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



H2

Date: **JUN 22 2012**

Office: GUATEMALA CITY



IN RE: Applicant:



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:



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,

f. Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Guatemala City, Guatemala, and is now before the Administrative Appeals Office (AAO) on appeal. The previous decision of the Field Office Director will be withdrawn and the waiver applicant declared unnecessary. The appeal will be dismissed. The matter will be returned to the Field Office Director for continued processing.

The record reflects that the applicant is a native and citizen of Belize. He 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 director stated that the applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act. The director 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.

On appeal, counsel states that the applicant's conviction of manslaughter by negligence contrary to section 113(2) of the Criminal Code, Chapter 101 of the Laws of Belize (Revised Edition) 1980-1990, does not involve moral turpitude. Counsel cited *Matter of Franklin*, 20 I&N Dec. 867, 868 (BIA 1994) as stating that "[m]oral turpitude refers generally to conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality and . . . has been defined as an act which is per se morally reprehensible and intrinsically wrong, or malum in se." Counsel asserts that in *Fernandez-Ruiz v. Gonzales*, 468 F.3d 1159, 1165-66 (9th Cir. 2006), the Ninth Circuit stated that crimes without willful conduct (a standard above mere negligence) do not have the requisite *malum in se*, which is necessary for finding moral turpitude.

Counsel argues that the applicant's crime is comparable to third degree assault under Washington law, which the Board of Immigration Appeals (Board) in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 618-620 (BIA 1992), held did not involve moral turpitude. Counsel states that the Board made this finding because only negligent intent was required for conviction of third degree assault. *Id.* Counsel asserts that the Board reasoned that if the statute required reckless or intentional conduct the crime would have been morally turpitudinous. *Id.* Accordingly, counsel contends that in the instant case since negligence is the only *mens rea* required for conviction for manslaughter by negligence, the offense does not involve moral turpitude.

Counsel cites *Matter of Torres-Valera*, 23 I&N Dec. 78 (BIA 2001), for the proposition that aggravated driving under the influence is not a crime involving moral turpitude where the culpable mental state cannot be established, *Matter of Lopez*, 13 I&N Dec. 725 (BIA 1971), as holding that involuntary manslaughter does not involve moral turpitude; and *Matter of Franklin*, 20 I&N Dec. 867 (BIA 1994), for the Board's holding that statutes must require conscious disregard of a substantial risk for a crime to involve moral turpitude. Counsel states that the Board in *Matter of Falaau*, 21 I&N Dec. 475 (BIA 1996), noted that reckless assault does not necessarily involve moral turpitude.

Lastly, counsel, citing *Fernandez-Ruiz v. Gonzales*, *supra*; *Partyka v. Atty. Gen. of U.S.*, 417 F.3d 408 (3d Cir. 2005), *Gill v. I.N.S.*, 420 F.3d 82, 89 (2d Cir. 2005), *Garcia-Maldonado v. Gonzales*, 491 F.3d 284 (5th Cir. 2007), and *Matter of G*, 1 I&N Dec. 403 (BIA 1943), contended that federal courts consider negligent conduct as distinct from reckless or willful conduct. Counsel argues that

since the Board and federal courts have ruled that negligent conduct cannot form the basis of a crime involving moral turpitude, it follows that the applicant's conviction does not require the requisite level of intent that is necessary for a finding of moral turpitude.

Inadmissibility for having been convicted of a crime involving moral turpitude is under section 212(a)(2)(A)(i)(I) of the Act, which 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-
 - (I) a crime involving moral turpitude . . . or an attempt or conspiracy to commit such a crime . . . is inadmissible.

The Board 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 analyzing whether the applicant's convictions involve moral turpitude, we turn to *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008). In *Silva-Trevino*, 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." *Silva-Trevino*, 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. Id. 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 charged with manslaughter by negligence contrary to section 113(2) of the Criminal Code, Chapter 101 of the Laws of Belize (Revised Edition) 1980-1990. On January 21, 1998, the applicant pleaded guilty to and was convicted of the lesser offense of causing death by careless conduct in the Supreme Court of Belize in the Central District of the Supreme Court. The applicant was sentenced to two years imprisonment.

Manslaughter is defined in section 113(2) of the Criminal Code, Chapter 101 of the Laws of Belize (Revised Edition) 1980-1990. This Section states:

- (1) Every person who commits manslaughter-
 - (a) by negligence shall be liable to imprisonment for five years;
 - (b) by any other cause shall be liable to imprisonment for five years;
- (2) Every person who causes the death of another by any careless conduct not amounting to negligence, as defined in this Code, shall be guilty of an offense and liable to imprisonment for two years.

“A person causes an event negligently, if he fails to a grave degree to observe the standard of care which he ought reasonably to observe in all the circumstances of the case.” *See* Criminal Code of Belize.

In *In Re Solon*, 24 I&N Dec. 239 (BIA 2007), the Board stated that crimes committed intentionally or knowingly have been found to involve moral turpitude, and that “[m]oral turpitude may also inhere in criminally reckless conduct, i.e., conduct that reflects a conscious disregard for a substantial and unjustifiable risk.” 24 I&N Dec. 239, 240 (BIA 2007). The Board stated that “as the level of conscious behavior decreases, i.e., from intentional to reckless conduct, more serious resulting harm is required in order to find that the crime involves moral turpitude.” *Id.* at 242. Further, the Board in *Matter of Medina*, 15 I&N Dec. 611 (BIA 1976), addressed whether criminally reckless conduct defined by Chapter 38 of the Illinois Revised Statutes section 4–6 provided a basis for a finding of moral turpitude. 15 I&N Dec. at 613-614. Section 4-6 provided that:

A person is reckless or acts recklessly, when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, described by the statute defining the offense; and such disregard constitutes a gross deviation from

the standard of care which a reasonable person would exercise in the situation. An act performed recklessly is performed wantonly, within the meaning of a statute using the latter term, unless the statute clearly requires another meaning.

