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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date NOV 13 2013 Office: VERMONT SERVICE CENTER FILE: [redacted]

IN RE: PETITIONER: [redacted]

PETITION: Petition for U Nonimmigrant Classification as a Victim of a Qualifying Crime Pursuant to Section 101(a)(15)(U) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(U)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

for Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center (the director), denied the U nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will remain denied.

The petitioner seeks nonimmigrant classification under section 101(a)(15)(U) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(U), as an alien victim of certain qualifying criminal activity.

Applicable Law

Section 101(a)(15)(U)(i) of the Act provides for U nonimmigrant classification to alien victims of certain criminal activity who assist government officials in investigating or prosecuting such criminal activity. Section 212(d)(14) of the Act requires U.S. Citizenship and Immigration Services (USCIS) to determine whether any grounds of inadmissibility exist when adjudicating a Form I-918, Petition for U Nonimmigrant Status (Form I-918 U petition), and provides USCIS with the authority to waive certain grounds of inadmissibility as a matter of discretion.

Section 212(a) of the Act sets forth the grounds of inadmissibility to the United States, and states, in pertinent part:

> (2) Criminal and Related Grounds
>
> (A) Conviction of Certain Crimes
>
> (i) In General.-Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –
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> (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . .
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> * * *
>
> is inadmissible.
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> * * *
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> (6) Illegal Entrants and Immigration Violators
>
> (A) Aliens Present Without Permission or Parole
>
> (i) In General.-An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.

* * *

(9) Illegal Entrants and Immigration Violators

(A) Certain Aliens Previously Removed

* * *

(ii) Other Aliens.-Any alien not described in clause (i) who-

(I) has been ordered removed under section 240 or any other provision of law, or

(II) departed the United States while an order of removal was outstanding, and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an aliens convicted of an aggravated felony) is inadmissible.

Factual and Procedural History

On October 4, 1986, the petitioner, a native and citizen of Mexico, entered the United States without inspection. The petitioner filed the instant Form I-918 U petition on December 21, 2011. The director issued a Request for Evidence (RFE), noting that the petitioner was inadmissible to the United States. When responding to the RFE, the petitioner submitted a Form I-192, Application for Advance Permission to Enter as Nonimmigrant, and additional evidence. On March 28, 2013, the director found the petitioner's response insufficient to overcome his grounds of inadmissibility and denied the Form I-192. The director determined that the petitioner was inadmissible under sections 212(a)(6)(A)(i) (present without admission or parole), 212(a)(2)(A)(i)(I) (conviction of crimes involving moral turpitude), and 212(a)(9)(A)(ii) (being ordered removed and seeking admission within ten years of being removed or departing the United States) of the Act. The director denied the petitioner's Form I-918 U petition on the same day. Although the director determined that the petitioner was statutorily eligible for U nonimmigrant status, he denied the Form I-918 U petition because the petitioner was inadmissible to the United States. The petitioner, through counsel, timely appealed the denial of the Form I-918 U petition. On appeal, counsel claims that the petitioner has been rehabilitated, that his U.S. citizen son would suffer exceptional and extremely unusual hardship if his Form I-192 is not approved, and that this case warrants a favorable exercise of discretion.

Analysis

All nonimmigrants must establish their admissibility to the United States or show that any grounds of inadmissibility have been waived. 8 C.F.R § 214.1(a)(3)(i). For aliens seeking U nonimmigrant status who are inadmissible to the United States, the regulations at 8 C.F.R §§ 212.17, 214.14(c)(2)(iv) require the filing of a Form I-192 in conjunction with a Form I-918 U petition in order to waive any ground of inadmissibility. The regulation at 8 C.F.R. § 212.17(b)(3) states in pertinent part: "There is no appeal of a decision to deny a waiver." As the AAO does not have jurisdiction to review whether the director properly

denied the Form I-192, the AAO does not consider whether approval of the Form I-192 should have been granted. The only issue before the AAO is whether the director was correct in finding the petitioner inadmissible to the United States and, therefore, requiring an approved Form I-192 pursuant to 8 C.F.R. §§ 212.17, 214.14(c)(2)(iv).

A full review of the record supports the director's determination that the petitioner is inadmissible under sections 212(a)(2)(A)(i)(I) (conviction of crimes involving moral turpitude) and 212(a)(6)(A)(i) (present without admission or parole) of the Act.

The record shows that the petitioner was convicted of:

- inflicting corporal injury on a spouse/cohabitant in violation of section 273.5(a) of the California Penal Code (CPC)[1] on April 28, 1989, for which he was sentenced to 30 days incarceration and 36 months of probation; and
- child abuse or endangerment in violation of CPC § 273a(a)[2] on May 7, 2003, for which he was sentenced to three years of probation.

