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**U.S. Department of Homeland Security**
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

**U.S. Citizenship and Immigration Services**

A2

[redacted]

DATE: JUN 0 8 2011 Office: SAN FRANCISCO FILE: [redacted]

IN RE: Applicant: [redacted]

APPLICATION: Application for Permanent Residence Pursuant to Section 1 of the Cuban Adjustment Act of November 2, 1966 (P.L. 89-732)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

**DISCUSSION:** The Field Office Director, San Francisco, California, denied the application to adjust status and certified his decision to the Administrative Appeals Office (AAO) for review. The director's decision will be affirmed. The application remains denied.

The applicant is a native and citizen of Cuba who filed this application for adjustment of status to that of a lawful permanent resident under section 1 of the Cuban Adjustment Act (CAA), Pub. Law No. 89-732 (Nov. 2, 1966). The CAA provides, in part:

> [T]he status of any alien who is a native or citizen of Cuba and who has been inspected and admitted or paroled into the United States subsequent to January 1, 1959 and has been physically present in the United States for at least one year, may be adjusted by the Attorney General, [now the Secretary of Homeland Security, (Secretary)], in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if the alien makes an application for such adjustment, and the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence.

*Pertinent Facts and Procedural History*

A review of the record shows that the applicant's status was previously adjusted to that of a lawful permanent resident on October 16, 1970. The date of adjustment was rolled back to February 17, 1968. On September 7, 1993, the applicant was convicted of battery on a peace officer with injury, under section 243(c) of the California Penal Code (CPC), a felony offense. The applicant was sentenced to two years of incarceration. Legacy Immigration and Naturalization Services (INS) initiated removal proceedings against the applicant based on this conviction. The applicant was found removable under section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(iii), as an alien convicted of an aggravated felony, namely, a crime of violence. On November 5, 1997, an immigration judge ordered the applicant removed to Cuba. The applicant's subsequent appeal to the Board of Immigration Appeals (BIA) was dismissed. Thereafter, U.S. Immigration and Customs Enforcement (USICE) released the applicant from its custody under an order of supervision.

The applicant filed the instant Form I-485, Application to Adjust Status, on March 23, 2009. The applicant was interviewed on October 27, 2010 in conjunction with his Form I-485 application. Upon review of the record, the field office director determined that the applicant's conviction for battery on a peace officer with injury is a crime involving moral turpitude and an aggravated felony. The director found that the applicant was not eligible for adjustment of status because his criminal history made him inadmissible to the United States and that he was ineligible for a waiver of inadmissibility.

The director certified the decision to the AAO for review. The director informed the applicant that he had 30 day to supplement the record with any additional statement or evidence that he wished the AAO to consider. The applicant submitted no further evidence or argument on certification. The record is considered complete.

*The Applicant's Conviction Renders Him Ineligible for Adjustment*

Section 212(a)(2)(A)(i) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i), states, in pertinent part: "any alien convicted 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 212(h)(2) of the Act provides in pertinent part:

> No waiver [of inadmissibility under section 212(a)(2)(A)(i)(I) due to a crime involving moral turpitude] shall be provided under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if . . . since the date of such admission the alien has been convicted of an aggravated felony . . . .

The applicant in this matter is inadmissible under section 212(a)(2)(A)(i)(I) of the Act due to his conviction for a crime involving moral turpitude. The term "crime involving moral turpitude" is not defined in the Act or the regulations, but has been part of the immigration laws since 1891. *Jordan v. De George*, 341 U.S. 223, 229 (1951) (noting that the term first appeared in the Act of March 3, 1891, 26 Stat. 1084). The Ninth Circuit Court of Appeals, within whose jurisdiction this case arose, has described a crime of moral turpitude as "one 'involving conduct that is inherently base, vile, or depraved, and contrary to the private and social duties man owes to his fellow men or to society in general.'" *Alvarez-Reynaga v. Holder*, 596 F.3d 534, 537 (9th Cir. 2010). A crime involving moral turpitude must involve both reprehensible conduct and some degree of scienter, be it specific intent, deliberateness, willfulness or recklessness. *Matter of Silva-Trevino*, 24 I&N Dec. 687, 689 n.1, 706 (A.G. 2008).

