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



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

H6

FILE: [REDACTED] Office: MEXICO CITY (CIUDAD JUAREZ)

Date: **MAY 12 2010**

IN RE: Applicant: [REDACTED]

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); and section 212(h) of the Act, 8 U.S.C. § 1182(h).

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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).

A handwritten signature in black ink that reads "Michael Shumway".

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer-in-Charge (OIC), Mexico City, Mexico, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant, [REDACTED], is a native and citizen of Mexico who 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; and under section 212(a)(9)(B)(i)(II) of 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. The applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h); and section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), so as to immigrate to the United States. The OIC approved the section 212(h) waiver, concluding that the applicant established that his admission to the United States would not be contrary to the safety or security of the United States and that he was rehabilitated. However, the OIC denied the section 212(a)(9)(B)(v) waiver, finding that the applicant failed to establish that his admission would impose extreme hardship on a qualifying relative. *Decision of the Officer-in-Charge*, dated January 12, 2007. The applicant filed a timely appeal.

On appeal, [REDACTED] asserts that she and her daughter need the applicant. She states that she works approximately 60 hours every week and has limited time to spend with her daughter. She claims that the crime her husband was convicted of was an accident.

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 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.

In determining whether a crime involves moral turpitude, the *Silva-Trevino* approach is similar in some respects to the approach previously followed by the Seventh Circuit Court of Appeals, with the exception of the realistic probability test. However, in that the Seventh Circuit has not yet addressed *Silva-Trevino* or the principles articulated in that decision, we will follow *Silva-Trevino* for the time being.

On May 8, 2003, the applicant plead guilty to and was convicted of violation of chapter 625 Illinois Compiled Statutes (ILCS) 5/11-401(b), failure to report accident/death/injury. He was incarcerated for one year in the Illinois Department of Corrections.

625 ILCS 5/11-401 provides:

- (a) The driver of any vehicle involved in a motor vehicle accident resulting in personal injury to or death of any person shall immediately stop such vehicle at the scene of such accident, or as close thereto as possible and shall then forthwith return to, and in every event shall remain at the scene of the accident until the requirements

of Section 11-403 have been fulfilled. Every such stop shall be made without obstructing traffic more than is necessary.

(b) Any person who has failed to stop or to comply with said requirements shall, within 3 hours after such motor vehicle accident, or, if hospitalized and incapacitated from reporting at any time during such period, within 48 hours after being discharged from the hospital, report the place of the accident, the date, the approximate time, the driver's name and address, the registration number of the vehicle driven, and the names of all other occupants of such vehicle, at a police station or sheriff's office near the place where such accident occurred. . . .

For purposes of this Section, personal injury shall mean any injury requiring immediate professional treatment in a medical facility or doctor's office.

(c) Any person failing to comply with paragraph (a) shall be guilty of a Class 4 felony.

(d) Any person failing to comply with paragraph (b) is guilty of a Class 3 felony if the motor vehicle accident does not result in the death of any person. Any person failing to comply with paragraph (b) when the accident results in the death of any person is guilty of a Class 2 felony, for which the person, if sentenced to a term of imprisonment, shall be sentenced to a term of not less than 3 years and not more than 14 years.

625 ILCS 5/11-403 provides:

The driver of any vehicle involved in a motor vehicle accident resulting in injury to or death of any person or damage to any vehicle which is driven or attended by any person shall give the driver's name, address, registration number and owner of the vehicle the driver is operating and shall upon request and if available exhibit such driver's license to the person struck or the driver or occupant of or person attending any vehicle collided with and shall render to any person injured in such accident reasonable assistance, including the carrying or the making of arrangements for the carrying of such person to a physician, surgeon or hospital for medical or surgical treatment, if it is apparent that such treatment is necessary or if such carrying is requested by the injured person.

If none of the persons entitled to information pursuant to this Section is in condition to receive and understand such information and no police officer is present, such driver after rendering reasonable assistance shall forthwith report such motor vehicle accident at the nearest office of a duly authorized police authority, disclosing the information required by this Section.

Any person failing to comply with this Section shall be guilty of a Class A misdemeanor.

The AAO is unaware of any published Seventh Circuit Court of Appeals cases addressing whether the crime of failure to report accident/death/injury under section 401(b) is a crime of moral turpitude. However, we observe that in *Garcia-Maldonado v. Gonzales*, 491 F.3d 284 (5th Cir. 2007), the Fifth Circuit Court of Appeals analyzed whether violation of Texas Transportation Code § 550.021, failure to stop and render aid after involvement in an automobile accident, was a crime involving moral turpitude.¹ The Fifth Circuit found that section 550.021 of the Texas Transportation Code 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. In applying the modified categorical approach, the Fifth Circuit held that the defendant's failure to stop and render aid following a fatal motor vehicle accident in violation of Texas Transportation Code § 550.021

¹ 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.

involved moral turpitude “because the offense reflects an intentional attempt to evade responsibility and is intrinsically wrong.” *Id.* at 290.

