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



U.S. Citizenship  
and Immigration  
Services

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FILE:



Office: PORTLAND, OR

Date:

MAR 08 2011

IN RE:



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 District Director, Portland, Oregon 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 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 applicant is the spouse of a lawful permanent resident and the father of three U.S. citizens. He 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.

The District Director found that the applicant had failed to establish that the bar to his admission would impose extreme hardship on a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *District Director's decision*, dated July 22, 2008.

On appeal, the applicant asserts that his spouse and children would suffer extreme hardship if his waiver application is denied. *Form I-290B, Notice of Appeal or Motion*, dated August 15, 2008.

In support of the application, the record contains, but is not limited to, statements from the applicant, his spouse, and his oldest daughter; employment letters for the applicant; an earnings statement for the applicant, as well as W-2 forms and 2006 federal and state tax returns for the applicant and his spouse; a rental agreement; and letters of support from the manager of the applicant's apartment building, his employer and coworkers, friends, the vicar at his church, and a community services agency; letters establishing that the applicant's children attend school; and records relating to the applicant's criminal and driving history. The entire record was reviewed and all relevant evidence considered in arriving at a decision on the appeal.

Section 212(a)(2)(A) of the Act states, in pertinent part:

(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 (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 applicant has submitted court and driving records that reflect he was convicted of a Theft Violation under Oregon Revised Statutes (ORS) 161.565(2) on August 27, 1992; Driving with Suspended or Revoked License under ORS 811.175(1) on August 9, 1993; Driving Under Influence under ORS 813.010 on October 20, 1993; two counts of Theft in the Second Degree under ORS 164.045 on August 5, 1994; Driving Under Influence under ORS 813.010 on October 20, 1994; Attempt to Commit a Class Felony under ORS 161.405(2)(d) and Driving Uninsured under ORS 806.010 on October 21, 1994; Violation of Basic Rule (Speeding) on June 3, 1997 under ORS 811.100; Driving Under Influence under ORS 813.010 on July 9, 1999; and Unlawful Use or Failure to Use Lights under ORS 811.520 and Driving Uninsured under ORS 806.010 on January 16, 2007.<sup>1</sup>

In the present matter, the applicant has a number of convictions for driving under the influence, speeding and driving without insurance, none of which are crimes involving moral turpitude. The applicant was also convicted of a theft violation on August 27, 1992, which is not a conviction for immigration purposes. *In Re Eslamizar*, 23 I&N Dec. 685 (BIA 2004). The applicant, however, also has two convictions for theft, an offense that the Board of Immigration Appeals (BIA) has found to be a crime involving moral turpitude if there is the intent to permanently deprive an owner of his or her property. *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973).

At the time of the applicant's conviction, ORS 164.045 provided, in pertinent part:

(1) A person commits the crime of theft in the second degree if, by other than extortion, the person:

(a) Commits theft as defined in ORS 164.015; and

(b) The total value of the property in a single or aggregate transaction is \$50 or more but is under \$200 in a case of theft by receiving and under \$500 in any other case.

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<sup>1</sup> The AAO notes that the record does not contain dispositions for two additional arrests for Theft in the Second Degree that the applicant's FBI Identification Record indicates took place on May 13, 1994 and August 5, 1994. However, a review of the court dockets relating to the applicant's August 9, 1994 theft convictions finds that these dates reflect events in Clackamas County District Court proceedings, not additional arrests.

The crime of theft was defined by ORS 164.015 as follows:

A person commits theft when, with intent to deprive another of property or to appropriate property to the person or to a third person, the person:

- (1) Takes, appropriates, obtains or withholds such property from an owner thereof; or
- (2) Commits theft of property lost, mislaid or delivered by mistake as provided in ORS 164.065; or
- (3) Commits theft by extortion as provided in ORS 164.075; or
- (4) Commits theft by deception as provided in ORS 164.085; or
- (5) Commits theft by receiving as provided in ORS 164.095.

The Ninth Circuit Court of Appeals, the jurisdiction in which this case arises, has adopted the “realistic probability” approach, as articulated by the U.S. Supreme Court in *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183 (2007), to determine whether or not the elements of a statute categorically render the offense a crime involving moral turpitude. See *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 1004-1007 (9th Cir. 2008)(overruled by *Marmolejo-Campos v. Holder*, 558 F.3d 903 (9<sup>th</sup> Cir. 2009) on other grounds).<sup>2</sup> To determine if a crime involves moral turpitude, the Ninth Circuit first applies the categorical approach, requiring the analysis of 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.

