



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

**Non-Precedent Decision of
the Administrative Appeals
Office**

MATTER OF C-A-L-

DATE: MAY 25, 2016

APPEAL OF SAN FERNANDO, CALIFORNIA FIELD OFFICE DECISION

APPLICATION: FORM I-601, APPLICATION FOR WAIVER OF GROUNDS OF
INADMISSIBILITY

The Applicant, a native and citizen of El Salvador, seeks a waiver of inadmissibility for crimes involving moral turpitude. *See* Immigration and Nationality Act (the Act) section 212(h), 8 U.S.C. § 1182(h). A foreign national seeking to be admitted to the United States as an immigrant or to adjust status to lawful permanent residence must be admissible or receive a waiver of inadmissibility. U.S. Citizenship and Immigration Services (USCIS) may grant this discretionary waiver if refusal of admission would result in extreme hardship to a qualifying relative or qualifying relatives; or, because the activities for which the foreign national is inadmissible occurred 15 years prior, if the foreign national's admission would not be contrary to the national welfare, safety, or security of the United States and the foreign national has been rehabilitated.

The USCIS Director, San Fernando, California Field Office, denied the application. The Director concluded that the Applicant had not established that a bar to his admission would impose extreme hardship on his qualifying relatives.

The matter is now before us on appeal. In the appeal, the Applicant asserts that he is not inadmissible and alternatively, his bar to admission would cause extreme hardship to his qualifying relatives.

Upon *de novo* review, we will sustain the appeal.

I. LAW

The Applicant is seeking to adjust status to lawful permanent resident and has been found inadmissible for crimes involving moral turpitude, specifically for his convictions of theft and prostitution. Section 212(a)(2)(A) of the Act, 8 U.S.C. § 1182(a)(2)(A), provides that any foreign national convicted of . . . a crime involving moral turpitude (other than a purely political offense) is inadmissible.

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Section 212(a)(2)(A) of the Act further provides that this inadmissibility does not apply to a foreign national who committed only one crime if the maximum penalty possible for the crime did not exceed imprisonment for one year and the foreign national was not sentenced to a term of imprisonment in excess of six months (regardless of the extent to which the sentence was ultimately executed).

Individuals found inadmissible under section 212(a)(2)(A) of the Act may seek a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h), which provides for a discretionary waiver where the activities occurred more than 15 years before the date of the application if admission would not be contrary to the national welfare, safety, or security of the United States, and the foreign national has been rehabilitated; or if denial of admission would result in extreme hardship to a U.S. citizen or lawful permanent resident spouse, parent, son, or daughter.

II. ANALYSIS

The Applicant concedes that he was convicted of crimes involving moral turpitude. However, he asserts that he is eligible for a waiver under the rehabilitation provisions of section 212(h)(1)(A) of the Act, because the activities that gave rise to three of his four convictions occurred over 15 years ago. He further asserts that he is eligible for the petty offense exception outlined in section 212(a)(2)(A)(ii) of the Act for his remaining conviction. Finally, he claims that three of his convictions were expunged and are no longer valid for immigration purposes.

The Applicant's most recent conviction was on [REDACTED] 2002. The activities related to that conviction occurred on [REDACTED] 2002, less than 15 years ago. The Applicant provides no authority to support his position that section 212(h) allows waiving some of his criminal inadmissibilities under the rehabilitative provisions of that section. The Applicant's assertion that the remaining and more recent conviction may be excused under the petty offense exception also lacks merit, because the statute specifically states that the petty offense exception applies only if the foreign national committed one crime. Here, the Applicant was convicted of four crimes involving moral turpitude, most recently for activities occurring in 2002. The Applicant's convictions were expunged pursuant to a rehabilitative statute; therefore, they are still valid for immigration purposes.

We must decide on appeal whether the Applicant's spouse would experience extreme hardship if the waiver is denied. Were he to depart or be removed from the United States, the Applicant does not indicate whether his spouse intends to remain in the United States or relocate with him to El Salvador. The claimed hardship to the Applicant's spouse resulting from her separation from the Applicant and relocation consists of financial and emotional hardship. The Applicant's spouse, an asylee, primarily has serious concerns about her personal safety should she return to El Salvador. In support of these hardship claims, the Applicant submitted the following evidence with his Form I-601: declarations from his

U.S. citizen spouse, children, and himself; financial records; court documents; evidence his spouse applied for asylum; letters of support documenting hardship and good moral character; and evidence of family ties in this country. On appeal, the Applicant submits a brief, declarations, financial records, medical records for his spouse and daughter, reports on conditions in El Salvador, and letters of support.

