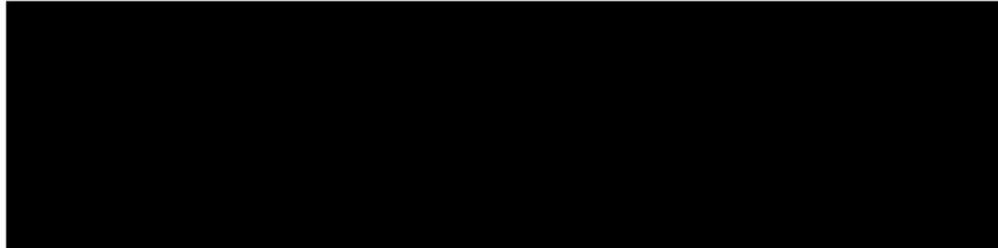


U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Ave. NW MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



H2

DATE: DEC 21 2012

OFFICE: SANTO DOMINGO, DR

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 black ink, appearing to be "Ron Rosenberg", with a long horizontal flourish extending to the right.

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Santo Domingo, Dominican Republic 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 the Dominican Republic 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 seeks a waiver of inadmissibility in order to reside in the United States with his lawful permanent resident mother.

The Field Office Director concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility accordingly. *See Decision of the Field Office Director*, dated January 26, 2012.

On appeal the applicant asserts that the crime at issue is one for which the record shows he was never tried or convicted because he never committed it, a fact corroborated by the accusers themselves who retracted their false allegations and admitted to bringing them against him in order to protect the actual perpetrator, a close family member of the victim. *See Form I-290B, Notice of Appeal or Motion*, received February 2, 2012.

The record contains, but is not limited to: Form I-290B and the applicant's statement thereon; various immigration applications and petitions; hardship letters from the applicant's mother and minor son; a letter and a sworn statement from the applicant; a court document confirming that no judicial process was brought against the applicant for the crime at issue; a prosecutor's office document confirming the same; and a signed sworn statement prepared by the court's official interpreter in which the accusers admit to making false allegations against the applicant and which they retract therein. The record also contains several Spanish-language documents which are not accompanied by full, certified English translations as required under 8 C.F.R. § 103.2(b)(3).¹ Because the required translations were not submitted for these documents, the AAO will not consider them in this proceeding. The entire record, with the exception of the Spanish-language documents, was reviewed and considered in rendering this decision on the appeal.

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 –

¹ 8 C.F.R. § 103.2(b)(3). Translations. Any document containing foreign language submitted to United States Citizenship and Immigration Services (USCIS) shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

- (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 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 record shows that the applicant was arrested on or about April 16, 1997 on suspicion of raping a 10-year-old child (referred to herein as “Erika”) based on allegations by her parents, a crime for which if convicted the sentence would be 10 to 20 years. The applicant was released from detention after five days with no official charges brought, no trial or other judicial process commenced, and no conviction, sentence or any form of punishment imposed. The record shows that the case was never prosecuted because within days of leveling the allegation, [REDACTED] parents retracted their allegations, admitting that they falsely accused the applicant because the actual perpetrator was a close family member. The record shows that the case was formally dismissed on May 2, 2001 following the tolling of the statute of limitations. The field office director found that, despite the fact that the applicant was not convicted of a crime, he admitted the essential elements of the offense for which he was charged. The field office director determined that the applicant’s offense constitutes a crime involving moral turpitude, and that he is inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The field office director referenced as evidence that the applicant made admissions to crimes involving moral turpitude: (1) an interrogation by a prosecutor in which the applicant allegedly said that [REDACTED] was his “girl for over a month,” (2) a statement on the Form I-601 that he “maintained a love relationship” with her; and (3) he had reached the age of majority and [REDACTED] was a minor, so therefore the applicant “admitted to essential elements of statutory rape.”

In order for a statement made by an applicant to serve as an admission to a crime (or the essential elements of crime) involving moral turpitude and basis for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act, three requirements must be met: (1) The applicant must be advised in a clear manner the definition and essential elements of the crime he is alleged to have committed

prior to his admission; (2) the applicant must clearly admit conduct constituting the essential elements of the crime in question and that he committed the offense (i.e., he must admit the legal conclusion that he is guilty of the crime); and (3) the applicant's admissions must be free and voluntary. See *Matter of K-*, 7 I&N Dec. 594, 598 (BIA 1957). See also *Matter of G--M-*, 7 I&N Dec. 40 (BIA 1955) and *Matter of K-*, 7 I&N Dec. 594 (BIA 1957). In *Matter of J-*, 2 I&N Dec. 285 (BIA 1945). In *Matter of K-*, the BIA stated that the rule concerning the furnishing of an adequate definition is not a specific statutory requirement but has evolved for the purpose of ensuring a fair hearing and to preclude a later claim of unwitting entrapment.

