

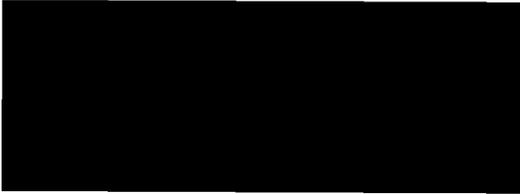
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U.S. Department of Homeland Security  
U.S. Immigration and Citizenship Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

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FILE: [REDACTED] Office: GUATEMALA CITY, GUATEMALA

Date:

MAY 17 2010

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v); and section 212(h) of the 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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Field Office Director, Guatemala City, Guatemala, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the director to issue a new decision consistent with this decision.

The applicant, [REDACTED], is a native and citizen of Guatemala who was found to be inadmissible to the United States under section 212(a)(9)(C)(i)(I) of the Act of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(C)(i)(I), for attempting reentry after aggregating more than one year of unlawful presence; and section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. The applicant sought a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), and section 212(h) of the Act, 8 U.S.C. § 1182(h). The director denied the wavier application, finding that the applicant failed to establish that his admission would impose extreme hardship on a qualifying relative. *Decision of the Director*, dated September 18, 2007. The applicant filed a timely appeal.

On appeal, counsel contends that section 212(a)(9)(C)(i)(I) was improperly applied. Counsel declares that the applicant was not unlawfully residing in the United States from July 1982 to May 2003. She asserts that the immigration judge granted the applicant lawful permanent resident status on June 23, 2000, a status which he held until the immigration judge ordered his removal on March 24, 2003. Counsel maintains that the denial letter erroneously states that the applicant attempted to enter the United States near San Ysidro, California, without inspection. Counsel declares that the applicant left the United States for a brief visit to Mexico on February 16, 2003, and had applied for admission on February 16, 2003 at the San Ysidro, California, Port of Entry, as shown in the Form I-261, Additional Charges of Inadmissibility/Deportability, dated March 18, 2003. Counsel avers that even though the applicant's evidence of temporary lawful admission for permanent residence had expired, he was still a lawful permanent resident of the United States. Counsel contends that on March 24, 2003, the immigration judge ordered the applicant's removable under section 237(a)(2)(A)(ii) for having been convicted of two or more crimes involving moral turpitude not arising out of a single scheme of criminal conduct after admission to the United States. Counsel maintains that the applicant's status as a lawful permanent resident terminated after his removable order.

Section 212(a)(9)(C) of the Act states:

(C) Aliens unlawfully present after previous immigration violations.-

(i) In general.-

Any alien who-

(I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

(II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law, and who enters

or attempts to reenter the United States without being admitted is inadmissible.

(ii) Exception.- Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Secretary has consented to the alien's reapplying for admission. The Secretary, in the Secretary's discretion, may waive the provisions of section 212(a)(9)(C)(i) in the case of an alien to whom the Secretary has granted classification under clause (iii), (iv), or (v) of section 204(a)(1)(A), or classification under clause (ii), (iii), or (iv) of section 204(a)(1)(B), in any case in which there is a connection between—

(1) the alien's having been battered or subjected to extreme cruelty;  
and

(2) the alien's--

(A) removal;

(B) departure from the United States;

(C) reentry or reentries into the United States; or

(D) attempted reentry into the United States.

U.S. Citizenship and Immigration Services (USCIS) records reflect that the applicant entered the United States without inspection on July 1, 1982. On November 30, 1994, his Form I-817, Application for Voluntary Departure Under the Family Unity Program was granted. On October 27, 1994, his mother filed the Form I-130, Petition for Alien Relative, on his behalf. The petition was approved on December 16, 1994. On April 10, 1998, the applicant filed the Form I-485, Application to Register Permanent Residence or Adjust Status. On December 21, 1999, the applicant was placed in removal proceedings and ordered to appear before an immigration judge. On April 25, 2000, a Notice of Hearing in Removal Proceedings was personally issued to the applicant for a master hearing on May 10, 2000. On May 10, 2000, he was personally issued a Notice of Hearing in Removal Proceedings for a master hearing on June 23, 2000. On June 23, 2000, the immigration judge ordered that the applicant's application for a waiver and his application for adjustment of status under section 245(a) be granted. On March 15, 2001, the Form I-485, Application to Register Permanent Residence or Adjust Status was approved. On July 18, 2001, the applicant was convicted of two counts of sexual battery in violation of Cal. Penal Code section 243.4(d). On February 17, 2002, the applicant was issued a Notice to Appear before an immigration judge. On August 16, 2002, a warrant for arrest was issued, and the applicant was placed in removal proceedings and ordered to appear before an immigration judge. On September 10, 2002, he was released from custody on his own recognizance. On October 9, 2002, a Notice of Hearing in Removal Proceedings

