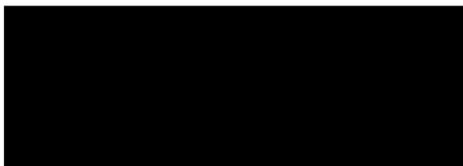


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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



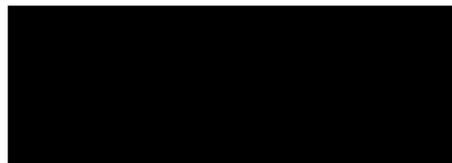
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Date: OCT 05 2011 Office: SAN SALVADOR FILE:

IN RE:

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

for Perry Rhew  
Chief, Administrative Appeals Office

(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 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.

A waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant or his child can be considered only insofar as it results in hardship to a qualifying relative. The applicant's spouse is the only qualifying relative in relation to his section 212(a)(9)(B)(v) waiver. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996).

The present application also indicates that the applicant was convicted on August 29, 1980 of soliciting prostitution on September 13, 1979. The record also indicates that the applicant was arrested on August 14, 1980 for grand larceny and embezzlement, but the charges were dismissed on August 29, 1980. The applicant has an arrest on July 25, 1977, for assault with a deadly weapon, but the record does not reflect how this arrest was resolved. Finally, the record indicates that on July 9, 1982 in Arlington, Virginia, the applicant was arrested for a "hit and run" and on November 23, 1982 was sentenced to 90 days in jail for the crime.

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 . . . or an attempt or conspiracy to commit such a crime . . . is inadmissible.

The AAO notes that arrests alone are not enough to find inadmissibility under section 212(a)(2)(A) of the Act. Furthermore, the record is not clear as to whether the applicant's convictions for soliciting a prostitute and "hit and run" involve moral turpitude. The Board of Immigration Appeals (BIA) has "observed that moral 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." *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992). Additionally, "[m]oral turpitude has been defined as an act which is per se morally reprehensible and intrinsically wrong, or malum in se, so it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude." *Matter of Franklin*, 20 I&N Dec. 867, 868 (BIA 1994).

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.

Because the documentation initially submitted on appeal gave very little detail regarding the applicant's criminal record, the AAO issued a request for further evidence, dated January 31, 2011, requesting that the applicant submit all police and court records related to his arrests and convictions and any other documentation relevant to a determination of whether or not his convictions were crimes involving moral turpitude. The AAO noted that to meet his burden, the applicant must, at a minimum, submit the available documents that comprise the record of conviction and show that these fail to establish that any convictions were based on conduct involving moral turpitude. To the extent such documents are unavailable, this fact must be established pursuant to the requirements in 8 C.F.R. § 103.2(b)(2). The AAO also provided that the applicant could submit additional or

updated evidence of extreme hardship if desired. The AAO noted that if the applicant has been convicted of a violent or dangerous crime it was likely that a waiver of the applicant's inadmissibility under section 212(h) would be subject to the discretionary requirements of 8 C.F.R. § 212.7(d), and the applicant would have to demonstrate that he warrants a favorable exercise of discretion because of "extraordinary circumstances," as those are set forth in that regulation.

In his response to the request for further evidence, counsel submits documentation regarding the applicant's criminal record, documentation of the applicant's rehabilitation, and documentation of the hardship the applicant's family is experiencing as a result of his inadmissibility. In support of the applicant's rehabilitation and family hardship counsel submits: a reference letter for the applicant from a fellow Alcoholics Anonymous support group member, a statement from the applicant's spouse, and a statement from the applicant's daughter.

In regards to the applicant's criminal record the record indicates that on February 25, 2011, counsel sent a letter to D.C. Superior Court listing the applicant's arrests while in D.C. and requesting court records and dispositions for each offense. The Superior Court apparently replied in sending the court disposition for the applicant's 1980 conviction for soliciting a prostitute and his 1980 arrest and dismissal for grand larceny and embezzlement. No disposition for the applicant's 1977 arrest for assault with a deadly weapon was submitted. The record also indicates that on February 25, 2011, counsel sent a letter to the General District Court of Arlington County listing the applicant's arrests while in Virginia and requesting court records and dispositions for each offense. The court dispositions in response to this letter indicate that the applicant was convicted of driving while under the influence (DUI) on three occasions and, as stated above, a hit and run felony.

