

(b)(6)

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

Date: **APR 05 2013**

Office: LOS ANGELES, CA

FILE: [REDACTED]

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.

Thank you,

A handwritten signature in black ink that reads "Michael Shumway".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Los Angeles, California, and is now before the Administrative Appeals Office (AAO) on appeal. The field office director's decision will be withdrawn and the matter remanded to the field office director for further action consistent with this decision.

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 crimes involving moral turpitude, and under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), for violating a law related to a controlled substance. The applicant's spouse and four children are U.S. citizens. 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 January 15, 2009.

On appeal, counsel states that the United States Citizenship and Immigration Services (USCIS) erred as a matter of law in denying the waiver application and it improperly found the applicant's crimes to be crimes involving moral turpitude. *Form I-290*, received February 17, 2008.

The record includes, but is not limited to, counsel's brief, statements from family members, information on American and Mexican sign language, and the applicant's criminal records. The entire record was reviewed and considered in arriving at a decision on the appeal.

Counsel asserts that the field office director erred in finding the applicant inadmissible under section 212(a)(2)(A)(i)(II) of the Act as the record is devoid of any conviction related to a controlled substance. The AAO agrees with counsel's assertion and finds that the applicant is not inadmissible under section 212(a)(2)(A)(i)(II) of the Act.

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

Criminal and related grounds. —

(A) Conviction of certain crimes. —

- (i) In general. — Except as provided in clause (ii), any 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, or
 - (II) a violation of (or conspiracy or attempt to violate)

any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), 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 applicant was convicted on June 29, 1977 under [REDACTED] of battery and he received a sentence of 60 days in jail, suspended, and 18 months of summary probation. Counsel asserts that this is not a crime involving moral turpitude. The AAO notes that generally simple assault or battery is not considered to involve moral turpitude for purposes of the immigration laws. *See Matter of Fualaau*, 21 I&N Dec. 475, 477 (BIA 1996); *Matter of Short*, 20 I&N Dec. 136, 139 (BIA 1989) and *Matter of B*, 5 I. & N. Dec. 538 (BIA 1953). [REDACTED] defines battery as, “...any willful and unlawful use of force or violence upon the person of another.” Upon review of the relevant statutory and case law, we conclude that the applicant’s conviction is for simple battery and does not constitute a crime involving moral turpitude.

The applicant was convicted on October 5, 1978 under [REDACTED] of three counts of burglary and he received a sentence of 90 days in jail and three years of probation. Counsel asserts that burglary is not a crime involving moral turpitude as there is no evidence of fraud. [REDACTED] stated at the time of the applicant’s convictions:

Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, as defined in Section 21 of the Harbors and Navigation Code, railroad car, trailer coach, as defined in Section 635 of the Vehicle Code, any house car, as defined in Section 362 of the Vehicle Code, inhabited camper, as defined in Section 243 of the Vehicle Code, vehicle as defined by the Vehicle Code, when the doors are locked, aircraft as defined by Section 21012 of the Public Utilities Code, or mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary. As used in this chapter, “inhabited” means currently being used for dwelling purposes, whether occupied or not.

The BIA has maintained that the determinative factor in assessing whether burglary involves moral turpitude is whether the crime intended to be committed at the time of entry or prior to the breaking out involves moral turpitude. *Matter of M-*, 2 I&N Dec. 721, 723 (BIA 1946). The BIA has held that burglary with intent to commit theft is a crime involving moral turpitude. *See Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982). In *Matter of Moore*, the BIA noted that since moral turpitude inheres in the intent, the crime of breaking and entering with intent to commit larceny involves moral turpitude. 13 I&N Dec. 711, 712 (BIA 1971). We acknowledge that the BIA has also determined that to constitute a crime involving moral turpitude, a theft offense must require the intent to permanently take another person’s property. *See Matter of Grazley*, 14 I&N Dec. 330 (BIA

1973) (“Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended.”). However, the Ninth Circuit Court of Appeals in *Castillo-Cruz v. Holder* determined that petty theft under Cal. Penal Code § 484(a) requires the specific intent to deprive the victim of his or her property permanently, and is therefore a crime categorically involving moral turpitude. 581 F.3d 1154, 1160 (9th Cir. 2009). The AAO notes that burglary under [REDACTED] involves the intent to commit grand or petit larceny or any felony. The AAO notes that this statute theoretically may be violated by conduct not involving moral turpitude (i.e. “any other felony” could be a felony which does not involve moral turpitude.) However, the applicant has not established that the burglary statute has been applied to conduct not involving moral turpitude in a prior case or in the applicant’s own criminal case. The AAO notes that the record does not contain all documents comprising the record of conviction, such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. Therefore, the AAO must find the applicant’s convictions for burglary under [REDACTED] to be crimes involving moral turpitude, and the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

Counsel asserts that if the applicant’s conviction for burglary under [REDACTED] is a crime involving moral turpitude, then the petty offense exception would apply as his sentence was 90 days in jail and the maximum sentence for his crime, which was a misdemeanor, is no longer than one year. The AAO notes that the petty offense exception applies to an applicant who has only committed one crime involving moral turpitude. As the applicant was convicted of three counts of burglary, he is not eligible for the petty offense exception under section 212(a)(2)(A)(ii) of the Act.

