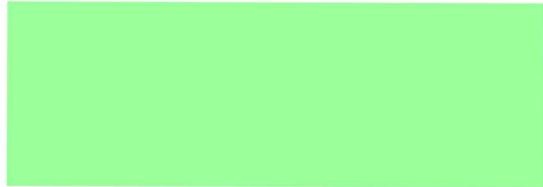


(b)(6)

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

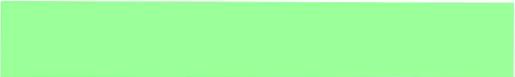


U.S. Citizenship  
and Immigration  
Services



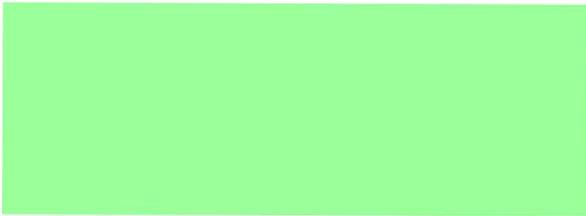
DATE: **MAY 30 2014** OFFICE: SAN BERNARDINO, CA

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 black ink that reads "Ron Rosenberg".

Ron Rosenberg  
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Honduras who was found 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 is the son of a U.S. citizen father and a lawful permanent resident mother. He seeks a waiver of his inadmissibility under section 212(h) of the Act, 8 U.S.C. §§ 1182(h), in order to reside in the United States.

The Field Office Director determined that the applicant had failed to establish that the bar to his admissibility would result in extreme hardship for a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Decision of the Field Office Director*, dated December 9, 2011.

On appeal, filed on January 10, 2012, and received by the AAO on February 6, 2014, counsel asserts that U.S. Citizenship and Immigration Services (USCIS) erred in finding the applicant inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act and that the applicant's crime of battery does not constitute a crime of moral turpitude. In the alternative, he argues that, even if his crime of battery was a crime of moral turpitude, the applicant qualifies for the petty-offense exception under section 212(a)(2)(A)(ii)(II) of the Act .

The evidence of record includes, but is not limited to, counsel's brief, records relating to the applicant's criminal conviction, financial documentation and identity documents for the applicant and his family. The entire record was reviewed and all relevant evidence considered in reaching a decision on the appeal.

Section 212(a)(2)(A)(i)(I) of the Act states 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.

(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).

In the present case, the record reflects that, on February 21, 2007, the applicant was convicted in the Superior Court of the County of San Bernardino, California of two counts of battery in violation of California (Cal.) Penal Code § 242. The applicant was ordered to serve 30 days in county jail and was credited with six days served, to attend a 52 week domestic batterers' program, and to pay various fines and was placed on probation for 36 months.

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 Ninth Circuit, the determination of whether a crime is a crime involving moral turpitude first requires the categorical inquiry set forth in *Taylor v. United States*, 110 S.Ct. 2143 (1990). See *Nicanor-Romero v. Mukasey*, 523 F.3d 999, 1004 (9th Cir. 2008), *overruled on other grounds by Marmolejo-Campos v. Holder*, 58 F.3d 903, 911 (9th Cir. 2009). The purpose of the categorical approach is to determine whether the full range of conduct encompassed by the statute constitutes a crime of moral turpitude. *Cuevas-Gaspar v. Gonzalez*, 430 F.3d 1013, 1017 (9th Cir. 2005). If the statute "criminalizes both conduct that does involve moral turpitude and other conduct that does not, the modified categorical approach is applied." *Marmolejo-Campos*, 558 F.3d at 912 (citing *Fernando-Ruiz v. Gonzalez*, 466 F.3d 1121, 1163 (9th Cir. 2006)); see also *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1161 (9th Cir. 2009). However, there must be "a realistic probability, not a theoretical possibility, that the statute would be applied to reach conduct that did not involve moral turpitude." *Nicanor-Romero*, 523 F.3d at 1004 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). To demonstrate a "realistic probability," the applicant must point to his or her own case or other cases in which the state courts in fact did apply the statute to conduct not involving moral turpitude. 523 F.3d at 1004-05. A realistic probability also exists where

the statute expressly punishes conduct not involving moral turpitude. *See U.S. v. Vidal*, 504 F.3d 1072, 1082 (9<sup>th</sup> Cir. 2007).

