

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

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



U.S. Citizenship
and Immigration
Services



H

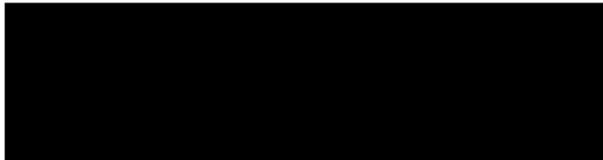
DATE: JUL 26 2012 OFFICE: CHICAGO, IL

FILE:

IN RE:

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

ON BEHALF OF APPLICANT:



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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

f. Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Chicago, Illinois 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)(1)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(1)(a)(iii), for having a physical or mental disorder with associated harmful behavior and section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having committed a crime involving moral turpitude. The applicant is the spouse and parent of U.S. citizens. He seeks a waiver of inadmissibility pursuant to sections 212(g) and (h) of the Act, 8 U.S.C. §§ 1182(g) and (h), in order to remain in the United States.

The Field Office Director stated that he would not favorably exercise discretion under section 212(g) of the Act and, further, that he had found that the applicant had failed to establish extreme hardship to a qualifying relative under section 212(h) of the Act. He denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Decision of the Field Office Director*, dated March 12, 2010.

On appeal, counsel states that the applicant is not inadmissible to the United States for having committed a crime involving moral turpitude. Alternately, he contends that the Field Office Director failed to consider all of the relevant hardship factors in the applicant's case. *Form I-290B, Notice of Appeal or Motion*, dated April 7, 2010; *see also Counsel's Brief*, submitted May 7, 2010.

The record of evidence includes, but is not limited to: counsel's brief; statements from the applicant, his spouse and his stepdaughters; letters of support from family members and friends; medical documentation relating to the applicant's spouse and stepdaughters; documentation of the applicant's and his spouse's finances; an employment letter for the applicant; records relating to the applicant's spouse's unemployment; country conditions information on Mexico; and documentation of the applicant's arrests and convictions, as well as his compliance with probationary requirements. The entire record was reviewed and all relevant evidence considered in reaching a decision on the appeal.

Section 212(a)(1) of the Act states, in pertinent part:

(1) Health-related grounds.—

(A) In general.—Any alien-

....

(iii) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services in consultation with the Attorney General [now Secretary of Homeland Security])—

(I) to have a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others, or

(II) to have had a physical or mental disorder and a history of behavior associated with the disorder, which behavior has posed a threat to the property, safety, or welfare of the alien or others and which behavior is likely to recur or to lead to other harmful behavior . . . is inadmissible.

The record contains a November 13, 2009 letter from [REDACTED] Immigrant, Refugee and Migrant Health Branch, Division of Global Migration and Quarantine, National Center for Preparedness, Detection and Control of Infectious Diseases, Centers for Disease Control and Prevention (CDC), which reports that the CDC's review of the applicant's medical examination and supporting documentation has found him to have a Class A medical condition that bars his admission to the United States under section 212(a)(1)(A)(iii) of the Act. [REDACTED] specifically reports that the applicant is suffering from Alcohol Abuse and has a history of associated harmful behavior that CDC has found likely to recur. Accordingly, the applicant is inadmissible pursuant to section 212(a)(1)(A)(iii) of the Act.

A waiver of a section 212(a)(1)(A)(iii) inadmissibility is provided by section 212(g) of the Act, which states:

(g) The Attorney General may waive the application of—

....

(3) subsection (a)(1)(A)(iii) in the case of any alien, in accordance with such terms, conditions, and controls, if any, including the giving of bond, as the [Secretary], in the discretion of the [Secretary] after consultation with the Secretary of Health and Human Services, may by regulation prescribe.

In his March 12, 2010 decision, the Field Office Director stated only that he had found the applicant ineligible for a favorable exercise of discretion in relation to his section 212(a)(1)(A)(iii) inadmissibility. While the AAO notes the Field Office Director's discretionary denial, we do not find the record to establish that the applicant has properly filed a section 212(g) waiver application for USCIS consideration. Filing requirements for a waiver under section 212(g)(3) of the Act are outlined in Part 4 of "Applicants Seeking a Waiver of Health-Related Grounds of Inadmissibility INA Section 212(a)(1)," on pages 3-4 of the instructions for the Form I-601. These instructions require an applicant found to have a physical or mental health disorder with associated harmful behavior to submit a complete medical history and report addressing the disorder, including the details of any hospitalization, institutional care or any other treatment received; the findings regarding the applicant's current physical condition and other pertinent diagnostic tests; findings regarding the current mental or physical condition, including a detailed prognosis regarding the likelihood that the harmful behavior will recur or that other harmful behavior associated with the disorder is likely to occur; and a recommendation concerning treatment available in the United States that can be expected to reduce the likelihood that the physical or mental disorder will result in harmful behavior in the future. The submitted medical report is then referred to the U.S. Public Health Service for review, which may require further assurances from the waiver applicant.