When determining whether a crime involves moral turpitude, we first examine the statute of conviction to see if it categorically involves moral turpitude. *Id.* at 696; *Matter of L-V-C-*, 22 I&N Dec. 594, 603 (BIA 1999); *Matter of Short*, 20 I&N Dec. 136, 137 (BIA 1989). An assault against a law enforcement officer categorically involves moral turpitude if the statute requires the injury of the officer by an offender who knows that the assaulted individual is a law enforcement officer performing an official duty. *Matter of Danesh*, 19 I & N Dec. 669, 673 (BIA 1988). *See also In Re Sanudo*, 23 I&N Dec. 968, 971-72 (BIA 2006) (citing *Danesh* in explaining that moral turpitude necessarily inheres in assault offenses against members of protected classes where the statute requires the knowing infliction of injury).

The applicant was convicted in California of battery on a peace officer with injury. California has long defined the crime of battery as "any willful and unlawful use of force or violence upon the person of another." Cal. Penal Code § 242 (West 1993). While moral turpitude may not necessarily inhere in simple battery under CPC § 242, the applicant in this case was convicted and sentenced under CPC § 243(c) which, at the time of his conviction, stated, in relevant part:

> When a battery is committed against a peace officer . . . engaged in the performance of his or her duties, whether on or off duty, including when the peace officer is in a police uniform and is concurrently performing the duties required of him or her as a peace officer while also employed in a private capacity as a part-time or casual private security

> guard or patrolman . . . and the person committing the offense knows or reasonably should know that the victim is a peace officer . . . engaged in the performance of his or her duties . . . and an injury is inflicted on that victim, the battery is punishable by imprisonment in a county jail for a period of not more than one year, or by a fine of not more than two thousand dollars ($2,000), or by imprisonment in the state prison for 16 months, or two or three years.

Cal. Penal Code § 243(c) (West 1993).

At the time of the applicant's conviction, the infliction of injury upon a peace officer with the offender's knowledge that the victim was a peace officer engaged in an official duty were essential elements of CPC § 243(c). Accordingly, the petitioner was convicted of a crime which categorically involved moral turpitude and his conviction renders him inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Act.

The applicant is ineligible for a waiver of his inadmissibility because his conviction is also an aggravated felony, specifically a crime of violence, as defined at Section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F): "a crime of violence (as defined in section 16 of Title 18, United States Code, but not including a purely political offense) for which the term of imprisonment [is] at least one year."

Title 18, section 16 of the United States Code (USC) defines the term "crime of violence" as:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

To determine whether an offense is a crime of violence we "look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to [the] petitioner's crime." *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004). Willful and unlawful use of force (battery) inflicting injury is an essential element of the statute under which the applicant was convicted. Accordingly, felony battery upon a peace officer with injury under CPC § 243(c) (1993) is a crime of violence under 18 U.S.C. §16 and an aggravated felony under section 101(a)(43)(F) of the Act. *See also Blake v. Gonzales*, 481 F.3d 152 (2d Cir. 2007) (assault and battery on a police officer under Massachusetts law is a crime of violence under 18 USC §16(a) and (b)); *Canada v. Gonzales*, 448 F.3d 560 (2d Cir. 2006) (assault on a police officer under Connecticut law is a crime of violence under 18 USC §16(b)).

The applicant's conviction of an aggravated felony renders him ineligible for a waiver of his inadmissibility due to his crime of moral turpitude. Section 212(h)(2) of the Act prohibits a waiver of inadmissibility for aliens convicted of an aggravated felony after admission as a lawful permanent resident. In this matter, the applicant was convicted of an aggravated felony after he

became a lawful permanent resident on October 16, 1970,[1] and he is consequently ineligible for a waiver of inadmissibility.

Even if the applicant were eligible for a waiver of his inadmissibility, his criminal record, which includes prior convictions for indecent exposure and possession of a weapon, would warrant against a favorable exercise of discretion to grant his adjustment application.

The applicant is also ineligible for registry under section 249 of the Act, 8 U.S.C. § 1259. Although the applicant entered the United States prior to January 1, 1972, section 249(c) of the Act requires among other things that the applicant establish his good moral character. The applicant's conviction for an aggravated felony precludes a finding of his good moral character. Section 101(f)(8) of the Act, 8 U.S.C. § 1101(f)(8).

*Conclusion*

The applicant bears the burden of proof to establish his eligibility for adjustment of status. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met his burden. Accordingly, the AAO will affirm the decision of the director, as modified by the foregoing discussion.

**ORDER:** The director's decision is affirmed, as modified. The application remains denied.

[1] Although the applicant became a lawful permanent resident through adjustment of status while in the United States, not upon arrival on an immigrant visa, adjustment of status is considered an "admission." *Matter of Rosas*, 22 I&N Dec. 616 (BIA 1999). The term "after admission," as used in the Act, includes after adjustment of status. *See Ocampo-Duran v. Ashcroft*, 254 F.3d 1133, 1134 (9th Cir. 2001).