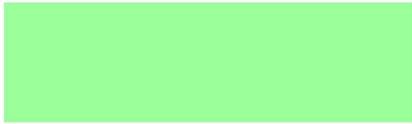


(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Office of Administrative Appeals
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

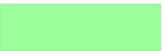


U.S. Citizenship
and Immigration
Services



Date: FEB 25 2014

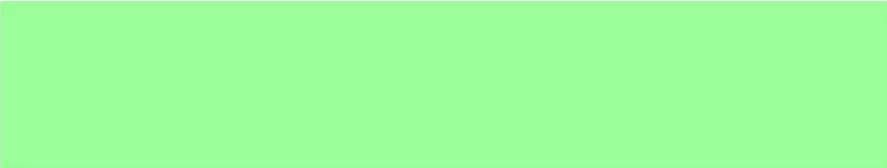
Office: DALLAS, TX

FILE: 

IN RE: 

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 (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

A handwritten signature in cursive script that reads "Michael Shumway".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Dallas, Texas, denied the waiver application and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the applicant is not inadmissible and the waiver application is unnecessary.

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 been convicted of crimes involving moral turpitude. The applicant is married to a United States citizen and has four U.S. citizen stepchildren. 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 family.

In a decision dated May 4, 2011, the field office director found the applicant inadmissible for having been convicted of Assault causing Bodily Injury – Family Violence on two separate occasions, once in March 24, 2010 and once on June 18, 2010. The field office director also found that the applicant had failed to establish extreme hardship would be imposed on his qualifying relatives. The Application for Waiver of Grounds of Inadmissibility (Form I-601) was denied accordingly.

In a Notice of Appeal to the AAO (Form I-290B), dated June 2, 2011, counsel states that the field office director erred in finding the applicant inadmissible because the applicant was not convicted of two counts of Assault Causing Bodily Injury – Family Violence. The applicant was convicted of Assault causing Bodily Injury to a Family Member on March 24, 2010, but on June 18, 2010 the applicant was convicted of Assault by Contact. Counsel states that the applicant's second offense is not a crime involving moral turpitude and his first offense, if deemed to be a crime involving moral turpitude, would qualify for the petty offense exception. Finally, counsel states that the applicant's inadmissibility will cause his U.S. citizen spouse and four stepchildren extreme hardship.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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.)

For cases arising in the Fifth Circuit, determination of whether a conviction is a crime involving moral turpitude requires a categorical inquiry into the “the inherent nature of the crime, as defined in the statute concerned, rather than the circumstances surrounding the particular transgression.” *Okabe v. I.N.S.*, 671 F.2d 863, 865 (5th Cir. 1982). This categorical inquiry takes into account only “the minimum criminal conduct necessary to sustain a conviction under the statute.” *Hamdan v. U.S.*, 98 F.3d 183, 189 (5th Cir. 1996). A conviction is “a crime involving moral turpitude if the minimum reading of the statute necessarily reaches only offenses involving moral turpitude.” *Amouzadeh v. Winfrey*, 467 F.3d 451, 455 (5th Cir. 2006) (citing *Pichardo v. I.N.S.*, 104 F.3d 756, 759 (5th Cir. 1997)). If, however, the statute is divisible into discrete subsections of criminal acts, some of which are categorically crimes involving moral turpitude and some of which are not, an adjudicator may make a modified categorical inquiry into the record of conviction to discern whether the applicant has been convicted of a subsection that qualifies as a crime involving moral turpitude. See *Hamdan*, *supra*, at 187; see also *Amouzadeh*, *supra*, at 455 (citing *Smalley v. Ashcroft*, 354 F.3d 332, 336 (5th Cir. 2003)). The record of

conviction is a narrow, specific set of documents which includes the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *See Matter of Louissaint*, 24 I&N Dec. 754, 757 (BIA 2009); *see also Shepard v. U.S.*, 544 U.S. 13, 16 (2005) (finding that the record of conviction is limited to the “charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented”). The Fifth Circuit does not permit inquiry beyond the record of conviction. *See Silva-Trevino v. Holder*, No. 11-60464, slip op. at 15 (January 30, 2014) (vacating the Attorney General’s decision in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)).