Having reviewed the record, the AAO finds no evidence that the applicant submitted the Form I-601 with the required medical documentation or that the U.S. Public Health Service has reviewed any documentation provided by the applicant. Accordingly, we must conclude that the applicant has not submitted a properly filed Form I-601 for the purposes of seeking a section 212(g)(3) waiver and that he remains inadmissible pursuant to section 212(a)(1)(A)(iii) of the Act.

The AAO now turns to a consideration of whether the record also establishes that the applicant is inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act, which states, in pertinent part:

- (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.

In the present case, the record reflects that, on April 6, 2001, the applicant pled guilty to two counts of Driving under the Influence, 625 Illinois Compiled Statutes (ILCS) § 5/11-501(a)(1) and was conditionally discharged for a period of two years.¹ On June 4, 2007, the applicant pled guilty to two counts of Aggravated Driving Under the Influence/No Valid License, 625 ILCS §§ 5/11-501(a) and (d)(1)(G). He was placed on probation for two years, during which time he was ordered not to drive, to comply with Alcohol and Drug Evaluation and Screening Specialists (ADES) and to attend Alcoholics Anonymous once a week. On April 27, 2009, the applicant was found guilty of Passing an Unloading School Bus, 625 ILCS 5/11-1414(a); Driving on a Suspended or Revoked License, 625 ILCS 5/6-303(a); and Operating an Uninsured Motor Vehicle, 625 ILCS § 5/3-707. On October 14, 2009, the applicant again pled guilty to Aggravated Driving Under the Influence/License Suspended or Revoked, 625 ILCS § 5/11-501(a), and was sentenced to two years in jail with credit for time served (108 days) and fined.

At the time of the applicant's DUI convictions in 2006 and 2009, section 625 ILCS § 5/11-501(a) stated in pertinent part:

- (a) A person shall not drive or be in actual physical control of any vehicle within this State while:
 - (1) the alcohol concentration in the person's blood or breath is 0.08 or more based on the definition of blood and breath units in Section 11-501.2;
 - (2) under the influence of alcohol

At the time of the applicant's 2006 DUI conviction, section 625 ILCS § 5/11-501(d)(1)(G) stated in pertinent part:

¹ A certified Statement of Disposition, Circuit Court of Cook County, Illinois, indicates that the applicant's December 29, 2000 arrest may not have resulted in his conviction until February 15, 2007.

(d)(1) Every person convicted of committing a violation of this Section shall be guilty of aggravated driving under the influence of alcohol, other drug or drugs, or intoxicating compound of compounds, or any combination thereof if:

....

(G) the person committed the violation while he or she did not possess a driver's license or permit or a restricted driving permit or a judicial driving permit

In 2009, the language of section 625 ILCS § 5/11-501(d)(1)(G) provided:

(d) Aggravated driving under the influence of alcohol, other drug or drugs, or intoxicating compound or compounds, or any combination thereof.

(1) Every person convicted of committing a violation of this Section shall be guilty of aggravated driving under the influence of alcohol, other drug or drugs, or intoxicating compound of compounds, or any combination thereof if:

....

(G) the person committed a violation of subsection (a) during a period in which the defendant's driving privileges are revoked or suspended, where the revocation or suspension was for a violation of subsection (a) or a similar provision

On appeal, counsel asserts that the Field Office Director erred in finding the applicant's 2006 and 2009 convictions for Aggravated Driving Under the Influence (DUI) to be convictions for crimes involving moral turpitude. The applicant's DUI violations, counsel states, may be distinguished from an aggravated DUI offense in Arizona, which he acknowledges the Board of Immigration Appeals (BIA) has found to be a crime involving moral turpitude. See *Matter of Lopez-Mesa*, 22 I&N Dec. 1188 (BIA 1999). He contends that, unlike the Arizona statute considered in *Matter of Lopez-Mesa*, the Illinois statute under which the applicant was convicted did not require him to know that he was driving on a suspended or revoked driver's license. Accordingly, counsel contends, aggravated DUIs in Illinois cannot be considered crimes involving moral turpitude.

