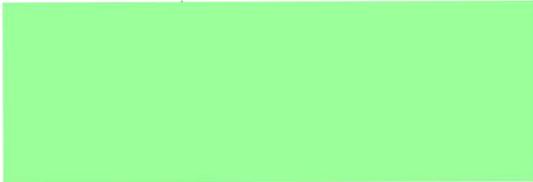


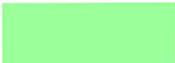


(b)(6)



DATE: **MAR 18 2013**

OFFICE: LIMA, PERU

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:



**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.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Argentina 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 U.S. citizen fiancée.

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 October 11, 2011.

On appeal the applicant's fiancée indicates that the applicant was never imprisoned for his 1987 conviction, has had no encounters with law enforcement since, and that she as his U.S. citizen fiancée, will suffer extreme hardship if a waiver is not granted. *See Form I-290B, Notice of Appeal or Motion*, received November 10, 2011 and *Hardship Letter*, dated October 31, 2011.

The record contains, but is not limited to: Form I-290B and the applicant's fiancée's statement thereon; various immigration applications and petitions; two hardship letters; a letter from the applicant; medical and financial records; birth, marriage and divorce records; embassy and consulate records; and documents and translations related to the applicant's criminal conviction. The record also contains three Spanish-language documents which are not accompanied by full, certified English translations as required under 8 C.F.R. § 103.2(b)(3).<sup>1</sup> These appear to include a handwritten letter from the applicant and his previous marriage and divorce certificates. 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 described, 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.

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<sup>1</sup> 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.

(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-

(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 in or about March 1990 for the offense of “grave injuries,” in violation of Argentina Penal Code Article 90, for his conduct on or about November 7, 1987. The applicant was sentenced to one year, six months in prison, suspended, and costs. The applicant does not contest whether he has been convicted of a crime involving moral turpitude, or whether he is inadmissible under section 212(a)(2)(A)(i)(I) of the Act. He requires a waiver under section 212(h) 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 "grave injuries" related to his conduct on or about November 7, 1987. As his culpable conduct took place more than 15 years ago, he meets the requirement of 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. Section 212(h)(1)(A)(ii) of the Act. While the applicant's conviction is significant and cannot be condoned, the record does not show that he has engaged in any violent or dangerous behavior following this November 1987 incident. The record does not show that the applicant has ever engaged in criminal activity since his only arrest more than 25 years ago in November 1987. The record does not show that he has ever been a public charge in Argentina or that he would likely become a public charge in the United States if admitted. Accordingly, the applicant has shown that he meets the requirement of section 212(h)(1)(A)(ii) of the Act.

The applicant has shown by a preponderance of the evidence that he has been rehabilitated. Section 212(h)(1)(A)(iii) of the Act. As discussed above, there is no evidence that he has engaged in criminal activity since his only arrest in November 1997. The record shows that the applicant has conducted himself well during the last 25 years, supporting himself and his three children in Argentina, ages 29, 23 and 16-years-old, by selling his own artisan goods and teaching tango lessons. The record shows that since April 2009, he has provided uplifting emotional and physical support to his fiancé. The record indicates that the applicant has expressed regret and remorse for his criminal conduct of more than 25 years ago. The record does not reflect that the applicant has a propensity to engage in further criminal activity. 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 eligible for consideration for a waiver under section 212(h)(1)(A) of the Act. However, a waiver under section 212(h) is discretionary and the crime involving moral

turpitude for which the applicant was convicted, grave injuries, is additionally a "violent or dangerous crime" as contemplated by 8 C.F.R. § 212.7(d).

At the time of the applicant's conviction, Argentina Penal Code Article 90 stated, in pertinent part concerning the offense of "lesions graves" ("grave" or "serious" injuries):

--Will be imposed confinement or imprisonment of one to six years if the injury causes a permanent impairment of health, a sense, of an organ, limb or permanent difficulty of the word or any set in endanger the life of the victim, her useless for any work for more than a month or you may have cause permanent deformation of the face.