In *Morales-Garcia v. Holder*, 567 F.3d 1058, 1065-66 (9th Cir. 2009), the Ninth Circuit Court of Appeals (Ninth Circuit) held that section 273.5(a) convictions are not categorically crimes involving moral turpitude because section 273.5(a) is "overly-broad" because it includes victims who do not necessarily have a relationship of trust with the perpetrators, like cohabitants. Therefore, section 273.5(a) includes both morally turpitudinous and non-morally turpitudinous conduct. *Id.* at 1065. Since a violation under section 273.5(a) of the Cal. Penal Code is not a categorical crime involving moral turpitude, the AAO must review whether the petitioner's offense qualifies as a crime involving moral turpitude under the modified categorical approach. *Id.* at 1066. Under the modified categorical approach, documents that are part of the record of conviction are reviewed to determine if the petitioner was convicted of the morally turpitudinous conduct in the statute. *Tokatly v. Ashcroft*, 371 F.3d 613, 620 (9th Cir. 2004).

The record establishes that at the time that the petitioner was convicted of violating Cal. Penal Code § 273.5(a), he and his wife were not married but were living together with a child in common. In *Matter of Tran*, 21 I&N Dec. 291, 294 (BIA 1996), the Board of Immigration Appeals (Board) held that "[a] person who cohabits with or is the parent of the offender's child maintains a relationship of a familial nature with

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[1] At the time of the petitioner's conviction, section 273.5(a) of the Cal. Penal Code stated, "[a]ny person who willfully inflicts upon his or her spouse, or any person who willfully inflicts upon any person of the opposite sex with whom he or she is cohabiting, or any person who willfully inflicts upon any person who is the mother or father of his or her child, corporal injury resulting in a traumatic condition, is guilty of a felony . . ." (West 1988).

[2] Section 273a(a) of the Cal. Penal Code states, "[a]ny person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health is endangered . . ." (West 2013).

the perpetrator of the harm" that approximates a spousal relationship. Based on the relationship of trust that the petitioner and his victim had, the petitioner's conviction for inflicting corporal injury on a cohabitant is a conviction for a crime involving moral turpitude. *See id.*

The Ninth Circuit has not directly addressed whether a violation of CPC § 273a(a) constitutes a crime involving moral turpitude. California courts have held that child abuse under section 273d of the Cal. Penal Code categorically involves moral turpitude, *see e.g. People v. Brooks*, 3 Cal.App. 4th 669, 671-72 (Cal. App. 3rd Dist. 1992), and the Ninth Circuit held in *Guerrero de Nodahl v. INS*, 407 F.2d 1405 (9th Cir. 1969), that a conviction under that provision is a crime involving moral turpitude. Like section 273d, section 273a(a) of the Cal. Penal Code includes a willfulness element that must be proven to obtain a conviction of guilt. Section 273a(a) of the Cal. Penal Code also includes conduct that does not categorically involve moral turpitude because the victim can either be injured or endangered. However, the record shows, and in his affidavit the petitioner admits, that he caused bruises to his daughters when he interceded in a fight between them and their mother. The AAO finds that willfully causing or allowing a child to suffer great bodily harm or injury involves moral turpitude, and on appeal counsel does not contest that the petitioner is inadmissible under section 212(a)(2)(A)(i) of the Act. Therefore, the petitioner's conviction for child abuse or endangerment is a conviction for a crime involving moral turpitude. Accordingly, the petitioner is inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act for being convicted of crimes involving moral turpitude.

A full review of the record supports the director's determination that the petitioner is also inadmissible under section 212(a)(6)(A)(i) of the Act. The record establishes that the petitioner entered the United States on October 4, 1986 without inspection. Accordingly, the petitioner is inadmissible under section 212(a)(6)(A)(i) of the Act, as an alien present without admission or parole.

The director found the petitioner inadmissible under section 212(a)(9)(A)(ii) of the Act for being ordered removed and seeking admission within ten years of being removed or departing the United States. The record establishes that the petitioner was ordered removed on December 15, 2009 after the Ninth Circuit dismissed his petition for review. The evidence in the record does not establish that the petitioner was removed from or otherwise departed the United States since he was ordered removed on December 15, 2009. Therefore, he is not inadmissible under section 212(a)(9)(A)(ii) of the Act. This portion of the director's decision will be withdrawn.

On appeal, counsel does not contest the petitioner's inadmissibility but instead focuses her assertions on why the director should have favorably exercised his discretion, determined that the petitioner had been rehabilitated, and approved the petitioner's Form I-192 waiver application.

The director denied the petitioner's application for a waiver of inadmissibility and we have no jurisdiction to review the denial of a Form I-192 submitted in connection with a Form I-918 U petition. 8 C.F.R. § 212.17(b)(3).

Conclusion

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Although the petitioner has met the statutory eligibility requirements for U nonimmigrant classification, he has not established that he is admissible to the United States or that his grounds of inadmissibility have been waived. He is consequently ineligible for nonimmigrant classification under section 101(a)(15)(U)(i) of the Act, pursuant to 8 C.F.R. § 214.1(a)(3)(i).

ORDER: The appeal is dismissed. The petition remains denied.