The evidence in the record, considered both individually and cumulatively, establishes that the Applicant's spouse would experience extreme hardship if the Applicant's waiver application is denied. The record contains sufficient evidence to establish that the Applicant's spouse would suffer emotional and financial hardship that cumulatively rises to the level of extreme hardship.

A. Inadmissibility

As stated above, the Applicant has been found inadmissible under section 212(a)(2)(A) of the Act for crimes involving moral turpitude, specifically three theft offenses, and prostitution.

In assessing whether a conviction is a crime involving moral turpitude, we must first "determine what law, or portion of law, was violated." *Matter of Esfandiary*, 16 I&N Dec. 659, 660 (BIA 1979). We conduct a categorical inquiry for that statutory offense, considering the "inherent nature of the crime as defined by statute and interpreted by the courts," not the underlying facts of the crime committed. *Matter of Short*, 20 I&N Dec. 136, 137 (BIA 1989); see also *Matter of Louissaint*, 24 I&N Dec. 754, 757 (BIA 2009) (citing *Taylor v. United States*, 495 U.S. 575, 599-600 (1990)). This categorical inquiry focuses on whether moral turpitude necessarily inheres in the minimal conduct for which there is a realistic probability of prosecution under the statute. See *Short, supra*; *Louissaint, supra*; *Moncrieffe v. Holder*, 133 S.Ct. 1678, 1684-1685 (2013); *Gonzales v. Duenas-Alvarez*, 127 S.Ct. 815, 822 (2007).

Where a criminal statute does not contain a single, indivisible set of elements, but rather encompasses multiple distinct criminal offenses, "some . . . which involve moral turpitude and some which do not," we engage in a modified categorical inquiry. *Short, supra*, at 137-138. A statute is divisible only if it lists "potential offense elements in the alternative, render[ing] opaque which element played a part in the defendant's conviction." *Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013).

We conduct a modified categorical inquiry by reviewing the record of conviction to determine which offense within the divisible statute was the basis of the conviction, and then determine whether that statutory offense is categorically a crime involving moral turpitude. See *Short, supra*, at 137-38, see also *Descamps, supra*, at 2285-86. The record of conviction is a narrow, specific set of documents which includes the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript.

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Louissant, supra, at 757; *see also Shepard v. U.S.*, 544 U.S. 13, 16 (2005) (finding that the record of conviction is limited to the “charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.”)

The record shows that the Applicant was convicted in [REDACTED] on [REDACTED] 1982, of theft of personal property in violation of California (Cal.) Penal Code § 484(a). On [REDACTED] 1987, the Applicant was convicted of petty theft, with prior jail term, in violation of Cal. Penal Code § 666. On [REDACTED] 1992, the Applicant was again convicted of petty theft of property, in violation of the same statute, in the Municipal Court of Los Angeles, [REDACTED]. On [REDACTED] 2002, the Applicant was convicted in the Superior Court of California, [REDACTED] of prostitution in violation of Cal. Penal Code § 647(b).

At the time of the Applicant’s convictions, Cal. Penal Code § 484(a) provided in pertinent part that, “[e]very person who shall feloniously steal . . . the personal property of another . . . is guilty of theft.”

At the time of the Applicant’s 1987 conviction under Cal. Penal Code § 666, the law provided in pertinent part:

Every person who, having been convicted of petit theft . . . burglary, or robbery and having served a term therefor in any penal institution or having been imprisoned therein as a condition of probation for such offense, is subsequently convicted of petit theft, then the person convicted of such subsequent offense is punishable by imprisonment in the county jail not exceeding one year, or in the state prison.

U.S. courts have held that the crime of theft or larceny, whether grand or petty, involves moral turpitude. *See Matter of Scarpulla*, 15 I&N Dec. 139, 140 (BIA 1974); *see also Morasch v. INS*, 363 F.2d 30, 31 (9th Cir. 1966). However, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended. *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973).

