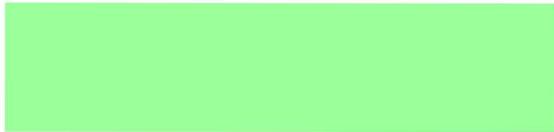




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **SEP 18 2013** OFFICE: SAN FERNANDO VALLEY 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:

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, San Fernando Valley, California denied the waiver application and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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 a crime involving moral turpitude. The record indicates that the applicant is the father of a U.S. citizen and the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States.

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 August 17, 2012.

On appeal counsel contends that a waiver should be granted because various extreme hardships to the applicant’s qualifying relatives have been clearly demonstrated and supported by documentary evidence. *See Form I-290B, Notice of Appeal or Motion*, received September 18, 2012.

The record contains, but is not limited to: Form I-290B, counsel’s statement thereon and a supporting letter; various immigration applications and petitions; a hardship letter from the applicant’s spouse; affidavits from two of the applicant’s children; letters of character reference and support; a psychological evaluation; medical/prescription-related records and bills; a letter from a recovery/rehabilitation center concerning the applicant’s son; financial records; birth and marriage certificates; and documents related to the applicant’s criminal record and deportation. 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) 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.)

To determine if a crime involves moral turpitude, the Ninth Circuit Court of Appeals employs the categorical approach set forth in *Taylor v. United States*, 110 S.Ct. 2143 (1990). See *Nicanor-Romero v. Mukasey*, 523 F.3d 999, 1004 (9th Cir. 2008), *overruled on other grounds by Marmolejo-Campos v. Holder*, 58 F.3d 903, 911 (9th Cir. 2009). The purpose of the categorical approach is to determine whether the full range of conduct encompassed by the statute constitutes a crime of moral turpitude. See *Cuevas-Gaspar v. Gonzalez*, 430 F.3d 1013, 1017 (9th Cir. 2005), *abrogation on other grounds recognized by Holder v. Martinez-Gutierrez*, 132 S.Ct. 2011, 2020-21 (2012). If the statute “criminalizes both conduct that does involve moral turpitude and other conduct that does not, the modified categorical approach is applied.” *Marmolejo-Campos*, 558

F.3d at 912 (citing *Fernando-Ruiz v. Gonzalez*, 466 F.3d 1121, 1163 (9th Cir. 2006)); *see also Castillo-Cruz v. Holder*, 581 F.3d 1154, 1161 (9th Cir. 2009). However, there must be “a realistic probability, not a theoretical possibility, that the statute would be applied to reach conduct that did not involve moral turpitude.” *Nicanor-Romero*, 523 F.3d at 1004 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). To demonstrate a “realistic probability,” the applicant must point to his or her own case or other cases in which the state courts in fact did apply the statute to conduct not involving moral turpitude. 523 F.3d at 1004-05. A realistic probability also exists where the statute expressly punishes conduct not involving moral turpitude. *See U.S. v. Vidal*, 504 F.3d 1072, 1082 (9th Cir. 2007).

Once a realistic probability is established, the modified categorical approach is applied, which requires looking to the “limited, specified set of documents” that comprise what is known as the record of conviction – the charging document, a signed plea agreement, jury instructions, guilty pleas, transcripts of a plea proceeding and the judgment – to determine if the conviction entailed admission to, or proof of, the elements of a crime involving moral turpitude. *Castillo-Cruz*, 581 F.3d at 1161 (citing *Fernando-Ruiz*, 466 F.3d at 1132-33); *see also Marmolejo-Campos*, 558 F.3d at 912 (citing *Cuevas-Gaspar*, 430 F.3d at 1020). The Ninth Circuit has reaffirmed that courts may not examine evidence outside the record of conviction in determining whether a conviction was for a crime involving moral turpitude. *See Olivas-Motta v. Holder*, --- F.3d ---, 2013 WL 2128318 (9th Cir. May 17, 2013) (rejecting *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)). Where the burden of proof is on the applicant, as in the present case, the applicant cannot sustain that burden where the record of conviction is inconclusive. *Young v. Holder*, 697 F.3d 976, 989 (9th Cir. 2012).

