

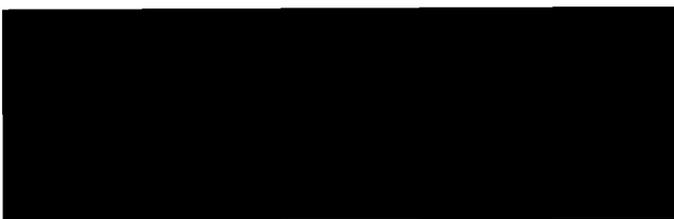
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U. S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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Services

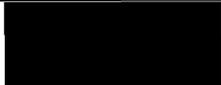
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MAR 05 2010

FILE:



Office: MEXICO CITY (CIUDAD JUAREZ)

Date:

IN RE:

Applicant:



APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B)(v)
of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(9)(B)(v)

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Mexico City, Mexico, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed, the previous decision of the district director will be withdrawn, and the application declared moot. The matter will be returned to the district director for continued processing.

The applicant, [REDACTED] is a native and citizen of Mexico. He was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking admission within 10 years of his last departure from the United States. The applicant seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. §§ 1182(a)(9)(B)(v), in order to return to the United States to join his U.S. citizen spouse.

The applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on an underlying Petition for Alien Relative (Form I-130). The applicant also filed an Application for Waiver of Grounds of Inadmissibility (Form I-601) on October 18, 2005. The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the waiver application accordingly. The applicant timely appealed the denial to the AAO. On September 21, 2009, the AAO issued the applicant a request for additional evidence related to his arrests for failure to appear in court and hit and run with property damage. The AAO noted that if the applicant has been convicted of both offenses, or fails to provide evidence sufficient to show that he was not convicted of those offenses, then the issue of whether his convictions are crimes involving moral turpitude must be addressed. On December 14, 2009, the applicant, through counsel, responded to the request for evidence with a brief and the responses to requests for the applicant's police reports. The entire record was reviewed and considered in rendering the 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 the recently decided *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 contains a Federal Bureau of Investigation (FBI) report, which reveals that the applicant was arrested on March 5, 1988 for *hit and run causing property damage* in violation of section 20002(a) of the California Vehicle Code (Cal. Vehicle Code). The record also contains a California Department of Motor Vehicles Driver License/Identification Card Information Report, which shows that among other offenses, the applicant was convicted on August 23, 1988 of *failure to appear* in violation of Cal. Vehicle Code § 40508(a).

On appeal, counsel asserts that the applicant's two traffic offenses do not constitute convictions for immigration purposes. Counsel states that even if they are considered convictions, they do not constitute crimes involving moral turpitude "under previous BIA precedent and according to the interpretation of regulatory offenses and state statutes related to motor vehicle offenses." Counsel states that if the AAO concludes that the applicant's failure to attend traffic court is a crime involving moral turpitude, the applicant "should be protected under the petty offense exception."

Cal. Vehicle Code § 20002(a) (West 1988) provides, in pertinent part:

(a) The driver of any vehicle involved in an accident resulting in damage to any property, including vehicles, shall immediately stop the vehicle at the scene of the accident and shall then and there do one of the following:

(1) Locate and notify the owner or person in charge of such property of the name and address of the driver and owner of the vehicle involved and, upon locating the driver of any other vehicle involved or the owner or person in charge of any damaged property, upon being requested, present his driver's license and vehicle registration to the other driver, property owner, or person in charge of such property. The information presented shall include the current residence address of the driver and of the registered owner. If the registered owner of an involved vehicle is present at the scene, he shall also, upon request, present his driver's license information, if available, or other valid identification to the other involved parties.

(2) Leave in a conspicuous place on the vehicle or other property damaged a written notice giving the name and address of the driver and of the owner of the vehicle involved and a statement of the circumstances thereof and shall without unnecessary delay notify the police department of the city wherein the collision occurred or, if the collision occurred in unincorporated territory, the local headquarters of the Department of the California Highway Patrol.

Any person failing to comply with all the requirements of this section is guilty of a misdemeanor and upon conviction thereof shall be punished by imprisonment in the county jail for not to exceed six months or by a fine of not to exceed one thousand dollars (\$1,000) or by both.

