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U.S. Citizenship
and Immigration
Services

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FILE:

Office: CALIFORNIA SERVICE CENTER

Date: NOV 24 2008

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:

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 "John F. Grissom".

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director of the California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant, [REDACTED] is a native and citizen of Jamaica 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 sought a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(i), which the director denied, finding the applicant failed to establish that extreme hardship would be imposed on a qualifying relative, *Decision of the Director*, dated April 21, 2006.

The AAO will first address the finding of inadmissibility.

The record reflects that on June 28, 1995 in the state of Florida, the applicant pled *nolo contendere* to the charges of misdemeanor battery in the first degree and aggravated assault, a third-degree felony. With the battery offense, he was to serve 10 days (concurrent) in jail and 1 year probation. For the aggravated assault offense, he was sentenced to 10 days in jail and 2 years probation.

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 applicant's convictions are within the meaning of section 101(a)(48)(A) of the Act, constituting convictions for immigration purposes because his sentences involved jail and probation, which are a restraint on his liberty.

In determining whether the applicant's convictions involve moral turpitude, the Board of Immigration Appeals (BIA) in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), held 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.

The applicant was convicted of battery under FLA. STAT. § 784.03. The simple battery statute provides:

(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.

A case-by-case approach has been employed to decide whether battery (or assault and battery) offenses involve moral turpitude. Judicial and administrative decisions have held that "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 under the law of the relevant jurisdiction." *In re Sanudo*, 23 I&N Dec. 968, 970-971 (BIA 2006), 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. 1933))); *Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996) (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).

At the same time, decisions have held that moral turpitude has been found where simple assault and battery offenses necessarily involved aggravating factors, such as the use of a deadly weapon, the *intentional* infliction of *serious* bodily injury on another, or the infliction of bodily harm upon persons whom society views as deserving of special protection, such as children, domestic partners, or peace officers. *In re Sanudo*, 23 I&N Dec. 968, 970-971 (BIA 2006). It is reasoned that the intentional or knowing infliction of injury on persons deserving special protection reflects a degenerate willingness on the part of the offender to prey on the vulnerable or to disregard his social duty to those who are entitled to his care and protection. (citations

omitted). *In re Sanudo* at 972. In battery offenses committed against the members of a protected class, the crimes were defined by statute to require proof of the actual infliction of some tangible harm on a victim. *Id.*

Whether a particular crime involves moral turpitude is determined by the “categorical approach” and the “modified categorical approach.” The “categorical approach requires looking to the elements of the criminal statute and the nature of the offense, rather than to the particular facts relating to the crime, to determine whether an offense involves moral turpitude. *Leocal v. Ashcroft*, 543 U.S. 1, 7, 125 S. Ct. 377, 160 L.Ed.2d 271 (2004). A court considers only the fact of conviction and the statutory definition of the criminal offense. *Matter of Tobar-Lobo*, 24 I&N Dec. 143 (BIA 2007). If necessary, one may look to authoritative court decisions in the convicting jurisdiction that elucidate the meaning of equivocal statutory language. *See Matter of Olquin*, 23 I&N Dec. 896, 897 (BIA 2006). 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*, 8 F.3d 645 (9th Cir. 1993). 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). Neither the seriousness of the criminal offense nor the severity of the sentence imposed determines whether a crime involves moral turpitude. *Matter of Serna*, 20 I&N Dec. 579, 581 (BIA 1992). “If the statute defines a crime in which moral turpitude necessarily inheres, then the conviction is for a crime involving moral turpitude for immigration purposes, and our analysis ends.” *Matter of Ajami*, 22 I&N Dec. 949 (BIA 1999).

When a statute contains offenses that do and do not involve moral turpitude, the modified categorical approach is applied. *See, e.g., Neely v. U.S.*, 300 F.2d 67 (9th Cir. 1962). With this approach 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 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). 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). The record of conviction does not include the arrest report. *See In re Teixeira*, 21 I&N Dec. 316, 319-20 (BIA 1996).

