

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Massachusetts Avenue NW, Rm. 3000
Washington, DC 20529



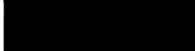
U.S. Citizenship
and Immigration
Services

PUBLIC COPY

H2



FILE:



Office: LOS ANGELES, CALIFORNIA

Date: **JUL 16 2008**

IN RE:



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

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Los Angeles, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the record does not establish that the applicant is inadmissible 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) and the relevant waiver application is therefore moot.

The applicant is a native and citizen of El Salvador who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude (leaving the scene of an accident resulting in injury or death). The applicant is married to a U.S. citizen and has one U.S. citizen child. He seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with his family.

The record reflects that the applicant was convicted of leaving the scene of an accident resulting in injury or death in violation of section 20001(a) of the California Vehicle Code and sentenced to 365 days in jail. *See Disposition of Arrest and Court Action* dated August 9, 1985.

The District Director found the applicant to be inadmissible for having been convicted of a crime involving moral turpitude. She concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *See Decision of the District Director*, dated March 1, 2006.

On appeal, counsel asserts that the applicant's conviction was not of a crime involving moral turpitude, because the offense does not involve conduct that demonstrates "baseness, vileness or depravity on the part of the perpetrator." *See Brief in Support of the Appeal* at 2. Counsel further states that the injury or death to an individual other than the perpetrator would only constitute involuntary manslaughter, a crime absent intent. *Id.* Counsel further asserts that the applicant has demonstrated extreme hardship to his wife and son and has shown that he is rehabilitated, and therefore merits a waiver of inadmissibility as an exercise of discretion. *Brief* at 2-3.

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.

The Board of Immigration Appeals (BIA) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992):

[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.

It is the "inherent nature of the crime as defined by statute and interpreted by the courts and as limited and described by the record of conviction" and not the facts and circumstances of the particular person's case that determines whether the offense involves moral turpitude. See, e.g., *Matter of Short*, 20 I&N Dec. 136, 137 (BIA 1989); *Omagah v. Ashcroft*, 288 F.3d 254, 260 (5th Cir. 2002); *Goldeshtein v. INS*, 8 F.3d 645 (9th Cir. 1993). Neither the seriousness of the criminal offense nor the severity of the sentence imposed is determinative of whether a crime involves moral turpitude. *Matter of Serna*, 20 I&N Dec. 579, 581 (BIA 1992). Before one can be convicted of a crime of moral turpitude, the statute in question by its terms, must necessarily involve moral turpitude. *Matter of Esfandiary*, 16 I&N Dec. 659 (BIA 1979); *Matter of L-V-C*, 22 I&N Dec. 594, 603 (BIA 1999) (finding no moral turpitude where the "statutory provision . . . encompasses at least some violations that do not involve moral turpitude"). Although evil intent signifies a crime involving moral turpitude, willfulness in the commission of the crime does not, by itself, suggest that it involves moral turpitude. *Goldeshtein v. INS*, *supra*. Under the statute, evil intent must be explicit or implicit given the nature of the crime. *Gonzalez-Alvarado*, v. INS, 39 F.3d 245, 246 (9th Cir. 1994).

A determination of whether an applicant has been convicted of a crime involving moral turpitude may be reached in one of two ways, described by the courts as the "categorical" and "modified categorical" approaches. The categorical approach focuses on "the crime categorically as defined by statute" and not the specific conduct that resulted in the conviction. See *Rodriguez-Herrera v. INS*, 52 F.3d 238, 239 (9th Cir. 1995); *Grageda v. INS*, *supra*; *Goldeshtein v. INS*, 8 F.3d 645, 647 (9th Cir. 1993); *Guerrero de Nodahl v. INS*, *supra*. See also *Matter of Khourn*, 21 I&N Dec. 1041, 1044 (BIA 1997); *Matter of Franklin*, 20 I&N Dec. 867, 868-869 (BIA 1994). In cases where the statute of conviction is facially over inclusive, the modified categorical approach, in which a court considers a limited set of documents in the record of conviction to make the determination, is employed. See, e.g., *Chang v. INS*, 307 F.3d 1185, 1189-92 (9th Cir. 2002).

Where a statute is divisible (broad or multi-sectional), see, e.g., *Matter of P-*, 6 I&N Dec. 193 (BIA 1954); *Neely v. U.S.*, 300 F.2d 67 (9th Cir. 1962), the court employs a modified categorical approach to determine whether the crime involves moral turpitude. *Matter of Ajami*, 22 I&N Dec. 949, 950 (BIA 1999) (look to indictment, plea, verdict, and sentence; *Zaffarano v. Corsi*, 63 F.2d 67 757 (2d Cir. 1933); *U.S. v. Kiang*, 175 F.Supp.2d 942, 950 E.D. Mich. 2001). A narrow, specific set of documents comprises the record: "[the] charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Shepard v. U.S.*, 125 S.Ct. 1254, 1257 (2005). The Ninth Circuit has further clarified that that the charging document, or information, is not reliable where the plea was to an offense other than the one charged. *Martinez-Perez v. Gonzales*, 417 F.3rd 1022, 1028-29 (9th Cir. 2005). It is also important to note that the record of conviction does not include the arrest report. See *In re Teixeira*, 21 I&N Dec. 316, 319-20 (BIA 1996).

In the present matter, the record establishes that the applicant was convicted of leaving the scene of an accident resulting in injury or death, in violation of section 20001(a) of the California Vehicle Code, which at the time of his conviction provided:

(a) The driver of any vehicle involved in an accident resulting in injury to any person, other than himself or herself, or in death of any person shall immediately stop the vehicle at the scene of the accident and shall fulfill the requirements of Sections 20003 and 20004.

