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U.S. Citizenship
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JUN 21 2007

FILE:

Office: CALIFORNIA SERVICE CENTER

Date:

IN RE:

Applicant:

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under section 212(i) of the
Immigration and Nationality Act, 8 U.S.C. § 1182(i).

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn. The appeal will be dismissed as the underlying application is moot.

The applicant [REDACTED], is a native and citizen of Cuba 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 committed a crime involving moral turpitude. The applicant is the son of a lawful permanent resident father and the claimed father of U.S. citizen children. He seeks a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(i).

The District Director concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601). *Decision of the District Director*, dated June 15, 2006.

The AAO will first address the director's finding of inadmissibility pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I).

Section 212(a)(2) of the Act states in pertinent part, that:

(A)(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.

Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines "conviction" for immigration purposes as:

A formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where -

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

The record reflects that on August 4, 2004, the applicant was found guilty of battery pursuant to Fla. Stat. § 784.03. The applicant "did unlawfully commit battery upon [] by actually and intentionally touching or striking said person against said person's will." *Information for Battery, Count 1*. The adjudication of judgment was withheld and the applicant was sentenced to six months of probation, and ordered to pay restitution, take an anger class, and stay away from the victim. Thus, for immigration purposes, the applicant was convicted pursuant to Fla. Stat. § 784.03.

The director concluded that the applicant's crime involved moral turpitude, and accordingly found him inadmissible to the United States based on the provisions of the Act. *See* section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I).

The AAO finds that a relevant case to the issue presented here is *In re Fualaau*, 21 I&N Dec. 475, 477 (BIA 1996), a case involving third-degree assault in which the Board of Immigration Appeals (BIA) defined “moral turpitude” in the following manner:

Moral turpitude refers generally to conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general. Moral 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.

The convicting statute in *In re Fualaau* reads as follows:

- (1) A person commits the offense of assault in the third degree if he:
 - (a) Intentionally, knowingly, or recklessly¹ causes bodily injury to another person; or
 - (b) Negligently causes bodily injury to another person with a dangerous instrument.
 - (2) Assault in the third degree is a misdemeanor unless committed in a fight or scuffle entered into by mutual consent, in which case it is a petty misdemeanor.
- Haw. Rev. Stat. § 707-712 (1992).

In *In re Fualaau*, the respondent pled guilty to third degree assault and his plea provided that he recklessly inflicted bodily injury on [REDACTED] without his consent. The BIA found that he was convicted of intentionally, knowingly, or recklessly causing bodily injury to another person.” Haw. Rev. Stat. § 707-712(1)(a). However, it concluded that the conviction did not arise under a statute with an element of “the death of another person,” the use of a deadly weapon, or any other aggravating circumstance. Therefore, it found the respondent’s crime to be similar to a simple assault and not a crime involving moral turpitude.

The BIA does not consider simple assault to be a crime involving moral turpitude. *See, e.g., In re Fualaau* at 477, citing *Matter of Short*, 20 I&N Dec. 136, 139 and *Matter of Baker*, 15 I & N Dec. 50, 51 (BIA 1974), modified on other grounds) and *Reyes-Morales v. Gonzales*, 435 F.3d 937, 945 n. 6 (8th Cir.2006) (observing that simple assault does not involve moral turpitude). However, it has held that assault with a deadly weapon is a crime involving moral turpitude. *In re Fualaau* at 477, citing *Matter of Medina*, 15 I & N Dec. 611 (BIA 1976), *aff’d sub nom. Medina-Luna v. INS*, 547 F.2d 1171 (7th Cir.1977). It has stated that in the area of assault, crimes involving moral turpitude ordinarily include an aggravating dimension. *In re Fualaau* at 478.

U.S. courts and the BIA have held that not all crimes involving assault or battery are considered crimes involving moral turpitude. *See, e.g., In re Sanudo*, 23 I. & N. Dec. 968, 970-971 (BIA 2006) (not all crimes involving the injurious touching of another reflect moral depravity on the part of the offender, even though they may carry the label of assault, aggravated assault, or battery) (citing *Matter of B-*, 1 I&N Dec. 52, 58 (BIA, A.G. 1941) (finding that second-degree assault under Minnesota law does not qualify categorically as a crime involving moral turpitude (following *United States ex rel. Zaffarano v. Corsi*, 63 F.2d 757, 758 (2d Cir.

¹ According to the law of Hawaii, a person acts “recklessly” when he consciously disregards a substantial and unjustifiable risk. Haw. Rev. Stat. § 707-206(3)(a) (1992).

1933)); *In re Fualaau, supra*, (holding that third-degree assault under the law of Hawaii, an offense that involved recklessly causing bodily injury to another person, is not a crime involving moral turpitude); *Matter of Perez-Contreras*, 20 I&N Dec. 615 (BIA 1992) (concluding that third-degree assault under the law of Washington, an offense that involved negligently causing bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering, is not a crime involving moral turpitude).

With the instant case, the AAO finds that the applicant was convicted under Florida's simple battery statute. *See Sosa-Martinez v. U.S. Attorney General*, 420 F.3d 1338, 1341 (11th Cir. 2005). The record conveys that his conviction did not involve using a deadly weapon or causing serious injury; his conviction did not involve aggravating factors that would have significantly increased his culpability. Applying the reasoning in the case decisions discussed above, the AAO finds that [REDACTED] conviction for battery was not for a crime involving moral turpitude. He is thus not inadmissible under section 212(a)(2)(A)(i)(I) of the Act and the waiver filed pursuant to section 212(h) of the Act is therefore moot. As the applicant is not required to file the waiver, the appeal of the denial of the waiver will be dismissed.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(6)(C) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. The applicant has met that burden.

ORDER: The June 15, 2006 decision of the director is withdrawn. The appeal is dismissed as the underlying application is moot.