



**U.S. Citizenship
and Immigration
Services**

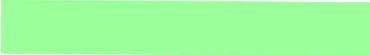
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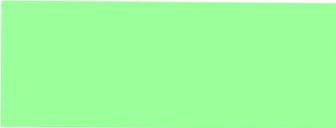
Office: HOUSTON, TX

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IN RE: 

APPLICATION: Application for Waiver of Grounds of Inadmissibility under sections 212(h) of the Immigration and Nationality Act (the 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, Houston, Texas, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the waiver application is no longer necessary.

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 sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with his lawful permanent resident wife and four U.S. citizen children.

In a decision, dated April 22, 2014, the field office director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On appeal, counsel states that the field office director's decision does not indicate that a determination regarding the reasons for the applicant's inadmissibility was made and that the applicant's criminal convictions do not constitute crimes involving moral turpitude. Counsel states that the applicant's is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act and, if he were found to be inadmissible, he has established that a qualifying relative would suffer extreme hardship as a result of his inadmissibility.

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.

The Board of Immigration Appeals (BIA) stated in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992):

[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.

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)).

In a 2013 decision, the Supreme Court held that sentencing courts may not apply the modified categorical approach when the crime of which the defendant was convicted has a single, indivisible set of elements. *Descamps v. United States*, 133 S. Ct. 2276 (2013). The Court noted that the modified categorical approach was developed so that when a statute was divisible and referred to several different crimes, “courts could discover which statutory phrase, contained within a statute listing several different crimes, covered a prior conviction.” *Id.* at 2284-85 (quoting *Nijhawan v. Holder*, 557 U.S. 29, 41 (2009) (internal quotation marks omitted)); see also *Johnson v. United States*, 559 U.S. 133, 144 (2010) (“[T]he ‘modified categorical approach’ that we have approved permits a court to determine which statutory phrase was the basis for the conviction.”).

In *Matter of Chairez-Castrejon*, the BIA revisited its method of determining whether a statute is divisible and held that the approach to divisibility applied in *Descamps* also applied in the immigration context. 26 I&N Dec. 349, 352-5 (BIA 2014) (reconsidering *Matter of Lanferman*, 25 I & N Dec. 721 (BIA 2012), and ultimately “withdraw[ing] from that decision to the extent that it is inconsistent with *Descamps*.”). The BIA noted that after *Descamps*, a criminal statute is divisible “only if (1) it lists multiple discrete offenses as enumerated alternatives or defines a single offense by reference to disjunctive sets of ‘elements,’ more than one combination of which could support a conviction; and (2) at least one, but not all, of those listed offenses or combinations of disjunctive elements is a categorical match” to the relevant generic offense. *Id.* at 353. The BIA further explained that for purpose of determining whether a statute is truly

divisible, an offense's elements are those facts about the crime which "[t]he Sixth Amendment contemplates that a jury—not a sentencing court—will find . . . unanimously¹ and beyond a reasonable doubt." *Id.* at 353 (quoting *Descamps* at 2288 (citing *Richardson v. United States*, 526 U.S. 813, 817 (1999))). The BIA found that a statute was not divisible merely because it "disjunctively enumerated intent, knowledge, and recklessness as alternative mental states" and further stated that the statute "can be 'divisible' into three separate offenses with distinct mens rea only if . . . jury unanimity regarding the mental state" was required. *Id.* at 352-354. As it had not been established that jury unanimity was required, the BIA held that the alternative mens rea were merely alternative "means" of committing the crime rather than alternative "elements" of the offense. *Id.* at 355.

The record establishes that the applicant has four criminal convictions in ██████ County, Texas. On August ██████ the applicant was convicted of Driving While Intoxicated and sentenced to 180 days in jail. His sentence was suspended and he was ordered to serve two years probation. In October ██████, the applicant violated the terms of his probation. On May ██████, his probation was revoked and he spent 20 days in jail. The applicant's second conviction occurred on July ██████. The applicant was convicted of assault and was sentenced to 15 days in prison. On June ██████ the applicant was again convicted of assault as a Class A misdemeanor under Texas Penal Code § 22.01(A)(1) and was sentenced to 60 days in jail. Finally, on December ██████ the applicant was convicted of Driving While Intoxicated. His license was suspended and he was sentenced to three days in jail.

