals Office (AAO) on appeal. The matter will be remanded for further proceedings consistent with this decision.

The applicant is a native and citizen of Canada who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of 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 wife.

In a decision dated October 21, 2008, the director found that the applicant failed to establish that denial of the present application would result in extreme hardship to a qualifying relative.

On appeal, counsel for the applicant asserts that the applicant is not inadmissible, as he was not convicted of a crime involving moral turpitude. Counsel further asserts that the applicant's wife will suffer extreme hardship if the applicant is prohibited from residing in the United States.

The record contains, but is not limited to: a brief from counsel, statements from the applicant and others in support of the waiver application; and documentation in connection with the applicant's criminal conviction. 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.)

In *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a 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)).¹ A realistic probability exists where, at the time of the proceeding, an “actual (as

¹ The Attorney General also indicates that an “immigration judge [may be] able to determine at the first stage that a prior conviction categorically was *not* a crime involving moral turpitude—i.e., if none of the circumstances in which there is a realistic probability of conviction involves moral turpitude.” *Id.* at 698, n. 2. However, it is unclear how such a conclusion could be reached where the burden of proof is on the applicant. Must the applicant demonstrate that there is not a realistic probability by showing that the statute has NEVER been applied to circumstances involving moral turpitude in a prior case, including his or her own case, or is it sufficient to show that morally turpitudinous conduct is not a statutory element of the crime? We note that in [REDACTED], the essential factor to render the crime at issue (sexual contact with a minor) a crime involving moral turpitude, was knowledge of the age of the victim, but that this was not an element of the crime (and mistake-of-age was not an affirmative defense). *Id.* at 707-708. Nevertheless, the Attorney General required proof that the criminal statute had been applied to conduct not involving moral turpitude in a prior case (a case in which an individual had been convicted of the offense without knowledge of the age of the victim) in order to find that the crime was not categorically a crime involving moral turpitude under the realistic probability test. *Id.* at 708. Thus, the omission of the relevant factor as an essential element within the statutory definition of the crime led the Attorney General to view the crime not as one for which there was no realistic probability of moral turpitude, but rather as one that could be committed, at least hypothetically, with *or* without moral turpitude. Thus, the mere omission of the essential factor to a determination of moral turpitude as an element required for conviction does not preclude a finding that the offense is a crime involving moral turpitude.

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 [REDACTED]. 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.

This case arises in the Ninth Circuit. Prior to *Silva-Trevino*, the Ninth Circuit adopted the "realistic probability" approach as articulated by the U.S. Supreme Court in *Duenas-Alvarez*. See *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 1004-1007 (9th Cir. 2008). The Ninth Circuit Court of Appeals has reserved judgment as to whether it will follow the ruling of the Attorney General in *Silva-Trevino* that adjudicators may look beyond the record of conviction as part of the modified categorical inquiry. See *Marmolejo-Campos v. Holder*, 558 F.3d 903, 915 (9th Cir. 2009). Therefore, we will consider evidence beyond the record of conviction as necessary.

On December 5, 1997, the applicant pled guilty to one count of Misuse of a Passport in violation of 18 U.S.C. § 1544. He faced a maximum sentence of 10 years of incarceration, yet he was sentenced to three years of probation and a \$250 fine. At the time of the applicant's conviction, 18 U.S.C. § 1544 stated:

Whoever willfully and knowingly uses, or attempts to use, any passport issued or designed for the use of another; or

Whoever willfully and knowingly uses or attempts to use any passport in violation of the conditions or restrictions therein contained, or of the rules prescribed pursuant to the laws regulating the issuance of passports; or

Whoever willfully and knowingly furnishes, disposes of, or delivers a passport to any person, for use by another than the person for whose use it was originally issued and designed—

Shall be fined under this title, imprisoned not more than 25 years (if the offense was committed to facilitate an act of international terrorism (as defined in section 2331 of this title)), 20 years (if the offense was committed to facilitate a drug trafficking crime (as defined in section 929 (a) of this title)), 10 years (in the case of the first or second such offense, if the offense was not committed to facilitate such an act of international terrorism or a drug trafficking crime), or 15 years (in the case of any other offense), or both.