The applicant was convicted of committing “simple battery” under FLA. STAT. § 784.03(1). Subsections (1)(a)(1) and (1)(a)(2) describe two distinct levels of force. Florida law provides that a person commits battery if he intentionally “touches” or “strikes” another person or intentionally causes bodily harm. The Florida statute is framed broadly to criminalize *any* use of force, whether violent, i.e., striking, or de minimis, i.e., touching. *See* statutory elements of FLA STAT. § 784.02(1)(a). Florida courts make it clear that any intentional touching, no matter how slight, is sufficient to constitute a simple battery. *See State v. Hearn*, 961 So.2d 211, 219 (Fla.2007) referring to *D.C. v. State*, 436 So.2d 203, 206 (Fla. 1st DCA 1983) (“[I]t is clear from Section 784.03 that *any* intentional touching of another person against such person’s will is technically a criminal battery.”); *L.D. v. State*, 355 So.2d 816, 817 (Fla. 3d DCA 1978) (“[I]t is clear that the force used in criminal battery need not be sufficient to injure.”). *See also, Johnson v. State*, 858 So.2d 1071, 1072 (Fla. Dist. Ct. App. 2003) (holding that spitting on police officer constitutes unwanted touching and thus battery under § 784.03 but is not a “use or threat of use of physical force or violence”). Because the conduct necessary to complete an offense in Florida under § 784.03(1)(a)(1) is an intentional “striking” or “touching” of another without injury, one may be convicted of simple battery in Florida under § 784.03(1)(a)(1) without injuring or even intending to injure the victim. This leads the AAO to conclude that an offense under §

784.03(1)(a)(1) is not a crime involving moral turpitude. However, the conduct necessary to complete an offense under § 784.03(1)(a)(2) is the intentional causing of bodily harm to another person; on its face a conviction under § 784.03(1)(a)(2) would involve moral turpitude.

Since the statute is divisible or separable, containing acts which both do and do not involve moral turpitude, the AAO must apply the “modified categorical” approach to determine the subsection of the applicant’s offense. The information in the record reflects that the applicant entered a plea of *nolo contendere* for the battery offense of “[a]ctually and intentionally touch[ing] or strik[ing] another person against the will of the other.” Given that Florida courts have interpreted § 784.03(1)(a)(1) as not requiring an injury to another, and since the applicant’s offense did not involve any aggravated factor, the AAO concludes that the applicant’s conviction under § 784.03(1)(a)(1) does not constitute a crime involving moral turpitude.

The applicant was convicted of aggravated assault, a third-degree felony. The aggravated assault statute, FLA. STAT. § 784.021, provides that an aggravated assault is an assault (a) with a deadly weapon without intent to kill; or (b) with an intent to commit a felony. It is clear that subsection (a) would involve moral turpitude. In *Matter of O*, 3 I&N Dec. 193 (BIA 1948), the BIA found that using a deadly or dangerous weapon in an assault involved moral turpitude, reasoning that “assault aggravated by the use of a dangerous or deadly weapon is contrary to accepted standards of morality in a civilized society” and is “inherently base.” With subsection (b), aggravated assault with “intent to commit a felony,” the statute is not specific as to the nature of the felony that is committed. The information in the record states that the applicant:

[I]ntentionally and unlawfully threatened by word or act to do violence to the person of [victim], coupled with an apparent ability to do so, and did an act, to-wit: chasing her with a machete, which created a well-founded fear in [victim] that violence was imminent, and said assault was committed with a deadly weapon, more particularly described as a machete, without intent to kill.

Given that the applicant’s assault involved a deadly or dangerous weapon, and in light of *Matter of O*, the AAO finds that his conviction constitutes a crime involving moral turpitude, rendering the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I).

Furthermore, because the maximum penalty for a felony of the third degree is a term of imprisonment of not more than 5 years, *see* FLA. STAT. § 775.082, the applicant’s conviction does not fall within the petty offense exception set forth under section 212(a)(2)(ii) of the Act.

The AAO will now consider whether granting the applicant’s section 212(h) waiver is warranted.

Section 212(h) of the Act provides, in pertinent part:

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if -

- (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . .

A section 212(h) waiver of the bar to admission resulting from violation of section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant is not a consideration under the statute and will be considered only to the extent that it results in hardship to a qualifying relative, who in this case is the applicant's U.S. citizen wife. Although the waiver application indicates that the applicant's step-sons and step-daughter are U.S. citizens, no independent documentation in the record corroborates this. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. See *Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996).

The concept of extreme hardship to a qualifying relative "is not . . . fixed and inflexible," and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals (BIA) set forth a list of non-exclusive factors relevant to determining whether an applicant has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. These factors include, with respect to the qualifying relative, the presence of family ties to U.S. citizens or lawful permanent residents in the United States, family ties outside the United States, country conditions where the qualifying relative would relocate and family ties in that country, the financial impact of departure, and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 565-566.