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)).

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<sup>2</sup> The AAO notes that the Ninth Circuit Court of Appeals appears to have refused to accept the ruling of the Attorney General in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), allowing adjudicators to look beyond the record of conviction to reach a determination as to whether an individual has been convicted of a crime involving moral turpitude. We base this conclusion on *Castillo-Cruz v. Holder*, 581 F.3d 1154 (9th Cir. 2009), in which the Ninth Circuit addressed whether receipt of stolen property under Cal. Penal Code § 496(a) constitutes a categorical crime involving moral turpitude by applying the “realistic probability” test.

The AAO does not, however, find it necessary to conduct a realistic probability analysis of ORS 164.045 as we find that the BIA has previously addressed the nature of the applicant's theft offense under ORS 164.045. In *In Re Eslamizar*, 23 I&N Dec. 684 (BIA 2004), the BIA noted that the respondent's third degree theft offense under ORS 164.043 was a crime involving moral turpitude. While the applicant in the present matter has been convicted of second degree theft under ORS 164.045, the AAO observes that the theft offenses described in ORS 164.043 and 164.045, both of which rely on the definition of theft found in ORS 164.015, differ only as to the value of the property taken. Based on the virtually identical language of the two statutes, the AAO finds that the BIA's identification of ORS 164.043 as a crime of moral turpitude also serves to establish ORS 164.045 as a crime involving moral turpitude. Accordingly, the applicant has been convicted of two crimes involving moral turpitude and is inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Act.

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

(h) The Attorney General [now Secretary of Homeland Security] may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) . . . if-

(1)(A) [I]t is established to the satisfaction of the Attorney General that-

- (i) [T]he 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 . . . .

The applicant's theft offenses were committed on November 6, 1992 and April 25, 1993. He is, therefore, eligible for waiver consideration under section 212(h)(1)(A) of the Act as the offenses on which his convictions are based occurred more than 15 years prior to the date of his application for adjustment of status.

The AAO notes that an application for admission or adjustment of status is considered a "continuing" application and "admissibility is determined on the basis of the facts and the law at the time the application is finally considered." *Matter of Alarcon*, 20 I.&N. Dec. 557, 562 (BIA 1992) (citations omitted). The issue the BIA addressed in *Matter of Alarcon* was whether the respondent, who had been found inadmissible for a crimes involving moral turpitude and had not disputed this finding on appeal, was eligible for a waiver as a consequence of amendments to the waiver provisions of section 212(h) of the Act enacted during the pendency of his appeal. *Id.* at 559-62. Based on the rationale that an application for adjustment of status is a continuing application and that "a final administrative decision does not exist until the Board renders its decision," the Board held that the waiver provisions in effect at the time of the Board's decision applied to the respondent. *Id.*

at 562-63. As the issue disputed in *Matter of Alarcon* was the availability of a waiver, and not the respondent's inadmissibility in the first instance, we conclude that the principles articulated by the BIA are of equal application to adjustment and waiver applications, to the extent both address the issue of admissibility.

Thus, where the basis for denying an applicant's adjustment application is inadmissibility that can be waived under section 212(h) of the Act, and an appeal of the denial of the applicant's waiver application is pending before the AAO, we deem the adjustment and waiver applications to be continuing applications, and no final administrative decision regarding the applicant's admissibility exists until we have rendered our decision. Therefore, in the present case, as the applicant's offenses predates the AAO's consideration of his appeal by more than 15 years, we will consider the applicant's eligibility for a waiver under 212(h)(1)(A) of the Act.

In order to be eligible for a section 212(h)(1)(A) waiver, the applicant must demonstrate that his admission to the United States would not be contrary to its national welfare, safety, or security and that he is rehabilitated. There is no indication in the record that the applicant has ever been involved in conduct or activities that would be contrary to the safety or security of the United States. There is also no reason to conclude that his admission would negatively affect the national welfare. The question of whether he has been rehabilitated is not as easily answered.

