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

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U.S. Citizenship
and Immigration
Services



H6

DATE: **MAY 18 2011** OFFICE: CIUDAD JUAREZ, MEXICO

FILE:

IN RE:

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

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Ciudad Juarez, Mexico and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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)(A)(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 and section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having accrued more than one year of unlawful presence and seeking admission within ten years of his last departure. The applicant is married to a U.S. citizen. He seeks waivers of inadmissibility pursuant to sections 212(a)(9)(B)(v) and 212(h) of the Act, 8 U.S.C. §§ 1182(a)(9)(B)(v) and 1182(h), in order to remain in the United States.

The Field Office Director found that the applicant had failed to establish that the bar to his admission would result in extreme hardship for a qualifying relative and, further, that he was not deserving of a favorable exercise of discretion. The Field Office Director denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Decision of the Field Office Director*, dated October 19, 2009.

On appeal, the applicant's spouse submits evidence of the hardship she is experiencing as a result of the applicant's inadmissibility. *Form I-290B, Notice of Appeal or Motion*, dated November 16, 2009; *Medical documentation*, received December 24, 2009.

The evidence of record includes, but is not limited to: statements from the applicant's spouse; medical records and statements concerning the applicant's spouse; a psychological evaluation of the applicant's spouse; and records relating to 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) 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 January 17, 2007, the applicant pled guilty to Failure to Stop and Render Assistance in violation of Texas Transportation Code § 550.021 and was sentenced to eight months in the Harris County, Texas jail.

At the time of the applicant's conviction, Texas Transportation Code § 550.21 stated in pertinent part:

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 550.23.

At the time of the applicant's conviction Texas Transportation Code § 550.23 stated:

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:

....

- (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.

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 inadmissibility under section 212(a)(2)(i)(I) of the Act, adopting the "realistic probability" standard used by the Supreme Court in *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183 (2007). The methodology requires an adjudicator to review the criminal statute at issue to determine if there is a "realistic probability, not a theoretical possibility," that the statute could be applied to reach conduct that does not involve moral turpitude. 24 I&N Dec. 687, 698 (A.G. 2008)(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 has been 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.

Here, however, the AAO need not engage in a *Silva-Trevino* analysis of the applicant's offense as the Fifth Circuit, within whose jurisdiction this case arises, has found that a conviction under Texas law for failing to stop and render aid after being involved in a vehicular accident resulting in injury or death is a crime involving moral turpitude. In *Garcia-Maldonado v. Gonzales*, 491 F.3d 284 (5th Cir. 2007), the Fifth Circuit concluded that the respondent's failure to stop and provide assistance after being involved in a fatal motor vehicle accident "reflected an intentional attempt to evade responsibility and was intrinsically wrong." Accordingly, the applicant is inadmissible to the United States under section 212(a)(2)(i)(I) for having committed a crime involving moral turpitude.

The record also reflects that the applicant is inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II), which states in pertinent part:

(B) Aliens Unlawfully Present.-

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

....

(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 record reflects that the applicant initially entered the United States without inspection in April 1996 and remained until March 21, 1997 when he was removed from the United States. On or about June 1, 2003, the applicant re-entered the United States without inspection and remained until July 2007. Accordingly, he accrued unlawful presence from the date of his June 2003 arrival until his departure in July 2007. In that the applicant accrued more than one year of unlawful presence and is seeking immigrant admission to the United States within ten years of his last departure, he is inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act.

Beyond the decision of the Field Office Director, the AAO finds the applicant to be inadmissible pursuant to section 212(a)(9)(C) of the Act,¹ which provides:

(C) Aliens unlawfully present after previous immigration violations.-

(i) In general.-Any alien who-

....

(II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law,

and who enters or attempts to reenter the United States without being admitted is inadmissible.

(ii) Exception.—Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if . . . the Attorney General [now the Secretary of Homeland Security] has consented to the alien's reapplying for admission....

The record reflects that, on March 21, 1997, an immigration judge ordered the removal of the applicant and that he was returned to Mexico the same day. The record also indicates that the applicant subsequently entered the United States without inspection on at least two occasions, on June 1, 2003 and on an unknown date but prior to March 13, 2011, the date on which a Colorado County Sheriff's probable cause affidavit indicates that he was arrested for consuming alcohol while driving. Based on this history, the applicant is inadmissible to the United States under section 212(a)(9)(C)(i)(II) of the Act for having entered the United States without inspection after having been ordered removed.

To seek an exception from a finding of inadmissibility under section 212(a)(9)(C)(i)(I) of the Act, an applicant must remain outside the United States for at least ten years following his or her last

¹ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the original decision does not identify all of the grounds for denial. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO conducts appellate review on a *de novo* basis).

departure. See *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006).² The record in the present matter does not establish that the applicant has resided outside the United States for the required ten years. Accordingly, the applicant is statutorily ineligible to seek an exception from his inadmissibility under section 212(a)(9)(C)(ii) of the Act.

As the applicant is not eligible to receive an exception from his section 212(a)(9)(C)(i) inadmissibility, the AAO finds no purpose would be served in considering whether he is eligible for waivers of inadmissibility under sections 212(a)(9)(B)(v) and 212(h) of the Act. The appeal will therefore be dismissed.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that she is eligible for the benefit sought. Here, the applicant has not met that burden.

ORDER: The appeal is dismissed.

²The AAO notes the preliminary injunction that was previously entered against the ability of the Department of Homeland Security to follow *Matter of Torres-Garcia*. *Gonzales v. DHS*, 239 F.R.D. 620 (W.D. Wash. 2006). The Ninth Circuit, however, reversed the district court, and ordered the vacating of that injunction. *Gonzales v. DHS (Gonzales II)*, 508 F.3d 1227 (9th Cir. 2007). In its opinion, the Ninth Circuit held that the Board of Immigration Appeal's decision in *Matter of Torres-Garcia* was entitled to judicial deference. *Gonzales II*, 508 F.3d at 1241-42. The Ninth Circuit's mandate was issued on January 23, 2009. On February 6, 2009, the district court denied the plaintiffs' motion for a new preliminary injunction. Order Denying Plaintiffs' Motion for Preliminary Injunction (Dkt # 59), *Gonzales v. DHS*, No. [REDACTED] (W.D. Wash. Filed February 6, 2006). Thus, there is no judicial prohibition in force that precludes the AAO applying the rule laid down in *Matter of Torres-Garcia*.