The record indicates that the applicant entered the United States without inspection in or about July 1979. On June 21, 1981, the applicant was arrested in California and charged with Battery (CPC § 242), Kidnapping (CPC § 207), and Rape by Force (CPC § 261.3), all felonies. On September 24, 1981, the applicant was convicted of False Imprisonment effected by violence (CPC § 236), a felony, and sentenced to two (2) years in State Prison. On November 25, 1982, the applicant was released and placed on three (3) years of parole. Shortly after his release, however, the applicant was ordered deported and was deported to Mexico on December 1, 1982. The applicant subsequently re-entered the United States without inspection or permission. On January 5, 1985, the applicant was arrested in California and charged with obstructs/resists public officer (CPC §148) and public intoxication (CPC §647). On January 22, 1985, the applicant pled guilty and was convicted of a misdemeanor non-retainable offense, for which he was fined and sentenced to 12 months of probation. The applicant falsely identified himself in these criminal proceedings as Abel Lucio Trista, an alias that appears on numerous employment-related documents and others in the record. The applicant’s September 24, 1981 conviction for felony false imprisonment effected by violence has been determined to be a crime involving moral turpitude, rendering the applicant inadmissible under section 212(a)(A)(i)(I) of the Act. 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 a crime involving moral turpitude, false imprisonment effected by violence, relates to his conduct in June 1981. 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 further violent behavior after June 1981. The record shows that the applicant’s only subsequent conviction was in 1985 and he does not appear to have engaged in criminal activity in the 18 years since. The record does not show that the applicant has ever been a public charge in the United States. 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. On November 21, 1990, a California Superior Court judge issued the applicant a certificate of rehabilitation and recommended that the governor of California

pardon him. Despite multiple claims by the applicant that he has received a full pardon no corroborating documentary evidence has been submitted. As discussed above, there is no evidence that the applicant has engaged in criminal activity since his most recent misdemeanor conviction in 1985. The record shows that he has conducted himself well since then, providing financial and emotional support for his spouse and three children, purchasing a home, and garnering numerous attestations by others to his hard work, good moral character and essential presence in the community. 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, false imprisonment effected by violence, is additionally a “violent or dangerous crime” as contemplated by 8 C.F.R. § 212.7(d).

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). 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 shows that the applicant’s spouse is a 60-year-old native of Mexico and citizen of the United States who asserts hardship of an emotional/psychological, physical/medical and economic nature. She states that she feels very dependent on the applicant and if he is removed, she would have a serious breakdown because her soul mate would be taken away from her. The applicant’s son [REDACTED] and his daughter [REDACTED] contend that their mother would suffer psychological hardship in their father’s absence. [REDACTED] writes that she interviewed the applicant’s spouse, [REDACTED] and [REDACTED] on September 11, 2012. [REDACTED] relays that since the waiver application was denied, the applicant’s spouse reports depression, anxiety, panic, sleeplessness, fatigue, appetite loss, weight loss, tearfulness, difficulty concentrating, gastrointestinal problems, and irritability. She diagnoses the applicant’s spouse with adjustment disorder with mixed anxiety and depressed mood, and estimates that separation from the applicant would cause extreme psychological harm. The AAO notes that [REDACTED] findings are based on self-reporting by the applicant’s spouse during a single interview. We note also that there are inconsistencies between what the applicant’s spouse wrote in her September 2012 hardship letter and what she reported to [REDACTED] the same month. Most notably, the applicant’s spouse maintains that the applicant helped her overcome “psychological issues of self-loathing and lack of confidence” she suffered from childhood, and which included years of mental, verbal and physical abuse by her mother. [REDACTED], however, reports that the applicant’s spouse has no history of anxiety disorder, trauma exposure, or abuse. Moreover, despite [REDACTED] asserted concerns for the applicant’s spouse, she makes no recommendations that any form of therapy be commenced, that medication be considered, or that the applicant’s spouse receive treatment of any kind to allay her symptoms. While substantial weight cannot be given [REDACTED] evaluation for the reasons described, it has been considered in the aggregate along with all other hardship factors.

The applicant’s spouse states that she began having knee problems in May 2001 and subsequently had surgery. She indicates that her knee pain returned in 2009 more excruciating than ever and her doctors recommend additional surgery. Chiropractor [REDACTED] writes on May 16, 2012 that the applicant’s spouse is under his care and will be treated weekly for six months. An insurance explanation of benefits indicates that the applicant’s spouse had “surgery-bone/muscle” on January 23, 2012 at a cost of \$120. The applicant’s spouse avers that she has been unable to work very much because of continued knee pain. [REDACTED] and [REDACTED] indicate that their mother

has taken time off work as a result of medical knee issues. While several medical-related billing statements, a laboratory order, a prescription printout, and a patient information sheet titled "Contusion (Bruise) of Foot" have been submitted, the record contains no documentary evidence addressing the applicant's spouse's current medical condition, diagnosis, prognosis or treatment from which the AAO might determine whether she has any physical limitations that would prevent her from working full-time, engaging in routine daily activities, or requiring professional or familial assistance.