With the instant case, the Appellate Court of the Second District stated in *People v. Kerger*, 191 Ill.App.3d 405, 411, 548 N.E.2d 36, 138 Ill.Dec. 806 (2d Dist.1989), that to avoid prosecution under section 11-401(b), a driver involved in a motor vehicle accident must either comply with the requirements under section 11-403 or section 11-401(b), and that a driver will be prosecuted if he fails to comply with the reporting requirements of section 11-403 or 11-401(b). *Id.* at 411-412. With regard to the *mens rea* element of section 401, the Illinois Supreme Court held that to support a conviction under section 11-401, the prosecution must prove that the defendant knew that an accident occurred. *People v. Nunn*, 77 Ill.2d 243, 252, 32 Ill.Dec. 914, 396 N.E.2d 27 (1979); *People v. Janik*, 127 Ill.2d 390, 399, 130 Ill.Dec. 427, 537 N.E.2d 756 (1989). The AAO observes that in *People v. Jack*, 282 Ill.App.3d 727, 668 N.E.2d 622 (1996), the Appellate Court of the Second District held that satisfying the *mens rea* element of the offense required the State to prove that the defendant knew he was in an accident (but not that he knew the accident could result in injury to another party) and failed to fulfill his duty under section 11-403 of the statute, which includes a duty to reasonably investigate. *Id.* at 733-734. In contrast to the decisions in *Nunn* and *Jack*, the Appellate Court of the Fifth Circuit has stated that the *mens rea* required to establish a defendant’s guilt is proving beyond a reasonable doubt that the defendant knew he was in an accident involving another person. *People v. Digirolamo*, 279 Ill.App.3d 487, 216 Ill.Dec. 83, 664 N.E.2d 720 (1996).

Viewed against the background of reported Illinois state court decisions and the holding in *Garcia-Maldonado*, wherein failure to comply with reporting and identification requirements was found not to be morally turpitudinous, but failure to render aid to an injured person was, the AAO finds that violation of 625 ILCS 5/11-401 does not categorically involve moral turpitude because the statute encompasses acts which both do (failure to render aid to an injured person) and do not (failure to render reasonable assistance to an injured person) involve moral turpitude. Since a conviction for failure to report accident/death/injury in violation of 625 ILCS 5/11-401 is not categorically a crime involving moral turpitude, the Seventh Circuit then applies the modified categorical approach and may consider evidence beyond the charging papers or judgment of conviction in determining whether the specific conduct of which the applicant was convicted involved moral turpitude. *Ali v. Mukasey*, 521 F.3d 737, 743 (7th Cir.2008). The AAO finds that the applicant conveys in the letter dated January 10, 2006, that he knowingly struck a pedestrian with his vehicle and did not stop because he was afraid. Based on the applicant’s admission of hitting a pedestrian with his vehicle and failing to stop and render assistance to the injured person, we find that the conduct of which the applicant was convicted involved moral turpitude.

A waiver is available for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act. Section 212(h) of the Act provides, in pertinent part:

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if -

(1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that -

- (i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,
 - (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
 - (iii) the alien has been rehabilitated; or
- (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . .

A section 212(h) waiver of the bar to admission resulting from violation of section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant is not a consideration under the statute and will be considered only to the extent that it results in hardship to a qualifying relative. The qualifying relative here are the applicant's wife and daughter, who are U.S. citizens. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996).

Inadmissibility for unlawful presence is found under section 212(a)(9)(B) of the Act. That section provides, in part:

(B) Aliens Unlawfully Present

- (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 . . . 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.

...

The application for cancellation of removal filed by the applicant on June 24, 2004, reflects that the applicant first entered the United States without inspection on May 1989, and that he left the United States on June 1990. The applicant returned to the United States without inspection on July 1990, and left the country on June 1994. He returned to the United States without inspection on July 1994. The record is not clear as to when the applicant left the United States after his July 1994 entry; however, U.S. Citizenship and Immigration Services (USCIS) records show that on March 1, 2001 he was placed in removal proceedings for attempting to gain admission to the United States without inspection, and was ordered to appear before an immigration judge. On May 8, 2003, in the Circuit Court of Cook County, Illinois, the applicant pled guilty to and was convicted of failure to report accident/death/injury, a felony. The judge ordered that the applicant be incarcerated for one year in the Illinois Department of Corrections. On August 19, 2003, a Notice of Hearing in Removal Proceedings was personally issued to the applicant for a master hearing on December 19, 2003. On October 27, 2003, the applicant's spouse filed the Form I-130, Petition for Alien Relative, on the applicant's behalf. On March 26, 2004, the immigration judge ordered that the applicant be granted voluntary departure on or before July 26, 2004 in lieu of removal. On June 24, 2004, the applicant filed a motion to reopen, which was denied by the immigration judge. On July 26, 2004, the applicant voluntarily departed from the United States. Based on the record, the applicant began to accrue unlawful presence from April 1, 1997, the date on which the unlawful presence provisions went into effect, until March 26, 2004, the date on which he was granted voluntary departure. When the applicant voluntarily departed from the United States, he triggered the ten-year bar, rendering him inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

