



U.S. Citizenship
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Services

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FILE: [REDACTED] Office: MIAMI DISTRICT OFFICE

Date: APR 20 2007

IN RE: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(h) of the
Immigration and Nationality Act (INA), 8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT:

[REDACTED]

PUBLIC COPY

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting District Director, Miami. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen. The motion will be granted and the previous decisions of the Acting District Director and the AAO will be withdrawn. The appeal will be dismissed as the applicant is not inadmissible under 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), thus the relevant waiver application is moot.

The applicant is a native and citizen of Colombia who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act for having been convicted of two crimes involving moral turpitude. The applicant has a U.S. citizen mother and child and a lawful permanent resident spouse, and she seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), so that she may remain in the United States with her family.

The acting district director ("director") based the finding of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act on the applicant's two convictions in Miami, Florida. *Director's Decision*, dated January 3, 2002. The record reflects that the applicant plead *nolo contendere* and was convicted by the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida of the offenses, committed on January 1, 1997, of "resisting an officer with violence" and "battery on a law enforcement officer." *Court Record*, October 23, 1997. The director concluded that these crimes involved moral turpitude, quoting the arresting officer's report that, "[a detective] witnessed the defendant (Liz Bustamante) and co-combatant striking each other and then proceeded [sic] to struggle on the ground. [The] Detective . . . ran towards them and when attempting to separate them the defendant bit [the detective's] left hand to the point of lacerating the skin and causing it to bleed." The director added,

The arresting officer report clearly illustrates that you violently interfered with the arresting officer's duties while attempting to separate you and the co-combatant while engaged in a physical fight. Even if found that your conviction does not constitute a crime involving moral turpitude, District Director [sic] still determines that your adjustment application should be denied as a matter of discretion, as your violent resistance to arrest clearly exemplifies your total disrespect for the law.

Director's Decision, supra. The director also found that the applicant failed to establish that extreme hardship would be imposed on her U.S. citizen parent, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly, based on the requirements of section 212(h)(1)(B) of the act. *Id.*

On appeal, the applicant asserted that the director failed to consider crucial facts in the record regarding the severe depression suffered by the applicant's mother. *Notice of Appeal to the Administrative Appeals Office (AAO) (Form I-290B)*, February 1, 2002. The AAO dismissed the appeal (*AAO Decision*, June 4, 2002), and the applicant filed a motion to reopen based on new facts, *i.e.*, the applicant had married a lawful permanent resident on March 15, 2002 and gave birth to a U.S. citizen son on May 13, 2002. *Motion to Reopen*, undated, filed July 8, 2002. The applicant submitted evidence that her son had suffered an injury – a cut to his face during a caesarian birth – and needed medical treatment, including possible plastic surgery; she claimed that he would suffer extreme hardship if she were not allowed to remain in the United States to ensure appropriate medical care. *Id.* In addition, the applicant submitted a Memorandum of Law in support of her Form I-601,

claiming, *inter alia*, that she does not need to file a request for a waiver of inadmissibility because the offenses she committed were not crimes involving moral turpitude and she is, therefore, not inadmissible. *Memorandum of Law*, dated November 17, 2006. The entire record was reviewed and considered in rendering this decision.

Upon review of the record, the AAO finds that the director and the AAO, in its decision of June 2002, erred in concluding that the applicant was convicted of crimes involving moral turpitude. The record indicates that, based on current case law, neither of the applicant's convictions was of an offense that is considered to be a crime involving moral turpitude. The applicant is thus *not* inadmissible under Section 212(a)(2)(A) of the Act.

Section 212(a)(2)(A) 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.

The Board of Immigration Appeals (BIA) held 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.

