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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

H2

[redacted]

FILE: [redacted] Office: PHILADELPHIA, PA Date: NOV 09 2010

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:

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.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Philadelphia, Pennsylvania. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as moot. The Field Office Director's decision will be withdrawn and the matter will be returned to the Field Office Director to reopen the applicant's adjustment of status application.

The applicant is a native and citizen of Egypt. He was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II) for having been convicted of a crime involving a controlled substance. The applicant is the spouse of a U.S. citizen. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h) in order to remain in the United States.

The Field Office Director concluded that the applicant had failed to establish that the bar to his admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on June 5, 2007.

On appeal, counsel states that the Field Office Director erred in denying the waiver application and that the applicant has established that his spouse will suffer extreme hardship.

Section 212(a)(2)(A)(i) of the Act states in pertinent part:

> (1) Criminal and related grounds. —
>
> (A) Conviction of certain crimes. –
>
> (i) In general. – Except as provided in clause (ii), any 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, or
>
> (II) a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

The record reflects that the Field Office Director found the applicant to be inadmissible to the United States under section 212(a)(2)(A)(i)(II) of the Act based on his conviction for possession of marijuana on February 15, 2002. The record, however, does not indicate that the applicant has been

convicted for possession of marijuana.[1] Instead, it reflects that the charges resulting from the applicant's arrest on February 15, 2002 were those of Disorderly Conduct, Engages in Fighting, and Public Drunkenness under §§ 5503(a)(1) and 5505 of the Pennsylvania Consolidated Statutes (Pa. Cons. Stat.). The applicant pled guilty to the charges and was fined. He was also fined for Carrying a Prohibited Knife under a local ordinance. Accordingly, the applicant has not been convicted of a crime involving a controlled substance and is not inadmissible under section 212(a)(2)(A)(i)(II) of the Act.

The AAO has also considered whether the applicant's criminal record establishes that he has been convicted of a crime involving moral turpitude and is, therefore, barred from admission pursuant to section 212(a)(2)(A)(i)(I) of the Act. The record indicates that the applicant, in addition to those crimes just noted, pled guilty to Disorderly Conduct, Engages in Fighting, in 1999 and a number of traffic-related violations in 1999 and 2002, and was fined. The record also indicates that the applicant was arrested on assault charges pursuant to 18 Pa. Cons. Stat. § 2701 on May 18, 2001 but has failed to provide a disposition for this arrest.

In the recently decided *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude. In evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a "realistic probability, not a theoretical possibility," that the statute would be applied to reach conduct that does not involve moral turpitude. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability exists where, at the time of the proceeding, an "actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien's own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude." *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

However, if a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, "the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude." 24 I&N Dec. at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage inquiry in which the adjudicator reviews the "record of conviction" to determine if the conviction was based on conduct involving moral turpitude. *Id.* at 698-699, 703-704, 708. The record of conviction consists of documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.* at 698, 704, 708.

If review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary or appropriate to resolve the moral turpitude question. 24 I&N Dec. at 699-704, 708-709. This "does not mean that the parties would be free to present any and all

[1] The record indicates that the applicant was arrested for Possession of Marijuana and Use/Possession of Drug Paraphernalia on August 20, 1999, but that these charges were withdrawn.

evidence bearing on an alien's conduct leading to the conviction. (citation omitted). The sole purpose of the inquiry is to ascertain the nature of the prior conviction; it is not an invitation to relitigate the conviction itself." *Id.* at 703.