The Ninth Court of Appeals in *Cerezo v. Mukasey*, 512 F.3d 1163 (9th Cir. 2008), discussed whether an offense similar to Cal. Vehicle Code § 20002(a), but significantly more culpable, leaving the scene of an accident resulting in bodily injury or death, in violation of Cal. Vehicle Code § 20001(a), is categorically a crime involving moral turpitude. The Court found that Cal. Vehicle Code § 20001(a) is divisible into crimes that may involve moral turpitude and crimes which may not. 512 F.3d at 1169. The Court noted that “Reading § 20001(a) literally, a driver in an accident resulting in injury who stops and provides identification, but fails to provide a vehicle registration number, has violated the statute.” 512 F.3d at 1167. The Court applied the realistic probability test articulated in *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, and reviewed lower court decisions involving the application of Cal. Vehicle Code § 20001(a). *Id.* The Court first reviewed *People v. Bautista*, 217 Cal. App. 3d 1, 7 (Cal. Ct. App. 1990), which emphasized that the purpose of Cal. Vehicle Code § 20001(a) was “to prevent the driver of a car involved in an accident from leaving the scene without furnishing information as to his identity and to prevent him from escaping liability.” 512 F.3d at 1168. The Court then reviewed other California court decisions that have interpreted Cal. Vehicle Code § 20001(a) as strictly requiring drivers to comply with the various reporting requirements set forth in the statute. *Id.* The Court determined that, “because the plain language of the statute criminalizes failure to provide all required forms of identification, and because some California courts have held that ‘[t]he various requirements of [§ 20001] are set forth in the conjunctive and omission to perform any one of the acts required constitutes an offense,’” it could not conclude that Cal. Vehicle Code § 20001(a) categorically involves moral turpitude. *Id.* at 1168–69 (citation omitted). The Court further determined under the modified categorical approach that the information contained in the record of conviction, consisting of the abstract of judgment, did not alter the Court’s analysis. *Id.* at 1169.

The AAO finds that the Ninth Circuit’s determination that Cal. Vehicle Code § 20001(a) is not categorically a crime involving moral turpitude applies with equal weight to a violation of Cal. Vehicle Code § 20002(a). Cal. Vehicle Code § 20002(a) is a divisible statute that criminalizes not only a driver who leaves the scene of an accident, but also a driver who fails to comply with all of the reporting requirements delineated in the statute. The driver’s failure to comply with all of the reporting requirements renders him guilty of a misdemeanor, regardless of whether he made an earnest attempt to provide his identifying information. Accordingly, the AAO cannot conclude that Cal. Vehicle Code § 20002(a) is categorically a crime involving moral turpitude.

Since Cal. Vehicle Code § 20002(a) is not categorically a crime involving moral turpitude, our next action would be to apply the modified categorical approach and “consider whether any of a limited, specified set of documents—including the state charging document, a signed plea agreement, jury instructions, guilty pleas, transcripts of a plea proceeding and the judgment (sometimes termed ‘documents of conviction’)” reflect that the applicant’s conviction involved an admission to, or proof of, morally turpitudinous conduct. *Fernando-Ruiz v. Gonzalez*, 466 F.3d 1121, 1132 (9th Cir. 2006) (citation omitted). However, such a step is not necessary in this case as it is not evident that the applicant was convicted of this offense. The most recent FBI report based upon the applicant’s fingerprints reveals that he was arrested for hit and run causing property damage, but the report does not contain the disposition of this charge. In an effort to meet the applicant’s burden of proof, counsel submitted the “Request for Police Report” she filed with the San Francisco Police

Department for records related to the applicant's arrest.¹ The police report request appears to have been returned to counsel with a "Purged" and "Destroyed" stamp notation. There is no evidence that counsel attempted to contact the court that had jurisdiction over this matter. However, the AAO acknowledges that the court records would likely be unavailable at this stage as the California Department of Motor Vehicles website states that most convictions of traffic offenses, such as hit and run, reckless driving, and driving under the influence (DUI) will remain on an individual's record for 10 years from the violation date.² Almost 22 years have passed since the applicant's March 5, 1988 arrest. It can therefore be presumed that the disposition of the charge filed against the applicant is no longer available. Therefore, the AAO cannot find that the applicant has been convicted of a violation of Cal. Vehicle Code § 20002(a).

