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**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF A-C-R-

DATE: AUG. 29, 2016

APPEAL OF HOUSTON, TEXAS FIELD OFFICE DECISION

APPLICATION: FORM I-601, APPLICATION FOR WAIVER OF GROUNDS OF
INADMISSIBILITY

The Applicant, a native and citizen of Mexico, seeks a waiver of the ground of inadmissibility for a crime involving moral turpitude. *See* Immigration and Nationality Act (the Act) section 212(h), 8 U.S.C. § 1182(h). A foreign national seeking to be admitted to the United States as an immigrant or to adjust status to lawful permanent residence must be admissible or receive a waiver of inadmissibility. U.S. Citizenship and Immigration Services (USCIS) may grant this discretionary waiver if refusal of admission would result in extreme hardship to a qualifying relative or qualifying relatives.

The Field Office Director, Houston, Texas, denied the application. The Director concluded the Applicant was inadmissible pursuant to section 212(a)(2)(A) of the Act for having been convicted of a crime involving moral turpitude and that the Applicant had not established extreme hardship to a qualifying relative.

The matter is now before us on appeal. In the appeal, the Applicant submits additional evidence and claims that the Director erred in determining that he had been convicted of a crime involving moral turpitude and further claims that his spouse and children will experience extreme hardship as a result of his inadmissibility.

Upon *de novo* review, we will sustain the appeal.

I. LAW

The Applicant is seeking to adjust status to lawful permanent resident and has been found inadmissible for a crime involving moral turpitude. Specifically, the record indicates the Applicant was convicted of Failure to Stop and Render Aid, in violation of Texas Penal Code § 550, on [REDACTED] 2004, in [REDACTED] Texas. He was sentenced to five years imprisonment, with imposition of the sentence suspended, and he was placed on community supervision. Section 212(a)(2)(A) of the Act, 8 U.S.C. § 1182(a)(2)(A), provides that any foreign national convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime is inadmissible.

The record further indicates the Applicant was convicted of driving while intoxicated in 2000 resulting in 20 days confinement, and failure to stop and render aid in 2004, resulting in five years confinement. As such, the Applicant has been convicted of two or more offenses that resulted in being sentenced to more than five years confinement. Section 212(a)(2)(B) of the Act, 8 U.S.C. § 1182(a)(2)(B), provides that any foreign national convicted of two or more offenses (other than purely political offenses), regardless of whether the convictions arose from a single scheme or involved moral turpitude, for which the aggregate sentences to confinement were five years or more is inadmissible. Section 101(a)(48)(B) of the Act provides that “[a]ny reference to a term of imprisonment or a sentence . . . is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.”

Individuals found inadmissible under section 212(a)(2)(A) or 212(a)(2)(B) of the Act may seek a waiver of inadmissibility under section 212(h) of the Act. Section 212(h) of the Act provides for a discretionary waiver if denial of admission would result in extreme hardship to a United States citizen or lawful permanent resident spouse, parent, son, or daughter.

Decades of case law have contributed to the meaning of extreme hardship. The definition of extreme hardship “is not . . . fixed and inflexible, and the elements to establish extreme hardship are dependent upon the facts and circumstances of each case.” *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999) (citation omitted). Extreme hardship exists “only in cases of great actual and prospective injury.” *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (BIA 1984). The Applicant must demonstrate that claimed hardship is realistic and foreseeable. *Id.*; see also *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968) (finding that the respondent had not demonstrated extreme hardship where there was “no showing of either present hardship or any hardship . . . in the foreseeable future to the respondent’s parents by reason of their alleged physical defects”). The common consequences of removal or refusal of admission, which include “economic detriment . . . [,] loss of current employment, the inability to maintain one’s standard of living or to pursue a chosen profession, separation from a family member, [and] cultural readjustment,” are insufficient alone to constitute extreme hardship. *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996) (citations omitted); but see *Matter of Kao and Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which the qualifying relatives would relocate). Nevertheless, all “[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists.” *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994) (citations omitted). Hardship to the Applicant or others can be considered only insofar as it results in hardship to a qualifying relative. *Matter of Gonzalez Recinas*, 23 I&N Dec. 467, 471 (BIA 2002).

