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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

Date: JUN 19 2013 Office: ROME, ITALY

IN RE:

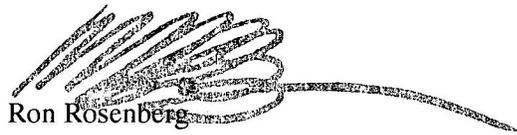
APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h) of the  
Immigration and Nationality Act, 8 U.S.C. § 1182(h)

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,

  
Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The application for waiver of inadmissibility was denied by the Field Office Director, Rome, Italy, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the applicant is not inadmissible and the underlying waiver application is unnecessary.

The applicant, a native and citizen of Italy, was admitted to the United States as a lawful permanent resident on November 3, 1955. He was 13-years-old. On February 13, 1962 the applicant was convicted of manslaughter in the second degree and sentenced to five years in prison. As a result of this conviction the applicant was placed in removal proceedings and ordered removed from the United States on August 19, 2004. The applicant appealed to the Board of Immigration Appeals (BIA), who on March 31, 2005, affirmed the immigration judge's decision to remove the applicant after it was discovered that he left the United States on February 15, 2005 to depart on a cruise to the Bahamas, effectively withdrawing his appeal. The applicant attempted to enter the United States on February 20, 2005 with his now invalidated lawful permanent resident card. The applicant was transferred to the Krome Detention Center in Miami, Florida until his departure to Italy on June 20, 2006. In applying for an immigrant visa the applicant was found to be inadmissible to the United States under 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 is applying for a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his three U.S. citizen children.

In her decision, dated May 31, 2012, the field office director found that the applicant had failed to show that he had been rehabilitated and did not demonstrate extreme hardship to a qualifying family member. The Application for Waiver of Grounds of Inadmissibility (Form I-601) was denied accordingly.

In regards to the applicant's waiver application, counsel asserts on appeal that the applicant was not convicted of a crime involving moral turpitude. He states that the field office director erroneously relied on a court document in the record stating that in 1962 the applicant was convicted under New York Penal Code (N.Y.P.L) § 125.15, which requires criminally reckless conduct and would constitute a crime involving moral turpitude in accordance with *Matter of Wojtkow*, 18 I. & N. Dec. 111 (BIA 1981). Counsel states that this document is incorrect in citing the applicant's conviction as being under N.Y.P.L § 125.15, because this version of the N.Y.P.L was not enacted until 1965, three years after the applicant was convicted. Counsel states further that the applicant was actually convicted under the 1881 version of the N.Y.P.L. which for manslaughter in the second degree involves only culpable negligence and does not constitute a crime involving moral turpitude in accordance with *Mongiovi v. Karnuth*, 30 F.2d 825 (W.D.N.Y. 1929). Finally, counsel asserts that in the event the applicant is found inadmissible under section 212(a)(2)(A)(i)(I) of the Act, he warrants the favorable exercise of discretion.

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 on February 13, 1962 the applicant was convicted in the Supreme Court of New York in [REDACTED] of one count of manslaughter in the second degree. The applicant was sentenced to five years in prison.

We find that counsel’s assertions regarding the statute in effect at the time of the applicant’s conviction are correct.<sup>1</sup> The applicant was convicted of manslaughter in the second degree under the version of the N.Y.P.L enacted in 1881.<sup>2</sup>

Section 1052(3) of N.Y.P.L. stated, in pertinent part:

Such homicide is manslaughter in the second degree, when committed without a design to effect death: ...

3. By any act, procurement or culpable negligence of any person, which, according to the provisions of this article, does not constitute the crime of murder in the first or second degree, nor manslaughter in the first degree.

In his brief, counsel cites to *Mongioli v. Karnuth*, 30 F.2d 825 (W.D.N.Y. 1929), where the court found that second degree manslaughter under N.Y.P.L. § 1052 did not involve moral turpitude. The court stated, “As defined, manslaughter, in the second degree does not include an evil intent or commission of the act willfully or designedly, and it expressly includes an act resulting in death without design to injure or effect death.” Section 1052(3) of N.Y.P.L. pertains to common law involuntary manslaughter, which is committed without contemplating death, without malice, and without intent....” Thus, we agree with counsel’s assertions and find that the applicant’s conviction does not constitute a crime involving moral turpitude. The applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The applicant’s waiver application is thus unnecessary and the appeal will be dismissed.

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

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<sup>1</sup> Counsel references the section of the N.Y.P.L. enacted in 1881 in which the applicant was convicted as § 193. This section number is incorrect. The correct section is § 1052(3).

<sup>2</sup> We note that N.Y.P.L. § 125.15, stated, in pertinent part, “A person is guilty of manslaughter in the second degree when;...1. He recklessly causes the death of another person....”