The record indicates that on March 24, 2010, the applicant pled guilty to Assault causing Bodily Injury – Family Violence under Sec. 22.01(a)(1) of the Texas Penal Code as a Class A Misdemeanor. The applicant was sentenced to 30 days imprisonment and \$100 fine. The record also indicates that the applicant was issued a citation for Assault by Contact under Sec. 22.01(a)(3) of the Texas Penal Code as a Class C Misdemeanor, on June 28, 2010. The applicant pled guilty to this violation on July 9, 2010 and paid a \$500 fine.

Sec. 22.01 of the Texas Penal Code states, in pertinent part:

- (a) A person commits an offense if the person:
 - (1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse;
 - (2) intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse; or
 - (3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.
- (b) An offense under Subsection (a)(1) is a Class A misdemeanor...
- (c) An offense under Subsection (a)(2) or (3) is a Class C misdemeanor...

We will first review the applicant’s conviction under Section 22.01(a)(1) of the Texas Penal Code. The Texas Penal Code states that “ ‘[b]odily injury’ means physical pain, illness, or any impairment of physical condition.” Tex. Penal Code Ann. § 1.07(a)(7). The term “reckless” is defined in Section 6.03(c) of the Texas Penal Code:

A person acts recklessly, or is reckless, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard

constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

Section 12.21 of the Texas Penal Code states that the punishment for a class A misdemeanor is a fine not to exceed \$4,000, confinement in jail for a term not to exceed one year, or both such fine and confinement.

Crimes of assault and battery may or may not involve moral turpitude; an assessment of both the mental state and level of harm to complete the offense is required. *See Matter of Solon*, 24 I&N Dec. 239 (BIA 2007). Intentional conduct resulting in a meaningful level of harm may be found to be morally turpitudinous. *Id.* at 242. Aggravating factors can also be taken into consideration. In *In re Sanudo*, 23 I&N Dec. 968, 972 (BIA 2006), the Board indicated that simple assault and battery offenses generally do not involve moral turpitude; however, that determination can be altered if there is an aggravating factor such as the infliction of bodily harm upon persons whom society views as deserving of special protection, such as children or domestic partners or intentional serious bodily injury to the victim. In *In Re Fualaau*, 21 I&N Dec. 475 (BIA 1996), the Board held that third degree assault with a criminally reckless state of mind was not a crime involving moral turpitude, and that “for an assault of the nature . . . to be deemed a crime involving moral turpitude, the element of a reckless state of mind must be coupled with an offense involving the infliction of serious bodily injury.”

Upon review of the Texas law at issue here, we find that not all of the actions punishable encompass conduct involving moral turpitude. The mental state underlying a conviction for recklessly causing bodily injury under section 22.01(a)(1) of the Texas Penal Code would not involve moral turpitude where such actions do not involve serious bodily injury. *See In Re Fualaau, supra*. An offense involving minimal harm could support a conviction under section 22.01. In *Lewis v. State*, 530 S.W.2d 117, 118 (Tex.Cr.App.1975), the Court of Appeals stated that the element of “bodily injury” was proven when the victim testified to suffering physical pain when the defendant grabbed her briefcase and twisted her arm back, causing her to sustain a small bruise. Thus, not all of the conduct punishable under the statute involves moral turpitude.

Because Sec. 22.01(a)(1) of the Texas Penal Code encompasses conduct that both does and does not involve moral turpitude, a conviction under its provisions is not categorically a crime involving moral turpitude. The record does not include the full record of conviction and we are unable to determine whether the applicant’s conduct was intentional, knowing, or reckless. However, unlike a removal hearing in which the government bears the burden of establishing a respondent’s removability, the burden in this proceeding is on the applicant to show “clearly and beyond a doubt” that he is not inadmissible. *See* 8 C.F.R. § 1240.8(b). Therefore, the applicant has the burden to produce the full record of conviction to prove that a conviction is not a crime involving moral turpitude. We cannot find that the applicant’s conviction under Sec. 22.01(a)(1) of the Texas Penal Code is not a crime involving moral turpitude.