The Ninth Circuit Court of Appeals addressed whether Cal. Penal Code § 484(a) constitutes a crime involving moral turpitude in *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1157 (9th Cir. 2009). The Ninth Circuit, reviewing cases involving convictions under Cal. Penal Code § 484(a), determined that a conviction for theft requires the specific intent to deprive the victim of his or her property permanently. *Id.* at 1160 (citations omitted). Therefore, we find that a conviction for petty theft under the California Penal Code is categorically a crime involving moral turpitude, because it requires the permanent intent to deprive the victim of his or her property. Accordingly, the record supports finding that the Applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of three theft-related crimes involving moral turpitude.

The Applicant also was convicted for violating Cal. Penal Code § 647(b), which then provided in pertinent part:

Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:

.....

(b) Who solicits or who agrees to engage in or who engages in any act of prostitution. A person agrees to engage in an act of prostitution when, with specific intent to so engage, he or she manifests an acceptance of an offer or solicitation to so engage, regardless of whether the offer or solicitation was made by a person who also possessed the specific intent to engage in prostitution. No agreement to engage in an act of prostitution shall constitute a violation of this subdivision unless some act, in addition to the agreement, is done within this state in furtherance of the commission of an act of prostitution by the person agreeing to engage in that act. As used in this subdivision, "prostitution" includes any lewd act between persons for money or other consideration.

The Ninth Circuit Court of Appeals has determined that a violation of Cal. Penal Code § 647(b) is categorically a crime involving moral turpitude. *Rohit v. Holder*, 670 F.3d 1085, 1089 (9th Cir. 2012). In *Rohit*, the Ninth Circuit held that:

soliciting an act of prostitution is not significantly less "base, vile, and depraved" than engaging in an act of prostitution. Solicitation is the direct precursor to the act. A person who solicits an act of prostitution does not become appreciably more morally turpitudinous when the other party accepts or the two engage in the act. The base act is the intended result of the base request or offer.

.....

There is no meaningful distinction that would lead us to conclude that engaging in an act of prostitution is a crime of moral turpitude but that soliciting or agreeing to engage in an act of prostitution is not.

Accordingly, we find that the Applicant's conviction under Cal. Penal Code § 647(b) for disorderly conduct involving prostitution constitutes a crime involving moral turpitude, making him inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The Applicant asserts that three out of four of his convictions were expunged pursuant to Cal. Penal Code § 1203.4. The Ninth Circuit, the jurisdiction in which this case arises, has found that expungements of criminal convictions pursuant to the successful completion of

some form of rehabilitation or probation still are considered valid convictions for immigration purposes, unless the conviction was dismissed because of a fundamental procedural or constitutional error in the trial court proceedings. See *Murillo-Espinoza v. I.N.S.*, 261 F.3d 771, 774 (9th Cir. 2001).¹ The provisions of Cal. Penal Code § 1203.4 are rehabilitative, because they allow a criminal defendant to withdraw a plea of guilty or nolo contendere and enter a plea of not guilty subsequent to a successful completion of some form of rehabilitation or probation. The statute does not function to expunge a criminal conviction because of a procedural or constitutional defect in the underlying proceedings. In this case, no evidence in the record shows that the Applicant's conviction was expunged because of an underlying procedural defect in the trial court proceedings; therefore the vacated judgment remains valid for immigration purposes.

On appeal, the Applicant asserts that three of his four convictions can be waived pursuant to section 212(h)(1)(A) of the Act, which provides that the Secretary may, in his discretion, grant a waiver if the activities for which the foreign national is inadmissible occurred more than 15 years before the date of his or her application for a visa, admission, or adjustment of status. The Applicant does not legally support his assertion that some of his convictions can be waived under one part of the Act, while more recent convictions may be waived under a different part of the Act. He is inadmissible due to his four convictions of crimes involving moral turpitude. The activities underlying his most recent conviction for a crime involving moral turpitude occurred less than 15 years ago, in 2002, so he is ineligible for a waiver under section 212(h)(1)(A) of the Act.

