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

U.S. Citizenship
and Immigration
Services

[redacted]

H2

DATE: AUG 0 2 2012 OFFICE: PROVIDENCE FILE: [redacted]

IN RE: [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,

Michael Shumway

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Providence, Rhode Island. 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 Dominican Republic who entered the United States pursuant to a B2 visa on February 22, 2006 and remained in the United States beyond his authorized stay period ending on August 21, 2006. The applicant was found to be inadmissible 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 a crime involving moral turpitude. The applicant seeks a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside with his wife and stepchildren in the United States.

The Field Office Director found that the applicant failed to establish extreme hardship to a qualifying relative and denied the Form I-601 application for a waiver accordingly. *Decision of the Field Office Director*, dated December 9, 2009.

Section 212(a)(2)(A) of the Act renders inadmissible "any alien convicted of . . . a crime involving moral turpitude." 8 U.S.C. § 1182(a)(2)(A)(i)(I). A discretionary waiver of this provision is available 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; or
>
> (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 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 . . .

The Board of Immigration Appeals (Board) has "observed that moral 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." *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992). Additionally, "[m]oral turpitude has been defined as an act which is per

se morally reprehensible and intrinsically wrong, or malum in se, so it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude." *Matter of Franklin*, 20 I&N Dec. 867, 868 (BIA 1994). In order to determine whether a conviction involves moral turpitude, the decision-maker must "look first to statute of conviction rather than to the specific facts of the alien's crime." *Matter of Silva-Trevino*, 24 I&N Dec. 687, 688 (A.G. 2008).

The record reflects that the applicant was convicted of two counts of simple assault, § 11-5-3 of the Rhode Island General Laws, on December 9, 2010, in Providence County Superior Court. On November 2, 2010, the applicant was sentenced to a consecutive six months suspended sentence, no contact orders of protection, and one year of probation.

Section 11-5-3 of Rhode Island General Laws states, in pertinent part:

> (a) Simple assault or battery. – Except as otherwise provided in § 11-5-2, every person who shall make an assault or battery or both shall be imprisoned not exceeding one year or fined not exceeding one thousand dollars ($1,000), or both

The Rhode Island Supreme Court has defined assault as a physical act of a threatening nature or an offer of corporal injury which puts an individual in reasonable fear of imminent bodily harm. *State v. Cardona*, 969 A.2d 667 (R.I. 2009).The same court has determined the crime of simple assault to be a general intent offense. *In re Michael*, 423 A.2d 1180 (R.I. 1981). A general intent offense merely requires proof that a defendant intended to do the proscribed act and that it was done unlawfully rather than inadvertently. *Id.* Intentional conduct resulting in a meaningful level of harm may be found to be morally turpitudinous, and aggravating factors are to be taken into consideration. *See id.* at 242. However, "[o]ffenses characterized as 'simple assaults' are generally not considered to be crimes involving moral turpitude . . . 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." *Id.* at 241 (internal citations omitted); *see also Perez-Contreras*, 20 I&N Dec. at 617-18 (holding that Washington conviction for assault in the third degree is not a crime involving moral turpitude where statute required no intent nor any conscious disregard of a substantial and unjustifiable risk); *Matter of Fualaau*, 21 I&N Dec. 475, 478 (BIA 1996) (en banc) (holding that Hawaiian conviction for assault in the third degree was not a crime involving moral turpitude where the offense is similar to simple assault).

Generally, simple assault or battery is not deemed to involve moral turpitude for purposes of the immigration laws. *Matter of Fualaau*, 21 I&N Dec. 475, 477 (BIA 1996). However, this general rule is inapplicable where an assault or battery necessarily involved some aggravating dimension, such as the use of a deadly weapon or serious bodily harm. *See, e.g., Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988), *Matter of Goodalle*, 12 I. & N. Dec. 106 (BIA 1967), *Matter of S-*, 5 I. & N. Dec. 668 (BIA 1954), and *Nguyen v. Reno*, 211 F.3d 692 (1st Cir. 2000). The Board of Immigration Appeals has also found:

> [M]oral turpitude necessarily inheres in assault and battery offenses that are defined by reference to the infliction of bodily harm upon a person whom society views as

> deserving of special protection, such as a child, a domestic partner, or a peace officer, because the *intentional or knowing infliction of injury* on such persons reflects a degenerate willingness on the part of the offender to prey on the vulnerable or to disregard his social duty to those who are entitled to his care and protection.

Matter of Sanudo, 23 I&N Dec. 968, 971 (BIA 2006) (emphasis added).

This applicant was originally charged with child abuse in the second degree, charges that were subsequently amended to two counts of simple assault. A police report indicates that the applicant's arrest was based upon an allegation that he struck a child with an object, resulting in visible injuries. A child abuse conviction under Rhode Island law involves the infliction of bodily harm upon a class of persons deserving of special protection. R.I. Gen. Laws § 11-9-5.3. However, the applicant was not convicted of child abuse, nor was he convicted of battery resulting in serious bodily injury. *Id*; R.I. Gen. Laws § 11-5-14.2. Clearly, under Rhode Island law, there exist separate statutes that contemplate the assault of a protected class, such as children. However, the applicant was convicted of two counts of simple assault, pursuant to a statute that does not require specific intent, actual bodily harm, serious or deadly threatened harm or any other aggravating factor that evinces moral turpitude. *See Silva-Trevino*, 24 I&N Dec. at 704 ("[L]ooking to the facts of an individual case to determine moral turpitude for immigration purposes does not mean that courts or immigration judges may relitigate or redetermine issues decided in prior criminal proceedings.") We cannot relitigate the applicant's criminal proceedings and, in essence, find him guilty of a crime – child abuse or battery – for which he was not convicted.

The AAO concludes that the applicant's offense is "fundamentally different from those that have been determined to involve moral turpitude" because the statute does not require "the death of another person, the use of a deadly weapon, or any other aggravating circumstance." 21 I&N Dec. at 478 (internal quotation marks and citations omitted); *cf. Nguyen v. Reno*, 211 F.3d 592 (1st Cir. 2000) (stating that a Connecticut second-degree assault conviction has the requisite aggravating dimension of requiring a defendant to cause serious physical injury); *Matter of Solon*, 24 I&N Dec. at 243 (holding that New York offense of assault in the third degree, which requires both specific intent and physical injury, is a crime involving moral turpitude). In *Silva-Trevino*, the Attorney General stated that even as an adjudicator can find that there is no realistic probability that a statute could be applied to conduct not involving moral turpitude based on the statutory elements, the inverse is also true: a crime may not be a crime involving moral turpitude categorically because "none of the circumstances in which there is a realistic probability of conviction involves moral turpitude." *Silva-Trevino*, 24 I&N Dec. at 699 n.2. As it would be impossible to ascertain all the circumstances to which a criminal statute has ever been applied, we interpret the language of footnote 2 to describe a determination based primarily on the statutory elements of the crime, particularly as compared to similar, but separate, statutory offenses that have as an element or elements of the criminal violation the morally turpitudinous conduct.

The AAO concludes that the applicant's convictions for simple assault are not crimes of moral

turpitude and do not render him inadmissible section 212(a)(2)(A)(i)(I) of the Act. Therefore, the Field Office Director's decision will be withdrawn. As the applicant is not inadmissible, the waiver application is unnecessary.

ORDER: As the applicant is not inadmissible, the Field Office Director's decision is withdrawn, the waiver application is deemed unnecessary and the appeal is dismissed. The case is returned to the Field Office Director for further processing.