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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[redacted]

FILE: [redacted] Office: MEMPHIS, TN Date: SEP 09 2010

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:

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.

Thank you,

Michael Rhew

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Memphis, Tennessee, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the underlying application is moot. The matter will be returned to the field office 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 her U.S. citizen spouse.

In a decision dated March 26, 2008, the field office director found the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of reckless endangerment, a misdemeanor in Tennessee on May 3, 2006. The field office director also found that the applicant failed to demonstrate that her U.S. citizen spouse would suffer extreme hardship as a result of her inadmissibility to the United States. The application was denied accordingly.

In a Notice of Appeal to the AAO (Form I-290B) dated April 17, 2008, counsel states that on April 3, 2006, the day that the events which led to the applicant's conviction occurred, the applicant had poor judgment when she left her daughter with her neighbor while she took her other children to baseball practice. Counsel also states that there would be a great hardship for the applicant's family if the applicant was removed from the United States. Counsel states that the applicant has five children, one that is still breastfeeding and four others who greatly depend on her for their daily needs. She states that the applicant's spouse is the only one working in the household and providing financial support.

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 –
>
> > (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.
>
> (ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-
>
> > (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.

The record shows that the applicant was arrested in Sumner County, Tennessee on April 3, 2006 and charged with reckless endangerment and child endangerment. She was convicted on May 3, 2006 of reckless endangerment under Tennessee Code Annotated (T.C.A.) § 39-13-103 and child endangerment under T.C.A. § 39-15-401 , both class A misdemeanors, and sentenced to 11 months and 29 days in jail. The applicant's sentence was suspended and she was placed on probation in accordance with T.C.A. § 40-35-313. The applicant, who was born on January 25, 1978, was 28 years old at the time she committed the acts that resulted in her conviction. The AAO notes that a Class A misdemeanor in Tennessee carries a maximum penalty of 11 months and 29 days in jail.

At the time of the applicant's conviction, T.C.A. § 39-13-103 provided, in pertinent part:

> (a) A person commits an offense who recklessly engages in conduct that places or may place another person in imminent danger of death or serious bodily injury.
>
> (b) Reckless endangerment is a Class A misdemeanor; however, reckless endangerment committed with a deadly weapon is a Class E felony.

The field office director noted that the Third Circuit Court of Appeals has found reckless endangerment to be a crime involving moral turpitude, but did not provide a citation. Nevertheless, the director observed that it was found to be a crime involving moral turpitude because of the combined elements of depravity, recklessness and grave risk of death.

In *Knapik v. Ashcroft*, 384 F.3d 84, 90 (3rd Cir. 2004), the Third Circuit Court of Appeals found that the aggravating factors contained in section 120.25 of the New York Penal Law, namely that a defendant create a "grave risk of death to another person" "under circumstances evincing a depraved indifference to human life," constitute moral turpitude. We note, as did the field office director, that this case does not arise in the Third Circuit. We also observe that the statute in this case does not contain the element of depravity, and can be violated by placing another person in danger of serious bodily injury as well as death. Therefore, we do not find *Knapik* controlling or persuasive in this case.

In *Matter of Falaau*, 21 I. & N. Dec. 475 (BIA 1996), the BIA held that to find moral turpitude, the element of a reckless state of mind must be coupled with an offense involving the infliction of serious bodily injury. More recently, in *Matter of Solon*, 24 I&N Dec. 239, 242 (BIA 2007), the BIA stated:

> [I]n the context of assault crimes, a finding of moral turpitude involves an assessment of both the state of mind and the level of harm required to complete the offense. Thus, intentional conduct resulting in a meaningful level of harm, which must be more than mere offensive touching, may be considered morally turpitudinous. However, as the level of conscious behavior decreases, i.e., from intentional to reckless conduct, more serious resulting harm is required in order to find that the crime involves moral turpitude. Moreover, where no conscious behavior is required, there can be no finding of moral turpitude, regardless of the resulting harm.

