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

U.S. Citizenship and Immigration Services

[redacted]

DATE: APR 2 4 2013 OFFICE: VIENNA 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), and Permission to Reapply for Admission into the United States after Deportation or Removal under section 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

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.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application and Application for Permission to Reapply for Admission into the United States after Deportation or Removal were denied by the Field Office Director, Vienna, Austria, and are now before the Administrative Appeals Office (AAO) on appeal. The applicant's Form I-601 application will be declared unnecessary, as the applicant is not inadmissible under section 212(a)(a)(2)(A) of the Act. The appeal will be sustained as to the applicant's Form I-212 application.

The applicant is a native of Yugoslavia and citizen of Macedonia 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 children.

The Field Office Director concluded that the record failed to establish the existence of extreme hardship for a qualifying relative, and denied the application accordingly. *See Decision of the Field Office Director*, dated March 16, 2012.

On appeal, counsel for the applicant asserts that the applicant has demonstrated extreme hardship upon separation and relocation to the applicant's spouse and children. Specifically, the applicant asserts that his oldest son suffers from a medical condition that requires treatment in the U.S. The applicant also asserts that his spouse needs his financial support and she cannot relocate to Macedonia because her father is wheelchair-bound and depends on her care.

In support of the waiver application and appeal, the applicant submitted identity documents, family photographs, letters of support, financial documentation, medical documentation concerning the applicant's child and father-in-law, background information concerning the impact of separation on the applicant's children, and criminal records. The entire record was reviewed and considered in rendering a decision on the appeal.

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

The record reflects that the applicant was convicted on October 2, 2009 in the , for abandoning or endangering a child pursuant to The applicant was sentenced to six months imprisonment.

provides:

> (c) A person commits an offense if he intentionally, knowingly, recklessly, or with criminal negligence, by act or omission, engages in conduct that places a child younger than 15 years in imminent danger of death, bodily injury, or physical or mental impairment.

The AAO notes that can be violated by a person acting intentionally, knowingly, recklessly, or with criminal negligence. The applicant's criminal record indicates that he was convicted for criminal negligence in endangering a child. The Fifth Circuit Court of Appeals, in *Rodriguez-Castro v. Gonzales*, 427 F.3d 316 (5th Cir. 2005), determined that a conviction under section 22.041(b) of the Texas Penal Code, child abandonment in circumstances with an unreasonable risk of harm, does not constitute a crime involving moral turpitude. The Fifth Circuit states that since the statute criminalizes conduct based upon the knowledge of a reasonably situated adult, without regard to whether a person is actually aware of such harm, it does not necessary encompass willful or intentional acts. *Id.* It is noted that as crimes involving moral turpitude require both reprehensible conduct and some degree of scienter, negligent acts generally do not rise to the level of moral turpitude. *See Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008); *Matter of Perez*-Contreras, 20 I&N Dec. 615 (BIA 1992) (holding that a statute that involves negligently causing bodily harm is not a CIMT).

Section 6.03(d) of the Texas Penal Code provides:

> (d) A person acts with criminal negligence, or is criminally negligent, with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

The AAO finds that the applicant's conviction under , like the conviction in *Rodriguez-Castro v. Gonzales*, criminalizes negligent conduct in which a person should be aware of a set of circumstances. Accordingly, the AAO finds that the applicant's conviction under this section of the penal law is not a crime involving moral turpitude.

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. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden.

The applicant has also filed a Form I-212, Application for Permission to Reapply for Admission to the United States After Deportation or Removal, which he appealed in conjunction with his Form I-601 appeal.

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

> (A) Certain aliens previously removed.-
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> (i) Arriving aliens.- Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within five years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.
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> (ii) Other aliens.-Any alien not described in clause (i) who-
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> (I) has been ordered removed under section 240 or any other provision of law, or
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> (II) departed the United States while an order of removal was outstanding, and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.
>
> (iii) Exception.- Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Secretary has consented to the alien's reapplying for admission.

An immigration judge granted the applicant voluntary departure on October 26, 1999, with permission to voluntarily depart from the United States by December 27, 1999. The Board of Immigration Appeals affirmed the immigration judge's decision and granted the applicant 30 days from its August 16, 2002 decision to depart from the United States. The applicant failed to depart the United States within that time so that an order of removal was entered against him. The

applicant was removed from the United States in March 2010. The applicant is, therefore, inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act and requires permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act

The record reflects that a Form I-130, Petition for Alien Relative, has been approved based upon the applicant's marriage to his U.S. citizen spouse. The applicant submitted identity documents to demonstrate that he and his wife have three U.S. citizen children.

