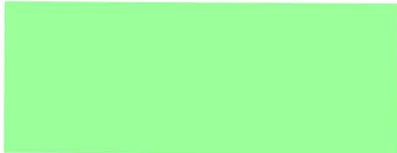


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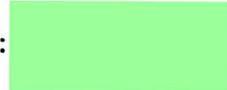


**U.S. Citizenship
and Immigration
Services**

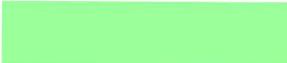


DATE: **FEB 25 2013** OFFICE: SAN BERNARDINO

FILE:

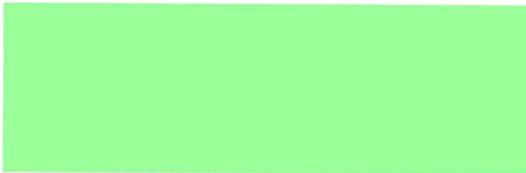


IN RE:



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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Thank you,

A handwritten signature in black ink, appearing to be "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, San Bernardino, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the applicant is not inadmissible and 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 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 with his U.S. citizen father.

The Field Office Director concluded that the record failed to establish the existence of extreme hardship for a qualifying relative, and denied the application accordingly. *See Decision of the Field Office Director*, dated April 18, 2011.

On appeal, counsel for the applicant asserts that the applicant's father would experience extreme hardship upon separation from the applicant due to financial, medical, and psychological reasons. Counsel further asserts that the applicant's father cannot relocate to Mexico for those same reasons in addition to his ties to the United States.

In support of the waiver application and appeal, the applicant submitted identity documents, a declaration, a declaration from his father, a psychological evaluation of his father, a letter from his father's physician, and country conditions reports concerning Mexico. The entire record was reviewed and considered in rendering a 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—

(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.

The record reflects that the applicant was convicted in the Superior Court of California, County of Los Angeles, on April 9, 2008, for felony unlawful carrying and possession of weapons, in violation of section 12020(a)(1) of the California Penal Code. The applicant was sentenced to 365 days incarceration and three years of probation.

Section 12020(A)(1) of the California Penal Code provides:

- (a) Any person in this state who does any of the following is punishable by imprisonment in a county jail not exceeding one year or in the state prison
 - (1) Manufactures or causes to be manufactured, imports into the state, keeps for sale, or offers or exposes for sale, or who gives, lends, or possesses any cane gun or wallet gun, any undetectable firearm, any firearm which is not immediately recognizable as a firearm, any camouflaging firearm container, any ammunition which contains or consists of any flechette dart, any bullet containing or carrying an explosive agent, any ballistic knife, any multiburst trigger activator, any nunchaku, any short-barreled shotgun, any short-barreled rifle, any metal knuckles, any belt buckle knife, any leaded cane, any zip gun, any shuriken, any unconventional pistol, any lipstick case knife, any cane sword, any shobi-zue, any air gauge knife, any writing pen knife, any metal military practice handgrenade or metal replica handgrenade, or any instrument or weapon of the kind commonly known as a blackjack, slungshot, billy, sandclub, sap, or sandbag.

The applicant was found to be inadmissible for having been convicted of a crime involving moral turpitude. In *Matter of S-*, the BIA held that carrying a concealed and deadly weapon with intent to use it against the person of another is a crime involving moral turpitude because “the use of a dangerous weapon against the person of another is motivated by an evil, base, and vicious intent. The essence of the offense is the carrying of the dangerous weapon with a base, evil and vicious intent to injure another.” 8 I&N Dec. 344, 346 (BIA 1959)(citations omitted). Accordingly, it is not just the possession of a weapon, but the intent to use it to injure another that results in the commission of a crime involving moral turpitude. The section under which the applicant was convicted, Cal. Penal Code § 12020(a)(1), pertains only to the manufacture, import, sale, or possession of certain weapons. It is noted that there are other sections in the California Penal Code, such as § 12024, which explicitly pertain to the possession of a deadly weapon with the intent to assault another. As such, under California law, there exist separate statutes that contemplate the possession of a dangerous weapon coupled with intent to injure.

In *Silva-Trevino*, the Attorney General stated that even as an adjudicator can find that there is no realistic probability that a statute could be applied to conduct not involving moral turpitude based on the statutory elements, the inverse is also true: a crime may not be a crime involving moral turpitude categorically because “none of the circumstances in which there is a realistic probability of conviction involves moral turpitude.” *Silva-Trevino*, 24 I&N Dec. at 699 n.2. As it would be impossible to ascertain all the circumstances to which a criminal statute has ever been applied, we interpret the language of footnote 2 to describe a determination based primarily on the statutory

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elements of the crime, particularly as compared to similar, but separate, statutory offenses that have as an element or elements of the criminal violation the morally turpitudinous conduct. The AAO finds that the applicant's conviction under section 12020(a)(1) of the California Penal Code lacks the evil, base, and vicious intent to injure another as described in *Matter of S-*. Accordingly, the AAO finds that the applicant's conviction under this section of the penal law is not a crime involving moral turpitude.

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. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden.

ORDER: As the applicant is not inadmissible, the Field Office Director's decision is withdrawn, the waiver application is deemed unnecessary and the appeal is dismissed. The case is returned to the Field Office Director for further processing.