identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

H2

FILE: [redacted] Office: LOS ANGELES, CA Date: AUG 04 2009

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]

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.

Michael Grissom

John F. Grissom,
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Los Angeles, California. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant is a native and citizen of Mexico who was found to be inadmissible to the United States 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 crimes involving moral turpitude. He filed an application for waiver of inadmissibility and evidence of extreme hardship in response to a Form I-72, Request for Further Evidence, provided by the district director. *Response to Form I-72 from Counsel,* dated October 31, 2003.

The district director denied the application for a waiver, finding that the applicant failed to establish extreme hardship to his lawful permanent resident mother as required by INA § 212(h), 8 U.S.C. § 1182. *Decision of District Director,* dated December 13, 2005.

On appeal, counsel asserts that the applicant's mother will suffer extreme hardship as a result of the applicant's inadmissibility because she is medically and physically disabled and relies on the applicant to provide her with day-to-day care and economic support. *Counsel's Brief*, dated February 9, 2006.

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.

The Board of Immigration Appeals (BIA) 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 the recently decided *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. Finally, in all such inquiries, the burden is on the alien to establish "clearly and beyond doubt" that he is "not inadmissible." *Id.* at 709 (citing *Kirong v. Mukasey*, 529 F.3d 800 (8th Cir. 2008))

The record shows that the applicant was convicted of Reckless Driving in violation of section 23103 of the California Vehicle Code on February 28, 1977, punishable by a maximum of five days in prison. On August 5, 1977 the applicant was convicted of Assault with a Deadly Weapon in violation of section 245(a) of the California Penal Code. He was sentenced to 180 days in jail and two years probation. On March 22, 1993 the applicant was convicted of Carrying a Concealed Weapon in his Vehicle in violation of section 12025(a)(1) of the California Penal Code and on October 11, 1994 the applicant was convicted of Driving Under the Influence with a blood alcohol level of .08% or more in violation of sections 23152(A) and (B) of the California Vehicle Code and driving without a license in violation of section 12500(A) of the California Vehicle Code.

The AAO will first address the applicant's conviction for Reckless Driving. Section 23103 of the California Vehicle Code provides, in pertinent part, that "[a]ny person who drives any vehicle in willful or wanton disregard for the safety of persons or property is guilty of reckless driving."

Although evil intent signifies a crime involving moral turpitude, willfulness in the commission of the crime does not, by itself, suggest that it involves moral turpitude. *Goldeshtein v. INS*. 8. F.3d 645, 648 (9th Cir. 1993). Under the statute, evil intent must be explicit or implicit given the nature of the crime. *Gonzalez-Alvarado, v. INS,* 39 F.3d 245, 246 (9th Cir. 1994). The AAO notes that the statute under which the applicant was convicted is a divisible statute violated by either willfully or wantonly driving a vehicle with disregard for the safety of persons or property. Thus, by the language of the statute the applicant may or may not have been convicted of a crime involving moral turpitude.

The AAO notes that the applicant has not presented and the AAO is unaware of any prior case in which a conviction has been obtained under section 23103 of the California Vehicle Code for conduct not involving moral turpitude. Furthermore, the entire record was reviewed and found inconclusive as to whether the applicant's conviction involved moral turpitude. Thus, pursuant to *Matter of Silva-Trevino*, the AAO must find that the applicant's conviction under Section 23103 of the California Vehicle Code constitutes a crime involving moral turpitude.

The AAO also finds that the applicant's conviction for Assault with a Deadly Weapon a crime involving moral turpitude.

Section 245(a) of the California Penal Code states:

> (1) Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars ($10,000), or by both the fine and imprisonment.
>
> (2) Any person who commits an assault upon the person of another with a firearm shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not less than six months and not exceeding one year, or by both a fine not exceeding ten thousand dollars ($10,000) and imprisonment.
>
> 3) Any person who commits an assault upon the person of another with a machinegun, as defined in Section 12200, or an assault weapon, as defined in Section 12276 or 12276.1, or a .50 BMG rifle, as defined in Section 12278, shall be punished by imprisonment in the state prison for 4, 8, or 12 years.

In *Matter of O-*, 3 I&N Dec. 193 (BIA 1948) and *Matter of Montenegro*, 20 I&N Dec. 603 (BIA 1992), the Board of Immigration Appeals (BIA) held that assault with a weapon is a crime involving

moral turpitude. It is noted that as a general rule, simple assault or battery is not deemed to involve moral turpitude for purposes of the immigration laws. *Matter of Fualaau,* 21 I&N Dec. 475, 477 (BIA 1996). However, this general rule does not apply where an assault or battery necessarily involved some aggravating dimension, such as the use of a deadly weapon.... *See, e.g., Matter of Danesh,* 19 I&N Dec. 669 (BIA 1988). The AAO notes that the Ninth Circuit Court of Appeals has specifically addressed the statute at issue, and has held that violation of C.P.C. § 245(a)(2) (Assault with a Firearm) is not a crime involving moral turpitude. *See Carr v. INS*, 86 F.3d 949, 951 (9th Cir. 1996) (citing *Komarenko v. INS*, 35 F.3d 432, 435 (9th Cir. 1994)). However, the Ninth Circuit did not provide a rationale for this finding in either *Carr* or *Komarenko*, and it did not engage in an analysis of the statute consistent with the methodology articulated by the Attorney General in *Matter of Silva-Trevino.* As stated above, the BIA has found that the use of a deadly weapon in the commission of an assault is an aggravating factor that renders the offense a crime involving moral turpitude. Given that this aggravating factor is an element of the offenses enumerated in C.P.C. § 245(a), and that the AAO is unaware of any prior case in which a court has applied C.P.C. § 245(a) to conduct not involving moral turpitude, the AAO must find that the applicant's conviction for violation of C.P.C. § 245(a) is a crime involving moral turpitude.

