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U.S. Citizenship and Immigration Services
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U.S. Citizenship
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[Redacted]

FILE: [Redacted] Office: SAN FRANCISCO (FRESNO)

Date:

OCT 15 2009

IN RE: Applicant: [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, San Francisco, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed, the previous decision of the district director will be withdrawn and the application declared moot. The matter will be returned to the district 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 a crime 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 and children.

The district director concluded that favorable discretion was not warranted. The waiver application was denied accordingly. *Decision of District Director*, dated May 9, 2006.¹

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.

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.)

¹ The AAO, in the Request for Evidence (RFE) issued on May 19, 2009, incorrectly noted that the district director denied the waiver application because the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative. *See RFE*, dated May 19, 2009. The issue of whether extreme hardship has been established is now moot, as further discussed below.

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).

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 shows that the applicant was convicted in the Superior Court of California, Stanislaus County, in March 2002, of unlawful sexual intercourse with a minor, in violation of section 261.5(d) of the California Penal Code, a felony punishable by a maximum of four years imprisonment.² The applicant was placed on probation for a period of three years.

Convictions obtained under statutes that limit convictions to defendants who know, or reasonably should have known, that their intentional sexual acts were directed at children categorically should

² Section 261.5 of the California Penal Code provides, in pertinent part:

(d) any person 21 years of age or older who engages in an act of unlawful sexual intercourse with a minor who is under 16 years of age is guilty of either a misdemeanor or a felony and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment in the state prison for two, three or four years.

be treated as convictions for crimes involving moral turpitude. *Id.* at 707. However, the AAO notes that in *Quintero-Salazar v. Keisler*, 523 F. 4d 688 (9th Cir. 2007), the Ninth Circuit Court of Appeals determined that section 261.5(d) of the California Penal Code is not categorically a crime involving moral turpitude.³

Based on the above finding and in accordance with *Silva-Trevino*, on May 19, 2009, the AAO sent a Request for Evidence (RFE) to the applicant, noting as follows:

[T]he AAO thus must determine if the record of conviction and/or other evidence in the record conclusively establishes that the applicant was convicted for violating the statute based on conduct that involved moral turpitude. The record of conviction and other evidence in the record is inconclusive as to whether the applicant was convicted for violating the statute based on conduct that did involve moral turpitude.

Because *Silva-Trevino* was decided after the applicant submitted the present appeal, the AAO will provide the applicant an opportunity to submit further evidence, if such evidence exists, addressing whether or not the conduct for which he was convicted involved moral turpitude. Such evidence may include the record of conviction, as described in detail above, and any additional evidence which may be of assistance in resolving accurately the moral turpitude question.

See RFE, dated May 19, 2009.

In response to the RFE, counsel submitted additional documents relating to the applicant's conviction, including, but not limited to, a supplemental brief, dated August 4, 2009, a copy of the police report, and a declaration from the applicant's victim.

As noted above, documents contained in the record indicate that the applicant was convicted of unlawful sexual intercourse with a minor, in violation of section 261.5(d) of the California Penal Code. There is no indication in the record to indicate that the applicant knew, or reasonably should have known, that the sexual act was directed at a child. In a declaration provided by the victim in regards to the above-referenced conviction, she confirms the applicant's lack of knowledge regarding her age. As she states:

I met [redacted] [the applicant] when I was fifteen years old.... At the time I met him I told him I was eighteen years old and he had no reason not to believe. We started dating and we quickly became involved and I fell in love and I moved in with him about three months later.

I was really in love with [redacted] and I thought he was with me too. That is why I was hurt when after ten months or so he told me he was getting

³ The Court noted that "because 261.5(d) defines conduct that is malum prohibitum in at least some cases, it cannot categorically be a crime of moral turpitude. Moreover, because §261.5(d) is a strict liability crime that does not require any showing of scienter, it lacks the requisite element of willfulness or evil intent as required...." *Id.* at 694.

back with his ex wife and wanted me to move out. I was extremely hurt and angry and I wanted to hurt him as well and I went to the police department to file a report of statutory rape. Even though I had been living with him for over ten months and my parents knew we were living together and he thought I was eighteen years of age when we met because that is what I told him....

He [the applicant] did not knowingly and willingly enter into a relationship with me knowing my true age. I was dishonest with him because I wanted to date him even though he was older than me. I was young and I was wrong and I made a horrible mistake.... At the time I was four months pregnant when I submitted the police report of statutory rape and I gave a birth to a baby daughter who lived for only twelve hours and passed away. [REDACTED] was very supportive and was there for me even though I had put the police report.

[REDACTED] is a good man and...myself and even my parents respect him and like him and we have remained good friends.... [I]f he had known my real age he wouldn't have dated me. That is why I told him I was eighteen.... I feel really bad about the whole situation because I see how much this has hurt [REDACTED] in his immigrant process....

Declaration of the Victim.

The police report submitted in response to the AAO's RFE confirms the basic information outlined above by the victim. As stated in the police report,

They [the applicant and the victim] began having a dating relationship. Sometime in October of 2000 she [the victim] moved in with [REDACTED] [the applicant] at which time they began having a sexual relationship.

She reported today she is currently four months pregnant with [REDACTED]'s baby. On today's date, while at [REDACTED] residence, she called the Modesto Police Department regarding a disturbance. [REDACTED] responded at which time she explained [REDACTED] was making her move out of the residence.... [The victim] said [REDACTED] was planning on getting back with his ex-wife, therefore, asked her to move out. [The victim] wishes to stay with [REDACTED] and to live at the residence as he promised she could do. [REDACTED] has broken this promise he made regarding her staying with him therefore, wishes to file is statutory rape report with the Modesto Police Department to have him prosecuted.

[REDACTED]

As noted in *Silva-Trevino*, “in a case involving sexual abuse, a simple inquiry regarding the alien’s knowledge of the victim’s age might conclusively resolve the moral turpitude question.” *Supra* at 709. The AAO thus finds that based on a through review of the record and the victim’s own declaration, the applicant’s conviction for unlawful sexual intercourse with a minor does not constitute a crime involving moral turpitude, as the applicant’s sexual acts were not directed at a person the applicant knew, or reasonably should have known, was a child. The applicant was misled regarding the victim’s age, and moreover, cohabitated with her for over ten months with her parent’s knowledge.

The AAO finds that the district director erred in determining that the applicant was inadmissible based on his conviction for unlawful sexual intercourse with a minor. As such, the waiver application is unnecessary and the issue of whether the applicant established extreme hardship to a qualifying relative pursuant to the Act is moot and will not be addressed. Accordingly, the appeal will be dismissed, the previous decision of the district director is withdrawn and the instant application for a waiver is declared moot.

ORDER: The appeal is dismissed, the previous decision of the district director is withdrawn and the instant application for a waiver is declared moot. The district director shall reopen the denial of the Form I-485 application on motion and continue to process the adjustment application.