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U.S. Citizenship
and Immigration
Services

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FILE:

Office: LOS ANGELES, CA

Date: FEB 10 2009

IN RE:

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

ON BEHALF OF APPLICANT:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

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

The applicant, Mr. Jamie Macias, 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 committed a crime involving moral turpitude.

The applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), so as to remain in the United States with his U.S. citizen spouse and children. The district director services concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director Services*, dated June 1, 2006. The applicant filed a timely appeal.

On appeal, counsel states that the applicant has five U.S. citizen children, ranging in age from one to nine years old, and a spouse who he financially supports. He states that the applicant's wife is a part-time student studying to become a licensed vocational nurse, and is scheduled to graduate in late 2007, and would not be able to complete her studies if the waiver application were denied. He states that the applicant's offenses occurred over eight years ago and he is now a model citizen. He states that Mexico has extreme poverty and that several of the applicant's dependents do not speak, read, or write Spanish. He states that the applicant would not find marginally acceptable employment in Mexico after spending all of his adult life in the United States, which would cause his children to live in poverty. Counsel indicates that the above cited factors establish extreme hardship to a qualifying relative.

The AAO will first address the finding of inadmissibility

Section 212(a)(2) of the Act states in pertinent part, that:

(A)(i) Except as provided in clause (ii), any 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.

A crime involves "moral turpitude" if it 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. *Matter of Olquin*, 23 I&N Dec. 896, 896 (BIA 2006); *Matter of Torres-Varela*, 23 I&N Dec. 78, 83 (BIA 2001); see also *Grageda v. U.S. INS*, 12 F.3d 919, 921 (9th Cir. 1993). Neither the seriousness of the criminal offense nor the severity of the sentence imposed is determinative of whether a crime involves moral turpitude. *Matter of Serna*, 20 I&N Dec. 579, 581 (BIA 1992). Before one can be

convicted of a crime of moral turpitude, the statute in question by its terms, must necessarily involve moral turpitude. *Matter of Esfandiary*, 16 I&N Dec. 659 (BIA 1979); *Matter of L-V-C*, 22 I&N Dec. 594, 603 (BIA 1999) (finding no moral turpitude where the “statutory provision . . . encompasses at least some violations that do not involve moral turpitude”). As a general rule, if a statute encompasses acts that both do and do not involve moral turpitude, deportability cannot be sustained. *Hernandez-Martinez v. Ashcroft*, 329 F3d 1117 (9th Cir. 2003), *reh’g denied* 343 F.3d 1075 (9th Cir. 2003). 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, supra*. 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).

Where a statute is divisible (broad or multi-sectional), *see, e.g., Matter of P-*, 6 I&N Dec. 193 (BIA 1954); *Neely v. U.S.*, 300 F.2d 67 (9th Cir. 1962), the court looks to the “record of conviction” to determine if the crime involves moral turpitude. *Matter of Ajami*, 22 I&N Dec. 949, 950 (BIA 1999) (look to indictment, plea, verdict, and sentence; *Zaffarano v. Corsi*, 63 F.2d 67 757 (2d Cir. 1933); *U.S. v. Kiang*, 175 F.Supp.2d 942, 950 E.D. Mich. 2001). A narrow, specific set of documents comprises the record: “[the] charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.” *Shepard v. U.S.*, 125 S.Ct. 1254, 1257 (2005). The Ninth Circuit has further clarified that that the charging document, or information, is not reliable where the plea was to an offense other than the one charged. *Martinez-Perez v. Gonzales*, 417 F.3rd 1022, 1028-29 (9th Cir. 2005). It is also important to note that the record of conviction does not include the arrest report. *See In re Teixeira*, 21 I&N Dec. 316, 319-20 (BIA 1996).

Courts have described two separate ways of analyzing crimes as the “categorical” and “modified categorical” approaches. The former looks solely to the structure of the statute of conviction to determine whether a person has been convicted of a designated crime; the latter looks to a limited set of documents in the record of conviction in cases where the statute of conviction was facially over inclusive. *See, e.g., Chang v. INS*, 307 F.3d 1185, 1189-92 (9th Cir. 2002).

