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

PUBLIC COPY

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FILE: [redacted] Office: HARLINGEN Date: OCT 20 2009

IN RE: [redacted]

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:

[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.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Harlingen, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed, the previous decision of the director will be withdrawn, and the application declared moot. The matter will be returned to the director for continued processing.

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 crimes involving moral turpitude. The applicant 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 U.S. citizen spouse.

The applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on an underlying Petition for Alien Relative (Form I-130). The applicant also filed an Application for Waiver of Grounds of Inadmissibility (Form I-601) on May 25, 2005. The director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the waiver application accordingly. The applicant timely appealed the denial to the AAO. On July 28, 2009, the AAO issued the applicant a request for additional evidence related to his convictions for assault and violation of a protection order, pursuant to the recent precedent decision, *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008). On September 16, 2009, the applicant responded to the request for evidence with copies of police reports and a criminal indictment.

The record contains, but is not limited to, documentation related to the applicant's arrests and convictions for assault and violation of a protection order and a statement from the applicant's spouse. The entire record was reviewed and considered in rendering this decision on the appeal.

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

> (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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> > (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.
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> (ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-
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> > (I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or
> >
> > (II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not

> exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

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 the recently decided *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. Finally, in all such inquiries, the burden is on the alien to establish "clearly and beyond doubt" that he is "not inadmissible." *Id.* at 709 (citing *Kirong v. Mukasey*, 529 F.3d 800 (8th Cir. 2008))

The record contains a certificate of record search from the Weslaco Police Department (Texas), dated January 5, 2005. The certificate shows that the applicant was arrested on December 21, 1994 by the Weslaco Police Department and charged with assault/family violence[1] – Class C, in violation of section 22.01 of the Texas Penal Code, punishable by a fine not to exceed $500. The certificate provides that the disposition for the arrest was five days jail credit [redacted]

The certificate further reflects that on July 21, 1995, the applicant was arrested by the Weslaco Police Department and charged with assault – Class C, in violation of section 22.01 of the Texas Penal Code, and violation of a protection order, in violation of section 25.07 of the Texas Penal Code, a Class A misdemeanor punishable by a maximum of one year imprisonment. The certificate provides that the disposition of the applicant's arrest for assault was a fine of $250 [redacted]

The record contains a court disposition from the County Court of Hidalgo County, Texas, which shows that on January 11, 1996, the applicant was convicted of violation of a protective order. The court disposition shows that the applicant was sentenced to 30 days in the Hidalgo County Jail, placed on one year of probation, ordered to complete 80 hours of community service, and ordered to pay a $300 fine [redacted]

At the time of the applicant's arrests for a Class C misdemeanor offense of assault, section 22.01 of the Texas Penal Code provided in pertinent part:

> (a) A person commits an offense if the person:
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> * * *
>
> (2) intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse; or

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[1]In the trial of an offense under Title 5, Penal Code, if the court determines that the offense involved family violence, as defined by Section 71.01, Family Code, the court shall make an affirmative finding of that fact and enter the affirmative finding in the judgment of the case. Tex. Code of Crim. Proc. Art. 42.013 (West 1994).

Family violence means:

(A) an act by a member of a family or household against another member of the family or household that is intended to result in physical harm, bodily injury, or assault, or that is a threat that reasonably places the member in fear of imminent physical harm, bodily injury, or assault, excluding the reasonable discipline of a child by a person having that duty; or

(B) abuse, as that term is defined by Sections 34.012(1)(C), (E), and (G) of this code, by a member of a family or household toward a child of the family or household. Tex. Family Code Ann. § 71.01(b)(2) (West 1994).

> (3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.

