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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536

SEP 04 2003

FILE: [redacted] Office: PORTLAND, OREGON Date:

IN RE: [redacted]

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: [redacted]

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting District Director, Portland, Oregon, and is now before the Administrative Appeals Office (AAO) on appeal. The District Director's decision will be withdrawn and the appeal dismissed as moot.

The applicant is a native and citizen of Mexico 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 has a 1-year-old United States (U.S.) citizen son and a U.S. citizen mother and lawful permanent resident father. He seeks a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h).

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed upon a qualifying relative. The application was denied accordingly.

Counsel asserts on appeal that the offense of attempted rape in the second degree, is not a crime involving moral turpitude under Oregon law, and that because there is no *mens rea* for this crime, it cannot be considered a crime involving moral turpitude. In the event that the applicant is inadmissible, counsel states that his removal from the United States would impose extreme financial, emotional and physical hardship on his parents and his son.

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

> (A)(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-
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> > (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, that:

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

> (1) (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 . . . .

The record reflects that the applicant pled guilty on February 29, 2000, to the offense of Attempted Rape in the Second Degree against a female under the age of 14 years, a class C felony in violation of the Oregon Revised Statute § 163.365. The applicant was placed on probation for three years.

Section 163.365 of the Oregon Revised Statutes, Title 16, Chapter 163, provides that:

> (1) A person who has sexual intercourse with another person commits the crime of rape in the second degree if the other person is under 14 years of age.
> (2) Rape in the second degree is a Class B felony.[1]

In *Matter of Dingena,* 11 I&N Dec. 723 (BIA 1966), the Board of Immigration Appeals (Board) held that a conviction of the offense of sexual intercourse with a female child is a crime involving moral turpitude. The Board determined that whether the offense is designated as statutory rape, carnal knowledge of a female under the age of consent, or sexual intercourse with a child under the age of consent, the essential elements of all of the offenses are the carnal knowledge or intercourse and the age of the female. The Board concluded that if sexual intercourse was present and it was established that the female was under the age of consent, the offense was a crime of moral turpitude and an independent *mens rea* element was not required.

In the present case, the evidence in the record indicates that the applicant was convicted of **attempted** rape in the second degree. The applicant was therefore not convicted of actually engaging in sexual intercourse with a female under the age of 14, as set forth in O.R.S. § 163.365. As such, the reasoning set forth in *Matter of Dingena* does not apply to the applicant, and traditional

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[1] It is noted that the Oregon Revised Statutes do not contain a separate provision for "attempted rape in the second degree". Instead, it is included as a lesser crime within O.R.S. § 163.365. *See State of Oregon v. Boyum,* 548 P.2d 172 (1976).

interpretations regarding the definition of a crime involving moral turpitude must be applied.

> 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.

Matter of Perez-Contreras, 20 I&N Dec. 615, 618 (BIA 1992). (Citations omitted). The statutory language set forth in O.R.S. § 163.365 contains no element of intentional or knowing conduct, and the statute contains no other language reflecting the required *mens rea* for a crime involving moral turpitude. The AAO therefore finds that the applicant has not been convicted of a crime involving moral turpitude, and that he is not inadmissible. The waiver application is thus moot.[2]

ORDER: The district director's decision is withdrawn and the appeal is dismissed as moot.

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[2] It is noted that the record contains evidence that on June 23, 1999, the applicant was found guilty of theft. The applicant was 16 years old and the proceedings took place within the jurisdiction of the Oregon Juvenile Authority. In its decision, *In re Miguel Devison-Charles,* 22 I&N Dec. 1362 (BIA 2000), the Board of Immigration Appeals (Board) stated, "[w]e have consistently held that juvenile delinquency proceedings are not criminal proceedings, that acts of juvenile delinquency are not crimes, and that findings of juvenile delinquency are not convictions for immigration purposes." *Devison-Charles* at 1365; *see also Matter of De La Nues,* 18 I&N Dec. 140 (BIA 1981) and *Matter of Ramirez-Rivero,* 18 I&N Dec. 135 (BIA 1981). Based on the above reasoning, the applicant's theft offense was not considered a crime involving moral turpitude or a ground of inadmissibility.