U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: APR 25 2D
[SRC 02 254 54540]

INRE: Applicant: [redacted]

APPLICATION: Application for Temporary Protected Status under Section 244 of the Immigration and Nationality Act, 8 U.S.c. § 1254

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vennont Service Center (VSC) approved and subsequently withdrew the approval of the initial application. The matter is now appeal before the Administrative Appeals Office (AAO). The case will be remanded to the director for further consideration and action.

The applicant is a native and citizen of EI Salvador who was granted Temporary Protected Status (TPS) under section 244 of the Immigration and Nationality Act (the Act), 8 U.S.c. §1254.

The director withdrew the approval of the application, finding that the applicant was no longer eligible for TPS because he had been convicted of assault in Texas. The director also determined that the applicant's assault conviction was a crime involving moral turpitude under § 212(a)(2)(A)(i)(I) of the Act and a crime of violence aggravated felony under § 101(a)(43)(F). Finally, the director found that conviction for this offense rendered the applicant inadmissible to the United States.

On appeal, counsel for the applicant asserts that the applicant's conviction for assault is a class A misdemeanor. Counsel asserts that there was no finding of violence in the indictment or the final plea. Counsel asserts that the applicant was sentenced to 365 days, not one year, and therefore, the offense was not an aggravated felony. Finally, counsel asserts that assault in Texas is not a crime involving moral turpitude.

The director may withdraw the status of an alien granted TPS under section 244 of the Act at any time if it is determined that the alien was not in fact eligible at the time such status was granted, or at any time thereafter becomes ineligible for such status. 8 C.F.R. § 244.14(a)(l).

Section 244(c) of the Act, and the related regulations in 8 C.F.R. § 244.2, provide that an applicant who is a national of a foreign state is eligible for TPS only if such alien establishes that he or she:

(a) Is a national of a state designated under section 244(b) of the Act;

(b) Has been continuously physically present in the United States since the effective date of the most recent designation of that foreign state;

(c) Has continuously resided in the United States since such date as the Attorney General may designate;

(d) Is admissible as an immigrant except as provided under section 244.3;

(e) Is not ineligible under 8 C.F.R. § 244.4; and

(f) (1) Registers for Temporary Protected Status during the initial registration period announced by public notice in the FEDERAL REGISTER, or

(2) During any subsequent extension of such designation if at the time of the initial registration period:

(i) The applicant is a nonimmigrant or has been granted voluntary departure status or any relief from removal;

(ii) The applicant has an application for change of status, adjustment of status, asylum, voluntary departure, or any relief

from removal which is pending or subject to further review or appeal;

(iii) The applicant is a parolee or has a pending request for reparole; or

(iv) The applicant is a spouse or child of an alien currently eligible to be a TPS registrant.

Section 2l2(a)(2)(A)(i)(I) of the Act describes classes of individuals who are not admissible to the United States:

(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

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

On May 15, 2006, the director notified the applicant that CIS records indicated that the applicant had been arrested on November 28,2005. The director stated that it appeared the applicant was no longer eligible for TPS because he had been arrested for a felony. The director requested that the applicant submit a final disposition of this arrest.

In response, the applicant submitted a final disposition indicating that on March 20, 2006, in the 292nd Judicial District Court of Dallas County Texas, the applicant pleaded guilty to the following:

1. One count of assault, in violation of Texas Penal Code § 22.01(a)(l).

In Texas, a conviction for assault under Texas Penal Code § 22.01(a)(1) is a categorized as class A misdemeanor and is punishable by a maximum of one year in jail.

As a result of his conviction, the applicant was sentenced to 365 days in jail, and given credit for four months served.

On September 5, 2006, the director withdrew the approval of the application, finding that the applicant was no longer eligible for TPS because he had been convicted of assault and was sentenced to 365 days in jail. The director determined that the applicant's conviction for assault rendered him ineligible for TPS pursuant to § 244(c)(I)(A)(iii) of the Act and 8 C.P.R. § 244.3(c). Then, pursuant to § 212(a)(2)(A)(i)(I), the director found the applicant ineligible for TPS as an alien who had been convicted of a crime involving moral turpitude. The director also found that the applicant's assault conviction was a crime of violence aggravated felony under § 101(a)(43)(F) of the Act. Finally, the director found that the applicant's assault conviction rendered him inadmissible to the United States.