As previously discussed, the applicant has submitted court records showing that he has been convicted of a series of driving offenses while in the United States, including driving under the influence, driving without insurance, and driving with a suspended/revoked license. While we note that the last time the applicant was found to have driven while intoxicated was on December 21, 1997, we also observe that the applicant has recent convictions for driving-related offenses – Unlawful Use or Failure to Use Lights under ORS 811.520 and Driving Uninsured under ORS 806.010 – as recently as January 16, 2007 and had his license suspended from July 13, 2007 until March 6, 2008 as a result of what appears to be his failure to comply with Oregon requirements for uninsured drivers.

The record contains statements from the applicant in which he asks for forgiveness for his past mistakes. He acknowledges that he had problems in the past, but that he was young and did not then have children. He states that he is now responsible for his family and has established a good life for them in the United States. He claims that he is employed on a full-time basis and financially provides for his family, assertions that are supported by the record. The record also contains letters from the applicant's spouse and his oldest daughter,<sup>3</sup> which state that the applicant takes care of their family, is a loving husband and father, and pays the family's bills. To provide evidence of his rehabilitation, the applicant submits statements from [REDACTED], the manager at his place of employment who asserts that the applicant is a "top notch" employee and is very trustworthy and

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<sup>3</sup> The AAO notes that the record includes a letter from an individual who also indicates that she is the daughter of the applicant and that she has an older brother. The record, however, does not establish that the applicant has any children other than the three daughters for whom birth certificates have been submitted. As a result, the AAO has not considered the referenced letter.

loyal; [REDACTED] the manager of the building where the applicant and his family reside, who indicates that he is a wonderful tenant and always pays his rent on time; [REDACTED] the applicant's doctor, who reports that the applicant is diligent in caring for his family and seeing to their medical needs; [REDACTED] who notes that the applicant provides support for his family and is a good husband and father; [REDACTED] vicar of the church attended by the applicant, who indicates that the applicant has been attending church and has been reliable and a good friend; and numerous coworkers, all of whom testify to the applicant's character, his goodwill, his consideration of others and his work ethic.

Although the AAO finds the applicant's 2007 conviction for driving without insurance to challenge his claim that his problems are behind him, we also acknowledge that prior to his 2007 arrest, the applicant had not been charged with any driving-related offense since 1997. We further acknowledge that the record indicates that he has not been arrested for or convicted of any criminal offense since his arrest for theft in 1993, nearly 18 years ago. Taking into account the many statements of support, which attest to the applicant's exemplary behavior as an employee, a coworker, a husband and father, and a friend, the AAO finds the record to establish that the applicant has been rehabilitated, thereby satisfying the waiver requirements of section 212(h)(1)(A) of the Act. We will, therefore, consider whether the applicant merits a favorable exercise of discretion under section 212(h)(2) of the Act.

In the present case, the mitigating factors that support the granting of the waiver application include the applicant's lawful permanent resident spouse and his U.S. citizen children; the general emotional and financial hardship that the applicant's family would experience as a result of his removal, as evidenced by their individual statements;<sup>4</sup> the absence of an arrest or conviction under the Oregon Criminal Code since the applicant's 1993 arrest for theft; and the esteem and affection in which the applicant is held by his family, friends, coworkers and employer. The unfavorable factors are the applicant's convictions for which he seeks a waiver, his extended periods of unlawful residence and employment in the United States; and his driving-related convictions, including his 2007 convictions for unlawful use/failure to use lights and driving uninsured.

We do not condone the crimes or immigration violations committed by the applicant. Nevertheless, we find that, taken together, the favorable factors in the present case outweigh the adverse factors such that a favorable exercise of discretion is warranted.

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<sup>4</sup> On appeal, the applicant asserts that his oldest daughter is suffering from depression and is under medical care. He also contends that his spouse is suffering mental and emotional hardship. Although the applicant indicates that he will submit medical statements in support of these claims, no such documentation is found in the record. As a result, the AAO will not consider this information in determining whether the applicant is eligible for the favorable exercise of discretion in this proceeding. Going on record without supporting documentation is not sufficient to meet the applicant's burden of proof in this proceeding. See *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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. Here the applicant has met that burden. Accordingly, the appeal will be sustained.

**ORDER:** The appeal is sustained.