The present case, however, arises within the jurisdiction of the Third Circuit Court of Appeals. The Third Circuit has adopted the traditional categorical approach to determine whether a crime constitutes a CIMT. *See Jean-Louis v. Holder*, 582 F.3d 462, 473-82 (3rd Cir. 2009) (declining to follow the "realistic probability approach" put forth by the Attorney General in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)). The categorical inquiry in the Third Circuit consists of looking "to the elements of the statutory offense . . . to ascertain that least culpable conduct necessary to sustain a conviction under the statute." *Id.* at 465-66. The "inquiry concludes when we determine whether the least culpable conduct sufficient to sustain conviction under the statute 'fits' within the requirements of a CIMT." *Id.* at 470. However, if the "statute of conviction contains disjunctive elements, some of which are sufficient for conviction of [a CIMT] and other which are not . . . [an adjudicator] examin[es] the record of conviction for the narrow purpose of determining the specific subpart under which the defendant was convicted." *Id.* at 466. This is true even where clear sectional divisions do not delineate the statutory variations. *Id.* In so doing, an adjudicator may only look at the formal record of conviction. *Id.*

With regard to whether the applicant may be inadmissible for having been convicted of a CIMT, the AAO finds no basis to consider his conviction for public drunkenness or that for the violation of a city ordinance for carrying a prohibited knife as constituting CIMTs. We now turn to a consideration of whether Disorderly Conduct, Engages in Fighting, 18 Pa. Cons. Stat. § 5503(a)(1) or Assault, 18 Pa. Cons. Stat. § 2701, the charge on which the applicant was arrested in 2001, may bar his admission to the United States under section 212(a)(2)(A)(i)(I) of the Act.

At the time of the applicant's convictions for disorderly conduct, 18 Pa. Cons. Stat. §5503(a) stated, in relevant part:

> **(a) Offense defined.**--A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:
>
> (1) engages in fighting or threatening, or in violent or tumultuous behavior;

The Board of Immigration Appeals (BIA) has found that disorderly conduct is generally not a CIMT when evil intent is not involved. *See Matter of S-*, 5 I&N Dec. 576 (BIA 1953); *Matter of P*, 2 I&N Dec. 117 (BIA 1944); *Matter of Mueller*, 11 I&N Dec. 268 (BIA 1965).

Using the test articulated in [redacted] an examination of the statute indicates that the minimal conduct for which a person may be convicted under Pennsylvania Criminal Code § 5503(a) is for recklessly creating a risk of public annoyance by engaging in fighting. The AAO does not find this behavior to reflect the evil intent that the BIA has indicated must underlie disorderly conduct to constitute a crime involving moral turpitude. Accordingly, we find that the applicant's conviction for disorderly conduct is not a conviction for a crime involving moral turpitude.

The record also indicates that on May 18, 2001, the applicant was charged with two counts of simple assault under Pa. Cons. Stat. § 2701, which stated:

> **(a) Offense defined.**--A person is guilty of assault if he:
>
> > (1) attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another;
> > (2) negligently causes bodily injury to another with a deadly weapon; or
> > (3) attempts by physical menace to put another in fear of imminent serious bodily injury.
>
> **(b) Grading.**--Simple assault is a misdemeanor of the second degree unless committed:
>
> > (1) in a fight or scuffle entered into by mutual consent, in which case it is a misdemeanor of the third degree; or
> > (2) against a child under 12 years of age by an adult 21 years of age or older, in which case it is a misdemeanor of the first degree.

As previously indicated, no dispositions for the applicant's assault charges are found in the record. The AAO notes, however, that the statute under which the applicant was charged is the same statute considered by the Third Circuit Court of Appeals in *Jean-Louis,* in which it held that a violation of Pa. Cons. Stat. § 2701 was not a CIMT. Therefore, the AAO finds that even if the applicant has been convicted of the assault charges brought against him in 2001, these convictions would not constitute convictions for crimes involving moral turpitude.

The record does not establish that the applicant has been convicted of a crime that would bar his admission under section 212(a)(2)(A)(i)(I) of the Act. As a result, he is not inadmissible to the United States and is not required to file a waiver. Accordingly, the appeal will be dismissed as the applicant's waiver application is moot.

The Field Office Director's decision will be withdrawn and the matter will be returned to the Field Office Director to reopen the applicant's adjustment of status application.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. The applicant has met that burden.

ORDER: The appeal is dismissed as the underlying waiver application is moot. The Field Office Director's decision is withdrawn and the matter returned to the Field Office Director to reopen the applicant's adjustment of status application.