Cal. Vehicle Code § 40508(a) (West 1988) provides:

(a) Any person willfully violating his or her written promise to appear or a lawfully granted continuance of his or her promise to appear in court or before a person authorized to receive a deposit of bail is guilty of a misdemeanor regardless of the disposition of the charge upon which he or she was originally arrested.

The record reflects that the applicant was convicted on August 23, 1988 of failure to appear in violation of Cal. Vehicle Code § 40508(a). The applicant was convicted of a misdemeanor, punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding one thousand dollars (\$1,000), or by both. Cal. Penal Code § 19 (West 1988). The AAO is unaware of any legal authority that finds a failure to appear in court under Cal. Vehicle Code § 40508(a) constitutes a crime involving moral turpitude. However, the AAO will decline to make such a determination in these proceedings because even if the applicant's conviction is a crime involving moral turpitude he would still qualify for the petty offense exception to this ground of inadmissibility. Section 212(a)(2)(A)(ii)(II) of the Act provides the "petty offense" exception for an applicant who has been convicted of only one crime involving moral turpitude if the maximum penalty possible for the applicant's conviction did not exceed imprisonment for one year and he or she was not sentenced to a term of imprisonment in excess of six months. The maximum penalty possible for the applicant's failure to appear conviction was imprisonment for six months; therefore it falls within the purview of the petty offense exception. Thus, the AAO does not find that the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having committed a crime involving moral turpitude.

We now turn to the next issue, the applicant's inadmissibility under section 212(a)(9)(B) of the Act. The district director found the applicant inadmissible under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for more than one year and seeking admission within 10 years of his last departure from the United States.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

(B) Aliens Unlawfully Present.-

¹ The burden of proof is on the applicant to establish that he is admissible to the United States. See Section 291 of the Act, 8 U.S.C. § 1361.

² <http://www.dmv.ca.gov/faq/genfaq.htm>

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . prior to the commencement of proceedings under section 235(b)(1) or section 240, and again seeks admission within 3 years of the date of such alien's departure or removal, or

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

(v) Waiver. - The Attorney General [now the Secretary of Homeland Security (Secretary)] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the [Secretary] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

The director found that the applicant accrued unlawful presence in the United States from November 2003, when he entered the United States without inspection, until August 2004, when he departed the United States. The director determined that the applicant accrued unlawful presence in excess of one year, and therefore, his departure triggered the 10-year bar to admission under section under section 212(a)(9)(B)(i)(II) of the Act. Although this finding of inadmissibility was not disputed on appeal, the AAO observes that there is an error in the director's determination. The applicant accrued unlawful presence for a period of 10 months, not 1 year. As such, at the time of the district director's decision, he was inadmissible pursuant to section 212(a)(9)(B)(i)(I) for having been unlawfully present in the United States for a period greater than 180 days (6 months) but less than 1 year and seeking admission within 3 years of his departure from the United States.

On March 10, 2003, the applicant's daughter filed a Petition for Alien Relative (Form I-130) on the applicant's behalf, which was approved on November 4, 2004. The applicant subsequently filed an Application for Immigrant Visa and Alien Registration (Form DS-230) in 2005 with the U.S Consulate in Ciudad Juarez, Mexico. The applicant's immigrant visa interview at the U.S. Consulate in Ciudad Juarez was on October 14, 2005. At the time of the applicant's immigrant visa interview, he was seeking admission to the United States within three years of his August 2004 departure from the United States. He was, therefore, inadmissible to the United States under section 212(a)(9)(B)(i)(I) of the Act.

An application for admission to the United States is a continuing application, and admissibility is determined on the basis of the facts and the law at the time the application is finally considered. *Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992). As of the date of the decision on this appeal, more than three years have passed since the applicant's departure from the United States and the applicant has remained outside the United States for that entire period. A clear reading of the statute reveals that the applicant is no longer inadmissible based on his prior unlawful presence, as the three-year period for which he was barred from admission has passed. Therefore, based on the current facts, the applicant does not require a waiver of inadmissibility, and the appeal will be dismissed as the waiver application is moot.

ORDER: The appeal is dismissed as the waiver application is moot because the three-year period for which the bar to admission was in effect against this applicant has passed. The district director should notify the U.S. Consulate with jurisdiction over the applicant's immigrant visa application that the applicant is no longer inadmissible to the United States under section 212(a)(9)(B)(i)(I) of the Act.