At the time of the applicant's conviction for Carrying a Concealed Weapon section 12025(a)(1) of the California Penal Code, stated, "a person is guilty of carrying a concealed firearm when he or she does any of the following: (1) Carries concealed within any vehicle..." Carrying a Concealed Weapon has generally been found to not involve a crime of moral turpitude. *U.S. ex rel. Andreacchi v. Curran*, 38 F.2d 498 (S.D.N.Y. 1926). Only in cases where intent to use the weapon against another person is presumed in the language of the statute has this crime been found to involve moral turpitude. *Matter of S-*, 8 I. & N. Dec. 344 (BIA 1959). The AAO notes that intent is not presumed in section 12025(a)(1) of the California Penal Code; thus, the applicant's conviction under this statute does not constitute a crime involving moral turpitude.

Lastly, the applicant was convicted of Driving Under the Influence with a blood alcohol level of .08% or more in violation of sections 23152(A) and (B) of the California Vehicle Code and driving without a license in violation of section 12500(A) of the California Vehicle Code.

Sections 23152(A) and (B) of the California Vehicle Code state:

> (a) It is unlawful for any person who is under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle.
>
> (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.

The AAO notes that the BIA has found that a simple "driving under the influence" conviction with no aggravating factors is not a crime involving moral turpitude. *In Re Lopez-Meza, Id.* 3423 (BIA

Dec. 21, 1999). Furthermore, a conviction for driving without a license is not a crime involving moral turpitude as it would not involve evil intent, vicious motive, or corrupt mind.

Therefore, the current record indicates that the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for his convictions for Assault with a Deadly Weapon and Reckless Driving. For this ground of inadmissibility the applicant is eligible for a waiver under section 212(h) of the Act.

Section 212(h) of the Act provides, in pertinent part, that:

> The Attorney General [now, Secretary, Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) . . . if –
>
> (1) (A) . . . it is established to the satisfaction of the Attorney General that –
>
> (i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,
>
> (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
>
> (iii) the alien has been rehabilitated; or
>
> (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 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 applicant's convictions for Assault with a Deadly Weapon and Reckless Driving occurred more than 15 years from the date of the application for adjustment of status. An application for admission or adjustment is a "continuing" application adjudicated based on the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). There has been no final decision made on the applicant's I-485 application, so the applicant, as of today, is still seeking admission by virtue of adjustment from his unlawful status. Furthermore, the three convictions that occurred in 1994, or less than 15 years from the date of the applicant's application for adjustment of status, are not for crimes involving moral turpitude. *See Matter of Alfonzo*, 23 I&N Dec. 78 (BIA 2001). Thus, the applicant is eligible to apply for a waiver under section 212(1)(A) of the Act.

The AAO notes that the record reflects that the applicant has not been charged with any crimes since his convictions in 1993. The record also establishes that the applicant cares for his elderly mother, who is suffering from diabetes, vascular disease, hypertension, high cholesterol, anemia, and congestive heart failure. *See Statement from Applicant's Mother*, undated. The applicant lives with his mother and shares the responsibilities of caring for her with his brother. *See Statement from Applicant's Brother*, undated. The applicant's brother states that the applicant works during the night so that he can care for their mother during the day. The record also includes a letter from the applicant's mother's doctor confirming her condition as being very ill, with her right leg having been amputated and her being continuously in and out of the hospital. *Doctor's Letter*, dated February 7, 2006.

The AAO finds that the record establishes that the applicant has been rehabilitated and the record does not establish that the admission of the applicant to the United States would be "contrary to the national welfare, safety, or security of the United States." Thus, the record reflects that the applicant meets the requirements for waiver of his grounds of inadmissibility under section 212(h)(1)(A) of the Act.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the applicant bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957). The BIA has stated:

> In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

See Matter of Mendez-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country. " *Id.* at 300. (Citations omitted).

The adverse factor in the present case is the applicant's criminal record. The favorable factors in the present case are the support the applicant provides to his mother and brother and the likelihood that both family members would suffer hardship if the applicant were removed from the United States. In addition, the applicant's lack of a criminal record or offense since 1993 is a favorable factor to be considered in his case.

The AAO finds that the applicant has established that the favorable factors in his application outweigh the unfavorable factors. In discretionary matters, the applicant bears the full burden of proving his eligibility for discretionary relief. *See Matter of Ducret,* 15 I&N Dec. 620 (BIA 1976). Here, the applicant has now met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained and the application is approved.