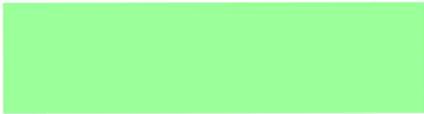




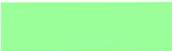
U.S. Citizenship
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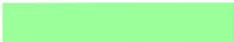
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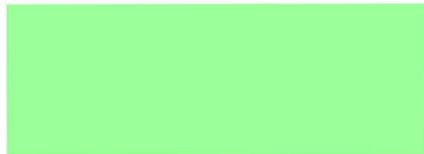
Office: NEWARK

FILE: 

IN RE: Applicant: 

APPLICATION: Application for Waiver of Grounds of Inadmissibility under sections 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,

A handwritten signature in black ink that reads "Michael Shumway".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Newark, New Jersey, and is now before the Administrative Appeals Office (AAO) on appeal. As the applicant is not inadmissible, the appeal will be dismissed as the waiver application is unnecessary.

The applicant is a native and citizen of Uruguay 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 applicant is a derivative beneficiary of an approved Form I-130, Petition for Alien Relative, as a family sponsored immigrant under section 203(a)(4) of the Act. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h).

On September 2, 2008, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based upon his approved immigrant petition. On November 3, 2009, the applicant filed an Application for a Waiver of Grounds of Inadmissibility (Form I-601).

In a decision dated March 29, 2011, the field office director denied the Form I-601 application for a waiver, finding that the applicant failed to establish that his U.S. citizen wife would experience extreme hardship as a consequence of his inadmissibility.

On appeal, counsel for the applicant asserts that the criminal statute under which the applicant was convicted does not involve moral turpitude, and that there is no evidence in the record of conviction from which to conclude that the applicant's conviction renders him inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The record includes, but is not limited to: counsel's brief; the applicant's sworn statement; a sworn statement by the applicant's wife; medical reports; copies of birth certificate; a marriage certificate; documentation indicating that the applicant successfully completed a term of probation; character reference letters; financial documentation; and documentation regarding the applicant's criminal history.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record has been reviewed and considered in rendering a decision on the appeal.

Section 212(a)(2)(A) of the Act provides, 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

The Board of Immigration Appeals (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.)

A review of the record of conviction in this case reflects that the Judgment of Conviction dated February 3, 2003, indicates that the applicant entered a guilty plea and was sentenced to probation for one year for "Possession of a weapon for unlawful use" in the third degree under statute NJSA 2C:39-4(d). However, counsel submitted evidence indicating that the NJSA 2C:39-4(d) charge was amended to a violation of unlawful possession of a weapon, a fourth degree felony in violation of NJSA 2C:39-5(d). To resolve this discrepancy, the AAO will examine the documents comprising the record of conviction under the modified categorical approach. In this case, the record of conviction includes a plea transcript, the plea form, and the judgment and sentence.

Here, the record includes the transcript of the plea hearing convened on February 3, 2003, before State Court Judge [REDACTED]. The transcript reflects that the applicant appeared before the state court represented by [REDACTED], Assistant Deputy Public Defender, to enter a guilty plea to count five, as amended, of the January 23, 2002 Indictment. The plea transcript indicates that the applicant pled guilty to one count of fourth degree unlawful possession of a weapon. Fourth degree unlawful possession of a weapon is codified in section 2C:39-5(d) of the New Jersey Statutes, whereas third degree unlawful possession of a weapon is codified in section 2C:39-4(d). The applicant pled guilty to a fourth degree offense, and not an offense under 2C:39-4(d) of the New Jersey Criminal Code, as clarified on page four of the transcript. During questioning, Judge [REDACTED] asked the applicant the following:

"THE COURT: I understand you're pleading guilty to one fourth-degree count of [] unlawful possession of a weapon, which normally carries up to 18 months in jail and a \$7,500 fine. The recommendation is that you'll receive probation without any custodial sentence, [] is that your understanding?"

THE DEFENDANT: Yes."

It is also noted that on page seven of the transcript, Judge [REDACTED] stated that the Court was satisfied that the applicant voluntarily entered into a guilty plea agreement and that there is a factual basis for the same. The plea agreement was thus accepted by Judge [REDACTED]

Further evidence that the applicant pled guilty to unlawful possession of a weapon in the fourth degree under section 2C:39-5(d) is found in the plea form dated February 3, 2003. The plea form, which was signed by the applicant, Assistant Deputy Public Defender [REDACTED] and [REDACTED] Prosecutor [REDACTED] contains the following statement on page one: "List the charges to which you are pleading guilty: count 5, UPW as amended, a fourth degree offense with a statutory maximum term of imprisonment of 18 months."

As such, it appears that the Judgment of Conviction in this case presents a clerical error as to the statute of conviction. Both the documentary evidence submitted as proof of conviction, as well as the documents comprising the record of conviction, indicate that the applicant pled guilty to and was convicted for violating section 2C:39-5(d) of the New Jersey Statutes. For this offense, the applicant was sentenced to one year of probation without any custodial sentence. The record reflects that the applicant successfully completed the terms of his probation.

Having determined that the applicant was convicted of fourth degree unlawful possession of a weapon in violation of NJSA 2C:39-5(d), the AAO next addresses whether the applicant's conviction renders him inadmissible as an alien who has been convicted of a crime involving moral turpitude under section 212(a)(2)(A)(i)(I) of the Act.

