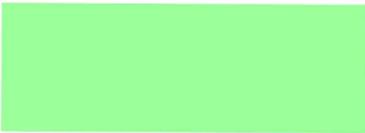




U.S. Citizenship  
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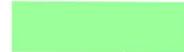


DATE:

**MAR 27 2013**

OFFICE: NEWARK, NJ

FILE:



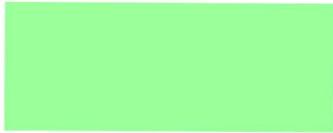
IN RE:



APPLICATION:

Application for Waiver of Grounds of Inadmissibility under sections 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 Field Office Director, Newark, New Jersey 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 is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to section 212(a)(2)(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 is the spouse and parent of U.S. citizens. He seeks a waiver of inadmissibility pursuant to sections 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States.

The Field Office Director concluded that the applicant had failed to establish that his inadmissibility would result in extreme hardship for a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Decision of the Field Office Director*, dated January 19, 2012.

On appeal, counsel states that the applicant is not inadmissible to the United States for having committed a crime involving moral turpitude. Alternately, he contends that the Field Office Director erred in finding that the applicant had failed to establish extreme hardship to his qualifying relatives. *Form I-290B, Notice of Appeal or Motion*, dated February 14, 2012; *see also Counsel's Brief*, dated March 14, 2012.

The record of evidence includes, but is not limited to: counsel's briefs; statements from the applicant, his spouse and his older daughter; letters of support from friends of the applicant, as well as his pastor; an employment letter and earnings statements for the applicant; tax records, and W-2 Wage and Tax Statements; medical documentation relating to the applicant, his spouse and his younger daughter; bank statements; copies of money transfers; country conditions information on Mexico; and documentation of the applicant's arrests and convictions. The entire record was reviewed and all relevant evidence considered in reaching a decision on the appeal.

Section 212(a)(2)(A)(i)(I) of the Act states, in pertinent part:

(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.

In the present case, the record reflects that, on December 7, 1994, the applicant pled guilty to a seatbelt violation under New Jersey Statutes (NJ ST) 39:3-76.2f for which he was fined \$40; a Motorcycle License Application offense under NJ ST 39:3.10b for which he was fined \$378; and Driving While Intoxicated, NJ ST 39:4-50, for which he was fined \$505, ordered to spend two days at the Intoxicated Driver Resource Center (IDRC) and had his license suspended for 180 days. On May 6, 1999, the applicant was convicted of Assault, NJ ST 2C:12-1a(1). He was fined \$500 and ordered to pay \$30 in court costs, plus other fees. On June 30, 2000, he was again convicted of Driving While Intoxicated, NJ ST 39:4-50, for which he was placed on probation for three years; ordered to pay a \$502 fine, \$30 in court costs, as well as other fees; required to perform 30 days of

community service and had his driver's license suspended for two years. On September 7, 2005, the applicant was found guilty of violating City of Passaic Ordinance §75-22, Public Consumption of Alcohol, and was fined \$150 and ordered to pay \$30 in court costs.

On May 16, 2005, the applicant was arrested for Assault by Auto, NJ ST 2C:12-1c(2) and Driving While Intoxicated, NJ ST 39:4-50. On December 16, 2005, he was convicted of Assault by Auto and sentenced to one day in jail, with credit for time served of one day, and placed on probation for two years. On February 7, 2006, the applicant pled guilty to the second charge of Driving While Intoxicated. He was sentenced to 180 days in jail, fined \$1,358, required to spend 48 hours at the IDRC and had his license suspended for ten years.

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.)

This case arises within the jurisdiction of the Third Circuit Court of Appeals, which has affirmed the traditional categorical approach to determine whether an offense constitutes a crime involving moral turpitude. See *Jean-Louis v. Holder*, 582 F.3d 462, 473-82 (3<sup>rd</sup> Cir. 2009) (declining to follow the "realistic probability approach" put forth by the Attorney General in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)). The categorical inquiry in the Third Circuit consists of looking "to the elements of the statutory offense . . . to ascertain that least culpable conduct necessary to sustain a conviction under the statute." *Id.* at 465-66. The "inquiry concludes when we determine whether the least culpable conduct sufficient to sustain conviction under the statute 'fits' within the requirements of a CIMT." *Id.* at 470. However, if the "statute of conviction contains disjunctive elements, some of which are sufficient for conviction of [a CIMT] and others which are not . . . [an adjudicator] examin[es] the record of conviction for the narrow purpose of determining the specific subpart under which the defendant was convicted." *Id.* at 466. This is true even where clear sectional divisions do not delineate the statutory variations. *Id.* In conducting this secondary review, an adjudicator may only look at the formal record of conviction. *Id.* Accordingly, the AAO will limit any inquiry into the nature of the applicant's offenses to his records of conviction.

