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U.S. Citizenship
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DEC 21 2004

Handwritten initials: A2

FILE: [REDACTED] Office: DENVER DISTRICT OFFICE Date:

IN RE: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(h) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT: SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Handwritten signature: Robert P. Wiemann

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Denver. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed, the district director's decision withdrawn, and the application declared moot.

The record reflects that the applicant is a native and citizen of Mexico who was found inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (INA, the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I). The record reflects that the applicant is the son of a U.S. citizen father and lawful permanent resident mother. He seeks a waiver to remain in the United States with his family and adjust his status to that of a lawful permanent resident.

The district director found that the applicant had failed to establish extreme hardship to his U.S. citizen parents and denied the application accordingly, also finding that the applicant did not merit a favorable exercise of discretion. The entire record was reviewed and considered in rendering a decision on the appeal.

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

(i) In general.—Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the 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.

8 U.S.C. § 1182(a)(2)(A). The Federal Bureau of Investigation (FBI) Record of Arrest and Prosecution ("RAP Sheet") pertaining to this applicant shows that he has been arrested four times between 1994 and 1999. He was arrested on March 5, 1994 in Colorado and charged with driving while ability impaired and "weaving." He pled guilty to driving while impaired, and the charge of weaving was dismissed. He was sentenced to 120 days in jail, with 120 days suspended, but was granted deferred sentencing for one year.

On June 6, 1994, he was again arrested in Colorado for driving while ability impaired and related charges. He pled guilty to driving under the influence, was sentenced to 120 days in jail, with 100 days suspended. He was placed on probation for one year.

On September 22, 1996, he was arrested in California for driving under the influence of alcohol or drugs and causing bodily injury. The details of the incident and injury involved are not in the record. He was convicted of a misdemeanor under California Vehicle Code § 23152(b) for driving with .08% or more alcohol in his blood, by plea of *nolo contendere* on October 15, 1996. He was sentenced to 15 days in jail, fines and fees of \$1644, probation for 36 months, and completion of a three-month drug education and counseling program. He violated the terms of his probation and was sentenced to an additional 60 days in jail, after which probation was reinstated. On January 24, 2002, a motion to dismiss the charge and vacate the plea was granted pursuant to Cal. Penal Code § 1203.4, which permits such dismissal after successful completion of probation and lack of further criminal record.

Finally, the applicant was arrested in Colorado on June 21, 1999, for driving under the influence and related charges. He was found guilty of driving under the influence and sentenced to two years probation, various alcohol abuse intervention programs, and payment of fines and fees totaling \$785.

A crime involving moral turpitude has been described by the BIA as "conduct that is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general . . . Under this standard, the nature of a crime is measured against contemporary moral standards and may be susceptible to change based on the prevailing views in society. . . . Furthermore, although crimes involving moral turpitude often involve an evil intent, such a specific intent is not a prerequisite to finding that a crime involves moral turpitude." *In re Torres-Varela*, 23 I&N Dec. 78, 83 (BIA 2001) (citations omitted). Driving under the influence of alcohol may or may not be a crime involving moral turpitude, depending on the underlying statute under which the applicant was convicted. The adjudicator must determine whether the statute at issue enhances the offense from a mere "marginal" or regulatory crime, involving no specific intent or mental state, to "such a deviance from the accepted rules of contemporary morality that it amounts to a crime involving moral turpitude." *Matter of Lopez-Meza*, 22 I&N Dec. 1188, 1196. The language of the statute under which the applicant was convicted is controlling. *Id.*, at 1193 (citations omitted).

The statute under which the applicant was twice convicted in 1994 is Colorado Revised Statute § 42-4-1202(1)(b). In 1994 the statute provided, in relevant part:

(b) It is a misdemeanor for any person who is impaired by alcohol or by one or more drugs, or by a combination of and one or more drugs, to drive any vehicle in this state.

...

(g) "Driving while ability impaired" means driving a vehicle when a person has consumed alcohol or one or more drugs, or a combination of both alcohol and one or more drugs, which alcohol alone, or one or more drugs alone, or alcohol combined with one or more drugs, affects him to the slightest degree so that he is less able than he ordinarily would have been, either mentally or physically, or both mentally and physically, to exercise clear judgment, sufficient physical control, or due care in the safe operation of a vehicle.

Colo. Rev. Stat. § 42-4-1202(1) (1994).

The statute under which the applicant was convicted in 1996 provides, in pertinent part:

§ 23152. Driving under influence; blood alcohol percentage; presumptions

...

(b) It is unlawful for any person who has 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle. For purposes of this article and Section 34501.16, percent, by weight, of alcohol in a person's blood is based upon grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath. In any prosecution under this subdivision, it is a rebuttable presumption that the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of driving the vehicle if the person had 0.08 percent

or more, by weight, of alcohol in his or her blood at the time of the performance of a chemical test within three hours after the driving.

Cal. Vehicle Code § 23152 (2004).

The 1999 conviction was under Colorado Revised Statute § 42-4-1301(1)(b), which provided, in pertinent part:

(b) It is a misdemeanor for any person who is impaired by alcohol or by one or more drugs, or by a combination of alcohol and one or more drugs, to drive any vehicle in this state.

...

(g) "Driving while ability impaired" means driving a vehicle when a person has consumed alcohol or one or more drugs, or a combination of both alcohol and one or more drugs, which alcohol alone, or one or more drugs alone, or alcohol combined with one or more drugs, affects the person to the slightest degree so that the person is less able than the person ordinarily would have been, either mentally or physically, or both mentally and physically, to exercise clear judgment, sufficient physical control, or due care in the safe operation of a vehicle.

Colo. Rev. Stat. § 42-4-1301(1)(b) (1999). Despite the applicant's multiple convictions, it appears that he was never treated as a repeat offender or convicted under an aggravated or enhanced charge. The offenses for which he was convicted cannot be excused or condoned, but do not include in the statutory language an element of moral culpability, depravity, or the like, as required to find that the applicant was convicted of a crime involving moral turpitude. Rather, the offenses for which the applicant was convicted are in similar nature as the crime for which the applicant was convicted in *In re Torres-Varela, supra*, which the BIA characterized as "marginal."

The AAO therefore finds that the applicant has not admitted or been convicted of a crime involving moral turpitude, the district director's determination of inadmissibility under INA § 212(a)(2)(A)(i)(I) was in error, and the application for waiver of grounds of inadmissibility is moot.¹ Consequently, it is not necessary to reach the question of whether he qualifies for a waiver under INA § 212(h), 8 U.S.C. § 1182(h).

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

¹ The AAO notes that the latest criminal history background check for the applicant is now over three years old. This decision expresses no opinion on separate inadmissibility determinations based on subsequent or intervening criminal charges, if any.