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 *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. The methodology adopted by the Attorney General consists of a three-pronged approach. 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. 24 I&N Dec. at 698 (citing *Duenas-Alvarez*, 549 U.S. at 193). 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 or “modified categorical” inquiry in which the adjudicator reviews the “record of conviction” to determine if the conviction was based on conduct involving moral turpitude. 24 I&N Dec. 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. Finally, 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. The Seventh Circuit Court of Appeals has deferred to the analytical framework set forth in *Matter of Silva-Trevino. Mata-Guerrero v. Holder*, 627 F.3d 256, 260 (2010).

In *Lopez-Mesa*, the BIA held that the offense of Aggravated DUI is a crime involving moral turpitude when the driver knows that he or she is prohibited from driving under any circumstances. 22 I&N Dec. 1188 (BIA 1999). In Illinois, however, Aggravated DUIs are strict liability offenses rendering “a defendant’s intent, knowledge or motive . . . immaterial to the question of guilt.” *People v. Teschner* 76 Ill.App.3d 124, 394 N.E.2d 893, 31 Ill.Dec. 691 (1979); *see also People v. Ciechanowski*, 379 Ill.App.3d 506, 884 N.E.2d 714, 318 Ill.Dec. 746 (2008). We note, however, that this is similar to the crime (sexual conduct with a minor) addressed by the Attorney General in *Silva-Trevino*, in that the requisite *mens rea* was also not an element of that crime. *See* 24 I&N Dec. at 707-08. As the Illinois statute under which the applicant was convicted punishes drunk driving without a valid license, regardless of whether or not the driver knows that he or she is not authorized to drive, the AAO finds there is a realistic probability that the statute under which the applicant was convicted encompasses aggravated DUI offenses that would qualify as crimes involving moral turpitude and those that would not. Accordingly, we cannot find that the offense of Aggravated DUI, 625 ILCS §§ 5/11-501, is categorically a crime involving moral turpitude.

Pursuant to the *Silva-Trevino* framework, the AAO has conducted a second-stage inquiry into the limited record of conviction available in the applicant’s file, but does not find it to provide sufficient information to determine if either of the applicant’s Aggravated DUI convictions were based on conduct involving moral turpitude. Accordingly, we have considered all relevant evidence in the record that relates to whether the applicant knew that he did not have a valid driver’s license at the time he committed his 2006 and 2009 Aggravated DUI offenses.

The AAO finds no evidence in the record that establishes the applicant was aware that he was driving without a valid license at the time of his 2006 arrest for Aggravated DUI. However, there is sufficient information to conclude that at the time of his 2009 offense, the applicant knew that he did not have a valid driver's license. A docket for the Circuit Court of Cook County, Illinois reflects that on June 4, 2007, the date on which the applicant was found guilty of his 2006 DUI offense, he was placed on probation for two years with the following conditions: "compliance with ADES, AA once a week, no driving." The record also indicates that the applicant was arrested or arraigned on April 9, 2009 for Driving on a Suspended or Revoked License and that he pled guilty to this charge on April 27, 2009. Given these circumstances, as well as the applicant's prior record of convictions for offenses relating to driving under the influence and driving without a valid driver's license, we conclude that it is more likely than not that he was aware he was not authorized to drive at the time of his June 29, 2009 arrest. Pursuant to *Lopez-Mesa*, we find that the record establishes that the applicant's 2009 Aggravated DUI offense, a Class 4 felony for which the applicant was sentenced to two years in prison, is a crime involving moral turpitude.

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

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), . . . of subsection (a)(2) . . . if –

. . . .

(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

A waiver under section 212(h) of the Act is dependent first upon a showing that the bar would impose an extreme hardship on the citizen or lawfully resident spouse, parent or child of the applicant. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

In most discretionary matters, the alien bears the burden of proving eligibility simply by showing that the mitigating factors in his or her case are not outweighed by the adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957). However, we also conclude that the applicant's 2009 conviction for Aggravated DUI subjects him to the requirements of the regulation at 8 C.F.R. § 212.7(d), which provides:

The Attorney General [Secretary, Department of Homeland Security], in general, will not favorably exercise discretion under section 212(h)(2) of the Act (8 U.S.C. 1182(h)(2)) to consent to an application or reapplication for a visa, or admission to the United States, or adjustment of status, with respect to immigrant aliens who are inadmissible under section 212(a)(2) of the Act in cases involving violent or dangerous crimes, except in extraordinary circumstances, such as those involving

national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of the application for adjustment of status or an immigrant visa or admission as an immigrant would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the alien's underlying criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act.

