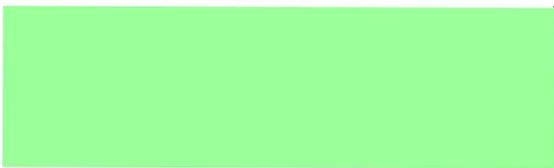


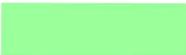
(b)(6)

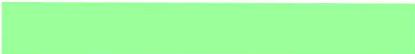


U.S. Citizenship  
and Immigration  
Services



Date: **APR 15 2013** Office: KINGSTON

FILE: 

IN RE: Applicant: 

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:



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.

If you believe the AAO inappropriately applied the law in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-190B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in black ink, appearing to read "Michael Shumway".

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Field Office Director, Kingston, Jamaica, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Jamaica 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 been convicted of crime involving moral turpitude. On October 4, 2011, the applicant filed an Application for Waiver of Grounds of Inadmissibility (Form I-601). The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his U.S. citizen wife.

In a decision dated March 30, 2012, the field office director denied the Form I-601 application for a waiver, finding that the applicant is statutorily ineligible for a Form I-601 waiver as an aggravated felon. The field office director further found that the negative factors in the applicant's case outweighed the positive considerations and denied the waiver application in the exercise of discretion.

On appeal, counsel for the applicant contends that the field office director erred in denying the applicant's Form I-601 waiver and that the director's decision provided "no concrete analysis related to the weighing of [the applicant's] positive factors and rehabilitation with the negative factors of his prior criminal history." Counsel for the applicant asserts that the field office director erred in finding that the record evidence did not establish that the applicant's bar to admission would result in extreme hardship to his spouse. He avers that the evidence outlining medical and emotional difficulties demonstrates extreme hardship to the applicant's qualifying relative, and that the evidence in the record supports a finding that the applicant has been rehabilitated.

The record contains, but is not limited to: counsel's brief; the applicant's statement; support statements from the applicant's family members, including the applicant's wife and daughter; medical documentation; a letter describing the applicant's wife's psychological state; a marriage certificate; documentation regarding the applicant's administrative removal proceeding; and documentation regarding the applicant's criminal history.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record has been reviewed and considered in rendering a decision on the appeal.

Section 212(a)(2)(A) of the Act provides, in pertinent part:

(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 (Board) 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 *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.

In the present case, the record reflects that on January 24, 1996, the applicant was convicted in the California Superior Court, [REDACTED] of Inflicting Corporal Injury on Spouse, in violation of section 273.5(a) of the California Penal Code. The applicant was sentenced to a term of imprisonment of 365 days and was placed on probation for 36 months. The field office director found the applicant was inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude.

According to section 273.5(a) of the California Penal Code, "Any person who willfully inflicts upon a person who is his or her spouse, . . . , corporal injury resulting in a traumatic condition is guilty of a felony." The Ninth Circuit Court of Appeals has held that a conviction under Cal. Penal Code § 273.5(a) is categorically a crime involving moral turpitude. In *Grageda v. INS*, the Ninth Circuit held: "Because spousal abuse is an act of baseness or depravity contrary to accepted moral standards, and willfulness is one of its elements . . . *spousal abuse* under section 273.5(a) is a crime of moral turpitude." 12 F.3d 919, 922 (9th Cir. 1993) (Emphasis added); see *Guerrero de Nodahl v. INS*, 407 F.2d 1405, 1406-07 (9th Cir. 1969) ("[W]e rule that inflicting 'cruel or inhuman corporal punishment or injury' upon a child is so offensive to American ethics that the fact that it was done purposely or willingly (the California definition of 'willful') ends debate on whether moral turpitude was involved. When the crime is this heinous, willful conduct and moral turpitude are synonymous terms."). Here, as in *Grageda*, the scope of our analysis is limited to spouses only, as the record evidence clearly establishes that the applicant was convicted for inflicting corporal injury upon his wife. Cf. *Morales-Garcia v. Holder*, 567 F.3d 1058, 1065 (9th Cir. 2009). Consequently, the AAO finds that the applicant's conviction for a crime involving moral turpitude renders him inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

A discretionary waiver of this criminal ground of inadmissibility is available under section 212(h) of the Act, 8 U.S.C. § 1182(h) if:

(1)(A) in the case of any immigrant it is established to the satisfaction of the Attorney General that--

(i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(iii) the alien has been rehabilitated

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . . .

....

No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.