II. ANALYSIS

The issues on appeal are whether the Applicant has been convicted of a crime involving moral turpitude and whether the Applicant has established extreme hardship to a qualifying relative. The Applicant claims that the Director did not properly examine the Applicant’s convictions when

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determining that they were crimes involving moral turpitude, and that a plain reading of the statute in each of his convictions demonstrates that they are not categorically crimes involving moral turpitude. The Applicant also claims that his spouse and children will experience extreme hardship if he is removed. The Applicant explains that he and his spouse have been living together since 1995, that they have two daughters together who reside with them, and that he is his spouse's only means of emotional and financial support. He states that his spouse and daughters would experience extreme hardship both upon separation and relocation.

The record supports a determination that the Applicant is inadmissible pursuant to section 212(a)(2)(A) of the Act for having been convicted of a crime involving moral turpitude and under section 212(a)(2)(B) of the Act for having been convicted of two or more offenses for which the aggregate sentences to confinement were more than five years. The record also supports a determination that the Applicant's daughters would experience extreme hardship due to his inadmissibility, and we find that the Applicant merits a waiver as a favorable exercise of discretion.

A. Inadmissibility

As stated above, the Applicant has been found inadmissible under section 212(a)(2)(A) of the Act for a crime involving moral turpitude for his conviction for Failure to Stop and Render Aid, in violation of Texas Penal Code § 550. The record indicates the Applicant was also convicted of driving while intoxicated, in violation of Texas Penal Code § 49.04, on [REDACTED] 1983, and sentenced to one year of probation and again convicted of driving while intoxicated in [REDACTED] Texas, on [REDACTED] 2000, and sentenced to 20 days in jail.

Texas Transportation Code § 550.021 provides, in pertinent part:

- (a) The operator of a vehicle involved in an accident resulting in injury to or death of a person shall:
 - (1) immediately stop the vehicle at the scene of the accident or as close to the scene as possible;
 - (2) immediately return to the scene of the accident if the vehicle is not stopped at the scene of the accident; and
 - (3) remain at the scene of the accident until the operator complies with the requirements of Section 550.023.

Section 550.023 of the Code, in turn, sets forth the following requirements:

The operator of a vehicle involved in an accident resulting in the injury or death of a person or damage to a vehicle that is driven or attended by a person shall:

- (1) give the operator's name and address, the registration number of the vehicle the operator was driving, and the name of the operator's motor vehicle liability insurer to any person injured or the operator or occupant of or person attending a vehicle involved in the collision;
- (2) if requested and available, show the operator's driver's license to a person described by Subdivision (1); and
- (3) provide any person injured in the accident reasonable assistance, including transporting or making arrangements for transporting the person to a physician or hospital for medical treatment if it is apparent that treatment is necessary, or if the injured person requests the transportation.

In assessing whether a conviction is a crime involving moral turpitude, we must first “determine what law, or portion of law, was violated.” *Matter of Esfandiary*, 16 I&N Dec. 659, 660 (BIA 1979). We engage in a categorical inquiry, considering the “inherent nature of the crime as defined by statute and interpreted by the courts,” not the underlying facts of the criminal offense. *Matter of Short*, 20 I&N Dec. 136, 137 (BIA 1989); *see also Matter of Louissaint*, 24 I&N Dec. 754, 757 (BIA 2009) (citing *Taylor v. United States*, 495 U.S. 575, 599-600 (1990)). This categorical inquiry focuses on whether moral turpitude necessarily inheres in the minimal conduct for which there is a realistic probability of prosecution under the statute. *See Short, supra; Louissaint, supra; Moncrieffe v. Holder*, 133 S.Ct. 1678, 1684-1685 (2013); *Gonzales v. Duenas-Alvarez*, 127 S.Ct. 815, 822 (2007).

Where a criminal statute does not contain a single, indivisible set of elements, but rather encompasses multiple distinct criminal offenses, “some . . . which involve moral turpitude and some which do not,” we engage in a modified categorical inquiry. *Short, supra*, at 137-138. A statute is divisible only if it lists “potential offense elements in the alternative, render[ing] opaque which element played a part in the defendant’s conviction.” *Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013).