On appeal, the Applicant also asserts that he is eligible for the petty offense exception under section 212(a)(2)(A)(ii) of the Act. The petty offense exception is available to individuals convicted of only one crime involving moral turpitude, where the maximum penalty for the crime did not exceed imprisonment for one year, and if the foreign national was convicted, he was not sentenced to a term of imprisonment in excess of six months. However, as discussed above, the Applicant was convicted of more than one crime involving moral turpitude. Therefore, he is not eligible for the petty offense exception.

B. Waiver

Because the Applicant has not demonstrated eligibility for a waiver under section 212(h)(1)(A) of the Act, he must demonstrate that denial of the application would result in extreme hardship to a qualifying relative. In this case, the Applicant's qualifying relatives are his U.S. citizen spouse and children. If extreme hardship to a qualifying relative is established, the Applicant is statutorily eligible for a waiver, and USCIS then assesses

¹ See *Matter of Roldan*, 22 I&N Dec. 512, 527 (BIA 1999); see also, *Matter of Luviano-Rodriguez*, 23 I&N Dec. 718 (A.G. 2005).

whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996).

In support of his claim of hardship to his qualifying family members, the Applicant submitted the following evidence. With the Form I-601, the Applicant submitted identity and relationship documents; declarations from the Applicant, his spouse and two children; court records; and letters of support. On appeal, the Applicant submits a brief, declarations from his children, and medical records relating to himself, his spouse, and their daughter.

We will first address hardship to the Applicant's U.S. citizen spouse if she relocates to El Salvador. The Applicant's spouse claims that if they relocate, they will lose their home and family-owned business. The Applicant asserts that his spouse has lived in this country since 1987 and was granted asylum status. If she relocates, she would be separated from their children and her extended family. She no longer has family in El Salvador. Agency records support the Applicant's claim that his spouse was granted asylum from El Salvador. Returning would put her at risk of future persecution or could revive memories of past persecution. The Applicant's spouse asserts that El Salvador is one of the most dangerous countries in the world. According to a 2016 Department of State travel warning, the crime and violence levels in El Salvador remain critically high.² Based on the totality of the evidence, we find that the Applicant's spouse would suffer extreme hardship if the waiver application was denied.³

C. Discretion

We now consider whether the Applicant merits a waiver of inadmissibility as a matter of discretion. The burden is on the Applicant to establish that a waiver of inadmissibility is warranted in the exercise of discretion. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 299 (BIA 1996). We must "balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the individual's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Id.* at 300 (citations omitted). In evaluating whether to favorably exercise discretion,

the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature, recency and seriousness, and the

² U.S. Department of State, El Salvador Travel Warning (January 15, 2016), <https://travel.state.gov/content/passports/en/alertswarnings/el-salvador-travel-warning.html>.

³ Because we find the Applicant's spouse will experience extreme hardship, we need not address the Applicant's evidence showing extreme hardship to his children.

presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

Id. at 301 (citations omitted). We must also consider "[t]he underlying significance of the adverse and favorable factors." *Id.* at 302. For example, we assess the "quality" of relationships to family, and "the equity of a marriage and the weight given to any hardship to the spouse is diminished if the parties married after the commencement of [removal] proceedings, with knowledge that the alien might be [removed]." *Id.* (citation omitted).

The unfavorable factors in this case are the Applicant's criminal history and periods of unauthorized presence in the United States. The favorable factors include the extreme hardship that the Applicant's qualifying spouse would face if the application is denied, the length of the Applicant's residence in the United States (35 years), the Applicant's substantial family ties, the Applicant's self-employment, the 14 years since the Applicant's most recent conviction, and his good character, as indicated in numerous letters of support. In addition, the Applicant expresses remorse for his criminal history. Upon review, the positive factors in this case outweigh the negative factors, such that a favorable exercise of discretion is warranted.

III. CONCLUSION

The Applicant has the burden of proving eligibility for a waiver of inadmissibility. *See* section 291 of the Act, 8 U.S.C. § 1361. The Applicant has met that burden. He has established that his spouse would suffer extreme hardship if his application is denied. Accordingly, we sustain the appeal.

ORDER: The appeal is sustained.

Cite as *Matter of C-A-L-*, ID# 12240 (AAO May 25, 2016)