The BIA and U.S. courts have found that it is the "inherent nature of the crime as defined by statute and interpreted by the courts and as limited and described by the record of conviction" and not the facts and circumstances of the particular person's case that determines whether the offense involves moral turpitude. *See, e.g., Matter of Short*, 20 I&N Dec. 136, 137 (BIA 1989); *Omagah v. Ashcroft*, 288 F.3d 254, 260 (5th Cir. 2002); *Goldeshtein v. INS*, 8 F.3d 645 (9th Cir. 1993). Neither the seriousness of the criminal offense nor the severity of the sentence imposed is determinative of whether a crime involves moral turpitude. *Matter of Serna*, 20 I&N Dec. 579, 581 (BIA 1992). Before one can be convicted of a crime of moral turpitude, the statute in question by its terms, must necessarily involve moral turpitude. *Matter of Esfandiary*, 16 I&N Dec. 659 (BIA 1979); *Matter of L-V-C*, 22 I&N Dec. 594, 603 (BIA 1999) (finding no moral turpitude where the "statutory provision . . . encompasses at least some violations that do not involve moral turpitude"). As a general rule, if a statute encompasses acts that both do and do not involve moral turpitude, deportability cannot be sustained. *Hernandez-Martinez v. Ashcroft*, 329 F.3d 1117 (9th Cir. 2003), *reh'g denied* 343 F.3d 1075 (9th Cir. 2003). Although evil

intent signifies a crime involving moral turpitude, willfulness in the commission of the crime does not, by itself, suggest that it involves moral turpitude. *Goldeshtein v. INS, supra*. Under the statute, evil intent must be explicit or implicit given the nature of the crime. *Gonzalez-Alvarado v. INS*, 39 F.3d 245, 246 (9th Cir. 1994).

Where a statute is divisible (broad or multi-sectional), *see, e.g., Matter of P-*, 6 I&N Dec. 193 (BIA 1954); *Neely v. U.S.*, 300 F.2d 67 (9th Cir. 1962), the court looks to the “record of conviction” to determine if the crime involves moral turpitude. *Matter of Ajami*, 22 I&N Dec. 949, 950 (BIA 1999) (look to indictment, plea, verdict, and sentence; *Zaffarano v. Corsi*, 63 F.2d 67 757 (2d Cir. 1933); *U.S. v. Kiang*, 175 F.Supp.2d 942, 950 E.D. Mich. 2001). A narrow, specific set of documents comprises the record: “[the] charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.” *Shepard v. U.S.*, 125 S.Ct. 1254, 1257 (2005). The Ninth Circuit has further clarified that that the charging document, or information, is not reliable where the plea was to an offense other than the one charged. *Martinez-Perez v. Gonzales*, 417 F.3rd 1022, 1028-29 (9th Cir. 2005). It is also important to note that the record of conviction does not include the arrest report. *See In re Teixeira*, 21 I&N Dec. 316, 319-20 (BIA 1996).

Courts have described the two separate ways of analyzing crimes as the “categorical” and “modified categorical” approaches. The former looks solely to the structure of the statute of conviction to determine whether a person has been convicted of a designated crime; the latter looks to a limited set of documents in the record of conviction in cases where the statute of conviction was facially over inclusive. *See, e.g., Chang v. INS*, 307 F.3d 1185, 1189-92 (9th Cir. 2002).

In this case, the applicant was “found guilty of the charge of resisting an officer with violence, and battery on a law enforcement officer, as set forth in the information.” *Court Record, supra*, incorporating by reference the State Attorney Information, or charging document. The charging document clarifies that the first charge was for violation of Florida Statutes Annotated (Fla. Stat. Ann.), section 843.01; and the second charge was for violation of Fla. Stat. Ann., sections [REDACTED] *State Attorney Information*, January 15, 1997. The applicant was placed on probation for six months and ordered to pay court costs of \$258 and to “enter and suc[cessfully] complete anger control.” *Court Record, supra*.

The relevant statutes state in pertinent part:

Charge 1: Resisting an Officer with violence

Section 843.01 **Resisting officer with violence to his or her person.** – Whoever knowingly and willfully resists, obstructs, or opposes any officer as defined in s. 943.10 . . . in the execution of legal process or in the lawful execution of any legal duty, by offering or doing violence to the person of such officer or legally authorized person, is guilty of a felony of the third degree.