The AAO is not aware of any Federal court or administrative decisions that address whether a conviction under 18 U.S.C. § 1544 constitutes a conviction for a crime involving moral turpitude. The applicant must demonstrate that there is a realistic probability, and not just a hypothetical possibility, that the statute would be applied to conduct that does not involve moral turpitude.

Counsel has cited to various Ninth Circuit decisions to demonstrate that the applicant's conviction is not a crime involving moral turpitude, but his arguments are based on the categorical and modified categorical inquiries as they existed prior to the issuance of *Silva-Trevino* and the Ninth Circuit's embrace of the "realistic probability" standard. We do find the Ninth Circuit's decision in *Blanco v. Mukasey*, 518 F.3d 714 (9th Cir. 2008), instructive, but because of changes to the categorical inquiry, further analysis is required in this case.

In *Blanco* the Ninth Circuit analyzed whether a conviction under California Penal Code § 148.9(a) constitutes a crime involving moral turpitude. 518 F.3d at 718. California Penal Code § 148.9(a) states:

Any person who falsely represents or identifies himself or herself as another person or as a fictitious person to any peace officer ... upon a lawful detention or arrest of the person, either to evade the process of the court, or to evade the proper identification of the person by the investigating officer is guilty of a misdemeanor.

The Ninth Circuit held that "[b]ecause intent to defraud is not a statutory element of the offense, we must determine whether intent to defraud is part of the crime's 'essential nature.'" 518 F.3d at 719. The Ninth Circuit held that "intent to defraud is implicit in the nature of the crime when the individual makes false statements in order to procure something of value, either monetary or non-monetary," yet "[w]hen the only 'benefit' the individual obtains is to impede the enforcement of the law, the crime does not involve moral turpitude." *Id.* The Ninth Circuit added that, "[a]lthough giving a false name or date of birth to a police officer clearly 'violates a duty owed to society to obey the law and not to impede the investigation of crimes,' this alone does not make the crime one that involves moral turpitude, because '[i]f this were the sole benchmark for a crime involving moral turpitude, every crime would involve moral turpitude.'" *Id.* at 720 (citing *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1070-71 (9th Cir.2007)). The Ninth Circuit ultimately held that, "because

the crime of false identification to a peace officer does not require fraudulent intent under California law, it is not categorically a crime involving moral turpitude.” *Id.*

We note that the court in *Blanco* did not apply the “realistic probability” test, but rather inquired as to whether “the generic elements of the crime [show] that it involves [morally turpitudinous] conduct. . . .” *Id.* at 718. Nevertheless, we accept the Ninth Circuit’s rule that false conduct not involving the intent to defraud, defined as seeking something of value, even if it impedes the enforcement of the law, is not considered morally turpitudinous, at least in the Ninth Circuit. *But cf. Matter of Flores*, 17 I&N Dec. 225, 230 (BIA 1980) (the uttering and selling false or counterfeit paper related to the registry of aliens found to be a crime involving moral turpitude, even though intent to defraud was not an explicit statutory element); *Omagah v. Ashcroft*, 288 F.3d 254, 262 (5th Cir. 2002) (finding that crimes that do not involve fraud but that include “dishonesty or lying as an essential element” also tend to involve moral turpitude); *Itani v. Ashcroft*, 298 F.3d 1213, 1216 (11th Cir. 2002) (“Generally a crime involving dishonesty or false statement is considered to be one involving moral turpitude.”).

18 U.S.C. § 1544 applies to the misuse of a passport, and misuse is defined either as the use of another’s passport or use contrary to the “conditions or restrictions therein contained, or of the rules prescribed pursuant to the laws regulating the issuance of passports.” While intent to defraud is not an element of the crime, or implicit in the nature of crime as statutorily defined, neither does the language of the statute preclude the possibility that the applicant misused a passport with such an intent. As in *Silva-Trevino*, the relevant factor to the moral turpitude question is not a statutory element of the crime, and it is thus possible for the statute to be violated by a misuse involving intent to defraud. *See* 24 I&N Dec. at 707-708. Therefore, it is the applicant’s burden to show that there is a “realistic probability” that the statute has been applied to conduct not involving moral turpitude in a prior case. The applicant has not presented any evidence of such a prior published case, but we will inquire into the applicant’s own case to see if the statute was here applied to conduct not involving moral turpitude.