The applicant was convicted on August 13, 1978 under [REDACTED] of disorderly conduct and he received a sentence of 30 days in jail and 18 months of probation. The applicant was convicted on September 4, 1984 under [REDACTED] of disorderly conduct: prostitution and he received a sentence of 7 days in jail. The applicant was convicted on January 16, 1987 under [REDACTED] of disorderly conduct: solicit lewd act and he received a sentence of 30 days in jail, suspended, and 18 months of probation. The applicant was convicted on January 16, 1987 under [REDACTED] of disorderly conduct: lewd conduct and he received a sentence of 30 days in jail and 18 months of probation. Counsel asserts that disorderly conduct under [REDACTED] lacks the requisite evil nature to serve as a crime involving moral turpitude. The AAO find that the applicant’s convictions under [REDACTED] are crimes involving moral turpitude. *See Rohit v. Holder*, 670 F.3d 1085 (9th Cir. 2012). As the field office director did not mention the applicant’s convictions under [REDACTED] and the AAO has found the applicant to have committed several crimes involving moral turpitude, it will not address whether his convictions under [REDACTED] involve moral turpitude.

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 . . .

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 record reflects that the activity resulting in the applicant's convictions occurred more than 15 years ago. 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). As the activities for which the applicant is inadmissible occurred more than 15 years before the date of this adjudication, he meets the requirements to be considered under section 212(h)(1)(A)(i) of the Act.

The record does not reflect that admitting the applicant would be contrary to the national welfare, safety, or security of the United States per section 212(h)(1)(A)(i) of the Act. The applicant's spouse asserts that he is working at the Naval Station Center. The applicant's social worker states that he relies on his family for monetary support and they rely on him when he can work. There is no indication that the applicant has ever relied on the government for financial assistance. The record reflects that the applicant has not had a criminal conviction since 1987. There is no indication that the applicant is involved with terrorist-related activities or poses other security issues.

The applicant has shown by a preponderance of the evidence that he has been rehabilitated per section 212(h)(1)(A)(iii) of the Act. The record reflects that the applicant has not been convicted of a crime in over 25 years. In addition, he has been involved in assisting his family as detailed in statements in the record. 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 statutorily eligible for a waiver under section 212(h)(1)(A) of the Act.

The granting of the waiver is discretionary in nature. The favorable factors include the applicant's U.S. citizen spouse and four children, hardship to him and his family, and lack of a criminal record since the aforementioned convictions. In regard to hardship, the record reflects that the applicant's family members are deaf; they have been taught in American Sign Language (ASL), which differs from LSM, the Mexican counterpart; the applicant's spouse has been married to the applicant for 39 years; she and her children would experience emotional hardship without him; and the applicant would be isolated and lost in Mexico, according to his social worker.

The unfavorable factors include the applicant's criminal convictions, unauthorized period of stay and unauthorized employment. In addition to the crimes mentioned above, the applicant was convicted in relation to an August 3, 1976 arrest under [REDACTED] for fighting/noise/offensive words and he received a sentence of 30 days in jail, suspended, and one year of summary probation. The applicant was convicted in relation to a March 8, 1977 arrest under [REDACTED] for fighting/noise/offensive words and he received a sentence of 30 days in jail, suspended, and one year of summary probation. The applicant was convicted on March 14, 1980 under [REDACTED] for fighting/noise/offensive words and he received a sentence of 90 days in jail, suspended, and 36 months of probation.

Although the applicant's criminal history cannot be condoned, the AAO finds that the applicant has established that the favorable factors in his application outweigh the unfavorable factors. However, the waiver application will not be approved at this time due to possible inadmissibility under section 212(a)(6)(E).

The record includes information reflecting that the applicant may be inadmissible under section 212(a)(6)(E) of the Act, which relates to alien smuggling. The AAO remands this case to the field office director to make a determination as to whether the applicant is inadmissible under section 212(a)(6)(E) of the Act. If the field office director determines there is no inadmissibility for alien smuggling, the waiver application will be approved based on this decision. If the field office director determines that the applicant is inadmissible under section 212(a)(6)(E) of the Act and he is not eligible for a waiver under section 212(d)(11) of the Act, then a new decision shall be issued denying the Form I-601 on discretion, as no purpose would be served in adjudicating the waiver application where approval cannot remove inadmissibility as a the basis of ineligibility for adjustment of status.

ORDER: The field office director's decision is withdrawn and the matter remanded to the field office director for further action consistent with the present decision.