In the present matter, the record reflects that the applicant was previously admitted to the United States as an alien lawfully admitted for permanent residence on December 6, 1978. On January 24, 1996, the applicant was convicted of inflicting corporal injury upon his spouse. On November 9, 2000, the applicant was served with a Notice to Appear (Form I-862) charging him with removability under section 237(a)(2)(A)(iii) of the Act as an alien who, at any time after admission, has been convicted of an aggravated felony as defined in section 101(a)(43) of the Act. On January 31, 2001, an immigration judge entered an order sustaining the aggravated felony ground of removability and ordered the applicant removed from the United States. On October 25, 2001, the applicant was physically removed from the United States to Jamaica pursuant to a Warrant of Removal/Deportation (Form I-205).

In considering whether the respondent's conviction is an aggravated felony, we first apply the "formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." *Taylor v. United States*, 495 U.S. 575, 601 (1990). First, we will look to the statute under which the alien was convicted and compare its elements to the relevant definition of aggravated felony set out in section 101(a)(43) of the Act, 8 U.S.C. § 1101(a)(43). Under this categorical approach, an offense qualifies as an aggravated felony if and only if the full range of conduct covered by the criminal statute falls within the meaning of that term. *Id.*

However, if the criminal statute of conviction could be applied to conduct that would constitute an aggravated felony and conduct that would not, we then see if there is "a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime." *Gonzalez v. Duenas-Alvarez*, 549 U.S. at 193. In applying this approach, the alien "may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues." *Id.*

If the alien demonstrates a "realistic probability" that the statute would be applied to conduct that falls outside the generic definition of the crime, we then apply a modified categorical approach. Under the modified categorical approach, we conduct a limited examination of documents in the record of conviction to determine if there is sufficient evidence to conclude that the alien was convicted of the elements of the generically defined crime. *Shepard v. U.S.*, 544 U.S. 13 (2005). These documents include the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the transcript of plea proceedings. 544 U.S. at 26.

Section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F), includes as an aggravated felony an alien convicted of a “crime of violence” for which the term of imprisonment is at least one year. The applicant does not dispute that a sentence to 365 days of imprisonment constitutes a sentence to a term of one year for purposes of determining whether a conviction is for an aggravated felony under the immigration laws. *See Matsuk v. INS*, 247 F.3d 999, 1001-02 (9th Cir. 2001). For the applicant’s infliction of corporal injury upon a spouse offense to qualify as a “crime of violence” under 18 U.S.C. § 16(a), the offense must also have as an element the use, attempted use, or threatened use of physical force against the person or property of another. Section 273.5(a) of the California Penal Code provides that any person “who willfully inflicts upon a person who is his or her spouse . . . corporal injury resulting in a traumatic condition” is guilty of the offense. Pursuant to precedent decisions of the California courts, the term “inflicts” has been defined to mean that the corporal injury must result from a direct application of force by the perpetrator upon the victim. *People v. Jackson*, 91 Cal. Rptr. 2d 805, 808-10 (Cal. Ct. App. 2000).

In *United States v. Laurico-Yeno*, 590 F.3d 818, 821 (9th Cir. 2010), the Ninth Circuit Court of Appeals found that because the California law prohibiting the willful infliction of corporal injury on a spouse requires a direct application of force on the victim by the defendant, such intentional use of physical force against the person of another falls within the scope of a “crime of violence” under 18 U.S.C. § 16(a). *See also Vasquez-Hernandez v. Holder*, 590 F.3d 1053, 1055-56 (9th Cir. 2010) (noting that a conviction for corporal injury to a spouse under section 273.5(a) of the California Penal Code, which resulted in a sentence of 14 days in jail, was a conviction for a crime of domestic violence, that is, a “crime of violence” as defined under 18 U.S.C. § 16(a) that was committed by the alien against his spouse).

Additionally, in *Matter of Perez-Ramirez*, 25 I&N Dec. 203, 208 (BIA 2010), the Board held that a California conviction for inflicting corporal injury upon a spouse in violation of section 273.5(a) of the California Penal Code qualifies categorically as a conviction for a “crime of violence” under 18 U.S.C. § 16(a). Here, the record of conviction reflects that the applicant was convicted of violating section 273.5(a) of the California Penal Code. Furthermore, the record evidence indicates that the applicant was sentenced to a one year term of imprisonment for this offense. The applicant’s 1996 conviction for inflicting corporal injury upon a spouse thus categorically falls within the definition of an “aggravated felony” as set forth in section 101(a)(43)(F) of the Act. Consequently, the applicant’s conviction under section 273.5(a) of the California Penal Code after being admitted as a lawful permanent resident statutorily bars him from section 212(h) relief. Since the applicant is statutorily ineligible for a waiver of inadmissibility, no purpose would be served in addressing claims of hardship, rehabilitation, or determining whether the applicant merits a waiver as a matter of discretion.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility rests with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.