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U.S. Citizenship  
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FILE:

[Redacted]

Office: LOS ANGELES

Date:

OCT 18 2007

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:

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 District Director, Los Angeles, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Vietnam 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 seeks 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 U.S. citizen father and sister.

The record reflects that the applicant's father filed a Petition for Alien Relative (Form I-130) on the applicant's behalf on July 18, 1990. The petition was approved on July 24, 1990. The applicant was paroled into the United States as a Public Interest Parolee on March 9, 1993. The record reflects that the applicant was convicted in the Municipal Court of Alhambra Courthouse Judicial District, County of Los Angeles, on February 27, 1997 of violation of section 245(a)(1) (Assault with a Deadly Weapon other than a Firearm) of the California Penal Code and sentenced to three years incarceration. The applicant's sentence was suspended and he was placed on probation for a period of three years. The applicant filed an Application to Register Permanent Resident or Adjust Status (Form I-485) on August 22, 2000 and an Application for Waiver of Grounds of Inadmissibility (Form I-601) on August 18, 2004.

In her decision, the district director stated that the applicant had been convicted of attempted murder and found him inadmissible for having committed a crime involving moral turpitude. *Decision of District Director*, dated March 24, 2005. The district director concluded that because the applicant does not have a U.S. citizen spouse, there is no qualifying relative for a waiver of inadmissibility. *Id.* The district director denied the waiver application accordingly. *Id.*

On appeal, counsel asserts that the applicant was not convicted of attempted murder as stated by the district director in her decision. Counsel maintains that the record reflects that the applicant's assault conviction was deemed by the court to be a misdemeanor on April 5, 2000. The verdict of guilt was then set aside, and a plea of not guilty was entered and the court dismissed the charges against the applicant. Counsel asserts that the applicant thus does not have a conviction that renders him inadmissible under section 212(a)(A)(i)(I) of the Act.

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

- (i) In general.— . . .[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 . . . or an attempt or conspiracy to commit such a crime . . . is inadmissible.

Court documents in the record reflect that the applicant was convicted in the Municipal Court of Alhambra Courthouse Judicial District, County of Los Angeles, on February 27, 1997 of violation of section 245(a)(1) (Assault with a Deadly Weapon Other Than a Firearm) of the California Penal Code (C.P.C.) and sentenced to three years incarceration. The applicant's sentence was suspended and he was placed on probation for a

period of three years. The record also reflects that on April 5, 2000, the applicant was permitted to withdraw his guilty plea, the verdict of guilt was set aside and the court dismissed the action pursuant to C.P.C. § 1203.4.

The AAO first considers whether the applicant's conviction for Assault with a Deadly Weapon Other Than a Firearm in violation of C.P.C. § 245(a)(1) is a crime involving moral turpitude that renders the applicant inadmissible pursuant to 212(a)(2)(A)(i)(I) of the Act. Section 245(a)(1) of the C.P.C. is violated by any "person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury." Under California law, assault is defined as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." C.P.C. § 240.

The AAO notes that the Board of Immigration Appeals ("Board") held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992) that:

[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. Assault may or may not involve moral turpitude. Simple assault is generally not considered to be a crime involving moral turpitude.

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.

(Citations omitted.)

The Board has generally found that assault with a deadly weapon is a crime involving moral turpitude. *See, e.g., Matter of G-R-*, 2 I. & N. Dec. 733 (BIA 1946); *see also Matter of Danesh*, 19 I. & N. Dec. 669 (BIA 1988). However, this case arises in the Ninth Circuit, where the Court of Appeals has held that violation of C.P.C. § 245(a)(2) (Assault *With* a Firearm) is not a crime involving moral turpitude. *See Carr v. INS*, 86 F.3d 949, 951 (9th Cir. 1996) (citing *Komarenko v. INS*, 35 F.3d 432, 435 (9th Cir. 1994)). Although the court in the *Carr* and *Komarenko* cases did not provide a detailed rationale for this finding, it is noted that violation of C.P.C. § 245(a)(1), which occurs when "any person . . . commits an assault upon the person of another with a firearm", differs from violation of C.P.C. § 245(a)(2) only in the means employed to commit the assault rather than in the motive or intent of the offender. Thus, the AAO determines that the applicant's conviction under C.P.C. § 245(a)(1) is not a crime involving moral turpitude, and no waiver of inadmissibility is necessary for this conviction.

As it has been established that the crime for which the applicant was convicted is not a crime involving moral turpitude, the district director's finding of inadmissibility must be withdrawn.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(2)(A) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

**ORDER:** The appeal is sustained.