

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



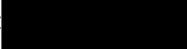
U.S. Citizenship  
and Immigration  
Services



H2

Date: **DEC 11 2012**

Office: MONTERREY, MEXICO

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:

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.

Thank you,

A handwritten signature in cursive script that reads "Michael Shumway".

*f.* Ron Rosenberg  
Acting Chief, Administrative Appeals Office

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

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 committed a crime involving moral turpitude. The applicant's spouse is a lawful permanent resident and his daughter is a U.S. citizen. He seeks a waiver of inadmissibility in order to reside in the United States.

The field office director found that the applicant had failed to establish extreme hardship to a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Field Office Director's Decision*, dated September 27, 2010.

On appeal, the applicant's daughter states that she sends money to the applicant and she details the circumstances behind his conviction. *Form I-290B Attachment*, received October 20, 2010.

The record includes, but is not limited to, the applicant's daughter's statements, medical records, immigration records and criminal records. The entire record was reviewed and considered in arriving at a decision on the appeal.

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

(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-

....

(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).

In *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 field office director found that the applicant was arrested in April 1977 for assault and that the applicant did not respond to a request for the court disposition of the case.

The record reflects that the applicant was arrested in New Mexico on April 17, 1977 for assault on a peace officer with intent to commit a violent felony and also for assisting in an assault. The officer who completed the Form I-213, Record of Deportable Alien, dated May 25, 1977 states that the applicant assaulted a peace officer near Vaughn, NM, he plead guilty to a misdemeanor charge and he was sentenced to six months, which was commuted in order for him to be turned over to Border Patrol. He also states that the applicant was convicted of assault. The AAO notes that under former New Mexico Statutes § 40A-22-22 assault with intent to commit a violent felony upon a peace officer is a second degree felony, which has a minimum sentence of one year per former New Mexico Statutes § 40A-1-6(A). However, assault under former New Mexico Statutes § 40A-3-1 is a petty misdemeanor, which carries a maximum sentence of six months per former New Mexico Statutes §40A-1-6(C). The record indicates that the officer who prepared the Form I-213 had access to the applicant’s criminal records in order to make his findings. Based on the record, the AAO finds that the applicant was convicted of assault under former New Mexico Statutes § 40A-3-1.

In 1977, New Mexico Statutes § 40A-3-1 provided:

Assault consists of either:

- A. an attempt to commit a battery upon the person of another;
- B. any unlawful act, threat or menacing conduct which causes another person to reasonably believe that he is in danger of receiving an immediate battery; or
- C. the use of insulting language toward another impugning his honor, delicacy or reputation.

Whoever commits assault is guilty of a petty misdemeanor.

In 1977, New Mexico Statutes § 40A-3-4 provided:

Battery is the unlawful, intentional touching or application of force to the person of another, when done in a rude, insolent or angry manner.

The AAO notes that simple assault/battery is not a crime involving moral turpitude. *Matter of Short*, 21 I&N Dec. 136 (BIA 1989). Notwithstanding the original charge and information in the record, the applicant was not convicted of assault with intent to commit a violent felony upon a peace officer and the AAO cannot re-litigate the offense regardless of other allegations in the record. Even in the event that we were to determine that the applicant's crime is a crime involving moral turpitude, the petty offense exception in section 212(a)(2)(A)(ii)(II) of the Act would apply as the maximum penalty possible for the crime of which he was convicted did not exceed imprisonment for one year and he was not sentenced to a term of imprisonment in excess of 6 months. As such, the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act, or if he is the petty offense exception would apply, and the appeal will be dismissed as the waiver application is unnecessary.

**ORDER:** The appeal is dismissed as the waiver application is unnecessary. The matter is returned to the field office director for further action consistent with this decision.