



U.S. Citizenship  
and Immigration  
Services

(b)(6)

[Redacted]

Date: **MAR 24 2015**

Office: VERMONT SERVICE CENTER

File: [Redacted]

IN RE:

PETITIONER: [Redacted]

PETITION:

Petition for U Nonimmigrant Classification as a Victim of a Qualifying Crime Pursuant to Section 101(a)(15)(U) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(U)

ON BEHALF OF PETITIONER:

[Redacted]

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. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Acting Director, Vermont Service Center (the director), denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will remain denied.

The petitioner seeks nonimmigrant classification under section 101(a)(15)(U) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(U), as an alien victim of certain qualifying criminal activity.

The director denied the petition on November 8, 2013, because although the petitioner meets the criteria for U-1 nonimmigrant status at section 101(a)(15)(U)(i) of the Act, he is inadmissible to the United States and his Form I-192, Advance Permission to Enter as a Nonimmigrant, had been denied. On appeal, the petitioner contends that the director has twice erred in finding that the petitioner was convicted of Aggravated Assault with a Deadly Weapon, when he was actually convicted of simple assault which is not a crime involving moral turpitude (CIMT). The petitioner also asserts that this incorrect finding of inadmissibility is crucial to this case because the director based his decision denying the Form I-192 largely on the finding that the petitioner was convicted of a crime involving moral turpitude.

*Applicable Law and Appellate Jurisdiction*

Section 101(a)(15)(U)(i) of the Act, 8 U.S.C. § 1101(a)(15)(U)(i), provides for U nonimmigrant classification to alien victims of certain criminal activity who assist government officials in investigating or prosecuting such criminal activity. Section 212(d)(14) of the Act requires U.S. Citizenship and Immigration Services (USCIS) to determine whether any grounds of inadmissibility exist when adjudicating a Form I-918 U petition and provides USCIS with the authority to waive certain grounds of inadmissibility as a matter of discretion. The petitioner bears the burden of establishing that he or she is admissible to the United States or that any grounds of inadmissibility have been waived. *See* 8 C.F.R. § 214.1(a)(3)(i).

For aliens seeking U nonimmigrant status who are inadmissible to the United States, the regulations at 8 C.F.R. §§ 212.17, 214.14(c)(2)(iv) require the filing of a Form I-192 waiver in conjunction with a Form I-918 U petition in order to waive any ground of inadmissibility. The regulation at 8 C.F.R. § 212.17(b)(3) states in pertinent part: "There is no appeal of a decision to deny a waiver." As we do not have jurisdiction to review whether the director properly denied the Form I-192, we do not consider whether approval of the Form I-192 should have been granted. The only issue that may come before us is whether the director was correct in finding the petitioner inadmissible to the United States and, therefore, requiring an approved Form I-192 pursuant to 8 C.F.R. §§ 212.17, 214.14(c)(2)(iv).

Section 212(a) of the Act sets forth the grounds of inadmissibility to the United States, and states, in pertinent part:

(2) Criminal and Related Grounds

(A) Conviction of Certain Crimes

- (i) In General.-Except as provided in clause (ii), any 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.

*Facts and Procedural History*

The petitioner is a native and citizen of Mexico who claims to have entered the United States in 1990 without admission, inspection or parole. The petitioner filed the instant Form I-918 U petition on December 20, 2010. On May 24, 2011, the director issued a Request for Evidence (RFE) noting that the petitioner was inadmissible to the United States, and requesting, among other things, that the petitioner submit evidence that he was not convicted of a CIMT and a Form I-192 waiver application. The petitioner responded with a Form I-192 and additional evidence. On January 8, 2013, the director found the petitioner's response insufficient to overcome his grounds of inadmissibility and denied the Form I-192. The director determined that the petitioner was inadmissible under sections 212(a)(6)(A)(i) (present without admission or parole), 212(a)(7)(B)(i)(I) (nonimmigrant without a valid passport), and 212(a)(2)(A)(i)(I) (conviction of a crime involving moral turpitude) of the Act. Although the director determined that the petitioner was statutorily eligible for U nonimmigrant status, he denied the Form I-918 U petition because the petitioner was inadmissible to the United States and his Form I-192 waiver of inadmissibility was denied.

