U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: CIUDAD JUAREZ, MEXICO Date: JUN 11 2009

IN RE: [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 under Section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT:

[redacted]

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).

John F. Grissom
Acting Chief, Administrative Appeals Office

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

The record reflects that 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 been convicted of a crime involving moral turpitude (gross vehicular manslaughter while intoxicated), and pursuant to 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 a period of one year or more and seeking readmission within ten years of his last departure.[1] The applicant has a lawful permanent resident father (the record is not clear as to the legal status of the applicant's mother), and he seeks a waiver of inadmissibility in order to reside in the United States.

The officer-in-charge found that the applicant had failed to establish extreme hardship to a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Officer-in-Charge's Decision*, at 4, dated March 22, 2006.[2]

On appeal, counsel asserts that the applicant does not require a waiver as he did not commit a crime involving moral turpitude and he did not accrue unlawful presence. *Brief in Support of Appeal*, at 1, 3, undated.

The record includes, but is not limited to, counsel's brief, and a statement from the applicant's father. The entire record was reviewed and considered in arriving at a decision on the appeal.

The record reflects that the applicant was convicted of Gross Vehicular Manslaughter While Intoxicated under California Penal Code § 191.5(a) on August 22, 1995. Counsel cites *Matter of Franklin*, 20 I&N Dec. 867 (BIA 1994) in asserting that involuntary manslaughter constitutes a crime involving moral turpitude only when the relevant statute requires the violator to, "have consciously disregarded a substantial and unjustifiable risk, and such disregard constituted a gross deviation from the standard of care that a reasonable person would exercise in the situation." *Brief in Support of Appeal*, at 2.

California Penal Code § 191.5(a), in effect at the time of the applicant's conviction, stated:

> (a) Gross vehicular manslaughter while intoxicated is the unlawful killing of a human being without malice aforethought, in the driving of a vehicle, where the driving was in violation of Section 23140, 23152, or 23153 of the Vehicle Code,

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[1] The officer-in-charge does not specifically cite to section 212(a)(9)(B)(i)(II) of the Act, however, he made a finding of accrual of over one year of unlawful presence. *Officer-in-Charge's Decision*, at 4.

[2] The officer-in-charge also denied the applicant's Form I-212, Application for Permission to Reapply for Admission in the United States after Deportation or Removal. *Officer-in-Charge's Decision*, at 4. The applicant would need to file a separate appeal for this denial.

> and the killing was either the proximate result of the commission of an unlawful act, not amounting to a felony, and with gross negligence, or the proximate result of the commission of a lawful act which might produce death, in an unlawful manner, and with gross negligence.

In determining whether a violation of California Penal Code § 191.5(a) constitutes a crime involving moral turpitude, the issue is the definition of gross negligence, which is not defined by statute. Gross negligence has been defined by the California Supreme Court as the exercise of so slight a degree of care as to exhibit a conscious indifference or "I don't care" attitude concerning the ultimate consequences of one's conduct. *People v. Bennett* (1991) 54 Cal.3d 1032, 1036-1038, 2 Cal.Rptr.2d 8, 819 P.2d 849. In addition, California Criminal Jury Instruction 3.36 defines gross negligence as:

> ["Criminal negligence"] ["Gross negligence"] means conduct which is more than ordinary negligence. Ordinary negligence is the failure to exercise ordinary or reasonable care.
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> ["Criminal negligence"] ["Gross negligence"] refers to [a] negligent act[s] which [is] [are] aggravated, reckless or flagrant and which [is] [are] such a departure from the conduct of an ordinarily prudent, careful person under the same circumstances as to be contrary to a proper regard for [human life] [danger to human life] or to constitute indifference to the consequences of those act[s]. The facts must be such that the consequences of the negligent act[s] could reasonably have been foreseen and it must appear that the [death] [danger to human life] was not the result of inattention, mistaken judgment or misadventure but the natural and probable result of an aggravated, reckless or flagrantly negligent act.

The AAO finds that the definition of gross negligence is analogous to the statutory language in *Matter of Franklin*. As such, the AAO finds the applicant to have committed a crime involving moral turpitude and he is inadmissible under section 212(a)(2)(A) of the Act.[3]

Section 212(a)(2)(A) of the Act states in pertinent part, that:

> (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-

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[3] The record reflects that the applicant entered the United States without inspection in 1992 or 1993, he filed for adjustment of status on May 3, 1995 (as indicated by a fee receipt) and he was removed from the United States on or after May 11, 2000. The record is not clear as to whether the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act and would require a waiver under section 212(a)(9)(B)(v) of the Act. However, if the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act, that inadmissibility would also be remedied by a section 212(h) waiver, as a section 212(h) waiver also requires a finding of extreme hardship and his father is the qualifying relative under both waivers.

> (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

Section 212(h) of the Act provides, in pertinent part, that:

> (h) The Attorney General [now, Secretary, Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) . . . if –
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> (1)(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.

The AAO notes that section 212(h) of the Act provides that a waiver of inadmissibility is dependent first upon a showing that the bar to admission imposes an extreme hardship on a qualifying family member, in this case the applicant's father. If extreme hardship is established, the Secretary then assesses whether an exercise of discretion is warranted.

In *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560 (BIA 1999) the Board of Immigration Appeals (BIA) provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship. These factors included the presence of lawful permanent resident or United States citizen family ties to 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.

Therefore, an analysis under *Matter of Cervantes-Gonzalez* is appropriate in this case. The AAO notes that extreme hardship to the applicant's father must be established whether he resides in Mexico or the United States, as he is not required to reside outside of the United States based on denial of the applicant's waiver request.

The first part of the analysis requires the applicant to establish extreme hardship to his father in the event that he resides in Mexico. The applicant's father states that he is disabled. *Applicant's Father's Statement*, dated February 2005. The record does not indicate the nature of his disability, whether he is receiving treatment in the United States or how his disability would

affect him in Mexico. The record does not include evidence of emotional, financial or any other type of hardship should the applicant's father relocate to Mexico. Going on record without supporting documentation will not meet the applicant's burden of proof in this proceeding. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). After a thorough review of the record, the AAO finds that extreme hardship has not been established in the event that the applicant's father resides in Mexico.

The second part of the analysis requires the applicant to establish extreme hardship in the event that his father remains in the United States. The applicant's father states that he and his spouse need the applicant with them, he is disabled and his spouse is suffering. *Applicant's Father's Statement*. The record does not include documentary evidence of medical, emotional, financial or any other type of hardship should the applicant's father remain in the United States without the applicant. The record does not include evidence of the role that the applicant would play in his father's life, the nature of his mother's suffering or how her hardship would affect the applicant's father. After a thorough review of the record, the AAO finds that extreme hardship has not been established in the event that the applicant's father resides in the United States.

U.S. court decisions have additionally held that the common results of deportation or exclusion are insufficient to prove extreme hardship. *See Hassan v. INS,* 927 F.2d 465, 468 (9th Cir. 1991). For example, *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In addition, *Perez v. INS,* 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined "extreme hardship" as hardship that was unusual or beyond that which would normally be expected upon deportation. *Hassan v. INS, supra,* held further that the uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported.

A review of the documentation in the record, when considered in its totality reflects that the applicant has failed to show that his father would suffer extreme hardship. 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 section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.