Charge 2: Battery on a law Enforcement Officer

Section 784.03 **Battery; felony battery.** –

(1)

(a) The offense of battery occurs when a person:

1. Actually and intentionally touches or strikes another person against the will of the other; or

2. Intentionally causes bodily harm to another person.
- (b) Except as provided in subsection (2), a person who commits battery commits a misdemeanor of the first degree . . .
- (2) A person who has two prior convictions for battery who commits a third or subsequent battery commits a felony of the third degree . . .

Section 784.07 Assault or battery of law enforcement officers . . . reclassification of offenses

- (1) As used in this section, the term:
 - (a) "Law enforcement officer" includes a law enforcement officer . . .
 - (2) Whenever any person is charged with knowingly committing an assault or battery upon a law enforcement officer, [or other designated official] while the officer . . . is engaged in the lawful performance of his or her duties, the offense for which the person is charged shall be reclassified as follows:
 - (a) . . .
 - (b) In the case of battery, from a misdemeanor of the first degree to a felony of the third degree.

Regarding Charge 1, the State Attorney Information states:

██████████, on or about January 01, 1997 . . . did unlawfully, knowingly, willfully and feloniously resist, obstruct or oppose Officer[s] . . ., duly qualified law enforcement officers in the lawful execution of a legal duty being performed by said officer(s), to wit: the detention and/or arrest of said defendant, by the said defendant(s) offering or doing violence to the person of said officer(s), in violation of s. 843.01, Fla. Stat. . . .

The statute does not indicate whether a conviction of this offense involves resisting, obstructing **or** opposing an officer by "offering" **or** "doing" violence. As it may therefore be considered a divisible statute, the decision-maker may look to the record of conviction to determine the elements of the crime, which is then considered in a determination of whether the offense involves moral turpitude.

As noted above, the record of conviction includes a limited set of documents and does not include the arrest report. *See In re Teixeira*, 21 I&N Dec. 316, 319-20 (BIA 1996). The AAO notes that the District Director's Decision, *supra*, referred to the arrest report as the basis for a finding that the applicant's convictions were for crimes of moral turpitude, describing the applicant's actions towards an officer when the officer attempted to break up a fight in which the applicant was involved.

Despite the director's reliance on a police report, the only documents in this case that comprise the record of conviction for purposes of ascertaining the details of the crime are the Court Record, *supra*, and the State Attorney Information, or charging document, *supra*. These documents do not indicate whether the applicant committed an act of violence or an "offering" of violence, which may be interpreted as a "threat" or "attempt." *Black's Law Dictionary* 1111 (Bryan A. Garner ed., 7th ed., West 1999). Nor do these documents indicate whether the applicant "resisted, obstructed or opposed" an officer. Most significant to a determination of whether moral turpitude is involved is that, regardless of whether an act of violence or a threat of violence was committed, or whether it is the under the language of the statute or as described in the record of conviction, evil intent is neither explicit nor implicit given the nature of the crime in this case. *See*

Gonzalez-Alvarado v. INS, supra, at 246. Moreover, there is no indication that the act requires a vicious motive or corrupt mind, another consideration in determining whether a crime involves moral turpitude. *Matter of Perez-Contreras, supra*, at 617-18. In light of current case law and the statute and record of conviction in this case, the applicant's conviction of resisting an officer with violence cannot be interpreted to be of a crime involving moral turpitude.

Regarding Charge 2, Battery on a Law Enforcement Officer, the State Attorney Information states:

██████████, on or about January 01, 1997 . . . did unlawfully, feloniously and knowingly commit a battery upon . . . a duly qualified law enforcement officer, while said person was then and there engaged in the lawful performance of duties, by actually and intentionally touching or striking said person against said person's will, in violation of s. 784.07 and s. 784.03, Fla. Stat. . . .

The relevant statute does not indicate whether a conviction of this offense involves "actually and intentionally touch[ing] or strik[ing] another person against the will of the other; or intentionally caus[ing] bodily harm to another person." Fla. Stat. Ann., section 784.03, *supra*. The AAO notes that the relevant statute defines "battery" under Florida law; the second statute of conviction under this charge incorporates that definition, but provides that the offense is elevated from a misdemeanor to a felony when the battery is against a law enforcement officer. Fla. Stat. Ann., section 784.07, *supra*. As simple battery is the included offense under both statutes, it is necessary to analyze only the statutory language of the former, Fla. Stat. Ann., section 784.03.

