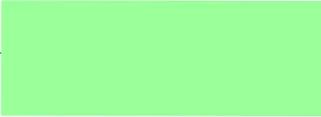


(b)(6)

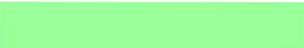


U.S. Citizenship
and Immigration
Services



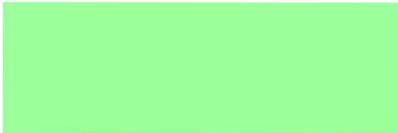
Date: **FEB 05 2013** Office: NEW YORK, NY

FILE: 

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:

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, New York, New York, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the waiver application is unnecessary.

The applicant is a native and citizen of Jamaica 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 committed a crime involving moral turpitude. The applicant's spouse and children are U.S. citizens. He seeks a waiver of inadmissibility in order to reside in the United States.

The district director found that the applicant had failed to establish extreme hardship to a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *District Director's Decision*, dated August 10, 2011.

On appeal, counsel asserts that the applicant was not convicted of a crime involving moral turpitude and a Form I-601 is not required. *Form I-290B*, dated September 7, 2011.

The record includes, but is not limited to, the Form I-290B and attachment, and the applicant's criminal record. The entire record was reviewed and considered in arriving at a 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 –

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

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....

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 reflects that the applicant was convicted of criminally negligent homicide in violation of New York Penal Law 125.10 on February 28, 2002. The applicant was sentenced to six months imprisonment and five years of probation.

New York Penal Law 125.10 provides, in pertinent part:

A person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person.

New York Penal Law 15.05 provides, in pertinent part:

3. "Recklessly." A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto.

4. "Criminal negligence." A person acts with criminal negligence with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

New York Penal Law 15.05 reflects that "criminal negligence" involves a level of scienter where one "fails to perceive a substantial and unjustifiable risk" whereas "recklessness" involves one who is "aware and consciously disregards a substantial and unjustifiable risk." The BIA has found that for a crime which contains the mens rea of "recklessness" to be considered a crime involving moral turpitude, the element of a reckless state of mind must be accompanied with an offense involving the infliction of serious bodily injury. *See Matter of Fualaau*, 21 I&N Dec. 475, 478 (BIA 1996). *See also Matter of Perez-Contreras*, 20 I&N Dec. 615, 618-619 (BIA 1992).

The applicant's conviction under New York Penal Law 125.10 lacks the requirement of at least a reckless state of mind. New York law reflects that criminally negligent homicide does not contain a conscious disregard of a risk. *See People v. Buffington*, 304 N.Y.S. 2d 746 (N.Y.Co.Ct. 1969).¹

Based on the aforementioned discussion, the AAO finds that the applicant's conviction is not a crime involving moral turpitude. As the AAO has found that the applicant's conviction under New York Penal Law 125.10 is not a crime involving moral turpitude, he is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act and the appeal will be dismissed as the waiver application is unnecessary.

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

¹ The AAO also notes that U.S. Department of State Foreign Affairs Manual, 9 FAM 40.21(a) N2.3-3(a)(10)(b), states, "A conviction for the statutory offense of vehicular homicide or other involuntary manslaughter that only requires a showing of negligence will not involve moral turpitude even if it appears the defendant in fact acted recklessly."