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



U.S. Citizenship
and Immigration
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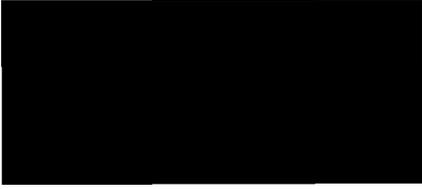
Office: SAN FRANCISCO, CA

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.

Thank you,

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, San Francisco, California, and is now before the Administrative Appeals Office (AAO) on appeal. The inadmissibility determination of the Field Office Director will be withdrawn and the application declared moot. The appeal will be dismissed and the matter will be returned to the Field Office Director for continued processing.

The applicant is a native and citizen of Mexico who was found to be inadmissible under 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 director indicated that the applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h). The director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

In the appeal notice counsel states that the applicant's criminal conviction in Mexico for unlawful possession of a weapon does not involve moral turpitude in view of the holding in *Matter of Granados*, 16 I&N Dec. 726 (BIA 1979), in which the Board of Immigration Appeals (the Board) found that possession of a concealed sawed-off shotgun is not a crime involving moral turpitude.

For the reasons set forth below, we concur that the applicant's conviction is not a crime involving moral turpitude.

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.

On December 8, 1996, the applicant was arrested for and charged with clandestinely introducing a firearm and ammunitions into Mexico. The applicant was convicted of the charge and sentenced to five years of imprisonment.

The Board 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 first applies the categorical approach. *Nunez v. Holder*, 594 F.3d 1124, 1129 (9th Cir. 2010) (citing *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 999 (9th Cir.2008)). This approach requires analyzing the elements of the crime to determine whether all of the proscribed conduct involves moral turpitude. *Nicanor-Romero*, *supra* at 999. In *Nicanor-Romero*, the Ninth Circuit states that in making this determination 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. *Id.* at 1004 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability can be established by showing that, in at least one other case, which includes the alien's own case, the state courts applied the statute to conduct that did not involve moral turpitude. *Id.* at 1004-05. *See also Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008) (whether an offense categorically involves moral turpitude requires reviewing the criminal statute to determine if there is a "realistic probability, not a theoretical possibility," that the statute would be applied to conduct that is not morally turpitudinous).

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." *Matter of Silva Trevino*, 24 I&N Dec. 687, 697 (A.G. 2008) (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.

With regards to following *Silva-Trevino* in the Ninth Circuit, the Board of Immigration Appeals (Board) stated recently "Since the Ninth Circuit . . . has not rejected *Silva-Trevino*, we will follow the approach set forth in the Attorney General's opinion." *Matter of Guevara Alfaro*, 25 I&N Dec. 417, 423 (BIA 2011).

In general, carrying a concealed weapon is not a crime involving moral turpitude. *See U.S. ex rel. Andreacchi v. Curran*, 38 F.2d 498 (S.D.N.Y. 1926); and *Ex Parte Saraceno*, 182 F. 955 (C.C.N.Y. 1910). However, in *Matter of S-*, the Board held that carrying a concealed and deadly weapon with intent to use it against the person of another is a crime involving moral turpitude because "the use of a dangerous weapon against the person of another is motivated by an evil, base, and vicious intent.

The essence of the offense is the carrying of the dangerous weapon with a base, evil and vicious intent to injure another.” 8 I&N Dec. 344, 346 (BIA 1959)(citations omitted).

The applicant was convicted pursuant to Mexico’s Judicial Act Penal Code Number 167/96/11, which punishes a person for introducing an illegal weapon and munitions that are for the military and air force’s exclusive use. The statute has no scienter requirement. As there is no evidence to indicate other than personal use of the firearm in question, we find that there must be evidence in the record establishing an intent to assault another with the weapon for the applicant’s conviction for introducing an illegal weapon and munitions to constitute a crime involving moral turpitude. The submitted court document stated that the applicant was at the Mexico City International Airport and a customs officer found the illegal firearm (nine millimeter Browning) and cartridges in the applicant’s luggage concealed in boots. In his declaration before the Attorney General, the applicant conveyed that he lived in the United States for several years, and bought the gun and ammunition three months before his trip to Mexico with the purpose to bring the gun for his personal protection and that it was not his intention to bring the gun and ammunition into Mexico illegally. None of the other documents comprising the record of conviction establish that the applicant’s had a specific intent to assault another with the gun. Accordingly, because the criminal record does not demonstrate such an intent, we find that the conviction is not a crime involving moral turpitude and he is thereby not inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

Therefore, the waiver application is unnecessary and the issue of whether the applicant established extreme hardship to a qualifying relative need not be addressed. Accordingly, the decision of the Field Office Director is withdrawn, the instant application for a waiver is declared moot, and the appeal is dismissed.

ORDER: The decision of the Field Office Director is withdrawn, the application for a waiver is declared moot, the appeal is dismissed, and the matter is returned to the Field Office Director for continued processing of the applicant’s adjustment application (Form I-485).