Although we have reviewed the applicant's multiple convictions for Driving While Intoxicated, we will not consider them in this proceeding as they do not constitute crimes involving moral turpitude. *Matter of Lopez-Mesa*, 22 I&N Dec. 1188 (BIA 1999)(noting that a simple DUI is not a crime involving moral turpitude as it involves no culpable mental state requirement). We also find no need

to review the applicant's 1999 conviction for assault under NJ ST 2C:12-1a(1) as simple assault or battery has not been found to involve moral turpitude for purposes of immigration law, even if the intentional infliction of physical injury is an element of the crime. *Matter of Fualaau*, 21 I&N Dec. 475, 477 (BIA 1996). Our review will instead be limited to a consideration of the applicant's conviction for Assault by Auto, NJ ST 2C:12-1c(2), which the Field Office Director has found to be a crime involving moral turpitude, barring the applicant's admission to the United States under section 212(a)(2)(A)(i)(I) of the Act.

At the time of the applicant's conviction for Assault by Auto, NJ ST 2C:12-1c stated:

- (1) A person is guilty of assault by auto or vessel when the person drives a vehicle or vessel recklessly and causes either serious bodily injury or bodily injury to another . . .
- (2) Assault by auto or vessel is a crime of the third degree if the person drives the vehicle while in violation of R.S.39:4-50 or section 2 of P.L.1981, c. 512 (C.39:4-50.4a) and serious bodily injury results and is a crime of the fourth degree if the person drives the vehicle while in violation of R.S.39:4-50 or section 2 of P.L.1981, c. 512 (C.39:4-50.4a) and bodily injury results.

In the present case, the applicant has been convicted of an assault offense resulting from reckless conduct. We note that in *Matter of Fualaau*, the Board of Immigration Appeals (BIA) held that in such cases, the element of a reckless state of mind must be coupled with "an offense involving the infliction of serious bodily injury." 21 I&N Dec. 475, 478 (BIA 1996). In *Matter of Solon*, 24 I&N Dec. 239, 242 (BIA 2007), the BIA again addressed the relationship between intent and harm in assault offenses, noting that:

[i]n the context of assault crimes, a finding of moral turpitude involves an assessment of both the state of mind and the level of harm required to complete the offense. Thus, intentional conduct resulting in a meaningful level of harm, which must be more than mere offensive touching, may be considered morally turpitudinous. However, 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. Moreover, where no conscious behavior is required, there can be no finding of moral turpitude, regardless of the resulting harm.

Pursuant to the analytical framework set forth in *Jean-Louis*, the AAO has considered the statute under which the applicant was convicted, NJ ST 2C:12-1c(2), which punishes reckless driving resulting in serious bodily harm, as well as that which results simply in bodily harm. Based on the BIA's reasoning in *Fualaau* and *Solon* regarding the level of harm that must accompany reckless conduct before it can be found morally turpitudinous, the statute clearly encompasses assault offenses that do not involve moral turpitude, as well as those that do. Therefore, we cannot find the applicant's offense to be a categorical crime involving moral turpitude.

As the applicant's offense is not a categorical crime of moral turpitude, we now turn to a review of the applicant's record of conviction, which includes the plea colloquy and judgment, to determine if it establishes the section of the statute under which the applicant was conviction. The judgment in

the applicant's case indicates that he pled guilty to and was convicted of fourth degree Assault by Auto resulting in bodily injury, rather than the more serious third degree Assault by Auto, which requires the infliction of serious bodily injury. As the reckless conduct that led to the applicant's conviction for Assault by Auto did not result in the serious level of harm that the BIA has found necessary for a finding of moral turpitude in such cases, his conviction is not a conviction for a crime involving moral turpitude.

The applicant has not been convicted of a crime involving moral turpitude. Accordingly, he is not inadmissible to the United States and is not required to file a waiver.

In proceedings for 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. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. The appeal will, therefore, be dismissed as the underlying waiver application is unnecessary.

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