While the applicant received a suspended sentence, the fact that his original sentence under Article 90 was to one year, six months imprisonment indicates that his conviction was for causing serious permanent injury to the victim. The record indicates that the underlying circumstances of the applicant's conviction concerned a dispute between himself and another vendor in Buenos Aires more than 25 years ago. The men exchanged words and tensions built over two days before they engaged in a physical altercation. During the course of the altercation the victim fell or was knocked to the ground and suffered a serious head injury for which he was hospitalized and the applicant was charged criminally. It is noted that had the victim's injuries been less serious, the applicant would likely have been charged under Article 89 instead of Article 90. The term of imprisonment under Article 89 is one month to one year for having caused another "body or health damage that is not covered by another provision of this Code." That the applicant was charged and convicted under Article 90 shows that the injury to the victim caused a permanent impairment, permanent difficulty, or permanent facial deformation or endangered the victim's life or rendered him unable to work for more than one month. The AAO finds that a conviction under Article 90 of Argentina's Penal Code is for a violent and dangerous crime as contemplated by 8 C.F.R. § 212.7(d).

The discretionary standard for violent or dangerous crimes was first articulated by the Attorney General in *Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002). The respondent in *Matter of Jean* was convicted of second-degree manslaughter in connection with the death of a nineteen-month-old child. The Attorney General noted:

It would not be a prudent exercise of the discretion afforded to me by this provision to grant favorable adjustments of status to violent or dangerous individuals except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of status adjustment would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the alien's underlying criminal offense, such a showing might still be insufficient. From its inception, the United States has always been a nation of immigrants; it is one of our greatest strengths. But aliens arriving at our shores must understand that residency in the United States is a *privilege*, not a *right*. For those aliens, like the respondent, who engage in violent criminal acts during their stay here, this country will not offer its embrace.

23 I&N Dec. at 383-84.

The Attorney General, through his rule making authority, codified the discretionary standard for violent or dangerous crimes set forth in *Matter of Jean*. The regulation at 8 C.F.R. § 212.7(d) provides:

The Attorney General [Secretary, Department of Homeland Security], in general, will not favorably exercise discretion under section 212(h)(2) of the Act (8 U.S.C. 1182(h)(2)) to consent to an application or reapplication for a visa, or admission to the United States, or adjustment of status, with respect to immigrant aliens who are inadmissible under section 212(a)(2) of the Act in cases involving violent or dangerous crimes, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of the application for adjustment of status or an immigrant visa or admission as an immigrant would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the alien's underlying criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act.

The AAO notes that the words "violent" and "dangerous" and the phrase "violent or dangerous crimes" are not further defined in the regulation, and the AAO is aware of no precedent decision or other authority containing a definition of these terms as used in 8 C.F.R. § 212.7(d). A similar phrase, "crime of violence," is found in section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F). Under that section, a crime of violence is an aggravated felony if the term of imprisonment is at least one year. As defined by 18 U.S.C. § 16, a crime of violence is an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, *or* any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. We note that the Attorney General declined to reference section 101(a)(43)(F) of the Act or 18 U.S.C. § 16, or the specific language thereof, in 8 C.F.R. § 212.7(d). The relationship between these distinct terms is set forth in the interim final rule codifying 8 C.F.R. § 212.7(d):

[I]n general, individuals convicted of aggravated felonies would not warrant the Attorney General's use of this discretion. In fact, the proposed regulations stated that even if the applicant can meet the "exceptional and extremely unusual hardship" standard for the exercise of discretion, depending upon the severity of the offense, this might "still be insufficient" to obtain the waiver. See 67 FR at 45407. That language would substantially limit the circumstances under which an individual convicted of an aggravated felony would be granted a waiver as a matter of discretion. Therefore, the Department believes that this language achieves the goal of the commenter while not unduly constraining the Attorney General's discretion to render waiver decisions on a case-by-case basis.

67 Fed. Reg. 78675, 78677-78 (December 26, 2002).

Thus, we find that the statutory terms “violent or dangerous crimes” and “crime of violence” are not synonymous and the determination that a crime is a violent or dangerous crime under 8 C.F.R. § 212.7(d) is not dependent on it having been found to be a crime of violence under 18 U.S.C. § 16 or an aggravated felony under section 101(a)(43)(F) of the Act. *See* 67 Fed. Reg. 78675, 78677-78 (December 26, 2002).