Simple assault and battery offenses generally do not involve moral turpitude; however, that determination can be altered if there are additional factors such as the infliction of bodily harm upon persons whom society views as deserving of special protection, such as children or domestic partners, or intentional serious bodily injury to the victim. *Matter of Sanudo*, 23 I. & N. Dec. 968, 972 (BIA 2006). Child and spousal abuse has been found to be a crime involving moral turpitude where the perpetrator willfully commits an act of baseness or depravity contrary to accepted moral standards. *See Grageda v. INS*, 12 F.3d 919, 922 (9th Cir. 1993); *see also Guerrero de Nodahl v. INS*, 407 F.2d 1405, 1406-07 (9th Cir. 1969). *In Matter of Tran*, 21 I&N Dec. 291, 294 (BIA 1996), the BIA held that violation of section 273.5(a) of the California Penal Code, which criminalizes a person for willfully inflicting upon a person who is his or her spouse, former spouse, cohabitant, former cohabitant, or the mother or father of his or her child, a corporal injury resulting in a traumatic condition, constitutes a crime involving moral turpitude.

However, *Matter of Sanudo*, *supra*, the BIA found that a conviction under California Penal Code sections 242 and 243(e), battery against spouse, is not categorically a crime involving moral turpitude. In looking to California court decisions construing the elements of the battery offense, the BIA found that they have construed the minimal conduct necessary to complete a battery in California as simply an intentional "touching" of another without consent. 23 I. & N. Dec. 968, 972 (BIA 2006). In light of this, the BIA reasoned that one may be convicted of battery in California without using violence and without injuring or even intending to injure the victim. *Id.* The BIA held that in the absence of admissible evidence reflecting that the alien's offense caused actual or intended physical harm to the victim, the existence of a current or former domestic relationship between the perpetrator and the victim is insufficient to establish the morally turpitudinous nature of the crime. 23 I&N Dec. at 973.

The violation of sections 22.01(a)(2) and 22.01(a)(3) of the Texas Penal Code include threatening another with imminent bodily injury and causing offense or provocative physical contact. Thus, based solely on the statutory language, it appears that Texas Penal Code § 22.01 encompasses (hypothetically) conduct that involves moral turpitude and conduct that does not.

On July 28, 2009, the AAO sent a notice to the applicant requesting him to provide the record of conviction for his December 21, 1994 and July 21, 1995 arrests for assault. The AAO further requested, in accordance with *Silva-Trevino*, *supra*, that the applicant submit evidence of a prior case, which may be evidence related to his own case, in which Texas Penal Code § 22.01 was applied to conduct not involving moral turpitude. In response to this request, counsel asserted that no criminal complaints related to the Class C assault charges were prepared or filed with the county court because Class C misdemeanors in Texas are handled by the Municipal or Justice of the Peace Courts. Counsel noted that such courts are not courts of record and they have informal procedures without the entry of formal charging documents or written judgments.[2] However, counsel obtained

[2] The Texas Office of Court Administration's website provides, "[Municipal] courts have original and exclusive jurisdiction over violations of city ordinances and, within the city limits, have concurrent jurisdiction with justice of the

police reports from the Weslaco Police Department pertaining to the applicant's December 21, 1994 and July 21, 1995 arrests for assault, and furnished them as evidence to resolve the moral turpitude question.

The arrest report dated December 21, 1994 states:

> On Wednesday 12/21/1994 at approximately 1:47pm, a male subject grabbed and shoved his wife and pushed his mother at [redacted]

The arrest report dated July 21, 1995 states:

> On Friday, July 21, 1995, at approximately 2:04 a.m., units were dispatched to [redacted] in reference to a disturbance in progress.

