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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: BALTIMORE, MD Date: JAN 05 2010

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. section 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.

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, as required by 8 C.F.R. 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Baltimore, Maryland. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the applicant is not inadmissible and the relevant waiver application is, thus, moot. The matter will be returned to the District Director for continued processing

The applicant is a native and citizen of Mexico. He was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I) for having been convicted of Crimes Involving Moral Turpitude (CIMT). The applicant is the father of a U.S. citizen. 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.

The District Director concluded that the applicant did not have a qualifying relative on which to base his waiver application[1] and, further, had failed to establish that the bar to his admission would impose extreme hardship on a qualifying relative. Accordingly, the District Director denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on March 25, 2008.

On appeal, counsel for the applicant asserts that the applicant's son would suffer exctreme hardship if his father is removed to Mexico.

Section 212(a)(2)(A) of the Act 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 –
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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.

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

> (h) The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) . . . if -
>
> . . . .
>
> (1) (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 . . . .

[1] The AAO notes that the record establishes that the applicant is the father of a U.S. citizen and that a U.S. citizen child is a qualifying relative for the purposes of waiver proceedings under section 212(h) of the Act.

The record reflects that the applicant was convicted of Vehicular Assault, New York Penal Law (NYPL) § 120.03 on February 7, 2001. The District Director concluded that the applicant had been convicted of a Crime Involving Moral Turpitude (CIMT), and was inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I). The District Director did not provide a basis for his conclusion.

To qualify as a crime involving moral turpitude for purposes of the Act, a crime must involve both reprehensible conduct and some degree of scienter, whether specific intent, deliberateness, willfulness, or recklessness. *Matter of Cristoval Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008). In determining whether a crime is a CIMT, the specific statute under which the conviction occurred is controlling. *In Re Torres-Varela*, 23 I&N Dec. 78 (BIA 2001); *Matter of Khourn*, 21 I&N Dec. 1041, 1046 (BIA 1997).

Vehicular Assault, NYPL § 120.03, states:

> 120.03 Vehicular Assault in the second degree
> A person is guilty of vehicular assault in the second degree when:
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> (1) with criminal *negligence* he causes serious injury to another person, and either
> (2) . . . in violation of . . . section eleven hundred ninety-two of the vehicle and traffic law . . . .

In this case, the applicant was convicted of Vehicular Assault in the second degree. Section 2 of NYPL § 120.3 incorporates NY Vehicle and Traffic Law 1192, operating a motor vehicle while under the influence of alcohol or drugs. Simple assault is not a CIMT. *Matter of Fualaau*, 21 I&N Dec. 475, 476 (BIA 1996). A conviction for simple DUI charge is not a CIMT. *Matter of Torres-Varela*, 23 I&N Dec. 78 (BIA 2001). A CIMT cannot be viewed as arising out of the undefined synergism by which two offenses that do not involve moral turpitude somehow combine to create one crime involving moral turpitude. *Matter of Short*, 20 I&N Dec. 136 (BIA 1989). As such, it is necessary to examine the statute for the basic elements of a CIMT.

As previously noted, a CIMT must involve both reprehensible conduct and some degree of scienter, whether specific intent, deliberateness, willfulness, or recklessness. A reading of the statute in this case reveals that a conviction under this section of the NYPL does not require establishing a scienter of knowledge or other degree of intent, but instead relates to situations involving negligence. NYPL § 15.05 defines "criminal negligence," as used in NYPL §120.3, as failing to perceive a substantial or unjustifiable risk. Without a perception of the risk there can be no intent. The distinction between the definitions of "criminal negligence" and "recklessness," as defined in NYPL § 15.05, demonstrates the absence of motive or evil intent on the part of a criminally negligent defendant. *State v. Montilla*, 513 N.Y. S.2d 338 (N.Y. 1987). Thus, based on a plain reading of the New York statute's language, specific or general intent is not required as an element for conviction, and therefore a violation of NYPL § 120.03 is not a CIMT. Accordingly, the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act and does not require a waiver.

An applicant must demonstrate by a preponderance of the evidence that he is eligible for the benefit sought. Section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361, places the burden of proof upon the applicant to establish that eligibility. The applicant has met his burden of proof in this matter. Accordingly, the appeal will be dismissed as the waiver application is moot.

ORDER: The appeal is dismissed as the underlying waiver application is moot. The District Director shall reopen the denial of the Form I-485 application on motion and continue to process the adjustment application.