Similar to the analysis of Charge 1, *supra*, the statute may be considered a divisible statute and the decision-maker may look to the record of conviction to determine the elements of the crime, which is then considered in a determination of whether the offense involves moral turpitude. The record of conviction under this statute does clarify the applicable elements of the crime, indicating that the applicant was charged with and convicted of "actually and intentionally touching or striking [the law enforcement officer] against [his] will" and **not** charged or convicted of "intentionally caus[ing] bodily harm to another person" under the statute.

As a general rule, simple assault or battery is not deemed to involve moral turpitude for purposes of the immigration laws, even if the intentional infliction of physical injury is an element of the crime. *Matter of Fualaau*, 21 I&N Dec. 475, 477 (BIA 1996). This general rule does not apply, however, where an assault or battery necessarily involved some aggravating dimension, such as the use of a deadly weapon or the infliction of serious injury on persons whom society views as deserving of special protection, such as children, domestic partners or peace officers. *See, e.g., Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988). In this case, the infliction of physical injury is not an element of the crime, be it intentional or otherwise; moreover, none of the aggravating factors is present, as the crime does not necessarily involve the use of a weapon or the infliction of serious injury, and the record of conviction specifically excludes those elements.

The BIA and U.S. courts have found that battery does not involve moral turpitude. *Matter of Garcia-Hernandez*, 23 I&N Dec. 590, 594 (BIA 2003); *see also, Griffio v. McCandless*, 28 F.2d 287 (E.D. Pa 1928), *Matter of S*, 9 I&N Dec. 688 (BIA 1962), *Matter of B*, 5 I&N Dec. 538 (BIA 1953) (assault and simple battery).

Aggravated battery has been found to involve moral turpitude. *Sosa-Martinez v. U.S. Attorney General*, 420 F.3d 1338 (11th Cir. 2005) (aggravated battery under Fla. Stat. Ann. § 784.045 is a crime of moral turpitude). In *Sosa-Martinez*, the court concluded that any intentional battery that includes, as an element of the offense, either (1) that it caused great bodily harm, permanent disability, or permanent disfigurement, or (2) involved the use of a deadly weapon constitutes a crime of moral turpitude.” *Id.* (citing decisions of other circuit courts involving laws similar to Florida’s aggravated battery statute, all concluding that assault or aggravated assault involves moral turpitude where conviction under the statute requires the use of a dangerous weapon or infliction of bodily injury); *see also*, *Ciambelli v. Johnson*, 12 F.2d 465 (D.Mass. 1926) (moral turpitude not involved because there was no weapon used in assault on an officer); *Zaranska v. DHS*, 400 F.Supp. 2d 500, 504-05 (E.D.N.Y. 2005) (no moral turpitude involved in assault of a police officer pursuant to N.Y. Penal Law), distinguishing *Matter of Danesh, supra*; *Matter of O-*, 4 I&N Dec. 301 (BIA 1951) (same).

In this case, it is clear that the statute does not require the commission of acts that involve moral turpitude. Moreover, looking beyond the statute at the record of conviction and the relevant charges, there is no indication of malicious intent, use of a weapon or the infliction of bodily injury. Before one can be convicted of a crime of moral turpitude, the statute in question by its terms, must necessarily involve moral turpitude. *Matter of Esfandiary, supra*. In light of controlling case law and the statute at issue in this case, the AAO finds that the applicant’s conviction of battery on a law enforcement officer cannot be interpreted to be of a crime involving moral turpitude.

Based on the record, the AAO finds that the applicant did not commit a crime involving moral turpitude and she is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The prior decisions of the Acting District Director and the AAO will be withdrawn. As the applicant is not required to file the waiver, the waiver filed pursuant to section 212(h) of the Act is moot and the appeal of the denial of the waiver will be dismissed.

ORDER: The January 3, 2002 decision of the director and the June 4, 2002 decision of the AAO are withdrawn. The appeal is dismissed as the underlying application is moot.