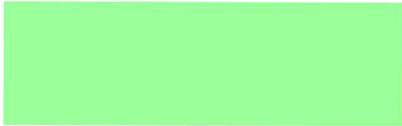




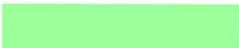
U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **MAR 15 2013** OFFICE: CHICAGO, ILLINOIS

File: 

IN RE: Applicant: 

APPLICATION: Application for Waiver of Grounds of Inadmissibility under § 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting Field Office Director, Chicago, Illinois and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the application will be approved.

The applicant is a native and citizen of El Salvador 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 crimes 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 her U.S. citizen spouse.

The acting 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 Acting Field Office Director*, dated September 30, 2011.

On appeal counsel asserts that the applicant's qualifying relative spouse will suffer extreme hardship if a waiver is not granted. *See Counsel's Legal Memorandum*, received December 2, 2011.

The record contains, but is not limited to: Form I-290B and counsel's legal memorandum; various immigration applications and petitions; a hardship affidavit; affidavits from the applicant; medical and disability records; tax and financial records; country conditions documents for El Salvador; and documents related to the applicant's criminal record. The entire record 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 –

(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 convicted on June 13, 1991 of property theft in violation of California Penal Code (CPC) § 484(A), for her conduct on or about June 12, 1991. She was sentenced to five days in jail and 24 months of probation. The applicant was convicted on August 10, 1993 of property theft in violation of CPC § 484(A), for her conduct on or about August 6, 1993. She was sentenced to 60 days in jail and three years of probation. The applicant was convicted on September 14, 1993 of property theft in violation of CPC § 484(A) for her conduct on or about September 11, 1993. She was found to have a prior conviction for the same offense and was sentenced to four days in jail and 24 months of probation. The applicant does not contest whether she has been convicted of a crime involving moral turpitude, or whether she is inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The AAO will not engage in detailed analysis of the applicant's convictions, as the waiver application will be approved as a matter of discretion under section 212(h)(1)(A) of the Act.

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 . . . ; and

(2) the Attorney General [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

The applicant's most recent conviction, for the offense of property theft, occurred in September 1993. As her culpable conduct took place more than 15 years ago, she meets the requirement of section 212(h)(1)(A)(i) of the Act.

The applicant has shown regret, remorse and has expressed that she is ashamed of her 1993 conduct. The record does not show that the applicant has ever engaged in criminal activity since her most recent conviction of more than 19 years ago. The record does not reflect that admitting the applicant would be contrary to the national welfare, safety, or security of the United States. Section 212(h)(1)(A)(ii) of the Act. While the applicant's convictions are significant and cannot be condoned, the record does not show that she has ever engaged in violent or dangerous behavior. The record does not show that the applicant has ever been a public charge in the United States. Accordingly, the applicant has shown that she meets the requirement of section 212(h)(1)(A)(ii) of the Act.

The applicant has shown by a preponderance of the evidence that she has been rehabilitated. Section 212(h)(1)(A)(iii) of the Act. As discussed above, there is no evidence that she has engaged in criminal activity since her most recent conviction for property theft in September 1993. The record shows that the applicant has conducted herself well during the last 19 years, marrying her U.S. citizen spouse in July 2006 and providing economic, emotional and physical support for him, a disabled 59-year-old diagnosed with diabetes and a number of other medical conditions. The record does not reflect that the applicant has a propensity to engage in further criminal activity. Accordingly, the applicant has shown that she meets the requirement of section 212(h)(1)(A)(iii) of the Act. Based on the foregoing, the applicant has shown that she is eligible for consideration for a waiver under section 212(h)(1)(A) of the Act.

In determining whether the applicant warrants a favorable exercise of discretion under section 212(h) of the Act, the Secretary must weigh positive and negative factors in the present case. The negative factors in this case are the applicant's multiple criminal convictions in 1993 for property theft, and her immigration violations which include entering the United States without inspection in 1990 and remaining without authorization until 1995, overstaying her 2002 visitor visa, and periods of unauthorized employment. The positive factors include hardship to the applicant's U.S. citizen spouse as a result of her inadmissibility, that she has consistently provided care and support for him during their marriage, has not been arrested or convicted of any crime since 1993, and has consistently paid taxes on the income she has earned in the United States. While the applicant's criminal activity cannot be condoned, the positive factors in this case outweigh the negative factors.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met her burden that she merits approval of her application.

ORDER: The appeal is sustained. The application is approved.