The AAO notes that the words "violent" and "dangerous" and the phrase "violent or dangerous crimes" are not further defined in the regulation, and the AAO is aware of no precedent decision or other authority containing a definition of these terms as used in 8 C.F.R. § 212.7(d). A similar phrase, "crime of violence," is found in section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F). Under that section, a crime of violence is an aggravated felony if the term of imprisonment is at least one year. As defined by 18 U.S.C. § 16, a crime of violence is an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, *or* any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. We note that the Attorney General did not reference section 101(a)(43)(F) of the Act or 18 U.S.C. § 16, or the specific language thereof, in 8 C.F.R. § 212.7(d). Thus, we find that the statutory terms "violent or dangerous crimes" and "crime of violence" are not synonymous and the determination that a crime is a violent or dangerous crime under 8 C.F.R. § 212.7(d) is not dependent on it having been found to be a crime of violence under 18 U.S.C. § 16 or an aggravated felony under section 101(a)(43)(F) of the Act. *See* 67 Fed. Reg. 78675, 78677-78 (December 26, 2002).

Nevertheless, we will use the definition of a crime of violence found in 18 U.S.C. § 16 as guidance in determining whether a crime is a violent crime under 8 C.F.R. § 212.7(d), considering also other common meanings of the terms "violent" and "dangerous". The term "dangerous" is not defined specifically by 18 U.S.C. § 16 or any other relevant statutory provision. Thus, in general, we interpret the terms "violent" and "dangerous" in accordance with their plain or common meanings, and consistent with any rulings found in published precedent decisions addressing discretionary denials under the standard described in 8 C.F.R. § 212.7(d). Decisions to deny waiver applications on the basis of discretion under 8 C.F.R. § 212.7(d) are made on a factual "case-by-case basis." 67 Fed. Reg. at 78677-78.

The term "dangerous" is commonly defined as that which is "able or apt to harm." *Webster's New College Dictionary, Third Edition, 2005*. In considering an Alabama assault conviction for driving under the influence and causing serious injury, the Seventh Circuit Court of Appeals, the jurisdiction within which this case arises, stated:

The dangers of drunk driving are well-known and well documented. Unlike other acts that may present some risk of physical injury . . . the risk of injury from drunk driving is neither conjectural nor speculative. Driving under the influence vastly increases the probability that the driver will injure someone in an accident Drunk driving, by its nature, presents a serious risk of physical injury Drunk driving is a reckless act that often results in injury, and the risks of driving while intoxicated are well-known

U.S. v. Rutherford, 54 F.3d 370, 376 (7th Cir. 1995).

Although the applicant's 2009 offense did not result in injury to persons or property, the AAO notes that it created the risk of such injury, and that by driving while under the influence of alcohol, the applicant endangered himself and others. Accordingly, the AAO finds that the applicant's 2009 Aggravated DUI conviction is a dangerous crime and that he is subject to the regulatory requirements at 8 C.F.R. § 212.7(d).

The AAO notes that the applicant has submitted additional evidence on appeal to establish that his U.S. citizen spouse would suffer extreme hardship if he is removed from the United States. The record now offers new evidence to establish that the applicant's spouse is unable to work for medical reasons and that she would experience significant financial hardship if he is removed from the United States. The record also provides additional documentation relating to the mental health problems of the applicant's older daughter, including a 2009 relapse. We further note the submission of updated country conditions information, which focuses on the drug-related violence now prevalent across Mexico. The AAO will not, however, consider whether the hardship factors now documented in the record meet the enhanced standard of exceptional and extreme unusual hardship or whether the applicant has established any other extraordinary circumstances that would support a favorable exercise of discretion as no purpose would be served by doing so. Even were the AAO were to find the applicant to have established extraordinary circumstances as required by the regulation at 8 C.F.R. § 212.7(d), we determine that a favorable exercise of the Secretary's discretion is not warranted because of the negative factors presented.

The record establishes that the applicant abuses alcohol and that as recently as June 2009 was convicted for driving under the influence of alcohol. While the AAO does not doubt the remorse expressed by the applicant in his May 7, 2010 affidavit regarding his 2009 Aggravated DUI and acknowledges his attendance at AA meetings and participation in outpatient alcohol counseling programs, we find his 2009 conviction to demonstrate that, despite his efforts, he has not reached the point where his alcoholism can be considered to be in full remission and that he continues to drink and drive, endangering himself and the public. We note here, again, the applicant's failure to establish eligibility for a waiver under section 212(g) of the Act for his inadmissibility under section 212(a)(1)(A)(iii), a further indication that the applicant's alcohol abuse has not been adequately addressed. Because of the overriding public safety concerns raised by the applicant's 2009 Aggravated DUI offense and his history of drunk driving, the AAO must conclude that, regardless of any exceptional circumstances, a favorable exercise of discretion is unwarranted.

In proceedings for application for waiver of grounds of inadmissibility under sections 212(g) and (h) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.