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

U.S. Citizenship and Immigration Services

[redacted]

H2

DATE: DEC 1 1 2012

OFFICE: MONTERREY, MEXICO

[redacted]

IN RE: Applicant: [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.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Monterrey, Mexico and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

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 been convicted of a crime involving moral turpitude. The applicant seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen son and lawful permanent resident spouse.

The Field Office Director concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility accordingly. *See Decision of the Field Office Director,* dated September 7, 2011.

On appeal counsel asserts that the applicant has not been convicted of a crime involving moral turpitude or in the alternative, that the applicant has established that he has been rehabilitated and merits a favorable exercise of discretion. *See Form I-290B, Notice of Appeal or Motion*, received October 8, 2011.

The record contains, but is not limited to: Form I-290B and counsel's appeal brief and earlier letter in support of a waiver; various immigration applications and petitions; the Ninth Circuit Court of Appeal's decision in *Cerezo v. Mukasey*, 512 F.3d 1163 (9th Cir. 2008); and documents pertaining to the applicant's criminal record and proceedings and his deportation and proceedings. The entire record was reviewed and considered in rendering this 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

> (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.

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. However, this "does not mean that the parties would be free to present any and all evidence bearing on an alien's conduct leading to the conviction. (citation omitted). *The sole purpose of the inquiry is to ascertain the nature of the prior conviction; it is not* an invitation to relitigate the conviction itself." *Id.* at 703.

The record shows that the applicant was arrested on February 8, 1984 and charged with "vehicular hit-and-run resulting in death or injury" in violation of California Penal Code (CPC) section 20001, a felony. The applicant was additionally charged with violations of CPC sections 12500(a) and 2180(a), for driving a motor vehicle upon a highway without holding a valid driver's license and failing to yield the right-of-way when making a left turn, respectively. The district attorney dismissed the charges under CPC sections 12500(a) and 2180(a), and reduced the felony charge to a misdemeanor violation of CPC section 20001(a), "duty to stop at scene of injury accident." On April 17, 1984 the applicant pled guilty to the single misdemeanor charge, was convicted in the Superior Court of Madera County, California, and was sentenced to not more than one year in the country jail or a fine of not more than $500 plus penalty assessment or both jail and a fine. Accordingly, the applicant's most recent criminal conviction occurred on or about April 17, 1984, more than 28 years ago.

Counsel correctly asserts that the Ninth Circuit Court of Appeals has ruled in *Cerezo v. Mukasey*, 512 F.3d 1163 (9th Cir. 2008), that violation of California Vehicle Code section 20001(a) is not categorically a crime involving moral turpitude. However, while counsel asserts that the modified categorical approach is to be applied in determining whether a conviction involves moral turpitude, the superseding approach for convictions in the Ninth Circuit is that described in *Matter of Silva-Trevino* above. Counsel further contends that the conduct giving rise to the applicant's conviction is not determinable from the record of conviction as the Madera County Superior Court notes in a letter dated June 29, 2010, that it destroyed the entire court file with the exception of the docket sheet. The AAO finds counsel's contention unpersuasive as the Criminal Complaint, filed with said court on February 9, 1984, provides sufficient detail as to the applicant's conduct on February 7, 1984, to wit: "the said defendant did willfully, unlawfully, and knowingly, being a driver of a vehicle involved in an accident resulting in injury and death to a person other than himself, fail, refuse, and neglect to give to the injured person and to a traffic and police officer at the scene of the accident his name and address, the registration number of his vehicle, and the name of the owner of said vehicle; to exhibit his operator's license; to render reasonable assistance to the injured person; and perform the duties specified in Vehicle Code Sections 20003 and 20004." The record of conviction shows that the applicant left the scene of a serious motor vehicle accident which resulted in injury and/or death, and the applicant has not shown that, based on his specific actions, he was erroneously deemed inadmissible under section 212(a)(2)(A) of the Act. However, the AAO finds that he is eligible for a waiver under section 212(h)(1)(A) of the Act, as discussed below.

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

> The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana . . . .
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> (1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that –
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> (i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,
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> (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
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> (iii) the alien has been rehabilitated; or
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> (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 . . .; and
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> (2) the Attorney General [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

The applicant's most recent conviction, for failing in his duty to stop at the scene of an injury accident, occurred on or about April 17, 1984. As his culpable conduct took place more than 15 years ago, he meets the requirement of section 212(h)(1)(A)(i) of the Act.

The record does not reflect that admitting the applicant would be contrary to the national welfare, safety, or security of the United States. Section 212(h)(1)(A)(ii) of the Act. While the applicant's conviction in 1984 is significant and cannot be condoned, the record does not show that he has engaged in violent or dangerous behavior following his February 1984 arrest. The record does not show that the applicant has engaged in criminal activity since his most recent conviction in April 1984. The record does not show that the applicant was ever a public charge when residing in the United States from 1975 to 1981 or in 1984. Accordingly, the applicant has shown that he meets the requirement of section 212(h)(1)(A)(ii) of the Act.

The applicant has shown by a preponderance of the evidence that he has been rehabilitated. Section 212(h)(1)(A)(iii) of the Act. As discussed above, there is no evidence that he has engaged in criminal activity since his last conviction in 1984. The record shows that he has conducted himself well during the last 28 years, marrying his spouse who was admitted as a lawful permanent resident in 2009 and raising a family of four children, including [redacted] a U.S. citizen. The record shows that the applicant has resided in Mexico since his 1984 deportation, that he has not re-entered or attempted to re-enter the United States since then, and that he has not been arrested in Mexico over the past 28 years. The record does not reflect that the applicant has a propensity to engage in further criminal activity. Accordingly, the applicant has shown that he meets the requirement of section 212(h)(1)(A)(iii) of the Act. Based on the foregoing, the applicant has shown that he is eligible for consideration for a waiver under section 212(h)(1)(A) of the Act.

In determining whether the applicant warrants a favorable exercise of discretion under section 212(h) of the Act, the Secretary must weigh positive and negative factors in the present case. The negative factors in this case are that the applicant was convicted in 1984 of a single misdemeanor, for failing in his duty to stop at the scene of an injury accident, and that he entered the United States without inspection in 1975 and 1984. The positive factors in this case include hardship to the applicant's U.S. citizen son and lawful permanent resident spouse as a result of his inadmissibility; that the applicant has not been convicted of a crime since 1984 – more than 28 years ago; that the applicant has raised four children; and that he has never re-entered or attempted to re-entered the United States unlawfully since his 1984 deportation. While the applicant's criminal activity and violation of U.S. immigration law cannot be condoned, the positive factors in this case outweigh the negative factors.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met his burden that he merits approval of his application.

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