The Board of Immigration Appeals has indicated in *In Re Lopez-Meza* that a simple DUI would not likely be a crime involving moral turpitude unless there was an aggravating dimension. *In Re Lopez-Meza, Id.* 3423 (BIA Dec. 21, 1999). *See also, Matter of Torres-Varela*, 23 I. & N. Dec. 78 (BIA 2001) (DUI with two or more prior DUI convictions is not a crime involving moral turpitude). Thus, AAO finds that the applicant is not inadmissible as a result of his three DUI convictions. In addition, the AAO finds that although crimes relating to the practice of prostitution, such as maintaining a house of prostitution or securing another for employment as a prostitute, have been found to be crimes involving moral turpitude, we are unaware of any legal authority requiring a finding that soliciting or patronizing an individual for the purpose of prostitution is a crime involving moral turpitude under the Act. *See, e.g., Matter of W-*, 4 I&N Dec. 401 (C.O. 1951); *Matter of A-*, 5 I&N Dec. 546 (BIA 1953) (Knowingly permitting premises to be used as a brothel); *Matter of Lambert*, 11 I&N Dec. 340 (BIA 1965) (securing another for prostitution). Further, this office need not determine whether this conviction is a crime involving moral turpitude as the applicant's hit-and-run conviction is a crime involving moral turpitude.

The U.S. Court of Appeals for the Fifth Circuit has held that failure to stop and render aid following a fatal auto accident in violation of Texas law is a crime involving moral turpitude, *see Garcia-Maldonado v. Gonzales*, 491 F.3d 284 (5th Cir. 2007). In the alternative, a hit-and-run crime only involving damage to property and not requiring evil intent would not be found to involve moral turpitude. *Perez-Contreras*, 20 I&N Dec. at 617-18. Although counsel failed to submit the language of the statute under which the applicant was convicted, the record includes the police accident report

from the accident which resulted in the applicant's conviction. This report, dated July 9, 1983, indicates that the applicant hit a pedestrian with his vehicle as well as a light pole. The AAO finds that because the hit-and-run incident involved striking a pedestrian, the applicant's conviction is for a crime involving moral turpitude pursuant to the modified categorical inquiry articulated in *Silva-Trevino*.

In a letter dated April 21, 2011, counsel asserts that the police report for the applicant's hit and run conviction is not part of the record of conviction and thus, in accordance with the finding in *Matter of Teixeira*, 21 I & N Dec. 316 (BIA 1996), the information within the report should not be used to ascertain whether the applicant's crime was a crime involving moral turpitude. Prior to *Silva-Trevino*, counsel would have been correct in this argument.. However, *Silva-Trevino* states that if a review of the record of conviction is inconclusive, an adjudicator can then consider any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. *Matter of Silva-Trevino*, 24 I&N Dec. at 699-704, 708-709.

Counsel asserts further that if the applicant's hit-and-run conviction is found to be a crime involving moral turpitude, the applicant qualifies for the petty offense exception as he has been convicted of only one crime involving moral turpitude, the crime was a misdemeanor in Virginia which carries a penalty of no more than 12 months in prison, and the applicant was only sentenced to 90 days in prison.

Although a misdemeanor in Virginia carries a maximum sentence of up to 12 months in prison, the AAO will not find that the applicant is not inadmissible under section 212(a)(2)(A) of the Act because the record does not show how his arrest for assault with a deadly weapon was resolved. The AAO sought this information in a request for evidence dated January 31, 2011. In response, counsel indicated that no such conviction can be located in Washington, D.C. records. However, counsel failed to submit "an original written statement on government letterhead establishing this from the relevant government or other authority" as required. 8 C.F.R. § 103.2(b)(2). Counsel also does not assert that the applicant was not convicted of the crime, but only that documentation is not available in Washington, D.C. records. The burden in this matter is on the applicant, and consistent with *Silva-Trevino*, we find that this burden extends beyond government records to any relevant evidence needed to resolve the question. The applicant is in the best position to know and demonstrate the outcome of this charge. Furthermore, as other prostitution offenses have been found to be crimes involving moral turpitude, the AAO will not rule out that the applicant's conviction for solicitation of prostitution is not a crime involving moral turpitude.

Regardless, given the applicant's long history of immigration violations and his substantial criminal record, the AAO finds that even given the substantial documentation of hardship to a qualifying relative included in the record for a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act, the applicant does not warrant the favorable exercise of discretion.

In discretionary matters, the applicant bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. See *Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

In evaluating whether . . . relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country'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 the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

*See Matter of Mendez*, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf 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 in the present case are the applicant's unlawful presence for which he now seeks a waiver; his unlawful residence in the United States prior to April 1, 1997, including numerous entries without inspection during the period of time from 1975 to 1991; his failure to comply with the grant of voluntary departure issued by an immigration judge in 1979; his record of two deportations; and his record of convictions for, at a minimum, multiple incidents of driving while intoxicated, hit-and-run, and solicitation of prostitution, all while residing in the United States.

Although, counsel has submitted evidence of the applicant's rehabilitation and the hardship his spouse and child would face as a result of the applicant's inadmissibility, extreme hardship is but one favorable factor in a determination of whether the Secretary should exercise discretion and the AAO finds that even if the applicant's spouse was suffering extreme hardship the adverse factors in the applicant's case would outweigh the positive. *See Matter of Mendez, supra.*

Thus, the AAO does not find the favorable factors in the present matter to outweigh the negative and will not favorably exercise the Secretary's discretion.

In discretionary matters, the applicant bears the full burden of proving his or her eligibility for discretionary relief. *See Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976). Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.