Simple driving under the influence statutes typically provide that it shall be unlawful for any person to operate, exercise control of, or drive a motor vehicle while under the influence of alcohol, intoxicating substances or any drug. *See, e.g.,* Ariz. Rev. Stat. § Section 28-1381; 625 Ill. Stat. 5/11-501(a)(1). At the time of the applicant's convictions, Texas Penal Code § 49.04 stated, "A person commits an offense if the person is intoxicated while operating a motor vehicle in a public place." The BIA has noted that "[s]imple DUI is ordinarily a regulatory offense that involves no culpable mental state requirement, such as intent or knowledge." *Matter of Lopez-Mesa*, 22 I&N Dec. 1188, 1194 (BIA 1999). Regulatory offenses are not generally considered morally turpitudinous. *See generally Matter of L-V-C-*, 22 I&N Dec. 594 (BIA 1999). In *Matter of Torres-Varela*, the Board noted that simple driving under the influence of alcohol does not constitute a crime involving moral turpitude, as it is a marginal crime that does not include aggravating factors. 23 I&N Dec. 78, 85 (BIA 2001). Thus, the applicant's convictions for driving while intoxicated were not crimes involving moral turpitude.

In addition, the applicant's convictions for Assault under Texas Penal Code § 22.01(a)(1) are not crimes involving moral turpitude. As a general rule, simple assault or battery is not deemed to involve moral turpitude. *Matter of Fualaau*, 21 I&N Dec. 475, 477 (BIA 1996). However, assault or battery offenses involving some aggravating dimension, such as the use of a deadly

¹ The BIA noted that in states where jury unanimity is not required, "we deem the 'elements' of the offense to be those facts about which the jury was required to agree by whatever vote was required to convict in the pertinent jurisdiction." 26 I&N Dec. at 353, n. 2.

weapon or serious bodily harm, have been found to be crimes involving moral turpitude. *See, e.g., Matter of Goodalle*, 12 I&N Dec. 106 (BIA 1967) (finding that second degree assault with a knife is a crime involving moral turpitude); *Matter of Medina*, 15 I&N Dec. 611 (BIA 1976) (assault with a deadly weapon); *Matter of S-*, 5 I&N Dec. 668 (BIA 1954) (assault with a .38-caliber revolver); *Nguyen v. Reno*, 211 F.3d 692 (1st Cir. 2000) (intentional infliction of serious injury). The infliction of bodily harm upon a person society views as deserving of special protection, such as a child, a domestic partner, or a peace officer, is also considered an aggravating circumstance. *See, e.g., Matter of Tran*, 21 I&N Dec. 291 (BIA 1996) (willful infliction of corporal injury on a spouse, cohabitant, or parent of the offender's child); *Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988) (aggravated assault against a peace officer).

At the time of the applicant's convictions for Assault, Texas Penal Code § 22.01(a)(1) stated:

§ 22.01. Assault

(a) A person commits an offense if the person:

(1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse;

Texas Penal Code § 1.07(a)(8) defined "bodily injury" as physical pain, illness, or any impairment of physical condition, as opposed to "serious bodily injury", which is defined in § 1.07(a)(46) as bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

Texas Penal Code § 22.01(a)(1) encompasses crimes which would be considered simple assault, and crimes that would be considered domestic violence simple assault. Texas case law finds that the statute makes a person guilty of assault if he intentionally, knowingly, or recklessly causes bodily injury to another, expressing the three culpable mental states disjunctively and, therefore, requiring that there be proof of any one of the three to support a conviction. *Perez v. State* (App. 13 Dist.1986) 704 S.W.2d 499.

It is not clear as to whether Texas Penal Code § 22.01(a)(1) is divisible, requiring jury unanimity regarding a single mental state of the defendant or that he or she committed the acts against a spouse. *See Matter of Chairez-Castrejon*, 26 I&N Dec. 349, 352-5 (BIA 2014) and *Descamps v. United States*, 133 S. Ct. 2276 (2013). However, the Judgments in both of the applicant's convictions clearly show that domestic or family violence was not involved in the commission of his acts.

Thus, the applicant's convictions are for simple assault and are not crimes involving moral turpitude. Therefore, the applicant has not been convicted of a crime involving moral turpitude, is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act, and the waiver application is not necessary.

(b)(6)

NON-PRECEDENT DECISION

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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, that burden has been met. Accordingly, the appeal will be dismissed as the waiver application is no longer necessary.

ORDER: The appeal is dismissed.