On February 1, 1995, the applicant entered a plea of guilty to violation of Cal. Vehicle Code § 23152(a),¹ driving a vehicle while under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug; and to violation of Cal. Vehicle Code § 12500(a), driving a motor vehicle upon a highway without a valid driver's license.²

¹ Cal. Vehicle Code § 23152(a) provides, in pertinent part:

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.

² Cal. Vehicle Code § 12500(a) states, in pertinent part:

A person may not drive a motor vehicle upon a highway, unless the person then holds a valid driver's license . . .

On July 2, 1996, the applicant pled nolo contendere to violation of Cal. Vehicle Code § 23103³ pursuant to Cal. Vehicle Code § 23103.5(a)⁴ (alcohol involved) and to misdemeanor violation of Cal. Vehicle Code § 14601.1(a), driving a motor vehicle when a driving privilege is suspended or revoked.⁵

On September 24, 1997, the applicant pled nolo contendere to misdemeanor violation of Cal. Penal Code § 261.5(c), unlawful sexual intercourse with a minor. The applicant was sentenced to a three-year probationary term and ordered to serve 120 days in custody.

On September 14, 1998, the applicant was convicted of misdemeanor violation of Cal. Penal Code § 12020(a), possession of a deadly weapon. He was sentenced to a three-year probationary term, to serve 180 days, and to pay a fine. His conviction was set aside/dismissed on August 21, 2002 pursuant to Penal Code § 1203.4.

With regard to driving under the influence (DUI) offenses, the BIA has held that a simple DUI does not involve moral turpitude, but when that crime is committed by an individual who knows that he or she is prohibited from driving, the offense becomes a crime involving moral turpitude. *See Matter of*

³ Cal. Penal Code § 23103 provides:

- (a) A person who drives a vehicle upon a highway in willful or wanton disregard for the safety of persons or property is guilty of reckless driving.
- (b) A person who drives a vehicle in an offstreet parking facility, as defined in subdivision (c) of Section 12500, in willful or wanton disregard for the safety of persons or property is guilty of reckless driving.

⁴ Cal. Penal Code § 23103.5(a) provides:

If the prosecution agrees to a plea of guilty or nolo contendere to a charge of a violation of Section 23103 in satisfaction of, or as a substitute for, an original charge of a violation of Section 23152, the prosecution shall state for the record a factual basis for the satisfaction or substitution, including whether or not there had been consumption of an alcoholic beverage or ingestion or administration of a drug . . .

⁵ Cal. Penal Code § 14601.1(a) states:

No person shall drive a motor vehicle when his or her driving privilege is suspended or revoked for any reason other than those listed in Section 14601, 14601.2, or 14601.5, if the person so driving has knowledge of the suspension or revocation. Knowledge shall be conclusively presumed if mailed notice has been given by the department to the person pursuant to Section 13106. The presumption established by this subdivision is a presumption affecting the burden of proof.

Lopez-Meza, 22 I&N Dec. 1188, 1194-96 (BIA 1999) (found moral turpitude where violation of § 28-1383(A)(1) of the Arizona Revised Statutes requires showing the offender was knowingly driving with a suspended, canceled, revoked, or refused license). Similarly, the Ninth Circuit found that a conviction for aggravated DUI under Arizona Revised Statutes § 28-1383(A)(1), which requires a showing that the offender was “knowingly” driving with a suspended, canceled, revoked, or refused license, involved moral turpitude. *Marmolejo-Campos v. Gonzales*, 503 F.3d 922 (9th Cir. 2007).

Here, the applicant’s 1995 DUI offense involved driving without a license, but because his offense did not have the aggravating factor of knowingly driving with a suspended, canceled, revoked, or refused license, it did not involve moral turpitude. However, the applicant’s 1996 DUI conviction did have the aggravating factor of driving a motor vehicle when a driving privilege is suspended or revoked; his 1996 DUI offense, therefore, is a crime involving moral turpitude, and regard to this offense, the applicant has failed to prove he is admissible pursuant to section 212(a)(2)(A)(i)(I) of the Act.

The applicant was convicted of violation of Cal. Penal Code § 261.5(c), unlawful sexual intercourse with a minor. Cal. Penal Code § 261.5(c) provides:

Any person who engages in an act of unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment in the state prison.