was personally issued to the applicant for a master hearing on December 9, 2002. On December 1, 2002, at the San Ysidro Port of Entry, the applicant applied for admission to the United States. He claimed to have lost his I-551 and indicated that he had to report to immigration court on December 9, 2002. On December 9, 2002, a Notice of Hearing in Removal Proceedings was personally issued to the applicant for a master hearing on March 26, 2003. On March 10, 2003, a Notice of Hearing in Removal Proceedings was personally issued to the applicant for a master hearing on March 24, 2003. On February 16, 2003, the applicant sought to procure admission to the United States at the San Ysidro Port of Entry. He claimed to have lost his I-551, Lawful Permanent Resident Card. He was taken into custody for a scheduled hearing before the immigration judge. On March 24, 2003, the immigration judge ordered the applicant's removal to Guatemala. The applicant was removed from the United States on May 7, 2003.

The director erred in finding the applicant unlawfully resided in the United States from July 1982 until May 2003, and that he attempted to enter the United States without inspection on February 16, 2003 near San Ysidro, California. The documentation in the record reflects that the applicant was granted adjustment of status on March 15, 2001, and that he sought to procure admission into the United States at the San Ysidro Port of Entry on February 16, 2003, by claiming to hold lawful permanent resident status, which status he did in fact hold until March 15, 2001. He did not attempt to gain admission into the United States without inspection on February 16, 2003. Even though unlawful presence was accumulated from April 1, 1997, until the filing of the Form I-485 on April 10, 1998, the ten-year-bar was not triggered because the applicant never left the United States.<sup>1</sup> The applicant was granted adjustment of status on March 15, 2001, which status he held until his order of removal on March 24, 2003. Based on record, the applicant is not inadmissible under section 212(a)(9)(C)(i)(I) of the Act.

The applicant was found inadmissible for having committed a crime involving moral turpitude. Section 212(a)(2)(A) of the Act states in pertinent part:

- (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 . . . or an attempt or conspiracy to commit such a crime . . . is inadmissible.

The Board of Immigration Appeals (BIA) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

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<sup>1</sup> Aliens with a properly filed pending Form I-485 do not accrue unlawful presence by virtue of USCIS policy. Memorandum by Lori Scialabba, Assoc. Director, Refugee, Asylum and International Operations Directorate and Pearl Chang, Acting Chief, Office of Policy and Strategy, Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act; AFM Update AD 08-03; May 6, 2009.

[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 the recently decided *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. 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). This case arises in the Ninth Circuit, and the Ninth Circuit Court of Appeals has adopted the realistic probability standard. *See Nicanor-Romero v. Mukasey*, 523 F.3d 992, 1004-1007 (9th Cir. 2008).

The court information sheet from the Superior Court of California, County of Ventura, reflects that on July 18, 2001, the applicant pled guilty to two counts of sexual battery in violation of Cal. Penal Code § 243.4(d). He was ordered to serve 365 days in jail.

The California statute under which the applicant was convicted, Cal. Penal Code § 243.4(d) provides:

Any person who, for the purpose of sexual arousal, sexual gratification, or sexual abuse, causes another, against that person's will while that person is unlawfully restrained either by the accused or an accomplice or is institutionalized for medical treatment and is seriously disabled or medically incapacitated, to masturbate or touch an intimate part of either of those persons or a third person, is guilty of sexual battery. A violation of this subdivision is punishable by imprisonment in a county jail for not more than one year, and by a fine not exceeding two thousand dollars (\$2,000); or by imprisonment in the state prison for two, three, or four years, and by a fine not exceeding ten thousand dollars (\$10,000).