A plea agreement executed by the applicant on December 5, 1997 states the stipulated factual basis for his plea as follows:

It is stipulated between the parties that on or about February 15, 1990, in the State and Northern District of California, the [applicant], while a fugitive in Indictment No. [REDACTED], used a United States passport in the name of [REDACTED] when in fact his true name was and is [REDACTED]

While the stipulation notes that the applicant was, at the time he used the passport, a fugitive in an indictment, it does not specify the reason for which he used the passport, such as to elude law enforcement or to commit fraud. The stipulation shows that the applicant was convicted pursuant to the first clause of 18 U.S.C. § 1544, but fails to indicate the reason he used a U.S passport. Nevertheless, it is supportive of the applicant’s testimony, as provided in a declaration dated May 28, 2008:

On or about February 15, 1990 I checked into a motel in Arcata, California with a passport in the name of [REDACTED]. I do not remember the name of the motel. After I used the passport one time for identification purposes at the motel, I never used it again. I put it in a drawer and it remained there until the U.S. marshals found it at the time of my arrest in 1997.

We note that, as stated in *Silva-Trevino*, “where a criminal statute does not require proof of an element or fact that categorically evidences moral turpitude,” proving that a conviction under the statute either does or does not involve moral turpitude can present evidentiary challenges. 24 I&N Dec. at 703, n. 4. For that reason, the Attorney General in [REDACTED] remanded that case for further inquiry, noting that the burden of proof was on *Silva-Trevino*:

The inquiry on remand need not be administratively burdensome. In a case involving sexual abuse, a simple inquiry regarding the alien's knowledge of the victim's age might conclusively resolve the moral turpitude question. If, for example, probative evidence, such as a birth certificate or an admission by the alien, establishes that the victim was a young child, this fact would prove that the alien's sexual acts were directed at a person he knew, or reasonably should have known, was a child and thus that the alien's conviction was for a crime involving moral turpitude. The same would be true if the alien and the victim had a relationship (familial or otherwise) from which it could be shown that the alien knew or should have known the victim's actual age.

Id. at 709. It may be that the applicant's testimony, as provided in the declaration discussed above, is a credible account of the conduct underlying his conviction, in which case his misuse of a passport was to conceal his whereabouts from law enforcement. If so, then there is a “realistic probability” that 18 U.S.C. § 1544 applies to conduct not involving moral turpitude, and the modified categorical inquiry demonstrates that the applicant's conviction was not based on conduct involving moral turpitude. Therefore, we remand this case to the director for further inquiry to determine whether the applicant's conviction for misuse of a passport involved intent to defraud or merely intent to elude law enforcement.

We also note that the applicant was charged with, but not convicted of, criminal offenses related to drug trafficking. A conviction is not required for a finding of inadmissibility under section 212(a)(2)(C) of the Act, but rather only a “reason to believe” that an alien “has been an illicit trafficker in any controlled substance” or “has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking” of a controlled substance. The director did not find the applicant inadmissible under section 212(a)(2)(C). Therefore, as the applicant has not been provided with an opportunity to address possible inadmissibility under section 212(a)(2)(C) on appeal, and no waiver exists for such inadmissibility, we will not make a *de novo* finding of admissibility under section 212(a)(2)(C). Nevertheless, as part of further proceedings concerning the applicant's inadmissibility, the director may consider whether there is sufficient evidence to support a finding of inadmissibility under section 212(a)(2)(C) of the Act.

As stated above, the burden in this matter is on the applicant. The director will provide the applicant ample opportunity to meet his burden of demonstrating admissibility on remand.

ORDER: The appeal is remanded to the director for further proceedings consistent with this decision.