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

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Date: FEB 13 2012 Office: PHILADELPHIA, PA FILE: [redacted]

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:

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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Michael Rhumway

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Philadelphia, Pennsylvania and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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 committed a crime involving moral turpitude. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with his U.S. citizen spouse and two children.

In a decision, dated November 12, 2004, the district director found the applicant to be inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of resisting arrest in New Jersey in 2001. The district director then found that the applicant had not established that his qualifying relative would suffer extreme hardship as a result of his inadmissibility. The waiver application was denied accordingly.

In a Notice of Appeal to the AAO (Form I-290B), dated December 15, 2004, the applicant states that his wife and two children need him in the United States, that he supports and loves his family very much, and that to break up his family would ruin their lives and his children's future.

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.
>
> (ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-
>
> > (I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or
> >
> > (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).

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 determining whether a crime involves moral turpitude, the Third Circuit Court of Appeals, per *Jean-Louis v. Holder*, 582 F.3d 462 (3rd Cir. 2009), makes a categorical inquiry, which consists of looking "to the elements of the statutory offense . . . to ascertain that least culpable conduct hypothetically necessary to sustain a conviction under the statute." *Id.* at 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 CIMT." *Id.* at 470.

However, if the "statute of conviction contains disjunctive elements, some of which are sufficient for conviction of [a CIMT] 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 record indicates that on November 10, 2000 the applicant was arrested and charged with two counts of resisting arrest under New Jersey Statutes Annotated (N.J.S.A) § 2C:29-2b and one count of Aggravated Assault on a police office under N.J.S.A. § 2C:12-1b(5)(a). On January 24, 2001 the applicant pled guilty to one count of resisting arrest in the second degree, the other charges were dismissed, and the applicant was sentenced to four years in prison.

At the time of the applicant's conviction N.J.S.A § 2C:29-2b provided, in pertinent part:

> b. Any person, while operating a motor vehicle on any street or highway in this State ... who knowingly flees or attempts to elude any police or law enforcement officer after having received any signal from such officer to bring the vehicle or vessel to a full stop commits a crime of the third degree; except that, a person is guilty of a crime of the second degree if the flight or attempt to elude creates a risk of death or injury to any person. For purposes of this subsection, there shall be a permissive inference that

> the flight or attempt to elude creates a risk of death or injury to any person if the person's conduct involves a violation of chapter 4 of Title 39 or chapter 7 of Title 12 of the Revised Statutes....

The AAO notes that Chapter 4 or Title 39 of the New Jersey Revised Statutes involved motor vehicle violations and Chapter 7 of Title 12 involves the regulation of boats.

In the applicant's case he was convicted of resisting arrest in the second degree, so his flight or attempt to elude arrest created a risk of death or injury to any person. N.J.S.A § 2C:29-2b requires the act of knowingly fleeing a police officer, with the result that this act creates a risk of injury or death to any person, but it does not require actual injury or death, a risk of serious injury, or that the creation of the risk be willful or conscious. Neither does it define the acts or types of acts that can be considered to create the risk, or the requisite degree of probability that injury or death will occur. The New Jersey courts have held that the defendant need not knowingly create the risk. *See State v. Dixon*, 346 N.J. Super. 126 (A.D. 2001). Further, the defendant need not even have the intention to avoid apprehension, just the awareness that he or she is fleeing a law enforcement officer. *See State v. Mendez*, 345 N.J. Super. 498 (A.D. 2001) (*affirmed* 175 N.J. 201).

Although the AAO is unaware of any cases specifically addressing N.J.S.A § 2C:29-2b, we note that in *Mei v. Ashcroft*, 393 F.3d 737 (7th Cir. 2004), the Seventh Circuit found the crime of aggravated fleeing an officer under Illinois law to be a crime involving moral turpitude. However, the statute at issue required that the fleeing involve excessive speed, and the court inferred knowledge on the part of the defendant that high speed flight was "greatly increasing the risk of an accident" 393 F.3d at 741-42. N.J.S.A § 2C:29-2b apparently can be violated without even a reckless mental state regarding the risk of injury or death. *See, e.g., Matter of Franklin*, 20 I&N Dec. 867 (BIA 1994).

