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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

U.S. Citizenship and Immigration Services

H2

[redacted]

DATE: JAN 10 2012 Office: CHICAGO, IL FILE: [redacted]

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:

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,

for
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Operations Director, Chicago, Illinois. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the waiver application is moot.

The applicant is a native and citizen of Trinidad 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's spouse and daughter are U.S. citizens. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h).

The field operations director concluded that the applicant had failed to establish extreme hardship to a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Field Operations Director*, dated June 4, 2008.

On appeal, counsel asserts that the field operations director failed to adequately consider the applicant's legal arguments and evidence. *Form I-290B*, received July 7, 2008.

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.

In *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.[1] 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

[1] It is noted that the instant case arose in the seventh circuit. Therefore, in this case, the AAO is bound by precedent decisions of the circuit court of appeals for the seventh circuit. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit). It is further noted that the seventh circuit has adopted the methodology used in *Matter of Silva-Trevino* for determining whether a crime involved moral turpitude. *See Mata-Guerrero v. Holder*, 627 F.3d 256 (7th Cir. 2010).

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 reflects that the applicant was convicted on February 18, 2004 of domestic battery which causes bodily harm under 720 ILCS 5/12-3.2(a)(1) and received a sentence of credit for time served and a $325 fine. This statute stated, at the time of the applicant's conviction, "[a] person commits domestic battery if he intentionally or knowingly without legal justification by any means: (1) Causes bodily harm to any family or household member."

725 ILCS 5/112A-3(3) defines family or household member as:

> Family or household members" include spouses, former spouses, parents, children, stepchildren and other persons related by blood or by present or prior marriage, persons who share or formerly shared a common dwelling, persons who have or allegedly have a child in common, persons who share or allegedly share a blood relationship through a child, persons who have or have had a dating or engagement relationship, persons with disabilities and their personal assistants, and caregivers as defined in paragraph (3) of subsection (b) of Section 12-21 of the Criminal Code of 1961. For purposes of this paragraph, neither a casual acquaintanceship nor ordinary fraternization between 2 individuals in business or social contexts shall be deemed to constitute a dating relationship.

Counsel refers to *Matter of Tran*, 21 I&N Dec. 291 (BIA 1996), in which the Board of Immigration Appeals (BIA) discussed willful infliction of corporal injury under section 273.5(a) of the California Penal Code. The BIA stated that:

> A person who cohabits with or is the parent of the offender's child maintains a relationship of a familial nature with the perpetrator of the harm. This relationship is likely to be one of trust and possibly dependency, similar to that of a spousal relationship. Violence between the parties of such a relationship is different from that between strangers or acquaintances, which may or may not involve moral turpitude, depending on the nature of the offense as delineated by statute. *Grageda v. INS, supra* (citing *United States ex rel. Zaffarano v. Corsi*, 63 F.2d 757, 758 (2d Cir.1933)); *see also, e.g., Matter of Danesh, supra;* Matter of Medina, 15 I & N Dec. 611 (BIA 1976), *aff'd sub nom. Medina-Luna v. INS*, 547 F.2d 1171 (7th Cir.1977); *Matter of G- R-*, 2 I & N Dec. 733 (BIA 1946; A.G. 1947). In our opinion, infliction of bodily harm upon a person with whom one has such a familial relationship is an act of depravity which is contrary to accepted moral standards. *Grageda v. INS, supra.* When such an act is committed willfully, it is an offense that involves moral turpitude.*Id.*
>
> We will follow the holding in *Grageda v. INS, supra*, that spousal abuse in violation of section 273.5(a) of the California Penal Code is a crime involving moral turpitude. Furthermore, inasmuch as we find that willful infliction of injury upon a cohabitant or parent of the offender's child in violation of the same statute is as reprehensible as spousal abuse, we conclude that such offense also involves moral turpitude. Thus, we hold that any violation of section 273.5(a) of the California Penal Code constitutes a crime involving moral turpitude.

The term "family or household member" as it appears in 725 ILCS 5/112A-3(3) is broadly defined and includes individuals who "formerly shared a common dwelling" or "had a dating or engagement relationships." Further, a conviction under 720 ILCS 5/12-3.2(a)(1) does not require "proof of the actual infliction of some tangible harm on a victim." *See Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006). Therefore, the AAO finds that the statute could apply to conduct which does not involve moral turpitude. In the applicant's case, the record reflects that he was convicted of domestic battery against his female cousin, who was his ex-girlfriend at the time; that he was not cohabitating with her at the time; and that they do not have any children together. The record does not reflect that the requirements for finding moral turpitude in *Matter of Sanudo* and *Matter of Tran* have been met. As such, the AAO finds that the applicant's conviction under 720 ILCS 5/12-3.2(a)(1) is not a crime involving moral turpitude and does not render the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act for this conviction.

The AAO notes that on September 3, 2002 the applicant was convicted of retail theft of under $150 pursuant to 720 ILCS 5/16A-3(a). The maximum punishment for this offense, a class A misdemeanor, is one year in jail and a $2,500 fine. The applicant received credit for his time served of 12days in jail and a $140 fine. In the event that the AAO found this to be a crime involving moral turpitude, it would find the petty offense exception in section 212(a)(2)(A)(ii)(II) of the Act to apply as the maximum sentence for the crime does not exceed one year and he was not sentenced to a term of imprisonment in excess of six months. The AAO also notes that the applicant was convicted of battery on November 1, 1999 under 720 ILCS 5/12-3, which is not a crime involving moral turpitude. *See Matter of Fualaau*, 21 I. & N. Dec. 475 (BIA 1996).

Based on the aforementioned discussion, the applicant is not required to file a section 212(h) waiver. As such, the waiver application is moot.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant is not required to file a waiver. Accordingly, the appeal will be dismissed as the waiver application is moot.

ORDER: The appeal is dismissed as the waiver application is moot.