As used in this provision, the word “touches” means “physical contact with another person, whether accomplished directly, through the clothing of the person committing the offense, or through the clothing of the victim.” (§ 243.4, subd. (e)(2).) California Jury Instructions provide that the specific intent to cause sexual abuse “does not mean that the perpetrator must be motivated by sexual gratification or arousal or have a lewd intent.” CALJIC No. 10.37. The California Court of Appeals states that touching another person for the purpose of sexual abuse “encompasses a purpose of insulting, humiliating, intimidating, or physically harming a person sexually by touching an “intimate part” of the person.” *In re Shannon T*, 144 Cal.App.4th 618, 621, 50 Cal.Rptr.3d 564, 565 (2006). The AAO notes that the sexual battery bill was enacted to punish crimes “more physically traumatic and psychologically terrifying” than misdemeanor assault and battery crimes. *People v. Arnold*, 6 Cal.App.4th 18, 25, 7 Cal.Rptr.2d 833, 836 (1992) (citing *News from Assembly Speaker Pro Tempore Leo McCarthy* (June 15, 1982)).

The AAO is unaware of any published federal cases addressing whether the crime of sexual battery under California law is a crime of moral turpitude. However, in *Matter of S-*, 5 I&N Dec. 686 (BIA 1954), the BIA held that the crime of indecent assault on a female under section 292 (a) of the Canadian Criminal Code, although not statutorily defined, involved moral turpitude because the crime denotes depravity. 5 I&N Dec. 686, 688. Furthermore, in *Matter of Z-*, 7 I&N Dec. 253, 255 (BIA 1956), the BIA found indecent assault in violation of section 6052 of the General Statutes of Connecticut, Revision of 1930, involved moral turpitude. An indecent assault is described as consisting “of the act of a male person taking indecent liberties with the person of a female or fondling her in a lewd and lascivious manner without her consent and against her will, but with no intent to commit the crime of rape.”

With the present case, the AAO finds that sexual battery under Cal. Penal Code § 243.4(d) is a crime involving moral turpitude. Sexual battery is a specific intent crime that involves the touching of an intimate part of another person, against the person's will, committed for the purpose of sexual arousal or gratification, or sexual abuse. The purpose of the sexual battery bill is to punish crimes “more physically traumatic and psychologically terrifying” than misdemeanor assault and battery crimes. Viewed against the holdings in *Matter of S-* and *Matter of Z-*, wherein indecent assault was held to involve moral turpitude; and in light of *Perez-Contreras*, wherein the BIA found that moral turpitude refers to conduct that is depraved and contrary to the rules of morality and is present when knowing or intentional conduct is an element of a crime, the AAO finds that sexual battery under Cal. Penal Code § 243.4(d) is a crime of depravity that involves moral turpitude. The applicant is therefore inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude.

On December 26, 1998, the applicant was convicted of theft in violation of Cal. Penal Code § 484. Petty theft under Cal. Penal Code § 484 is a crime involving moral turpitude. *See Castillo-Cruz v. Holder*, 581 F.3d 1154 (9<sup>th</sup> Cir. 2009) (a conviction for petty theft under Cal.Penal Code § 484 requires, “the specific intent to deprive the victim of his property permanently”).

A waiver is available for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act. Section 212(h) of the Act provides, in pertinent part:

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if -

...

(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 . . .

A section 212(h) waiver of the bar to admission resulting from violation of section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant is not a consideration under the statute and will be considered only to the extent that it results in hardship to a qualifying relative, who in this case is the applicant's naturalized citizen mother. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996).

Extreme hardship to the applicant's qualifying relative must be established in the event that she remains in the United States without the applicant, and alternatively, if she joins the applicant to live in Mexico. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

"Extreme hardship" is not a definable term of "fixed and inflexible meaning"; establishing extreme hardship is "dependent upon the facts and circumstances of each case." *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). The Board of Immigration Appeals (BIA) in *Matter of Cervantes-Gonzalez* lists the factors it considers relevant in determining whether an applicant has established extreme hardship a qualifying relative pursuant to section 212(i) of the Act. The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. *Id.* at 565-566.

In *Matter of O-J-O*, 21 I&N Dec. 381, 383 (BIA 1996), the BIA stated that the factors to consider in determining whether extreme hardship exists "provide a framework for analysis," and that the "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." It further stated that "the trier of fact must consider the entire range of factors concerning hardship in their totality" and then "determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation." (citing *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994).

The director did not address the issue of whether the applicant demonstrated extreme hardship to a qualifying relative, which is a requirement of the 212(h) waiver. The AAO will therefore remand the matter to the director to make a determination regarding the applicant's eligibility for a waiver of

inadmissibility under section 212(h) of the Act. The director may request any additional evidence deemed necessary to assist with the determination. As always in these proceedings, the burden of proof rests solely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The appeal is remanded to the director for issuance of a new decision.