The waiver for unlawful presence is found under section 212(a)(9)(B)(v) of the Act. That section provides that:

- (v) Waiver. – The Attorney General [now Secretary, 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 Attorney General [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 waiver under section 212(a)(9)(B)(v) of the Act is dependent upon a showing that the bar to admission imposes an extreme hardship on a qualifying relative, *i.e.*, the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to an applicant is not a consideration under the statute, and will be considered only to the extent that it results in hardship to a qualifying relative, who in this case is the applicant's U.S. citizen spouse. Once extreme hardship is established, it is but one favorable factor to be considered in determining whether the Secretary should exercise discretion. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996).

This decision will address the applicant's waivers under sections 212(h) and 212(a)(9)(B)(v) of the Act. However, in that the applicant's waiver under 212(a)(9)(B)(v) of the Act requires satisfying a higher hardship standard, we will apply that standard in our decision.

“Extreme hardship” is not a definable term of “fixed and inflexible meaning”; establishing extreme hardship is “dependent upon the facts and circumstances of each case.” *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). The Board of Immigration Appeals (BIA) in *Matter of Cervantes-Gonzalez* lists the factors it considers relevant in determining whether an applicant has established extreme hardship a qualifying relative pursuant to section 212(i) of the Act. The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative’s family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative’s ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. *Id.* at 565-566.

In *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996), the BIA stated that the factors to consider in determining whether extreme hardship exists “provide a framework for analysis,” and that the “[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists.” It further stated that “the trier of fact must consider the entire range of factors concerning hardship in their totality” and then “determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation.” (citing *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994).

Extreme hardship to the applicant’s wife and daughter must be established in the event that they remain in the United States without the applicant, and alternatively, if they join the applicant to live in Mexico. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant’s waiver request.

With regard to remaining in the United States without the applicant, the applicant’s wife indicates in her letter that she is paying \$50 every month on the \$110,000 in damages that her husband owes as a result of the automobile accident. She conveys that she is financially strained and lives with a family because she could no longer afford her apartment. She states that she works 50-60 hours every week, but it still is not enough. She avers that her mother, aunt, and sister take care of her daughter while she is at work. The record shows that the applicant owes \$109,900 regarding his automobile accident. The applicant’s wife declares that she stopped attending St. Xavier University, where she was in her second year, because she no longer has her husband to care for their daughter. The record reflects that the applicant’s wife attended St. Xavier University. The applicant’s wife indicates that her present job does not provide medical benefits and that she cannot afford all of the vaccines that her daughter requires. She conveys that she and her daughter have a close relationship with the applicant and wants her family together. The applicant conveys in his letter that his wife and daughter have only been able to visit him in Mexico a few times. He indicates that his wife has lost weight and is losing her hair and that her family suggested that she see a therapist.

Family separation must be considered in determining hardship. In *Salcido-Salcido v. INS*, 138 F.3d 1292 (9th Cir. 1998) the Ninth Circuit discussed the effect of emotional hardship on the alien and her husband and children as a result of family separation. The Ninth Circuit stated that “the most important single hardship factor may be the separation of the alien from family living in the United States” and that there must be a careful appraisal of “the impact that deportation would have on children and families.” *Id.* at 1293. Furthermore, the Ninth Circuit indicated that “considerable, if

not predominant, weight,” must be attributed to the hardship that will result from family separation. *Id.* In *Yong v. INS*, 459 F.2d 1004 (9th Cir. 1972), the Ninth Circuit reversed a BIA decision denying an application for suspension of deportation. The Ninth Circuit noted that “[s]eparation from one's spouse entails substantially more than economic hardship.” *Id.* at 1005. Similarly, the Third Circuit in *Bastidas v. INS*, 609 F.2d 101 (3rd Cir.1979) explicitly stressed the importance to be given the factor of separation of parent and child.

The AAO notes that in view of the substantial weight that is given to family separation in the hardship analysis, and in light of the significant impact that separation will have on the applicant's wife if she remains with her child in the United States, we find the applicant has demonstrated that his wife will experience extreme emotional hardship as a result of their separation.

With regard to joining the applicant to live in Mexico, the applicant's spouse conveys that she has no family living in Mexico except for her husband. We find that the applicant's spouse has not fully demonstrated how she would experience extreme hardship if she joined her husband to live in Mexico and was thereby separated from her mother and brothers in the United States.

The applicant has shown that his wife will experience extreme hardship if she remained in the United States without him; however, he has not demonstrated that she will experience extreme hardship if she joined him to live in Mexico. Based upon the record before the AAO, the applicant in this case fails to establish extreme hardship to a qualifying family member for purposes of relief under sections 212(h) and 212(a)(9)(B)(v) of the Act.

Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under sections 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.