

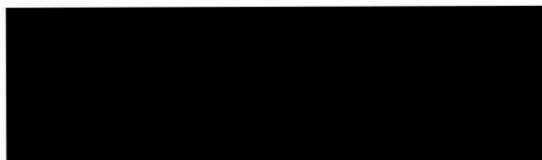
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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE:



Office: PHOENIX

Date:

OCT 31 2008

IN RE:



APPLICATION: Application for Adjust Status to Permanent Residence under section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255.

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 "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the Field Office Director, Phoenix, Arizona, and certified for review to the Administrative Appeals Office (AAO). The field office director's decision will be withdrawn and the matter returned to the field office director for further proceedings consistent with this decision.

The applicant is a native and citizen of Uruguay who is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by his U.S. citizen spouse and seeks to adjust his status to permanent residence pursuant to section 245 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1255.

The record reflects that the applicant entered the United States on March 18, 2003 as a visitor under section 217 of the Act, the Visa Waiver Program (VWP), with an authorized period of stay through June 17, 2003. The applicant remained in the United States beyond the period of authorized stay. On July 20, 2006, the applicant married his U.S. citizen spouse, [REDACTED]. The applicant's spouse filed the Form I-130 petition on March 1, 2007. The petition was approved on June 9, 2007. On July 26, 2007, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485).

On February 26, 2007, the applicant was convicted in the Superior Court of Maricopa County, Arizona, of aggravated assault in violation of sections 13-1203(A)(1), 13-1204(A)(2), 13-610, 13-701, 13-702.01, and 13-801 of the Arizona Revised Statutes. The applicant was sentenced to six months in jail and four years of probation. After his release, the applicant was taken into custody by Immigration and Customs Enforcement (ICE). On August 31, 2007, the ICE field office director in Phoenix issued an order of removal for the applicant. On January 9, 2008, the applicant was released under an order of supervision pending the adjudication of his adjustment application.

Citing *Momemi v. Chertoff*, 521 F.3d 1094 (9th Cir. 2007), the field office director determined that the applicant was ineligible to seek adjustment of status by virtue of the waiver of rights provision of the Visa Waiver Program (VWP), section 217(b) of the Act, 8 U.S.C. § 1187(b), and denied the adjustment application accordingly. *Decision of the Field Office Director*, dated June 4, 2008. The applicant has not disputed the decision.

The AAO does not concur with the decision of the field office director. Section 245(c)(4) of the Act prohibits adjustment of status for those admitted under the VWP except for those who meet the definition of immediate relative in Section 201(b). Section 217(b) of the Act provides:

Waiver of Rights.—An alien may not be provided a waiver under the program unless the alien has waived any right—

- (1) to review or appeal under this Act or an immigration officer's determination as to the admissibility of the alien at the port of entry into the United States, or
- (2) to contest, other than on the basis of an application for asylum, any action for removal of the alien.

However, the issue in the present case is not whether the applicant may contest an action to remove him, but whether is eligible for adjustment of status as provided for in Section 245(c)(4) of the Act. As stated by the

Ninth Circuit Court of Appeals in *Freeman v. Gonzalez*, 44 F.3d 1031, 1035 (9th Cir. 2006), “the interplay between the adjustment of status regime and the visa waiver program . . . explicitly allows VWP visitor to file an adjustment of status application pursuant to an immediate relative petition.” The court further states that “once a VWP visitor properly files an adjustment of status application, the VWP no-contest clause does not deprive the visitor-applicant of the procedural guarantees afforded any applicant seeking adjustment of status.” *Id.* The applicant filed for adjustment of status as the spouse of a U.S. citizen. The record reflects that he applied for adjustment prior to being ordered removed. ICE subsequently chose not to remove the applicant, instead releasing him under an order of supervision pending adjudication of his adjustment application. Under the circumstances of this case, the no-contest clause of the VWP is not relevant to the determination of the applicant’s eligibility for adjustment of status. Accordingly, the decision of the field office director is withdrawn.

Beyond the decision of the field office director, it is noted that the applicant has a conviction for aggravated assault. The AAO will address whether the applicant is inadmissible under section 212(a)(2)(A)(i)(I) for having been convicted of a crime involving moral turpitude. Section 212(a)(2)(A) of the Act states in pertinent parts:

(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.