Nevertheless, we find the definition of a crime of violence found in 18 U.S.C. § 16 to useful guidance in determining whether a crime is a violent crime under 8 C.F.R. § 212.7(d), considering also other common meanings of the terms “violent” and “dangerous”. The term “dangerous” is not defined specifically by 18 U.S.C. § 16 or any other relevant statutory provision. Thus, in general, we interpret the terms “violent” and “dangerous” in accordance with their plain or common meanings, and consistent with any rulings found in published precedent decisions addressing discretionary denials under the standard described in 8 C.F.R. § 212.7(d). Decisions to deny waiver applications on the basis of discretion under 8 C.F.R. § 212.7(d) are made on a factual “case-by-case basis.” 67 Fed. Reg. at 78677-78.

The record reflects that the applicant’s fiancée is a 55-year-old native of Canada and citizen of the United States who met the applicant for the first time in April 2009 when she was part of a tour group visiting Argentina. She explains that if someone would have told her she would meet the man of her life at 51-years-old she would not have believed it but when she returned to Florida she recognized that she had truly fallen in love. The applicant’s fiancée states that during their time apart her feelings for the applicant only grew stronger and her faith in him and desire to spend her life with him unmistakable. She wrote in February 2011 that she has had the opportunity to visit the applicant and stay at his home six times since their first encounter, has met every member of his family, and has shared with them her profound desire to spend the rest of her life with him. The applicant too expresses that his and his fiancée’s relationship is not a casual encounter or one of adolescent whims, but rather an encounter everlasting in time as adults over 50 years of age who decide to be together and enjoy this life with anxious desires, projects in common, and in love.

The applicant’s fiancée states on appeal that she had surgery in December 2010 for severe bunions and that while she has returned to work, she has never been able to function normally since the operation. She explains that it is demanding for her to be on her feet all day and to perform daily chores, she is still limping and gets tired easily which has affected her sleep for which she is now taking medication. [REDACTED] confirms that the applicant’s fiancée had surgery on her left foot on December 29, 2010 and has an external fixator device in the foot as well as titanium screws. [REDACTED] does not describe the applicant’s spouse’s current condition or address her prognosis and/or whether she has any limitations or restrictions as a result of the surgery.

The applicant’s fiancée writes that she needs the applicant with her to help with what she cannot do and needs him “in order to be able to work and meet the financial obligations.” A letter from [REDACTED] dated February 11, 2010 indicates that the applicant’s

fiancée has been employed by the hospital for more than eight years and her wages for 2009 totaled \$75,243 at an hourly rate of \$34.34. The applicant has never resided in the United States and the record does not indicate the amount of income he would likely generate if admitted hereto. While the AAO recognizes that a strong bond exists between the applicant and his fiancée and the latter deeply desires the applicant's presence with her in the United States, the evidence in the record is insufficient to establish that she is unable to continue supporting herself in his absence or that her separation-related challenges are distinguished from those ordinarily associated with the inadmissibility of a loved one to such a significant degree that they rise to the level of exceptional and extremely unusual hardship.

The AAO acknowledges that continued separation from the applicant may cause various difficulties for the applicant's fiancée. However, it finds the evidence in the record insufficient to demonstrate that the challenges encountered by the qualifying relative, when considered cumulatively, meet the exceptional and extremely unusual hardship standard.

The applicant's fiancée does not address the possibility of relocating to Argentina to be with the applicant and the AAO is unable to speculate in this regard. The applicant indicates that his fiancée does not speak Spanish and would have a difficult time finding work in Argentina. As no other assertions of relocation-related hardship have been made, the AAO finds the evidence insufficient to demonstrate that the applicant's U.S. citizen fiancée would suffer exceptional and extremely unusual hardship were she to relocate to Argentina be with the applicant.

The applicant has, therefore, failed to demonstrate that the challenges his fiancée faces rise to the level of exceptional and extremely unusual hardship. Accordingly, the AAO finds that the applicant has failed to demonstrate exceptional and extremely unusual hardship to a qualifying relative. Accordingly, the applicant does not warrant a favorable exercise of discretion and the appeal will be dismissed.

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 not met that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.