In accordance with *Matter of Solon*, we find that for the applicant's crime to constitute a crime involving moral turpitude, it must have *resulted* in serious bodily harm. In this case, the victim of the applicant's crime apparently was not injured. The Affidavit of Complaint, dated April 3, 2006, indicates that the applicant left her daughter at home alone while food was in the oven on a low fire. The applicant had stated that she left her daughter to take her sons to baseball practice and that she had asked a neighbor to look after her daughter until she returned home. While the applicant was away, a fire started in her home, neighbors broke into the home, removed her daughter from the house and took her to safety. The complaint does not state that the applicant's daughter was injured. The AAO finds that as the applicant's reckless state of mind was not coupled with the infliction of serious bodily injury or other aggravating factor, the applicant's conviction is not for a crime involving moral turpitude.

The AAO now turns to the applicant's conviction for child endangerment. The field office director characterized the applicant's crime as child neglect, observing that the BIA found the act of leaving a child in destitute circumstances to involve moral turpitude in *Matter of R-*, 4 I.&N Dec. 192 (C.O. 1950). The AAO notes that the BIA has also found that not providing support to a child when acting in good faith and with honest motives, and where the child is not in destitute circumstances and where the health or the life of the child has not been impaired, is not a crime involving moral turpitude. *Matter of E-*, 2 I. & N. Dec. 134 (BIA 1944; A.G. 1944).

At the time of the applicant's conviction, T.C.A. § 39-15-401 provided, in pertinent part:

> (a) Any person who knowingly, other than by accidental means, treats a child under eighteen (18) years of age in such a manner as to inflict injury commits a Class A misdemeanor; provided, however, that, if the abused child is six (6) years of age or less, the penalty is a Class D felony.
>
> (b) Any person who knowingly abuses or neglects a child under eighteen (18) years of age, so as to adversely affect the child's health and welfare, commits a Class A misdemeanor; provided, that, if the abused or neglected child is six (6) years of age or less, the penalty is a Class E felony.

The AAO notes that T.C.A. § 39-15-401 is violated by either inflicting injury or by adversely affecting the child's health and welfare. In both cases, T.C.A. § 39-15-401 requires knowing conduct on the part of the offender, but the mens rea of knowing refers only to the conduct elements of treatment or neglect and not to the resulting injury or adversely affected health or welfare. *Supreme Court of Tennessee v. Ducker*, 27 S.W. 3d 889 (2001). Thus, a person may be convicted under T.C.A. § 39-15-401 without knowing that his or her conduct would result in an injury to and/or adversely affected health or welfare of a child. Furthermore, T.C.A. § 39-15-401(a) excludes accidental acts whereas T.C.A. § 39-15-401(b) does not, implying that a conviction under T.C.A. § 39-15-401(b) may include acts by accidental means. Thus, based solely on the statutory language, it appears that T.C.A. § 39-15-401 encompasses (hypothetically) conduct that involves moral turpitude and conduct that does not.

However, in accordance with *Silva-Trevino*, the AAO must determine if an actual case exists in which these criminal statutes were applied to conduct that did not involve moral turpitude. The

AAO is not aware of a prior case in which T.C.A. § 39-15-401 has been applied to conduct not involving moral turpitude. Nevertheless, the AAO will review the record of conviction to determine if the applicant's own case is such a prior case. As stated above, the Affidavit of Complaint indicates that the applicant left her daughter at home alone while food was in the oven on a low fire. While the applicant was away, a fire started in her home, neighbors broke into the home, removed her daughter from the house and took her to safety. The complaint does not state that the applicant's daughter was injured. Based on this evidence, and the lack of any contradictory evidence in the record, the AAO determines that the applicant was convicted for child endangerment under T.C.A. § 39-15-401(b) rather than § 39-15-401(a), as the applicant's crime did not result in an injury to her child. Consequently, this conviction is not a crime involving moral turpitude that renders the applicant inadmissible under 212(a)(2)(A)(i)(I) of the Act.

Accordingly, the applicant is not inadmissible as a result of her convictions and the field office director's findings regarding this conviction are withdrawn. The applicant's waiver of inadmissibility application is thus moot and the appeal will be dismissed.

ORDER: The applicant's waiver application is declared moot and the appeal is dismissed. The matter will be returned to the field office director for continued processing.