The applicant contests inadmissibility, stating that he had no sexual contact with [REDACTED] did not admit to any essential elements of the crime alleged, was never tried or convicted for the crime, and that her parents falsely accused him in order to protect the close family member who was the actual perpetrator, a scheme to which they admitted by retracting their false allegations and have additionally submitted a signed sworn statement included in the record.

The Criminal Code of the Dominican Republic, Article 331, states in pertinent part: Rape

-Is a violation of any act of sexual penetration, of whatever nature, committed on a person by violence, constraint, threat or surprise.

The violation is punishable by ten to fifteen years' imprisonment and a fine of one hundred thousand to two hundred thousand dollars.

However, the violation shall be punished with imprisonment from ten to twenty years and a fine of one hundred thousand to two hundred thousand dollars when it has been committed against a person particularly vulnerable because of their pregnancy status, disability or physical or mental disability.

It will also be punished with imprisonment from ten to twenty years and a fine of one hundred thousand to two hundred thousand dollars when committed against a child or teenager, is under threat of a weapon or by two or more authors or accomplices, is by a legitimate, natural or adoptive parent of the victim, or by a person who has authority over it, or by a person who has abused the authority conferred by his functions, all regardless of the provisions of Articles

Upon review, the probative record does not contain documentation concerning the "prosecutor interrogation" to which the field office director refers. And even if the applicant told a prosecutor under interrogation that [REDACTED] was his "girl for over a month," the record contains no explanation regarding the meaning of this statement or evidence that it constitutes an admission to any, let alone all, the essential elements of the crime for which he was accused or that the applicant was informed, in the detail required, of each particular element of the specified statutory offense. Likewise the statement at page 3 of the applicant's Form I-601, that he "maintained a love relationship" with [REDACTED] is not a clear admission of criminal conduct nor is it sufficient to demonstrate that the applicant was specifically informed concerning each essential element of the crime and/or that its inclusion on his waiver application constitutes an admission to a crime for

which he was accused many years earlier. The applicant explains on appeal that the notary “made a big mistake when his secretary wrote that I was in love with [REDACTED]...,” which seems to suggest a translation error. Whether the statement was accurately presented or not is immaterial as the words “maintained a love relationship” do not constitute a clear admission of any or all essential elements of rape, particularly as the applicant has consistently maintained that he has never engaged in sexual conduct with [REDACTED]. And certainly the mere fact that the applicant had reached the age of majority and [REDACTED] was a minor in April 1997 does not constitute an admission to an essential element of the crime of statutory rape. The AAO agrees that certain words chosen by the applicant, or attributed to him, in describing his relationship with [REDACTED] are troubling. Among these are a reference to her as his “girlfriend,” and that “far from having maintained sexual intercourse with that young person, our relation was based on conversations and kisses.” While naturally alarming, these statements do not establish that the applicant has admitted to a crime involving moral turpitude and neither these nor those referred to by the field office director meet the requirements of an admission for the purpose of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act as there is no probative evidence in the record that he was advised in a clear manner of the essential elements of the alleged crime; that he clearly admitted conduct constituting the essential elements of the crime; or that he committed the offense, i.e., the legal conclusion that he is guilty of the crime for the purpose of determining inadmissibility.

The AAO finds that in thoroughly reviewing the record as currently constituted, the applicant has established that he was never convicted of, nor has he admitted to having committed, nor has he admitted committing acts which constitute the essential elements of a crime involving moral turpitude which render him inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The AAO concludes that the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act. Accordingly, the field office director's findings concerning inadmissibility under section 212(a)(2)(A)(i)(I) of the Act will be withdrawn. The waiver application filed pursuant to section 212(h) of the Act will, therefore, be determined to be unnecessary as the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The applicant's file will be returned to the field office director to continue processing consistent with this decision.

ORDER: The appeal is dismissed as the underlying waiver application is unnecessary.