Section 20003 of the California Vehicle Code, entitled "Duty upon injury or death," provided:

(a) The driver of any vehicle involved in an accident resulting in injury to or death of any person shall also give his name, address, the registration number of the vehicle he is driving, and the name of the owner to the person struck or the driver or occupants of any vehicle collided with or shall give such information to any traffic or police officer at the scene of the accident and shall render to any person injured in the accident reasonable assistance, including the carrying or the making arrangements for the carrying of such person to a physician, surgeon, or hospital for medical or surgical treatment if it is apparent that treatment is necessary or if such carrying is requested by the injured person.

(b) Any driver or injured occupant of a driver's vehicle subject to the provisions of subdivision (a) shall also, upon being requested, exhibit his or her driver's license, if available, or, in the case of an injured occupant, any other available identification, to the person struck or to the driver or occupants of any vehicle collided with, and to any traffic or police officer at the scene of the accident.

Section 20004 of the California Vehicle Code, entitled "Duty upon death," provided:

In the event of death of any person resulting from an accident, the driver of any vehicle involved after fulfilling the requirements of this division, and if there be no traffic or police officer at the scene of the accident to whom to give the information required by Section 20003, shall, without delay, report the accident to the nearest office of the Department of the California Highway Patrol or office of a duly authorized police authority and submit with the report the information required by Section 20003.

The U.S. Court of Appeals for the Ninth Circuit has held that a violation of section 20001 of the California Vehicle Code did not constitute a crime involving moral turpitude, finding that "the state statute plainly and specifically criminalizes conduct outside the contours of the federal definition." *Cerezo v. Mukasey*, 512 F.3d 1163, 1167 (9th Cir. 2008). The Court states,

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. The failure to provide a vehicle registration number under such circumstances is not base, vile and depraved; nor does it necessarily evince any willfulness or evil intent, a

requisite element of crimes of moral turpitude. *Id.* at 1167 (citing *Quintero-Salazar v. Keisler*, 506 F.3d 688, 693 (9th Cir. 2007)).

The court relied upon decisions by California state courts that interpret the statute to require drivers to complete each of the requirements of sections 20003 and 20004 of the California Vehicle Code. *Cerezo* at 1168. The court cites one decision in which a court found that even though the defendant did stop at the scene of the crime, he nevertheless was guilty of a violation of the statute by failing to comply with the other requirements. *Id.* (citing *People v. Newton*, 155 Cal.App.4th 1000, 1003-1004, 66 Cal.Rptr.3d 422 (Cal.Ct.App.2007)) (“The various requirements of the statute are set forth in the conjunctive and omission to perform any one of the acts required constitutes an offense.”). The court therefore held that under the categorical approach, a violation of section 20001(a) of the California Vehicle Code does not constitute a crime involving moral turpitude, stating, “we cannot conclude that the elements of § 20001(a) ‘are of the type that would justify its inclusion’ within the federal definition of crimes involving moral turpitude.” *Cerezo* at 1169 (citing *James v. United States*, 550 U.S. ----, 127 S.Ct. 1586, 1594, 167 L.Ed.2d 532 (2007)).¹

The court in *Cerezo v. Mukasey* did not consider whether any conduct that would constitute a violation of section 20001(a) of the California Vehicle Code would be a crime involving moral turpitude under the modified categorical approach because the record in that case contained only the abstract of judgment, which stated only that the defendant pleaded guilty to a violation of section 20001(a) with no further detail. The court stated that based on this limited record the modified categorical approach would not alter its analysis. *Cerezo* at 1169.

Based on the above reasoning, the AAO must conclude that the record of conviction in the present matter does not provide sufficient evidence to determine that the applicant’s conviction is a crime involving moral turpitude. The limited number of documents in the record of conviction does not specify the conduct that was found to be a violation of section 20001(a) of the California Vehicle Code. The record includes only an abstract of the court disposition that states that the applicant was originally charged with Vehicular Manslaughter, to which he pleaded not guilty, and was found guilty in a jury trial of “Hit/Run Resulting in Death or Injury” under section 20001 of the Vehicle Code. *See Disposition of Arrest and Court Action* dated August 9, 1985. No other documents are included in the record of conviction. The AAO notes that the evidence on the record includes a police report stating that the applicant fled the scene after the truck he was driving struck an individual on a bicycle, and this individual died as a result of his injuries. This police report is not, however, part of the record of conviction, and cannot be relied upon to determine whether the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act. *See In re Teixeira, supra*, at 319-20.

¹ The court compared its holding to the Fifth Circuit decision in *Garcia-Maldonado v. Gonzales*, 491 F.3d 284, 288-89 (5th Cir.2007), which held that a conviction under § 550.021 of the Texas Transportation Code was not categorically a crime involving moral turpitude because a violation of the statute could involve “reprehensible conduct (leaving the scene of an accident)” as well as “conduct that was not morally culpable (failing to affirmatively report identifying information).”

In that the record of conviction fails to identify the specific offense that the applicant was found to have committed, the applicant's conviction under section 20001(a) of the California Vehicle Code may not be established as a crime involving moral turpitude and does not render the applicant inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Act. *See Matter of Short, supra.* The district director's decision will be withdrawn and the appeal will be dismissed as the underlying waiver application is moot.

ORDER: The decision of the district director is withdrawn. The appeal is dismissed as the underlying waiver application is moot.