This case arises in the Third Circuit. The Third Circuit has affirmed the traditional categorical approach for determining whether a crime involves moral turpitude. *See Jean-Louis v. Holder*, 582 F.3d 462, 473-82 (3rd Cir. 2009) (declining to follow the "realistic probability approach" put forth by the Attorney General in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)). The categorical inquiry in the Third Circuit consists of looking "to the elements of the statutory offense . . . to ascertain the least culpable conduct hypothetically necessary to sustain a conviction under the statute." 582 F.3d 462, 465-66. The "inquiry concludes when we determine whether the least culpable conduct sufficient to sustain conviction under the statute 'fits' within the requirements of a [crime involving moral turpitude]." 582 F.3d at 470. However, if the "statute of conviction contains disjunctive elements, some of which are sufficient for conviction of [a crime involving moral turpitude] and other of which are not . . . [an adjudicator] examin[es] the record of conviction for the narrow purpose of determining the specific subpart under which the defendant was convicted." *Id.* at 466. This is true "even where clear sectional divisions do not delineate the statutory variations." *Id.* In so doing, an adjudicator may only look at the formal record of conviction. *Id.*

The statute pertaining to unlawful possession of a weapon in the fourth degree, NJSA 2C:39-5(d) provides that:

"Other weapons. Any person who knowingly has in his possession any other weapon [that is not a machinegun, handgun, rifle or shotgun] under circumstances not manifestly appropriate for such lawful uses as it may have is guilty of a crime of the fourth degree."

The AAO is unaware of any published federal cases addressing whether the crime of fourth degree unlawful possession of a weapon under New Jersey law is a crime involving moral turpitude. Generally, however, the crime of possession of a concealed weapon, without intent to use it, is not a

crime involving moral turpitude. See *U.S. ex rel. Andreacchi v. Curran*, 38 F.2d 498 (S.D.N.Y. 1926); *Ex Parte Saraceno*, 182 F. 955 (C.C.N.Y. 1910) (finding that carrying a concealed weapon without a written license is not a crime involving moral turpitude). In *Matter of S-*, the Board of Immigration Appeals 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.” 8 I&N Dec. 344, 346 (BIA 1959). The Board reasoned that “[t]he essence of the offense is the carrying of the dangerous weapon with a base, evil and vicious intent to injure another.” *Id.* This intent to injure, in the opinion of the Board, involves moral turpitude. *Id.* Conversely, the Board held in *Matter of Granados* that a conviction for possession of a concealed and unregistered sawed-off shotgun, in violation of 26 USC 5861(d), an offense that does not include as an additional element the intent to use the weapon for an unlawful purpose, is not a crime involving moral turpitude. 16 I&N Dec. 726, 728 (BIA 1979).

In New Jersey, the crime of unlawful possession of a weapon in the fourth degree does not include, as an element, an intent to use the weapon unlawfully. In *State v. Lee*, 96 N.J. 156 (1984), the Supreme Court of New Jersey upheld the conviction of the appellant, who had been convicted of possessing taped scissors and surgical tape. The New Jersey Supreme Court noted that the Legislature “carefully constructed a scheme for the criminalization of possession of weapons in various situations, depending on the nature of the weapon, the intent of the possessor, and the surrounding circumstances.” *Id.* at 160. Chapter 39 of the New Jersey Statutes, of which 2C:39-5(d) is a part, contains three classes of possessory weapons offenses. In the first class of offenses, codified in NJSA 2C:39-3(b), the mere possession of certain weapons, such as sawed-off shotguns, constitutes a *per se* offense. *Id.* A second class of offenses, codified in NJSA 2C:39-4(a) - (d), prohibits the possession of a weapon with the intent to use it against the person or property of another. *Id.* at 161. The final category, described in NJSA 2C:39-5(d), prohibits the possession of any weapon other than certain unlicensed firearms “under circumstances not manifestly appropriate for such lawful uses as it may have.” *Id.*

The New Jersey Supreme Court also noted that the Legislature made the possession of a given weapon a more serious crime if that possession was accompanied by an intent to use it unlawfully against another. Compare NJSA 2C:39-3 a (possession of a “destructive device” is a crime of the third degree) with NJSA 2C:39-4 c (possession of such a device with an accompanying intent to use unlawfully is a second degree crime). Regarding the specific statute at hand, the Supreme Court found that the New Jersey Legislature “addressed the situation in which someone who has not yet formed an intent to use an object as a weapon possesses it under circumstances in which it is likely to be so used.” *State v. Lee*, 96 N.J. at 161. The Supreme Court opined, regarding NJSA 2C:39-5(d), that “[t]he obvious intent of the Legislature was to address a serious societal problem, the threat of harm to others from the possession of objects that can be used as weapons under circumstances not manifestly appropriate for such lawful uses as those objects may have.” *Id.* Consequently, the Supreme Court held that NJSA 2C:395-(d) does not require as an element proof of intent to use a weapon for an unlawful purpose. *Id.* at 163. The unlawful possession of a weapon statute at issue in this case therefore does not include any additional elements as aggravating factors.

Rather, additional aggravating factors, such as the endangerment of another person, a resulting injury to another person, and the intent to use a weapon unlawfully, are covered by other sections of New Jersey's Criminal Statutes. For instance, section 2C:12-1b of the New Jersey Statutes punishes an assault and battery against another using a dangerous weapon. Section 2C:12-11 of the New Jersey Statutes punishes disarming a law enforcement officer with the intent to use the weapon against another person. In addition, it is noted that section 2C:39-4 of the New Jersey Statutes punishes the possession of a weapon with the intent to use it unlawfully against another. Similarly, section 2C:39-4c of the New Jersey Statutes punishes the possession of a destructive device with intent to use it unlawfully against another person.

Therefore, under the categorical approach followed in the Third Circuit, the AAO finds that the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The waiver filed pursuant to section 212(h) of the Act is therefore unnecessary. As the applicant is not required to file a waiver application, the appeal of the denial of the waiver will be dismissed.

ORDER: The appeal will be dismissed as the applicant is not inadmissible and the waiver application is unnecessary.