For purposes of Cal. Penal Code § 261.5(c), Cal. Penal Code § 261.5(a) defines unlawful intercourse as involving intercourse with a person who is not the spouse of the perpetrator, if the person is a minor. A "minor" is a person under the age of 18 years, and an "adult" is a person who is at least 18 years of age.

The AAO notes that in *Quintero-Salazar v. Keisler*, 506 F.3d 688 (9th Cir. 2007) the Ninth Circuit found that violation of Cal. Penal Code § 261.5(d), which criminalizes engaging in intercourse with a minor who is under 16 years of age when the perpetrator is 21 years of age or older,⁶ did not categorically involve moral turpitude. The court reasoned that the range of conduct criminalized by § 261.5(d), would include consensual intercourse between a 21-year-old (possibly a college sophomore) and a minor who is 15 years, 11 months (possibly a high school junior), which behavior

⁶ Cal. Penal Code § 261.5(d) provides:

Any person 21 years of age or older who engages in an act of unlawful sexual intercourse with a minor who is under 16 years of age is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment in the state prison for two, three, or four years.

the Ninth Circuit determined would not be “inherently base, vile, or depraved,” or accompanied by a “vicious motive or corrupt mind,” or “so far contrary to the moral law” as to “give rise to moral outrage.” *Id.* at 693. (citations omitted). Furthermore, the court concluded that § 261.5(d) proscribes some conduct that is *malum prohibitum*, which is conduct that is only statutorily prohibited but is not an act inherently wrong. *Id.* Finally, the court stated that California's purpose in passing the law was not moral so much as pragmatic - to reduce teenage pregnancies. (citation omitted). *Id.* The court stated that because § 261.5(d) defines conduct that is *malum prohibitum* in at least some cases, it cannot *categorically* be a crime of moral turpitude. *Id.* at 694. In applying the modified categorical approach, the court found that the applicant’s record of conviction failed to establish § 261.5(d) as a crime involving moral turpitude. *Id.* at 694.

The analysis in [REDACTED], when applied here, demonstrates that Cal. Penal Code § 261.5(c) is not categorically a crime involving moral turpitude. For example, the full range of conduct criminalized by Cal. Penal Code § 261.5(c) would include consensual intercourse between a 21-year-old and a minor who is 15 years, 11 months; § 261.5(c) prohibits some conduct that is *malum prohibitum*; and the same reason for the law’s passage, to prevent teenage pregnancy, applies to § 261.5(c). As the language of § 216.5(c) encompasses violations that may involve moral turpitude as well as those that do not, the AAO will look to the record of conviction to determine whether the applicant has been convicted of a crime involving moral turpitude.

With regard to this offense, the applicant has submitted only a minute order, and the AAO is, therefore, unable to determine whether the full record of conviction would demonstrate that the applicant was not convicted of a crime involving moral turpitude. As the burden is on the applicant to establish his admissibility to the United States, the AAO finds that, with regard to his § 261.5(c) offense, the applicant has failed to prove he is admissible pursuant to section 212(a)(2)(A)(i)(I) of the Act.

As the applicant was convicted of two crimes involving moral turpitude, the AAO need not address whether his weapons possession conviction is a crime involving moral turpitude.

The AAO will now consider whether granting the applicant’s section 212(h) waiver is warranted.

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) . . . 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 section 212(h) waiver of the bar to admission resulting from violation of section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant is not a consideration under the statute and will be considered only to the extent that it results in hardship to a qualifying relative, who in this case are the applicant's spouse, who is a naturalized citizen, and his five children, who are U.S. citizens. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Moralez*, 21 I&N Dec. 296 (BIA 1996).

The concept of extreme hardship to a qualifying relative "is not . . . fixed and inflexible," and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals (BIA) set forth a list of non-exclusive factors relevant to determining whether an applicant has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. These factors include, with respect to the qualifying relative, the presence of family ties to U.S. citizens or lawful permanent residents in the United States, family ties outside the United States, country conditions where the qualifying relative would relocate and family ties in that country, the financial impact of departure, and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 565-566.

In *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996), the BIA stated that the factors to consider in determining whether extreme hardship exists "provide a framework for analysis," and that the "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." It further stated that "the trier of fact must consider the entire range of factors concerning hardship in their totality" and then "determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation." (citing *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994)).

