

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy



U.S. Citizenship  
and Immigration  
Services

PUBLIC COPY

H2

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER

Date: OCT 03 2008

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.

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 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 Cuba 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 a crime involving moral turpitude. The applicant is married to a Lawful Permanent Resident and seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), so that he may remain in the United States with his wife.

The service center director based the finding of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act on the applicant's conviction for Battery on a Law Enforcement Officer in Miami-Dade County, Florida. *See Decision of the Service Center Director denying Form I-485* dated May 26, 2006. The record reflects that the applicant was convicted of the offense of Battery of a Law Enforcement Officer on July 22, 1996. *See Order of Probation, Circuit Court for the Eleventh Judicial Circuit for Dade County, Florida* dated July 22, 1996. The director concluded that this crime involved moral turpitude. *Director's Decision on Form I-485, supra.*

The director also found 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 Inadmissibility (Form I-601) accordingly, based on the requirements of section 212(h)(1)(B) of the Act. *Director's Decision on Form I-601*, dated May 26, 2006.

On appeal, former counsel asserts that U.S. Citizenship and Immigration Services erred in failing to consider the fact that the applicant is a native and citizen of Cuba and his removal would cause his family to suffer extreme hardship. *See Notice of Appeal to the AAO* dated June 16, 2006. Counsel further asserts that the applicant's wife is dependent on the applicant for financial support and to cover her medical expenses. Counsel submitted with the appeal additional evidence to document extreme hardship to the applicant's wife, and 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 record indicates that the applicant pleaded guilty to two counts of Battery on a Law Enforcement Officer in violation of Florida Statutes § 784.07. Florida Statutes section 784.07(2) provides, in pertinent part:

(2) Whenever any person is charged with knowingly committing an assault or battery upon a law enforcement officer . . . 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:

. . .

(b) In the case of battery, from a misdemeanor of the first degree to a felony of the third degree.

Section 784.03 of the Florida Statutes provides, in pertinent part:

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, punishable as provided in s. 775.082 or s. 775.083.

(2) A person who has one prior conviction for battery, aggravated battery, or felony battery and who commits any second or subsequent battery commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. For purposes of this subsection, “conviction” means a determination of guilt that is the result of a plea or a trial, regardless of whether adjudication is withheld or a plea of nolo contendere is entered.

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 (5<sup>th</sup> Cir. 2002); *Goldeshtein v. INS*, 8 F.3d 645 (9<sup>th</sup> 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 (9<sup>th</sup> Cir. 2003), *reh’g denied* 343 F.3d 1075 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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.3<sup>rd</sup> 1022, 1028-29 (9<sup>th</sup> 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 defined the two separate methods of analyzing criminal convictions 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 (9<sup>th</sup> Cir. 2002).

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, none of the aggravating factors is present, as the crime does not necessarily involve the use or a weapon or the infliction of serious injury.

The BIA and U.S. courts have found that assault on a law enforcement officer is not a crime involving moral turpitude absent elements including malicious intent, use of a weapon or infliction of bodily injury. *Partyka v. Attorney General*, 417 F.3d 408, 411-17 (3d Cir. 2005) (no moral turpitude involved in aggravated assault on a law enforcement officer under a New Jersey statute where the person may be convicted for negligent conduct and the record in the case did not reveal otherwise); *Zaffarano v. Corsi*, 63 F.2d 757 (2d Cir. 1933) (no moral turpitude involved in assault related to resisting arrest); *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 *Matter of Danesh*, the BIA found that, unlike the cases noted above, aggravated assault against a police officer is a crime involving moral turpitude where the statute specifies, *inter alia*, that the person assaulted must sustain bodily injury and the accused must know that the person assaulted is a peace officer. *Matter of Danesh, supra* at 673. In the present case the statute does not require that the victim sustain bodily injury, and the AAO finds the facts in *Matter of Danesh* to be distinguishable from the present case. Moreover, looking beyond the statute at the record of conviction and the applicant’s plea, there is no indication of malicious intent, use of a weapon or the infliction of bodily injury. 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 he is not inadmissible under section 212(a)(2)(A) of the Act. 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.

**ORDER:** The May 26, 2006 decision of the service center director is withdrawn. The appeal is dismissed as the underlying application is moot.