The applicant's spouse writes that although she sometimes works as a housekeeper, her income alone would be insufficient to meet her financial obligations. A 2011 income tax return and Form W-2, Wage and Tax Statement (W-2) reflect earnings for the applicant's spouse of \$22,333.50 from [REDACTED]. The return does not appear to include any income from housekeeping and the record contains no documentary evidence demonstrating the amount of income the applicant's spouse earns in this capacity. The applicant's 2011 W-2 reflects wages of \$51,129.46. In terms of expenses, the record contains billing statements for a mortgage and homeowners insurance, a car loan and auto insurance, and utilities. The monthly total for these is approximately \$1,500, less than the applicant's spouse's salary, apart from her additional housekeeping income or income from any other source.

The applicant's spouse indicates that in addition to their own expenses, the applicant has assumed expenses for the drug rehabilitation treatment of their eldest son [REDACTED]. A September 2012 letter from a substance abuse specialist at [REDACTED] indicates that [REDACTED] is a resident. However, the letter is addressed "to whom it may concern" and does not address financial responsibility. While no related billing statements have been submitted, a receipt copy indicates that the applicant paid \$2,000 to [REDACTED] on August 22, 2012. Copies of two sequential receipts for the same date indicate that an additional \$3,000 was received. However, as a result of poor copy quality, the payee is illegible as are the full names of those from whom payment was received. These receipts contain notations referencing the applicant. No other documentary evidence has been submitted to demonstrate any ongoing expenses assumed by the applicant for [REDACTED] treatment. The applicant's daughter, [REDACTED], writes that the applicant has also assumed responsibility for [REDACTED] three children. No corroborating documentary evidence has been submitted. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The applicant's spouse states that the applicant's parents reside in Mexico and depend heavily on him to send money when he can for their essentials. She states that the applicant sends money to help with his parents' bills and groceries since because of their old age they are unable to work. No corroborating documentary evidence has been submitted.

The applicant's 28-year-old son, [REDACTED], writes that he has been residing rent-free with his parents with whom he moved in after losing his job. No documentary evidence has been submitted to show that [REDACTED] is unable to secure employment, support himself, or contribute financially to his mother's support in the event of the applicant's removal. Moreover, [REDACTED] writes that if his father is sent to Mexico, he will have to "continue to try to provide and care for" his mother. It is unclear from this statement whether [REDACTED] currently contributes financially to the household he shares

with his parents, but he appears to offer assistance in the event of the applicant's removal. The record contains no financial records for any of the applicant's children. The applicant's spouse explains that if the applicant is removed, she would lose her health insurance coverage which is provided through his employment. The evidence in the record does not show that health insurance is not available to the applicant's spouse through her own employment or that she would be unable to secure private health insurance.

The AAO recognizes that a strong familial bond exists between the applicant, his spouse and children and that his removal would result in emotional challenges, some reduction in income to the applicant's spouse, and the loss of her current health insurance coverage. However, the evidence in the record is insufficient to demonstrate that any of the applicant's qualifying relatives would be unable to support themselves or each other emotionally and financially in his absence, or that the challenges they would face are distinguished from those ordinarily associated with a loved one's inadmissibility or removal to such a significant degree that they rise to the level of exceptional and extremely unusual hardship.

The AAO acknowledges that separation from the applicant may cause various difficulties for his spouse and children. However, we find the evidence in the record insufficient to demonstrate that the challenges encountered by the qualifying relatives, when considered cumulatively, meet the exceptional and extremely unusual hardship standard.

Addressing relocation, the applicant's spouse states that it is not possible to move her family to Mexico because her children were born in the United States, have lived here all their lives, and hardly speak Spanish. As these are the types of challenges ordinarily associated with relocation and as the record contains no other relocation-related assertions of hardship to the applicant's children, the AAO finds the evidence insufficient to demonstrate that any of these qualifying relatives would suffer exceptional and extremely unusual hardship were they to relocate to Mexico to be with the applicant.

The applicant's spouse writes that she left Mexico in 1975, became a U.S. citizen in October 2010, and considers herself to be an American culturally. She states that it would be extremely hard if not impossible for her and the applicant to find jobs in Mexico due to their "old age" and her fragile health. The record contains no documentary evidence addressing employment in Mexico or showing that either the applicant or his spouse would be unable to secure employment therein. The AAO acknowledges that the applicant's spouse would experience various difficulties in the event she chooses to relocate to Mexico to be with the applicant. However, we find the evidence in the record insufficient to demonstrate that the challenges asserted, when considered cumulatively, meet the exceptional and extremely unusual hardship standard.

The applicant has, therefore, failed to demonstrate that the challenges his spouse and children face 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.

(b)(6)

NON-PRECEDENT DECISION

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In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.