In *Matter of Tin,* 14 I&N Dec. 371 (Reg. Comm. 1973), the Regional Commissioner listed the following factors to be considered in the adjudication of a Form I-212 Application for Permission to Reapply After Deportation:

> The basis for deportation; recency of deportation; length of residence in the United States; applicant's moral character; his respect for law and order; evidence of reformation and rehabilitation; family responsibilities; any inadmissibility under other sections of law; hardship involved to himself and others; and the need for his services in the United States.

In *Tin,* the Regional Commissioner noted that the applicant had gained an equity (job experience) while being unlawfully present in the U.S. The Regional Commissioner then stated that the alien had obtained an advantage over aliens seeking visa issuance abroad or who abide by the terms of their admission while in this country, and he concluded that approval of an application for permission to reapply for admission would condone the alien's acts and could encourage others to enter the United States to work in the United States unlawfully. *Id.*

Matter of Lee, 17 I&N Dec. 275 (Comm. 1978) further held that a record of immigration violations, standing alone, did not conclusively support a finding of a lack of good moral character. *Matter of Lee* at 278. *Lee* additionally held that,

> [T]he recency of deportation can only be considered when there is a finding of poor moral character based on moral turpitude in the conduct and attitude of a person which evinces a callous conscience [toward the violation of immigration laws] . . . . In all other instances when the cause of deportation has been removed and the person now appears eligible for issuance of a visa, the time factor should not be considered. *Id.*

The Seventh Circuit Court of Appeals held in *Garcia–Lopes v. INS*, 923 F.2d 72 (7th Cir. 1991), that less weight is given to equities acquired after a deportation order has been entered. Further, the equity of a marriage and the weight given to any hardship to the spouse is diminished if the parties married after the commencement of deportation proceedings, with knowledge that the alien might be deported. It is also noted that the Ninth Circuit Court of Appeals, in *Carnalla-Munoz v. INS,* 627 F.2d 1004 (9th Cir. 1980), held that an after-acquired equity, referred to as an after-acquired family tie in *Matter of Tijam,* 22 I&N Dec. 408 (BIA 1998), need not be accorded great weight by the district director in a discretionary determination. Moreover, in *Ghassan v. INS,* 972 F.2d 631, 634-

35 (5th Cir. 1992), the Fifth Circuit Court of Appeals held that giving diminished weight to hardship faced by a spouse who entered into a marriage with knowledge of the alien's possible deportation was proper. The AAO finds these legal decisions establish the general principle that "after-acquired equities" are accorded less weight for purposes of assessing favorable equities in the exercise of discretion.

The favorable factors include the applicant's U.S. citizen spouse, his three U.S. citizen children, the evidence of hardship the applicant's spouse and children are suffering upon separation from the applicant, letters of support submitted on the applicant's behalf, and evidence that the applicant was gainfully employed and paying taxes in the United States.

The unfavorable factors for this applicant include the applicant's criminal conviction, immigration violations including the applicant's initial admission to the United States without a valid entry document, failure to attend an immigration hearing, and failure to comply with the terms of voluntary departure.

The applicant's violations of criminal and immigration law cannot be condoned, but it is noted that the applicant resided in the United States for nearly 15 years, from his entry in October 1995 until his removal in March 2010. The applicant has three U.S. citizen children who have resided in the United States since their births. The applicant's tax records indicate that he was gainfully employed in the United States and the applicant's spouse asserts that she is now living on food stamps and behind on rent without the financial support of the applicant. A letter from the applicant's children's physician states that the applicant's children are considered special needs patients due to their impairments and disabilities. A letter from the applicant's oldest child's school states that the applicant's child needs the applicant to support him with his current academic and social issues.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish he is eligible for the benefit sought. After a careful review of the record, it is concluded that the applicant has established that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal of the field office director's denial of the applicant's Form I-212 will be sustained and the application will be approved.

ORDER: As the applicant is not inadmissible under section 212(a)(2)(A) of the Act, the Field Office Director's decision on the applicant's Form I-601 application is withdrawn, the waiver application is deemed unnecessary, and the appeal is dismissed in that respect. The applicant's Form I-212 appeal is sustained.