identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

H2

DATE: Office: LOS ANGELES, CA FILE: [redacted]

IN RE: MAR 2 0 2012 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,

for

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Los Angeles, California. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the waiver application is moot.

The applicant is a native and citizen of South Korea 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's spouse and child are U.S. citizens.

The field office director found that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility. *Field Office Director's Decision*, dated June 9, 2009.

On appeal, counsel asserts that the denial was based on incorrect facts. *Attorney Letter*, dated April 12, 2011.

The record includes, but is not limited to, counsel's letter and brief and the applicant's spouse's statement. The entire record was reviewed and considered in arriving at a decision on the appeal.

On November 29, 2007, the applicant was convicted of Driving under the influence, .08% alcohol, and causing bodily injury to another person under California Vehicle Code § 23153(b) and he was sentenced to three years of probation, 364 days in jail and monetary penalties.

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-
>
> (I) a crime involving moral turpitude . . . or an attempt or conspiracy to commit such a crime . . . is inadmissible.

The Board of Immigration Appeals (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 *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.

California Vehicle Code § 23153(b), states:

> It is unlawful for any person, while having 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle and concurrently do any act forbidden by law, or neglect any duty imposed by law in driving the vehicle, which act or neglect proximately causes bodily injury to any person other than the driver.

The AAO notes that simple DUI is not a crime involving moral turpitude. *In re Lopez-Meza*, 22 I. & N. Dec. 1188, 1194 (BIA 1999). The record reflects, however, that the applicant's crime is not a simple DUI, rather it requires that bodily injury occurs, an aggravated factor. The AAO notes that aggravated DUI may be a crime involving moral turpitude. The court in *In re Lopez-Meza* stated:

> A conviction for aggravated DUI under section 28-697(A)(1) or section 28-1383(A)(1) requires a showing that the offender was "knowingly" driving with a suspended, canceled, revoked, or refused license. See State v. Cramer, 962 P.2d 224 (Ariz. Ct. App. 1998); State v. Superior Court, 945 P.2d 1334 (Ariz. Ct. App. 1997); State v. Agee, 887 P.2d 588 (Ariz. Ct. App. 1994). Thus, in order for a motorist to be convicted of aggravated DUI in Arizona, the state must prove that the defendant knew or should have known that his license was suspended. [FN7] State v. Williams...
>
> Consequently, aside from the culpability that is often, but not inherently, present in a simple DUI offense, an individual who drives under the influence in violation of the relevant provisions of section 28-697(A)(1) or section 28-1383(A)(1) does so with the knowledge that he or she should not be driving under any circumstances. We find that a person who drives while under the influence, knowing that he or she is absolutely prohibited from driving, commits a crime so base and so contrary to the currently accepted duties that persons owe to one another and...it involves moral turpitude.
>
> *In re Lopez-Meza*, at 1195-1196.

In the applicant's case, the statute does not require the requisite culpable mental state. Nor does the record reflect that the applicant was found to have such a mental state. As such, the AAO finds that the applicant's conviction does not involve moral turpitude. As such, he is not inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of Act, and he does not require a Form I-601 waiver. The appeal is dismissed as the waiver application is moot.

ORDER: The appeal is dismissed as the waiver application is moot.