On appeal, counsel for the applicant asserts that the applicant's conviction for assault is a class A misdemeanor. Counsel asserts that there was no finding of violence in the indictment or the final plea. Counsel asserts that the applicant was sentenced to 365 days, not one year, and therefore, the offense was not an aggravated felony. Finally, counsel asserts that assault in Texas is not a crime involving moral turpitude.

The issue in this case is whether the applicant is inadmissible for having been convicted of a crime involving moral turpitude or not[1].

The term crime involving moral turpitude is not defined in § 212(a)(2)(A)(i), but courts have held that moral turpitude refers generally to conduct which is inherently base, vile, or depraved, contrary to the accepted rules of morality and the duties owed between man and man, either one's fellow man or society in general. *Matter of Franklin*, 20 I&N Dec. 867, 868 (BIA 1994).

In determining whether a crime involves moral turpitude we must examine the statute under which the applicant was convicted. *Matter of Torres-Varela*, 23 I&N Dec. 78, 84 (BIA 2001). Here, the applicant was convicted of assault, under Texas Penal Code § 22.01(a)(l).

A person is guilty of assault in Texas if he or she:

> intentionally, knowingly, or recklessly causes bodily Injury to another, including the person's spouse.

The Board of Immigration Appeals (BIA) has held that assault may or may not involve moral turpitude, as the crime of assault includes a broad spectrum of offenses. *See Matter of Fualaau*, 21 I&N Dec. 475, 477 (BIA *1996); Matter of Perez-Contreras*, 20 I&N Dec. 615, 618 (BIA 1992); *Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988). The BIA has historically held that simple assault is not a crime involving moral turpitude. *See, Matter of Short*, 20 I&N Dec. 136, 139 (BIA 1989). In cases where infliction of injury upon a spouse is an element of the offense, however, the assault offense may be found to involve moral turpitude. *Matter of Tran*, 21 I&N Dec. 291 (BIA 1996); *Matter of Fualaau, supra,* at 478; *Matter of Perez-Contreras*, 20 I&N Dec. 615,618 (BIA 1992).

Texas Penal Code § 22.01(a)(1) is a divisible statute, in that it encompasses acts that may and may not involve moral turpitude. In a case involving a divisible statute, we look to the record of conviction to determine which offense the respondent was convicted of. In this case, the record of conviction consists of the court's judgment of conviction. The record does not establish that the respondent was convicted under a section of the statute that would be found to be a crime involving moral turpitude. Therefore, the applicant's conviction for assault in Texas is not a crime involving moral turpitude under § 212(a)(2)(A)(i). Accordingly the director's decision to withdraw the approval of the initial application on this ground is withdrawn.

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[1] The director determined that the applicant's conviction was a crime of violence aggravated felony under § 101(a)(43)(F). This is an issue of removability under § 237 of the Act and is not relevant to these proceedings.

The applicant has not been convicted of a crime involving moral turpitude. The applicant is not inadmissible under § 212(a) of the Act. Therefore the applicant is not ineligible for TPS due to his single misdemeanor assault conviction.

The applicant has overcome the director's decision to deny the application based on his criminal conviction. A thorough review of the record of proceeding, however, indicates that the applicant has not submitted sufficient evidence to establish his qualifying continuous residence and continuous physical presence. The documentation to establish this element of his case consists of insufficiently detailed affidavits from individuals who know the applicant personally and a single document that appears to be a remittance receipt. None of the affiants indicated where the applicant was living when they met him, how they dated their acquaintance with the applicant, how they met the applicant, or, how frequently they saw the applicant.

Therefore, the case will be remanded so that the director may accord the applicant an opportunity to submit evidence regarding his qualifying continuous residence and continuous physical presence. The director shall then enter a new decision in accordance with this decision.

As always in these proceedings, the burden of proof rests solely with the applicant. Section 291 of the Act, 8 U.S.c. § 1361.

ORDER: The director's decision is withdrawn. The case is remanded for appropriate action consistent with the above discussion and entry of a new decision.