In *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996), the BIA stated that the factors to consider in determining whether extreme hardship exists "provide a framework for analysis," and that the "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." It further stated that "the trier of fact must consider the entire range of factors concerning hardship in their totality" and then "determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation." (citing *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994)).

Applying the *Cervantes-Gonzalez* factors here, extreme hardship to the applicant's spouse must be established if she joins the applicant, and alternatively, if she remains in the United States without him. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

In the appeal brief, counsel states that on February 15, 2003, the Social Security Administration labeled the applicant's spouse, [REDACTED] as completely disabled and since then has received social security benefits. Counsel states that [REDACTED] has the HIV virus, takes antiretroviral therapy medication, suffers from anemia, and had acute renal failure in 2003. Counsel asserts that [REDACTED] relies heavily upon her husband for care and support; she states that although [REDACTED] children are adults, they have their own lives and are not able to assist with their mother's daily needs.

In addition to other documentation, the record contains the following evidence:

- Medical records of [REDACTED], spanning from 2003 to April 12, 2006, showing she takes medication for underlying HIV disease.
- Social Security Administration records reflecting [REDACTED] became disabled on February 15, 2003, and since then has received monthly benefits.
- The waiver application, dated November 18, 2003, indicates that [REDACTED] has three adult children, one of whom lived with her and her husband.
- The letter by [REDACTED], dated November 18, 2003, conveys that she was in a car accident and has problems with her kidneys. She states that her husband bears all financial responsibilities for the household and her medication. She states that her older children moved out and that her husband supports her 14-year-old son. She states that her husband supports her emotionally.
- In his letter, [REDACTED] explains the circumstances involving his 1995 convictions.
- The June 4, 2002 letter by the vice president of [REDACTED] c. conveys that the applicant was employed there as a pipelayer since 1995.
- The document entitled "Batterer Intervention Program, Termination Summary," shows the applicant completed the Glass House program.
- The Circuit Court's disposition order shows that in 2003 the applicant was charged with felony battery in violation of FLA. STAT. § 784.041 and was acquitted by a jury.

In rendering this decision, the AAO has carefully considered all of the evidence in the record.

With regard to family separation, courts have stated that "the most important single hardship factor may be the separation of the alien from family living in the United States," and also, "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion." *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted); *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to BIA) ("We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.") (citations omitted).

The AAO finds that in considering the documentation in the record accumulatively, and in light of the holdings in *Salcido-Salcido* and *Cerrillo-Perez*, the submitted documentation, particularly [REDACTED]'s medical records and her Social Security Administration benefits, establishes extreme hardship to [REDACTED] if she were to remain in the United States without her husband.

If she joined her husband in Jamaica, [REDACTED] would experience extreme hardship because she would no longer receive treatment for HIV in the United States, compromising her condition; and she would no longer receive social security benefits. The AAO finds that the hardship factors raised here, and considered both individually and in the aggregate, establish extreme hardship to [REDACTED] if she were to join her husband to live in Jamaica.

In conclusion, the factors presented in this case do constitute extreme hardship to a qualifying family member for purposes of relief under section 212(h) of the Act, 8 U.S.C. § 212(h).

The grant or denial of the above waiver does not depend only on the issue of the meaning of "extreme hardship." Once extreme hardship is established, the Secretary then determines whether an exercise of discretion is warranted.

The favorable factors in this matter are the extreme hardship to the applicant's spouse, his steady employment, and the passage of 13 years since the applicant's criminal convictions. The unfavorable factors in this matter are the applicant's criminal convictions in 1995. The AAO notes that the applicant does not appear to have any other criminal convictions, and it points out in 2004 a jury found the applicant was not guilty of felony battery.

While the AAO cannot emphasize enough the seriousness with which it regards the applicant's criminal convictions, the severity of the applicant's crimes are at least partially diminished by the fact that 13 years have elapsed since the commission of the crimes. The AAO finds that the hardship imposed on the applicant's spouse as a result of his inadmissibility outweighs the unfavorable factors in the application. Therefore, a favorable exercise of the Secretary's discretion is warranted in this matter.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h), the burden of establishing that the application merits approval remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. The applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained. The waiver application is approved.