The petitioner filed a motion to reopen, along with additional evidence, which was approved on April 10, 2013, based on the fact that the director had misstated the petitioner's conviction on which the CIMT finding of inadmissibility was based as one for assault with a deadly weapon, as opposed to "simple assault under Texas Penal Code § 22.01." The director again reviewed all the evidence presented, and on November 8, 2013, he again denied the Form I-192, finding again that the petitioner was inadmissible under sections 212(a)(6)(A)(i) (present without admission or parole), 212(a)(7)(B)(i)(I) (nonimmigrant without a valid passport), and 212(a)(2)(A)(i)(I) (conviction of a crime involving moral turpitude) of the Act. On the same day, the director again denied the petitioner's Form I-918 petition because the petitioner was inadmissible to the United States and his Form I-192 waiver of inadmissibility was denied. The petitioner timely appealed the denial of the Form I-918 U petition.

On appeal, the petitioner does not dispute that he is inadmissible to the United States but claims that he has not been convicted of a CIMT, and that the director's finding that he has been convicted of a CIMT negatively affected the outcome of his Form I-192 waiver application. Although the petitioner does not contest that he is inadmissible on the other grounds cited by the director in his Form I-192 denial, and we

do not have jurisdiction to review whether the director properly denied the Form I-192, we will review whether the director erred in determining that the petitioner has been convicted of a CIMT as the petitioner asserts that this incorrect inadmissibility determination greatly affected the outcome of his waiver denial.<sup>1</sup>

*Analysis*

We conduct appellate review on a *de novo* basis. A full review of the record supports the director's determination that the petitioner is inadmissible under sections 212(a)(6)(A)(i) (present without admission or parole), 212(a)(7)(B)(i)(I) (not in possession of a valid passport), and 212(a)(2)(A)(i)(I) (conviction of a crime involving moral turpitude) of the Act. The petitioner does not dispute that he is present in the United States without admission or parole, and he has not provided a copy of a valid passport. As such the petitioner is inadmissible under sections 212(a)(6)(A)(i) and 212(a)(7)(B)(i)(I) of the Act.

The record also shows, and the petitioner does not contest, that on [REDACTED] 2009, he was convicted of "Assault Causes Bodily Injury" under section 22.01 of the Texas Penal Code. The Texas Penal Code describes assault as, 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.

TEX. PENAL CODE ANN. § 22.01 (West 2009).

For cases arising within 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

<sup>1</sup> We note, however, that the director may consider any negative factors or convictions that are present in the petitioner's case, even if they do not reach the level of a crime involving moral turpitude or a separate ground of inadmissibility, to determine whether a waiver would be in the public or national interest. See INA § 212(d)(14).

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*, 742 F.3d 197, 205 (5<sup>th</sup> Cir. 2014) (vacating the Attorney General’s decision in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)).

A conviction under the statute in this case, section 22.01 of the Texas Penal Code, is not categorically a crime involving moral turpitude because a subsection of the statute, section 22.01(a)(3), only proscribes contact that is “offensive or provocative,” which does not qualify as morally turpitudinous. See *Esparza-Rodriguez v. Holder*, 699 F.3d 821, 825 (5th Cir. 2012); see also *Matter of Fualaau*, 21 I&N Dec. 475, 477 (BIA 1996). However, the first two subsections of the statute can apply to conduct that is morally turpitudinous because these subsections involve intentional and knowing actions that cause bodily injury or threats of bodily injury. *Chancoy-Tonoc v. Holder*, 519 F. App’x 326, 326 (5th Cir. 2013); *Esparza-Rodriguez v. Holder*, 699 F.3d at 825-826; *Matter of Solon*, 24 I. & N. Dec. 239, 243 (BIA 2007) (finding that that assault in the third degree under section 120.00(1) of the New York Penal Law, which requires both specific intent and physical injury, is a crime involving moral turpitude).<sup>2</sup>

