

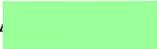
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

(b)(6)



Date: **MAY 15 2013** Office: LIMA 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,

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, Lima, Peru, 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 Peru 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 married to a U.S. citizen. On February 24, 2012, the applicant filed an Application for a Waiver of Grounds of Inadmissibility (Form I-601). The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his U.S. citizen spouse.

In a decision dated July 27, 2012, the field office director denied the Form I-601 application for a waiver, finding that the applicant's conviction for endangering the welfare of a child after having been admitted to the United States as a lawful permanent resident constitutes an aggravated felony for which there is no waiver available. The field office director further found that the applicant failed to establish that his U.S. citizen wife would experience extreme hardship as a consequence of his inadmissibility and denied the waiver application accordingly.

On appeal, counsel for the applicant asserts that the criminal statute under which the applicant was convicted is divisible, and that there is no evidence in the record of conviction from which to conclude that the applicant's conviction constitutes an aggravated felony for sexual abuse of a minor under section 101(a)(43)(A) of the Act. Counsel concedes that a conviction for endangering the welfare of a child in violation of section 260.10 of the New York Penal Code involves moral turpitude, but asserts that the petty offense exception to inadmissibility arising under section 212(a)(2)(A)(i)(I) of the Act applies.

The record includes, but is not limited to: counsel's brief; a sworn statement by the applicant's wife; copies of airline tickets; copies of the applicant's wife's wage and tax statements; copies of income tax returns; medical documentation; the applicant's affidavit; birth certificates; a marriage certificate; documentation concerning the removal proceeding against the applicant and subsequent grant of voluntary departure; 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.)

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 “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 on October 9, 2007, the applicant was convicted in the Supreme Court of the State of New York, County of Queens, of endangering the welfare of a child, a class A misdemeanor in violation of section 260.10(1) of the New York Penal Code. The applicant was sentenced to one year conditional discharge and a three year limited order of protection. The field office director found that the applicant's conviction constitutes a crime involving moral turpitude pursuant to section 212(a)(2)(A)(i)(I) of the Act. As the applicant has not disputed this finding on appeal, and the record does not show the determination to be erroneous, the AAO will not disturb the finding of the field office director.

However, the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act because the petty offense exception (section 212(a)(2)(A)(ii)(II) of the Act) applies. Section 212(a)(2)(a)(ii) of the Act provides, in pertinent part, that:

(ii) Exception.-Clause (i)(I) shall not apply to an alien who committed only one crime if-

....

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

New York Penal Law § 260.10(1) provides that:

A person is guilty of endangering the welfare of a child when:

1. He or she knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old or directs or authorizes such child to engage in an occupation involving a substantial risk of danger to his or her life or health; ...

Endangering the welfare of a child is a class A misdemeanor.

New York law indicates that for class A misdemeanor offenses, a person may be sentenced to imprisonment for a term not exceeding one year. *See* New York Penal Code § 70.15(1). Additionally, the judicial record of conviction in this case shows that the applicant was not sentenced to a term of imprisonment in excess of 6 months; he was sentenced to one year of conditional discharge, which is a form of probation. *See* New York Penal Law § 65.05. The Board has held that when a criminal court issues an order placing a defendant on probation, "the alien has not had a sentence imposed of him in excess of six months for purposes of the petty offense exception." *Matter of Castro*, 19 I&N Dec. 692, 694 (BIA 1988); *see also Matter of Gonzalez- Zoquiapan*, 24 I&N Dec. 549, 554 (BIA 2008) (noting that an alien sentenced to probation is eligible for the petty offense exception); *Matter of Cortez Canales*, 25 I&N Dec. 301, 306 (BIA 2010) (finding that an

alien sentenced to 60 days imprisonment and five years of probation was eligible for the petty offense exception).

The Board has held that the exculpatory effect of the petty offense exception is “mandatory and automatic, not discretionary.” *Matter of Mendoza*, 11 I&N Dec. 239, 241 (BIA 1965); *Matter of H-*, 6 I&N Dec. 738, 740-41 (BIA 1955) (finding that application of the petty offense exception is mandatory, and that none of the expressions Congress typically uses to grant latitude to immigration adjudicators, such as the phrase “in the exercise of discretion,” or providing for a “waiver” of grounds of inadmissibility, appear in the statutory language of the petty offense exception). As such, an alien convicted of a first-offense crime involving moral turpitude with a maximum sentence of one year and an imposed sentence of six months or less is not inadmissible under the section 212(a)(2)(A)(i)(I) ground of inadmissibility. Therefore, such an alien need not seek a discretionary waiver of inadmissibility.

Here, the evidence in the record of proceedings establishes that the applicant’s conviction for misdemeanor endangering the welfare of a child in violation of New York Penal Code § 260.10 falls within the petty offense exception set forth in the Act and does not render him inadmissible under section 212(a)(2)(A)(i)(I) of the Act. *See Matter of Garcia-Hernandez*, 23 I&N Dec. 590, 593 (BIA 2003) (finding that an alien is not within the class of aliens described in section 212(a)(2)(A) if the “petty offense” exception applies to his or her crime).

Based on the aforementioned discussion, the applicant is not required to file a section 212(h) waiver and the waiver application is unnecessary. As the applicant is not required to file a waiver application, the aggravated felony bar to section 212(h) statutory eligibility does not apply in this case.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C., § 1361. Here, the applicant is not required to file a waiver. Accordingly, the appeal will be dismissed as the waiver application is unnecessary.

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