In reviewing other similar crimes, we note that, in general, assaulting a law enforcement officer has been found not to be a crime involving moral turpitude unless it involves actual injury to the officer. *See Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988) (distinguishing cases in which knowledge of the police officer's status was not an element of the crime and where bodily injury or other aggravating factors were not present to elevate offense beyond "simple" assault); *see also Matter of O-*, 4 I&N Dec. 301 (BIA 1951) (German law involving an assault on a police officer was not a crime involving moral turpitude because knowledge that the person assaulted was a police officer engage in the performance of his duties was not an element of the crime); *Matter of B-*, 5 I&N Dec. 538 (BIA 1953) (a*s modified by Matter of Danesh, supra.*) (assault on prison guard not a crime involving moral turpitude because offense charged appeared to be only "simple" assault and no bodily injured was alleged); *Ciambelli ex rel. Maranci v. Johnson*, 12 F.2d 465 (D. Mass 1926) (assault on an officer was not a crime involving moral turpitude in spite of fact that defendant was armed with a razor because the razor was not used in the assault). The BIA has also held that breaking out of prison, a crime also involving fleeing from law enforcement, has been held not to be a crime involving moral turpitude. *Matter of B-*, 5 I&N Dec. 538 (BIA 1953); *Matter of J-*, 4 I&N Dec. 512 (BIA 1951). Thus, the AAO finds that N.J.S.A § 2C:29-2b is overbroad and categorically not a crime involving moral turpitude because the least culpable conduct sufficient to sustain a conviction is merely fleeing or attempting to elude law enforcement without the knowing, willful or even reckless creation of a risk of injury or death. Therefore, the AAO finds that the applicant is not

inadmissible under section 212(a)(2)(A)(i)(I) of the Act and does not require a waiver of inadmissibility on this basis.

However, the record contains a 2003 statement from the applicant detailing his immigration history in which he admits that he has resided without legal status in the United States since May 1995, departing for brief visits to Mexico in February 1998, August 1999 and August 2000. Each subsequent reentry (there were two in April 1998 as a consequence of the applicant being apprehended the first time by immigration officers and immediately returned to Mexico) was without inspection and admission. Based on applicant's statement, we find that the applicant is also inadmissible under section 212(a)(9)(C)(i) of the Act.

Section 212(a)(9) of the Act states in pertinent part:

....

(C) Aliens unlawfully present after previous immigration violations.-

(i) In general.-Any alien who-

(I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

(II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law, and who enters or attempts to reenter the United States without being admitted is inadmissible.

(ii) Exception.- Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Secretary has consented to the alien's reapplying for admission. The Secretary, in the Secretary's discretion, may waive the provisions of section 212(a)(9)(C)(i) in the case of an alien to whom the Secretary has granted classification under clause (iii), (iv), or (v) of section 204(a)(1)(A), or classification under clause (ii), (iii), or (iv) of section 204(a)(1)(B), in any case in which there is a connection between—

(1) the alien's having been battered or subjected to extreme cruelty; and

(2) the alien's--

(A) removal;

(B) departure from the United States;

(C) reentry or reentries into the United States; or

(D) attempted reentry into the United States.

An alien who is inadmissible under section 212(a)(9)(C)(i) of the Act may not apply for consent to reapply unless the alien has been outside the United States for more than 10 years since the date of the alien's last departure from the United States. *See Matter of Torres-Garcia,* 23 I&N Dec. 866 (BIA 2006); *Matter of Briones,* 24 I&N Dec. 355 (BIA 2007); and *Matter of Diaz and Lopez,* 25 I&N Dec. 188 (BIA 2010). Thus, to avoid inadmissibility under section 212(a)(9)(C) of the Act, it must be the case that the applicant's last departure was at least ten years ago, the applicant has remained outside the United States *and* USCIS has consented to the applicant's reapplying for admission. In the present matter, the applicant's last departure from the United States, according to the applicant, occurred in 2000. However, the applicant is currently residing in the United States, and, therefore, has not remained outside the United States for 10 years since his last departure. Consequently, the applicant is inadmissible and currently statutorily ineligible to apply for permission to reapply for admission.

Accordingly, we withdraw the finding of inadmissibility under section 212(a)(2)(A) of the Act, but find inadmissibility under section 212(a)(9)(C)(i) of the Act, for which no waiver is available. As there is no waiver available for inadmissibility under section 212(a)(9)(C) of Act, and the applicant is currently ineligible for the exception found in that section, no purpose is served in discussing the evidence of hardship or other favorable discretionary factors. The appeal is dismissed.

ORDER: The appeal is dismissed.