Pursuant to *Matter of Sanudo, supra*, the fact that an assault is knowingly committed upon a person deserving of special protection, in the absence of bodily injury to the victim, does not render the assault morally turpitudinous. Based on the police reports, and the lack of any contradictory evidence in the record, the AAO finds that the applicant's convictions for assault under Texas Penal Code § 22.01 were not based on conduct that caused bodily injury to his spouse, mother, or any other individual. Therefore, the AAO finds that the applicant's convictions for assault under Texas Penal Code § 22.01 are not crimes involving moral turpitude that render the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

At the time of the applicant's conviction for violation of a protective order, section 25.07 of the Texas Penal Code provided in pertinent part:

> (a) A person commits an offense if, in violation of an order issued under Section 3.581, 71.11, or 71.12, Family Code, or under Article 17.292, Code of Criminal Procedure, the person knowingly or intentionally:
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> (1) commits family violence or an act in furtherance of an offense under Section 42.07(a)(7):[3]
>
> (2) directly communicates with a protected individual or a member of the family or household in a threatening or harassing manner, communicates a threat through any person to a protected individual or a member of the family or household, and, if the order prohibits any communication with a protected individual or a member of the

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peace courts over Class C misdemeanor criminal cases where the punishment upon conviction is by small fine only. When city ordinances relating to fire safety, zoning, public health, or sanitation are violated, fines of up to $2,000 may be charged, when authorized by the governing body of the city. Municipal judges may issue search or arrest warrants. These courts do not have jurisdiction in most civil cases but do have limited civil jurisdiction in cases which involve owners of dangerous dogs." http://www.courts.state.tx.us/courts/mn.asp.

[3] The 1995 amendment to section 42.07 of the Texas Penal Code (harassment) deleted subsection (a)(7). Tex. Penal Code Ann. § 42.07 (West 1996).

family or household, communicates in any manner with the protected individual or the member of the family or household except through the person's attorney or a person appointed by the court; or

(2) communicates:

(A) directly with a member of the family or household in a threatening or harassing manner;

(B) a threat through any person to a member of the family or household; and

(C) in any manner with the member of the family or household except through the person's attorney or a person appointed by the court, if the order prohibits any communication with a member of the family or household;

(3) goes to or near any of the following places as specifically described in the order:

(A) the residence or place of employment or business of a protected individual or a member of the family or household; or

(B) any child care facility, residence, or school where a child protected by the order normally resides or attends.

(4) engages in conduct directed specifically toward a person who is a member of the family or household, including following the person, that is reasonably likely to harass, annoy, alarm, abuse, torment, or embarrass that person.

The AAO notes that a violation of section 25.07 of the Texas Penal Code includes physical abuse, verbal and written threats, harassment, stalking and prohibited communication. Thus, based solely on the statutory language, it appears that Texas Penal Code § 25.07 encompasses (hypothetically) conduct that involves moral turpitude and conduct that does not.

In its July 28, 2009 notice to the applicant, the AAO requested, in accordance with *Silva-Trevino*, *supra,* that the applicant submit evidence of a prior case, which may be evidence related to the applicant's own case, in which Texas Penal Code § 25.07 was applied to conduct not involving moral turpitude. In response to the request for evidence, counsel furnished a copy of the indictment of the applicant for violation of a protection order.

The indictment, issued by the Assistant Criminal District Attorney of Hidalgo County, provides:

[redacted] heretofore on or about July 21, 1995, did then and there intentionally and knowingly, in violation of an order of the 92nd District Court of Hidalgo County, Texas dated January 17, 1995, commit an offense by then and there going to the residence of [redacted], a member of the family of the said defendant as specifically prohibited by said order.

The record reflects that at the time of the applicant's arrest, was the applicant's spouse. The indictment indicates that the applicant violated a protection order by going to his spouse's residence. It does not reflect that he caused any bodily injury to her. Based on the indictment, and the lack of any contradictory evidence in the record, the AAO finds that the applicant's conviction for violation of a protective order under Texas Penal Code § 25.07 was not based on conduct that caused bodily injury to his spouse. Therefore, the AAO finds that this conviction is not a crime involving moral turpitude that renders the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

In proceedings for application for waiver of grounds of inadmissibility, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. The decision of the director will be withdrawn and the appeal will be dismissed as the underlying waiver application is moot.

ORDER: The director's decision is withdrawn and the appeal is dismissed as the underlying waiver application is moot. The director shall continue processing the Form I-485 accordingly.