For cases arising in the Fifth Circuit, as in this case, determination of whether a conviction is a crime involving moral turpitude requires a categorical inquiry into the “the inherent nature of the crime, as defined in the statute concerned, rather than the circumstances surrounding the particular transgression.” *Okabe v. INS*, 671 F.2d 863, 865 (5th Cir. 1982). This categorical inquiry takes into account only “the minimum criminal conduct necessary to sustain a conviction under the statute.” *Hamdan v. United States*, 98 F.3d 183, 189 (5th Cir. 1996). A conviction is “a crime involving moral turpitude if the minimum reading of the statute necessarily reaches only offenses involving moral turpitude.” *Amouzadeh v. Winfrey*, 467 F.3d 451, 455 (5th Cir. 2006) (citing *Pichardo v. I.N.S.*, 104 F.3d 756, 759 (5th Cir. 1997)).

If, however, the statute is divisible into discrete subsections of criminal acts, some of which are categorically crimes involving moral turpitude and some of which are not, an adjudicator may make

a modified categorical inquiry into the record of conviction to discern whether the Applicant has been convicted of a subsection that qualifies as a crime involving moral turpitude. See *Hamdan, supra*, at 187; *Amouzadeh, supra*, at 455 (citing *Smalley v. Ashcroft*, 354 F.3d 332, 336 (5th Cir. 2003)). A statute is divisible only if it lists “potential offense elements in the alternative, render[ing] opaque which element played a part in the defendant’s conviction.” *Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013); see also *Franco-Casasola v. Holder*, 773 F.3d 33, 38 (5th Cir. 2014).

The record of conviction is a narrow, specific set of documents which includes the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. See *Matter of Louissaint*, 24 I&N Dec. 754, 757 (BIA 2009); see also *Shepard v. U.S.*, 544 U.S. 13, 16 (2005) (finding that the record of conviction is limited to the “charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented”).

In *Garcia-Maldonado v. Gonzales*, 491 F.3d 284 (5th Cir. 2007), the Fifth Circuit Court of Appeals determined that a violation of Texas Transportation Code § 550.021, failure to stop and render aid after involvement in an automobile accident, could be violated both by reprehensible conduct (leaving the scene of an accident) and by conduct that was not morally turpitudinous (failing to affirmatively report identifying information), and, consequently, was not categorically a crime involving moral turpitude. *Id.* at 289. The Fifth Circuit Court of Appeals then used a modified categorical approach to determine that the Applicant had been convicted of a subsection that constituted a crime involving moral turpitude because it involved leaving the scene of an accident where an injury or death occurred. *Id.* at 290 (“The subsection of section 550.21 that criminalizes failure to render aid proscribes behavior that runs contrary to accepted social duties ... and is ‘intrinsically wrong.’”).

An examination of the record of conviction reveals that the Applicant, like the Applicant in *Garcia-Maldonado*, was convicted of leaving the scene of an accident where an injury was involved without rendering assistance. We therefore find the Applicant has been convicted of a crime involving moral turpitude.

As stated above, the Applicant was convicted of driving while intoxicated in 2000 and sentenced to 20 days incarceration. The Applicant’s conviction for failure to stop and render aid in 2004 resulted in a sentence of five years’ confinement. We therefore find that the Applicant has been convicted of two or more offenses for which the aggregate sentences to confinement were more than five years and that the Applicant is inadmissible under section 212(a)(2)(B) of the Act.

B. Waiver

The Applicant must demonstrate that denial of the application would result in extreme hardship to a qualifying relative or relatives. In this case, the qualifying relatives are his daughters.¹ The record

¹ The record does not clearly establish that the Applicant’s marriage to his lawful permanent resident spouse is legally

includes statements from the Applicant and members of his family, bank records, tax records, medical records and background documentation on epilepsy and the living conditions in Mexico.

The Applicant claims that his spouse and two daughters will experience extreme hardship due to his inadmissibility. He states that he is the sole financial support for his spouse and two daughters who still reside with him and his spouse. He explains that his younger daughter suffers from epilepsy and must be monitored by physicians to prevent recurrence of seizures. The Applicant also explains that his spouse would be unable to find employment or support his two daughters without him and that she would lose health insurance coverage and be unable to support his daughters, one of whom is attending college paid for by the Applicant and his spouse.

