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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

H6

[redacted]

DATE: JUN 01 2011

Office: MEXICO CITY, MEXICO (SAN SALVADOR, EL SALVADOR)

FILE: [redacted]

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 Immigration and Nationality Act, 8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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 $630. 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 District Director, Mexico City, Mexico. 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 El Salvador who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude and pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking readmission within ten years of his last departure from the United States.[1] The applicant's spouse is a U.S. citizen. He seeks a waiver of inadmissibility in order to reside in the United States.

The district director found that the applicant had failed to establish extreme hardship to a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *District Director's Decision*, dated January 13, 2009.

On appeal, the applicant asserts that his spouse will suffer extreme hardship. *Form I-290B*, received February 9, 2009.

The record includes, but is not limited to, the applicant's spouse's statements, letters from family members, medical reports for the applicant's spouse and grandson, a statement of vehicle repossession, and other financial documents.

The record reflects that the applicant entered the United Stated without inspection on or around May 4, 1973, was ordered deported on June 21, 1978, entered the United States without inspection on or around December 12, 1982, was ordered deported on August 18, 1983, entered the United States without inspection later in 1983, filed a Form I-485, Application to Register Permanent Residence or Adjust Status, on September 19, 1997, had his Form I-485 denied on September 25, 2006, and departed the United States in August 2008.

The AAO notes that the proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary] as an authorized period of stay for purposes of determining bars to admission under section 212 (a)(9)(B)(i)(I) and (II) of the Act. *See Memorandum by Donald Neufeld, Acting Associate Director, Domestic Operations Directorate; Lori Scialabba, Associate Director, Refugee, Asylum and International Operations Directorate; Pearl Chang, Acting Chief, Office of Policy and Strategy*, dated May 6, 2009. As such, the applicant accrued unlawful presence from September 25, 2006, the date his Form I-485 was denied, until his

[1] The district director mentions that the applicant entered the United States on December 12, 1982 under an assumed name at a port of entry. However, the record reflects that he entered without inspection and he gave a false name upon being apprehended. *Form I-213*, dated December 15, 1982. The AAO will not determine whether his misrepresentation (which may have been an attempt to avoid the penalty of having two deportations on his record as opposed to one) renders him inadmissible under section 212(a)(6)(C)(i) of the Act, as a waiver for his unlawful presence would also result in a section 212(i) waiver for a willful misrepresentation.

departure in August 2008.[2] The applicant is inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for more than one year and seeking readmission within ten years of his August 2008 departure from the United States.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

> (B) Aliens Unlawfully Present.-
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> > (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-
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> > > (I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . prior to the commencement of proceedings under section 235(b)(1) or section 240, and again seeks admission within 3 years of the date of such alien's departure or removal, . . . is inadmissible.
> >
> > > . . . .
> >
> > > (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.
> >
> > > . . . .
> >
> > (v) Waiver. – The Attorney General [Secretary] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

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

[2] The AAO notes that the applicant's Form I-601 was pending when the Form I-485 was denied. In the event that the time period of the applicant's Form I-601 pendency and appeal period are considered as a period of authorized stay, the applicant still would have accrued more than one year of unlawful presence.

"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 reflects that the applicant was convicted on February 14, 1978 of sexual abuse in the second degree under New York Statutes § 130.60. He received a sentence of 9 months in the Nassau County Correctional Facility. At the time of the applicant's conviction, prior New York Statutes § 130.60 stated:

A person is guilty of sexual abuse in the second degree when he subjects another person to sexual contact and when such other person is:

> 1. Incapable of consent by reason of some factor other than being less than seventeen years old; or
>
> 2. Less than fourteen years old.
>
> Sexual abuse in the second degree is a class A misdemeanor.

The AAO notes that any intentional sexual conduct by an adult with a child involves moral turpitude, as long as the perpetrator knew or should have known that the victim was under the age of 16. *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008). The AAO is not aware of a case in which prior New York Statutes § 130.60 has been applied to conduct not involving moral turpitude. The AAO will now look at the applicant's case. The record of conviction is not clear as to which

subsection of prior New York Penal Code § 130.60 the applicant was convicted under and whether his conduct involved moral turpitude. As such, the AAO will look beyond the record of conviction. Form I-213, Record of Deportable Alien, reflects that the applicant was arrested by the Nassau County Police on December 27, 1997 for having sexual intercourse with his stepdaughter. A record of sworn statement in affidavit form, dated January 4, 1978, from the applicant's first spouse reflects that the applicant had sexual relations with her 13 year old daughter. Based on evidence in the record, the AAO finds that the applicant was convicted under subsection 2 of prior New York Statutes § 130.60 and that he knew or should have known that the victim was under the age of 14. As such, he committed a crime involved moral turpitude and he is inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Act.

Section 212(a)(2)(A) of the Act states in pertinent part, that:

> (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.

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 –
>
> > (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 . . .

In examining whether the applicant is eligible for a waiver, the AAO will assess whether he meets the requirements of section 212(h)(1)(A) of the Act. The record reflects that the activity resulting in the applicant's convictions occurred prior to February 14, 1978, the date of his conviction. As the activities for which the applicant is inadmissible occurred more than 15 years before the date of his application for an immigrant visa in 2008, 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. The record reflects that the applicant was working as a janitor when he was in the United States. There is no evidence that he has ever relied on the government for financial assistance. There is no evidence that he has been arrested since the time of his sexual abuse conviction, although he committed acts of domestic violence as listed in the July 24, 1978 findings and judgment from his first divorce. In addition, there is no indication that the applicant is involved with terrorist-related activities. 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 per section 212(h)(1)(A)(iii) of the Act. As discussed above, there is no evidence that he has been arrested since the time of his sexual abuse conviction. He did commit acts of domestic violence, however, this was over 30 years ago. The record reflects that the applicant has assisted his disabled grandson, provided emotional and financial support to his spouse, and raised his daugther. 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.

The granting of the waiver is discretionary in nature. There favorable factors include the applicant's U.S. citizen spouse and child, hardship to his family, lack of a criminal record since the aforementioned conviction, letters related to his good moral character and evidence of taxes being filed.

The unfavorable factors include the applicant's criminal conviction, his three entries without inspection, his two deportation orders, acts of domestic violence as listed in the findings and judgment from his first divorce, and his long period of unauthorized stay and unauthorized employment. The AAO places significant weight on the facts underlying the applicant's criminal conviction which reflect that he had sexual relations with his stepdaughter.

The AAO finds that the applicant has not established that the favorable factors in his application outweigh the unfavorable factors.

As the applicant is not being granted a section 212(h)(1)(A) waiver based on a negative exercise of discretion, no purpose would be served in evaluating his claim of extreme hardship under section 212(h)(1)(B) or section 212(a)(9)(B)(v) of the Act as it would also be denied based on a negative exercise of discretion.

In discretionary matters, the applicant bears the full burden of proving his eligibility for discretionary relief. *See Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976). Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.