In support of the waiver application, the record contains a declaration by the applicant's wife, birth certificates, a marriage certificate, financial records, and other documentation.

With regard to remaining in the United States without the applicant, in her declaration the applicant's wife states that she and the applicant have five children, she does not work outside the house, she is a part-time student studying to become a licensed vocational nurse, and she may graduate in 2007. She states that the entire family depends upon the applicant's income as a mechanic for their livelihood and she relies upon him to complete her studies. She conveys that the applicant has a close relationship with his family and that his convictions occurred during the applicant's youth and he has had no legal problems since then.

The birth certificates in the record show the applicant's children were born on December 15, 2004, December 25, 2003, November 9, 1999, December 3, 1997, and November 20, 1996.

The income tax records show the applicant's income in 2005 with Transmasters Transmission as \$14,000 and his gross income with his own auto repair business as \$14,305.

In rendering this decision, the AAO has carefully considered all of the evidence in the record.

Applying the *Cervantes-Gonzalez* factors here, extreme hardship to the applicant's qualifying relative must be established if she or he joins the applicant, and alternatively, if she or he remains in the United States without him. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

With regard to family separation, courts in the United States have stated that "the most important single hardship factor may be the separation of the alien from family living in the United States," and also, "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion." *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted); *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to BIA) ("We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.") (citations omitted).

In light of the hardship factors which indicate that the applicant's spouse and children depend upon the applicant for their entire means of financial support and would be left to care for five young children on her own, and that the applicant's spouse depends upon her husband in order to complete her nursing degree, the AAO finds that, in considering the evidence in the aggregate, the applicant has established extreme hardship to his spouse and children if they were to remain in the United States without him.

If the family were to join the applicant to live in Mexico, counsel states that the applicant's children would live in extreme poverty because the applicant would find only marginal employment in Mexico, and that several of the applicant's dependents do not speak, read, or write Spanish.

The AAO notes that U.S. court and administrative decisions have held that the consequences of deportation imposed on citizen children of school age must be considered in determining extreme hardship. For example, in *Matter of Kao & Lin*, 23 I&N Dec. 45, 50 (BIA 2001), the BIA concluded that the language capabilities of the respondent's 15-year-old daughter were not sufficient for her to have an adequate transition to daily life in Taiwan; she had lived her entire life in the United States and was completely integrated into an American lifestyle; and uprooting her at this stage in her education and her social development to survive in a Chinese-only environment would constitute extreme hardship. In *Ramos v. INS*, 695 F.2d 181, 186 (5th Cir. 1983), the Circuit Court indicated that "imposing on grade school age citizen children, who have lived their entire lives in the United States, the alternatives of . . . separation from both parents or removal to a country of a vastly

different culture where they do not speak the language,” must be considered in determining whether “extreme hardship” has been shown. And, in *Prapavat v. INS*, 638 F. 2nd 87, 89 (9th Cir. 1980) the Circuit Court found the BIA abused its discretion in concluding that extreme hardship had not been shown in light of fact that aliens’ five-year-old citizen daughter, who was attending school, would be uprooted from the country where she lived her entire life and taken to land whose language and culture were foreign to her.

Based upon the aforementioned decisions, the AAO finds that the applicant’s children, who have lived their entire lives in the United States, would suffer extreme hardship if they were to join the applicant to live in a country whose language and culture is foreign to them.

The grant or denial of the above waiver does depend only on the issue of the meaning of "extreme hardship." Once extreme hardship is established, the Secretary then determines whether an exercise of discretion is warranted.

The favorable factors in this matter are the extreme hardship to the applicant’s spouse and children, the applicant’s gainful employment and payment of income taxes, and the passage of approximately 10 years since the applicant’s immigration violation. The unfavorable factors in this matter are the applicant’s criminal convictions, and his unauthorized presence and employment.

While the AAO cannot emphasize enough the seriousness with which it regards the applicant's breach of the laws of the United States, the severity of the applicant’s criminal convictions is at least partially diminished by the fact that 10 years have elapsed since his most recent conviction. The AAO finds that the hardship imposed on the applicant’s spouse and children as a result of his inadmissibility outweighs the unfavorable factors in the application. Therefore, a favorable exercise of the Secretary’s discretion is warranted in this matter.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h), 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. The applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained. The waiver application is approved.