With regard to hardship upon relocation, the Applicant has asserted that his daughters will experience physical and economic hardship. He explains that his daughters have resided all their lives in the United States and that all of their family and friends reside in the United States. One of his daughters, as explained above, has a serious medical condition. He claims that they would experience physical and economic hardship in Mexico due to the violent conditions there and the lack of health care facilities.

In *Matter of Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001), the Board found that a 15-year-old child who was not fluent in Chinese, had spent her formative years in the United States and was integrated into the American lifestyle would experience extreme hardship if she relocated to Taiwan with her parents. In the present case, the Applicant's daughters, like the child in *Kao and Lin*, are not fluent in Spanish and have spent their formative years in the United States. They are attending college and are integrated into the American culture and lifestyle. Pursuant to the reasoning in *Kao and Lin*, we find that relocation to Mexico would result in hardship to the Applicant's daughters.

As discussed above, the Applicant's daughter suffers from epilepsy and must be monitored. Background materials in the record describe epilepsy and note that the symptoms can come on suddenly and, if not treated, can lead to serious medical consequences. Relocating to Mexico would mean that the Applicant's daughter would have to disrupt the continuity of her medical care and sever ties with the doctors who are familiar with her medical condition and history. This would result in a hardship to the Applicant's daughter because she would have to find adequate medical facilities and treatment to ensure that the treatment for her epilepsy is maintained.

When we examine the hardships upon relocation in the aggregate, we find that they rise to a degree of extreme hardship to the Applicant's daughter upon relocation if he is denied admission to the United States.

valid as a divorce decree between the Applicant and his former spouse was not final until 2014, two years after he was married to his current spouse.

C. Discretion

We now consider whether the Applicant merits a waiver of inadmissibility as a matter of discretion. The burden is on the Applicant to establish that a waiver of inadmissibility is warranted in the exercise of discretion. *Matter of Mendez-Morales*, 21 I&N Dec. 296, 299 (BIA 1996). We must balance the adverse factors evidencing the Applicant's undesirability as a lawful permanent resident with the social and humane considerations presented to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country. *Id.* at 300 (citations omitted). The adverse factors include the nature and underlying circumstances of the inadmissibility ground(s) at issue, the presence of additional significant violations of immigration laws, the existence of a criminal record, and if so, its nature, recency and seriousness, and the presence of other evidence indicative of bad character or undesirability. *Id.* at 301. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where residency began at a young age), evidence of hardship to the foreign national and his or her family, service in the U.S. Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to good character. *Id.*

The primary negative factor in this case is the Applicant's conviction for Failure to Render Aid. Additional negative factors include the Applicant's two driving while intoxicated convictions. In addition, the Applicant was not completely truthful or accurate about his convictions when being interviewed for adjustment of status in 2014 and failed to reveal the extent of his criminal record. Nonetheless, despite the fact that driving while intoxicated is a serious crime, as is failure to render aid, the Applicant has not been convicted of any violent crimes and it has also been 12 years since the Applicant's last arrest.

The positive factors in this case include the Applicant's family ties in the United States, including three children and a spouse. The Applicant and his spouse have resided together since 1995 and have two grown daughters who still reside with them. The Applicant has a stable work history, and the record indicates he has been employed at the same job since 2004, a period of 12 years. The record demonstrates that the Applicant's daughters would experience extreme hardship if he were removed. There are also letters in the record from family members and friends of the Applicant attesting to his good moral character and support for his family, and the Applicant himself describes his 12 years of sobriety and states that he is sorry for his crimes and has been rehabilitated.

Despite the Applicant's convictions for failure to render aid and driving while intoxicated, the positive factors outweigh the negative factors in this case and favorable discretion will be exercised.

III. CONCLUSION

The Applicant has the burden of proving eligibility for a waiver of inadmissibility. *See* section 291 of the Act, 8 U.S.C. § 1361. The Applicant has established that a qualifying relative will experience extreme hardship and the positive factors in this case outweigh the negative factors. The Applicant has met that burden. We sustain the appeal.

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ORDER: The appeal is sustained.

Cite as *Matter of A-C-R-*, ID# 16542 (AAO Aug. 29, 2016)