However, we agree with counsel's argument that the applicant is not also inadmissible under section 212(a)(2)(A)(i)(I) of the Act on account of his conviction for Assault by Contact under Section.

We note that correspondence from the municipal court in Fort Worth, Texas, and the citation issued to the applicant for his conviction on July 9, 2010, all indicate that the applicant was convicted for Assault by Offensive Contact under Sec. 22.01(a)(3), as opposed to Section 22.01(a)(2) of the Texas Penal Code.

Given that Texas law contains ample provisions to address assaults resulting in bodily harm, we find that Sec. 22.01(a)(3) of the Texas Penal Code, which extends only to offensive or provocative contact, applies to simple assault. As the BIA stated in *Matter of Solon*, 24 I&N Dec. at 241:

Assault may or may not involve moral turpitude. Offenses characterized as "simple assaults" are generally not considered to be crimes involving moral turpitude. This is so because they require general intent only and may be committed without the evil intent, depraved or vicious motive, or corrupt mind associated with moral turpitude. (citations omitted).

In addition, we have recognized that not all crimes involving the injurious touching of another person reflect moral depravity on the part of the offender. Many simple assault statutes prohibit a wide range of conduct or harm, including *de minimis* conduct or harm, such as offensive or provocative physical contact or insults, which is not ordinarily considered to be inherently vile, depraved, or morally reprehensible.(citations omitted)

Accordingly, the AAO finds that the applicant's conviction for assault under Sec. 22.01(a)(3) of the Texas Penal Code is not a crime involving moral turpitude, and it therefore does not render the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

As stated above, the applicant's only conviction for a crime of moral turpitude is his conviction under Sec. 22.01(a)(1) of the Texas Penal Code, which carries a maximum sentence not to exceed one year. The applicant was sentenced to 30 days imprisonment. Therefore, given that we find that the applicant's conviction under section 22.01(a)(3) of the Texas Penal Code is not a crime involving moral turpitude, the applicant's conviction under Section 22.01(a)(1) qualifies for the petty offense exception.

In *Matter of Garcia-Hernandez*, 23 I&N Dec. 590 (BIA 2003), the Board held that a respondent who was convicted of more than one crime, only one of which was a crime involving moral turpitude, was eligible for the petty offense exception provided for under section 212(a)(2)(A)(ii) of the Act. The Board reasoned that:

The “only one crime” proviso, taken in context, is subject to two principal interpretations: (1) that it is triggered . . . by the commission of any other crime, including a mere infraction; or (2) that it is triggered only by the commission of another crime involving moral turpitude [W]e construe the “only one crime” proviso as referring to . . . only one crime involving moral turpitude.

Id. at 594.

The record shows that the applicant was convicted of only one crime involving moral turpitude and that the crime qualifies under the petty offense exception to inadmissibility.¹ Accordingly, the AAO finds that the applicant is not inadmissible under section 212(a)(2)(A) of the Act .

Thus, we find that the applicant is not inadmissible. In proceedings for an application for waiver of grounds of inadmissibility, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. The appeal will be dismissed as the applicant is not inadmissible and the waiver application is not necessary.

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

¹ We note that the applicant was convicted of driving while intoxicated in Fort Worth, Texas on August 13, 2009. In *Matter of Torres-Varella*, 23 I&N Dec. 78 (BIA 2001), the BIA held that a simple driving under the influence conviction is not a crime involving moral turpitude unless the alien is convicted under a state statute that requires a culpable mental state. Sec. 49.04 of the Texas Penal Code does not require a culpable mental state for a conviction for driving while intoxicated.