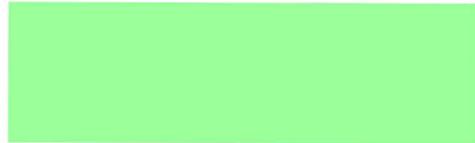


(b)(6)

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

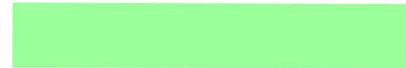


U.S. Citizenship
and Immigration
Services

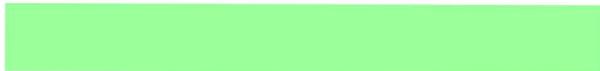


DATE: JAN 08 2014

OFFICE: KENDALL

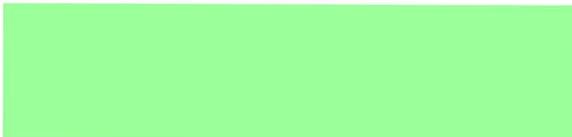


IN RE:



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 (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

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

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Kendall Field Office Director, Miami, Florida denied the waiver application and the matter is now before the Administrative Appeals Office (AAO) on appeal. As the applicant is not inadmissible, the waiver application will be deemed unnecessary, and the appeal will be dismissed.

The applicant is a native and citizen of Cuba who was found to be inadmissible 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 seeks a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside with her U.S. citizen son in the United States.

The Field Office Director found that the applicant failed to establish extreme hardship to a qualifying relative and denied the Form I-601 application for a waiver accordingly. *Decision of the Field Office Director*, dated June 10, 2013.

On appeal, counsel for the applicant asserts that the applicant was not convicted of a crime involving moral turpitude, as even negligent behavior could be punished under the statute

In support of his appeal, the applicant submitted a letter from the applicant's son, a statement from the applicant, and criminal court records concerning the applicant. The entire record was reviewed and considered in rendering 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.

(ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did

not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

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 on December 27, 2002, the applicant was convicted of homicide and damage in driving vehicles on public roads, pursuant to Article 177 of the Cuban Penal Code. The applicant was sentenced to four years imprisonment. Based upon this conviction, the Field Office Director found the applicant to have committed a crime involving moral turpitude and to be inadmissible to the United States.

Article 177 of the Cuban Penal Code states:

The driver of a vehicle who, infringing the traffic laws or regulations, provokes the death of an individual shall be subject to a punishment of deprivation of freedom for a period of from one to ten years.

The BIA held that an involuntary manslaughter conviction involves moral turpitude when it requires a mens rea of recklessness, a conscious disregard of a substantial and unjustifiable risk, where the disregard constitutes a gross deviation from the standard of care a reasonable person would employ. *Matter of Franklin*, 20 I&N Dec. 867 (BIA 1994). The BIA contrasted this recklessness requirement with its holding in *Matter of Perez-Contreras*, 20 I&N Dec. 615 (BIA 1992), finding that a third degree assault conviction with criminal negligence was not a crime involving moral turpitude. The BIA held that criminal negligence exists when the perpetrator fails to be aware of a substantial risk that a wrongful act may occur and that failure constitutes a gross deviation from a reasonable person standard.

Article 9.1 of the Cuban Penal Code indicates that all the offenses contained therein are committed intentionally or through negligence.

Article 9 of the Cuban Penal Code states:

1. The offense can be committed intentionally or by negligence.
2. The offense shall be intentional when the agent performs the action or omission consciously and willfully and wanted its result, or when, without wanting said result, predicted the possibility of occurrence and assumed this risk.
3. The offense shall be committed by negligence when the agent predicted the possibility of occurrence of the socially harmful consequences of its action or omission, but expected, carelessly, to

avoid them; or when he did not predict the possibility of occurrence although he could have or should have predicted them.

Article 48.1 of the Cuban Penal Code states that crimes resulting from negligence are punished with deprivation of freedom of five days to eight years or a specified fine. As the applicant's conviction under Article 177 of the Cuban Penal Code carries a possible sentence of deprivation of freedom of one to ten years, it is evident that an offense under this penal code can be committed intentionally or by negligence, under the penal code.

The record contains criminal records for the applicant, including a court's judgment of conviction and sentencing, dated December 27, 2002. The court determined that the applicant, on May 2, 2002, was driving a jeep, without a permit valid in Cuba, and with three passengers, a number excessive for this type of vehicle. The applicant failed to stop at a stop sign, resulting in impact with another vehicle and two deaths amongst the applicant's passengers.

The court's judgment of conviction and sentencing do not indicate that the applicant acted intentionally or consciously disregarded a substantial and unjustifiable risk in the actions leading to her conviction. As such, it appears that the applicant's offense was determined to be negligent, pursuant to section 9.1(3) of the Cuban Penal Code, with a sentence of four years imprisonment. It is noted that the Department of State, in its Foreign Affairs Manual, 9 FAM 40.21(a), N2.3-3(a)(10)(b), which the AAO finds to be persuasive, though not dispositive, states that a conviction for the statutory offense of vehicular homicide that only requires a showing of negligence will not involve moral turpitude even if it appears the defendant in fact acted recklessly.

Accordingly, the AAO concludes that the applicant has not been convicted of a crime involving moral turpitude that would render her inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act. As the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act, she does not require a waiver pursuant to the present Form I-601 application, and the Field Office Director's decision will be withdrawn.

ORDER: As the applicant is not inadmissible, the waiver application is unnecessary. The Field Office Director's decision is withdrawn, and the appeal is dismissed. The case is returned to the Field Office Director for further proceedings in accordance with this determination.