Id. The Board stated that the definition of recklessness at section 4-6 “requires an actual awareness of the risk created by the criminal violator’s action” and that even though the “statute may not require a specific intent to cause a particular harm, the violator must show a willingness to commit the act in disregard of the perceived risk. The presence or absence of a corrupt or vicious mind is not controlling.” The Board held that the conduct defined by section 4-6 was the basis for a finding of moral turpitude. *Id.*

In *Matter of Wojtkow*, 18 I&N Dec. 111, 112-113 (BIA 1981), the Board concluded that a conviction of second degree manslaughter under the New York Penal Law constituted a crime involving moral turpitude. The Board noted that a person is guilty of second degree manslaughter in New York if “he recklessly causes the death of another person.” 18 I&N Dec. at 112 n.1. The Board further observed that the definition of “recklessness” under New York law was the same as the definition under Illinois law that had been analyzed in *Medina*. *Id.* at 112-13.

In *Matter of Franklin*, 20 I&N Dec. 867 (BIA 1994), the respondent was convicted of involuntary manslaughter, which, under Missouri law, was defined as “[r]ecklessly caus[ing] the death of another person.” 20 I&N Dec. at 869. The Board found that Missouri’s statutory definition of “recklessness” was essentially identical to the definitions which it construed in *Wojtkow* and *Medina*, *i.e.*, a conscious disregard for a substantial and unjustifiable risk, where the disregard constitutes a gross deviation from the standard of care which a reasonable person would employ. 20 I&N Dec. at 869-870. Accordingly, the Board stated that “because the statute under which the respondent was convicted requires that she acted with a “conscious disregard of a substantial and unjustifiable risk,” the conclusion necessarily follows that she has been convicted of a crime involving moral turpitude.” *Id.* at 870. (*citing Matter of Perez-Contreras, supra*, at 7; *see also Matter of Wojtkow, supra; Matter of Medina, supra*.) Thus, we agree with counsel’s contention that the Board in *Matter of Franklin* essentially held that statutes must require conscious disregard of a substantial risk for a finding of moral turpitude. However, we disagree with counsel’s assertion that *Matter of Lopez, supra*, holds that involuntary manslaughter does not involve moral turpitude. In *Matter of Franklin*, the Board found that a “black-letter” holding that convictions for involuntary manslaughter do not constitute crimes involving moral turpitude is not workable, and modified its precedent decisions which contained the categorical statement that involuntary manslaughter is not a crime involving moral turpitude. *Id.* at 870-871.

In *Matter of Perez-Contreras*, 20 I&N Dec. 615, 618-620 (BIA 1992), the Board concluded that a conviction for third degree assault under Washington law, where the alien had caused injury to the victim “with criminal negligence,” was not a crime involving moral turpitude. The Board emphasized that unlike *Wojtkow* and *Medina*, the alien’s conviction in *Perez-Contreras* did not involve “the conscious disregard of a substantial and unjustifiable risk.” *Id.* at 618-619. The Board thus concluded: “Since there was no intent required for conviction, nor any conscious disregard of a substantial and unjustifiable risk, we find no moral turpitude inherent in the statute.” *Id.* at 619. Accordingly, we concur with counsel’s assertion that the Board reasoned that if the statute required reckless or intentional conduct, third degree assault under the Washington law would have been morally turpitudinous. However, we disagree with counsel’s contention that the applicant’s

conviction in the instant case required proving negligence as the applicant was convicted for causing the death of another by careless conduct not amounting to negligence. We therefore will not address counsel's argument that the Board and federal courts have ruled that negligent conduct cannot form the basis of a crime involving moral turpitude

In the instant case, Section 113(2) of the Criminal Code, Chapter 101 of the Laws of Belize (Revised Edition) 1980-1990 states that "[e]very person who causes the death of another by any careless conduct not amounting to negligence, as defined in this Code, shall be guilty of an offense and liable to imprisonment for two years." An act is done "negligently" where a person "fails to a grave degree to observe the standard of care which he ought reasonably to observe in all the circumstances of the case." The applicant's crime involved "careless conduct not amounting to negligence." In view of our discussions of *In Re Solon*, *Matter of Medina*, *Matter of Franklin*, *Matter of Wojtkow*, and *Matter of Perez-Contreras*, we can conclude that there is a realistic probability that violation of Section 113(2), which requires that the death of another be caused by careless conduct not amounting to negligence, is an offense that extends to criminally reckless conduct that creates the risk of death or serious harm. Accordingly, the applicant's conviction of causing death by careless conduct is not a crime involving moral turpitude, and the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

Thus, the waiver application is not necessary and the issue of whether the applicant established extreme hardship to a qualifying relative pursuant to the Act is necessary and will not be addressed. Accordingly, the appeal will be dismissed, the prior decision of the Field Office Director withdrawn and the instant application for a waiver declared unnecessary.

ORDER: The appeal is dismissed as the waiver application is unnecessary. Absent other grounds of inadmissibility or ineligibility, the applicant appears to be eligible an immigrant visa.