Once a realistic probability is established, the modified categorical approach is applied, which requires looking to the “limited, specified set of documents” that comprise what is known as the record of conviction – the charging document, a signed plea agreement, jury instructions, guilty pleas, transcripts of a plea proceeding and the judgment – to determine if the conviction entailed admission to, or proof of, the elements of a crime involving moral turpitude. *Castillo-Cruz*, 581 F.3d at 1161 (citing *Fernando-Ruiz*, 466 F.3d at 1132-33); *see also Marmolejo-Campos*, 558 F.3d at 912 (citing *Cuevas-Gaspar*, 430 F.3d at 1020). The Ninth Circuit has reaffirmed that courts may not examine evidence outside the record of conviction in determining whether a conviction was for a crime involving moral turpitude. *See Olivas-Motta v. Holder*, 716 F.3d 1199, 1203 (9th Cir. 2013) (rejecting *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)). Where the burden of proof is on the applicant, as in the present case, the applicant cannot sustain that burden where the record of conviction is inconclusive. *Young v. Holder*, 697 F.3d 976, 989 (9th Cir. 2012).

At the time of the applicant’s 2007 conviction, Cal. Penal Code § 242 defined battery as:

A battery is any willful and unlawful use of force or violence upon the person of another.

On appeal, counsel contends that the Ninth Circuit Court of Appeals in *Galeana-Mendoza v. Gonzales*, 465 F.3d 1054 (9<sup>th</sup> Cir. 2006), has determined that battery against a spouse is generally not a crime involving moral turpitude because it lacks an injury requirement and does not include “grave acts of baseness or depravity.”

The Ninth Circuit in *Galeana-Mendoza* found the phrase “use of force or violence” in Cal. Penal Code § 242, as interpreted by California courts, to be a “term of art” and to require “neither a force capable of hurting or causing injury nor violence in the usual sense of the term.” *Id.* at 1059 (citing *Ortega-Mendez v. Gonzales*, 450 F.3d 1010, 1016 (9<sup>th</sup> Cir. 2006)). Moreover, the Board of Immigration Appeals in *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006), has held that domestic battery in violation of Cal. Penal Code §§ 242 and 243(e) is not categorically a crime involving moral turpitude.

Since a violation of Cal. Penal Code § 242 is not categorically a crime involving moral turpitude, pursuant to the analytical framework established by the Attorney General in *Silva-Trevino*, we have considered the applicant’s formal record of conviction, which in the present case includes a letter from the State of California Department of Justice’s Bureau of Criminal Information and Analysis, the Advisement of Rights and Waiver Form, and the Plea Bargain Agreement, as indicated in counsel’s July 7, 2011 letter. The record of conviction lacks a description of the specific acts that resulted in the applicant’s conviction. Therefore, the applicant has not established that his conviction is not for a crime involving moral turpitude. *See Young v. Holder*, 697 F.3d 976, 989 (9th Cir. 2012) (the applicant cannot sustain his burden of proof where the record of conviction is inconclusive).

Nonetheless, the record includes court documents showing that the applicant was convicted of battery, sentenced to thirty days in jail, and that his crime carried a maximum sentence of one year in county jail. As such, we find that the applicant's conviction qualifies for the petty-offense exception, as the maximum penalty possible for his conviction is one year in prison and he was sentenced to less than six months in prison. Thus, the applicant is not inadmissible under section 212(a)(2)(A)(i) of the Act.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, because the applicant qualifies for the petty-offense exception, he is not inadmissible and not required to file a waiver application. Because the waiver application is unnecessary, the appeal is dismissed.

**ORDER:** The appeal is dismissed as unnecessary.