



U.S. Citizenship
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Services

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER

Date: APR 22 2008

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:



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 Director, California Service Center and is now before the Administrative Appeals Office (AAO) on appeal. 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) and the relevant waiver application is therefore moot.

The applicant is a native and citizen of the Jamaica 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 one crime involving moral turpitude. The applicant has a U.S. citizen mother, and he seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h).

The director based the finding of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act on the applicant's conviction for Assault in Canada. *Director's Decision on Form I-485*, dated September 27, 2006. The record reflects that the applicant pled guilty and was convicted in the Central East Region Court, Ontario, Canada of Assault on April 11, 2001. *Court Disposition of April 11, 2001*, certified November 13, 2003. The director concluded that this crime involved moral turpitude and then noted a second conviction in the applicant's record for Breach of Recognizance. *Director's Decision on Form I-485*, dated September 27, 2006.

The director also found 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. *Director's Decision on Form I-601*, dated September 27, 2006.

On appeal, counsel asserts that the crimes committed by the applicant are not crimes involving moral turpitude. *Counsel's Brief*, dated October 30, 2006. He also states that the applicant's mother would suffer extreme hardship as a result of the applicant's inadmissibility. *Id.* The entire record was reviewed and considered in rendering this decision.

Upon review of the record, the AAO finds that the director erred in concluding that the applicant was convicted of a crime involving moral turpitude. The AAO notes that the director's decision does not indicate that he found the applicant's conviction for Breach of Recognizance to be a crime involving moral turpitude, but that he based his finding of inadmissibility solely on the applicant's conviction for assault. The record indicates that, based on current case law, the applicant's conviction for assault was not 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.

(ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if—

....

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

The court disposition in the record shows that the applicant was convicted of Assault under Section 266 of the Canadian Criminal Code in the municipality of York, Ontario and sentenced to one-year probation. *Court Disposition of April 11, 2001*, certified November 13, 2003. He was subsequently found guilty of Breach of Recognizance under section 145(3) of the Canadian Criminal Code after violating his probation and was sentenced to one day in jail. *Court Disposition of June 15, 2001*, certified November 13, 2003.

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 F3d 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).

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 Fualacu*, 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).

Section 265 of the Canadian Criminal Code sets out the definition of assault as follows:

(1) A person commits an assault when

- (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
- (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or
- (c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

Section 266 of the Canadian Criminal Code sets out the penalties for an assault conviction as follows:

Every one who commits an assault is guilty of

- (a) an indictable offence and is liable to imprisonment for a term not exceeding five years; or
- (b) an offence punishable on summary conviction.

The record establishes that the applicant was convicted of simple assault under section 266 of the Canadian Criminal Code and no aggravating factors of the type discussed in *Matter of Danesh* are present in this matter. Therefore, the AAO finds that the applicant did not commit a crime involving moral turpitude and is not inadmissible under section 212(a)(2)(A) of the Act. The appeal of the denial of the waiver will be dismissed as the waiver application is moot.

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