As the statute is divisible, we must proceed to the modified categorical approach to determine under which subsection the petitioner was convicted. *Esparza-Rodriguez v. Holder*, 699 F.3d at 825. Although the record does not explicitly enumerate under which subsection the petitioner was convicted, the Judgment and Sentence to County Jail lists the offense as “Assault Causes Bodily Injury.” Subsection 22.01(a)(1) of Texas Penal Code, unlike subsections 22.01(a)(2) and (a)(3), specifies “causes bodily injury to another” as an element of the offense. The petitioner asserts that he was convicted of “simple assault,” and the Board has held that simple assault is not a crime involving moral turpitude.<sup>3</sup> The record of conviction, however, does not support the petitioner’s simple assault claim, as he was convicted of assault that caused bodily injury.<sup>4</sup> As stated above, courts have held that assault with bodily injury can constitute a CIMT.

<sup>2</sup> In *Matter of Solon*, the Board of Immigration Appeals (the Board) found that the respondent was convicted of a CIMT, and concluded that a conviction under the statute includes, at minimum, “that the offender acts with the conscious objective to cause another person impairment of physical condition or substantial pain of a kind meaningfully greater than mere offensive touching, and . . . that such impairment of physical condition or substantial pain actually results. Thus, a conviction under this statute requires, at a minimum, intentionally injurious conduct that reflects a level of depravity or immorality appreciably greater than that associated with the crime at issue in *Matter of Sanudo*” (citations omitted).

<sup>3</sup> See *Matter of Fualaau*, 21 I&N Dec. at 477.

*Chancoy-Tonoc v. Holder*, 519 F. App'x at 326; *Esparza-Rodriguez v. Holder*, 699 F.3d at 825-826; *Matter of Solon*, 24 I. & N. Dec. at 243. Accordingly, we find that the applicant's conviction under section 22.01(a)(1) of the Texas Penal Code is a conviction for a crime involving moral turpitude.

On appeal, the petitioner does not dispute that he is inadmissible to the United States on the other stated grounds, and asserts that he merits a favorable exercise of discretion such that his waiver application and Form I-918 U petition should be granted. However, we have affirmed that the director correctly concluded that the petitioner is inadmissible as someone who has been convicted of a CIMT, the director denied the petitioner's application for a waiver of inadmissibility, and we have no jurisdiction to review the discretionary denial of a Form I-192 submitted in connection with a Form I-918 U petition. See 8 C.F.R. § 212.17(b)(3).

### *Conclusion*

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Although the petitioner appears to have met the statutory eligibility requirements for U nonimmigrant classification, he has not established that he is admissible to the United States or that his grounds of inadmissibility have been waived. He is consequently ineligible for nonimmigrant classification under section 101(a)(15)(U)(i) of the Act, pursuant to 8 C.F.R. § 214.1(a)(3)(i).

**ORDER:** The appeal is dismissed. The petition remains denied.

---

<sup>4</sup> On appeal, the petitioner asserts that in *Matter of Ahortalejo-Guzman*, the Board held that assault under Texas Penal Code § 22.01 is not a CIMT. See 25 I&N Dec. 465 (BIA 2011). However, the petitioner's reliance on this case is misplaced, particularly as the Fifth Circuit Court of Appeals, where this case arises, has held otherwise. See *Esparza-Rodriguez v. Holder*, 699 F.3d 821 at 825-826. In *Matter of Ahortalejo-Guzman*, the Board held that the respondent was not convicted of a CIMT because where the record of conviction conclusively resolved the issue, the Immigration Judge was not allowed to use sources outside of the record of conviction to determine whether the petitioner was convicted of a CIMT. 25 I&N Dec. at 465.