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

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or

(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 AAO notes that the Board of Immigration Appeals (“BIA”) 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. . . .

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 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”).

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 (9th 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). 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).

The record reflects that the applicant pled guilty on January 19, 2007 in the Superior Court of the State of Arizona for the County of Maricopa to Aggravated Assault, a class three felony, in violation of sections 13-1203(A)(1), 13-1204(A)(2), 13-610, 13-701, 13-702.01, and 13-801 of the Arizona Revised Statutes. The applicant was sentenced to six months incarceration and four years of probation. ARS § 13-1203(A)(1) defines assault as “[i]ntentionally, knowingly or recklessly causing any physical injury to another person,” and ARS § 13-1204(A)(2) provides that an assault is considered an aggravated assault if “the person uses a deadly weapon or dangerous instrument.” Although simple assault is generally not considered a crime involving moral turpitude, aggravated assault, including assault with a deadly weapon, has been found to be a crime involving moral turpitude in most cases. *See Matter of Chavez-Calderon*, 20 I&N Dec. 744 (BIA 1993); *see also Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988); *Matter of Medina*, 15 I&N Dec. 611 (BIA 1976), *but see In re Fualaau*, 21 I&N Dec. 475 (BIA 1996) (conviction for assault in the third degree for “intentionally, knowingly or recklessly caus[ing] bodily injury to another person” was not a crime involving moral turpitude in the absence of the requirement of a reckless state of mind coupled with the infliction of serious bodily injury or other aggravating factors such as use of a weapon); *Matter of Perez-Contreras*, 20 I&N Dec. 615 (conviction for assault in the third degree resulting in bodily harm under Washington law was

not a crime involving moral turpitude where intentional or reckless conduct was excluded from the statutory definition of the crime.); *Matter of Short*, 20 I&N Dec. 136 (assault with intent to commit any felony was not necessarily a crime involving moral turpitude absent showing that underlying felony was a crime involving moral turpitude).

However, this case arises in the Ninth Circuit, and the Ninth Circuit Court of Appeals has held that assault with a firearm under section 245(a)(2) of the California Penal Code (C.P.C.) 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)). At the time of the *Carr* or *Komarenko* decisions, C.P.C. § 245(a)(2) prohibited “assault with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury. . . .” It is noted that assault under California law consists only of “an unlawful attempt, coupled with a present ability, to commit a violent injury,” C.P.C. § 240. Such an offense is similar to that described in ARS § 13-1203(A)(2), which defines assault as “intentionally placing another person in reasonable apprehension of imminent physical injury.” However, ARS § 13-1203(A)(1) contains the element of intent, knowledge or recklessness in causing actual physical harm to the another person. In consequence of the differences between the Arizona statutes at issue in this case and the California statutes addressed in *Carr* or *Komarenko*, the AAO finds that the holdings in *Carr* and *Komarenko* are not controlling. Because a conviction under ARS §§ 13-1203(A)(1) and 13-1204(A)(2) requires a showing of several aggravating elements (i.e. intent, knowledge or recklessness; physical injury; the use of a deadly weapon or dangerous instrument), the AAO determines that the applicant’s conviction is a crime involving moral turpitude.

Based on the evidence in the record, the applicant’s conviction does not qualify for the “petty offense” exception under section 212(a)(2)(A)(ii) of the Act. Although the applicant, who was born on September 15, 1986, was under 18 years of age at the time he committed his crime on May 28, 2004, he was released from confinement only on August 25, 2007. Furthermore, in accordance with the plea agreement and ARS §§ 13-701 and 13-702, the maximum sentence possible for the applicant’s crime was at least three years.

Therefore, based on the evidence in the record, the applicant is inadmissible under section 212(a)(2)(A)(i) of the Act. A waiver for this ground of inadmissibility is available under Section 212(h) of the Act. Accordingly, the matter is returned to the field office director for further proceedings to allow the applicant the opportunity to file a Form I-601, Application for Waiver of Ground of Inadmissibility.

ORDER: The field office director’s decision is withdrawn and the matter returned to the field office director for further proceedings consistent with this decision.