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

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U.S. Citizenship
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Services

[redacted]

H6

FILE: [redacted] Office: ATHENS, GREECE Date: FEB 18 2011

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under sections 212(h) and 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(h) and 1182(a)(9)(B)(v)

ON BEHALF OF APPLICANT:

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.

Thank you,

Michael Shumway

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Athens, Greece and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the underlying waiver application is moot.

The applicant is a native and citizen of Egypt 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 been convicted of a crime involving moral turpitude and section 212(a)(9)(B)(i)(I) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) for having been unlawfully present in the United States for more than 180 days and seeking admission within three years of his last departure. The applicant is the spouse of a U.S. citizen. He seeks a waiver of inadmissibility pursuant to sections 212(h), 8 U.S.C. § 1182(h), and 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v) of the Act in order to reside in the United States.

The Field Office Director found that the applicant had failed to establish that the bar to his admission would impose extreme hardship on a qualifying relative and denied the Form I-601, Application for Waiver of Ground of Inadmissibility, accordingly. *Field Office Director's Decision*, dated March 18, 2009.

On appeal, the applicant contends that his spouse and daughter cannot return to the United States without him and that both face significant hardship in Egypt. *Applicant's Statement submitted with the Form I-290B, Notice of Appeal or Motion*, dated April 15, 2009.

In support of the application, the record contains, but is not limited to, an April 13, 2009 statement signed by the applicant and his spouse; an undated statement from the applicant's spouse; a medical statement relating to the applicant's daughter; a memorandum issued by the Consular Section, American Embassy Cairo; and documentation relating to the applicant's criminal history in the United States. The entire record was reviewed and all relevant evidence considered in arriving at a decision on the appeal.

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

> (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.

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 record establishes that, on June 28, 2007, the applicant was arrested and charged with Assault in the Third Degree under New York Penal Law (NYPL) § 120.00(1), a Class A misdemeanor, and Harassment in the Second Degree under NYPL § 240.26(1), a violation.[1] The applicant pled guilty to the assault charge on August 8, 2007 and was conditionally discharged; no disposition for the harassment charge is found in the record. A copy of an Incident Information Slip from the 104th Precinct, Ridgewood, New York, which was submitted by the applicant in response to a request for evidence from the Field Office Director, indicates that he was arrested for Harassment in connection with an incident that took place on August 28, 2007 and that the case was subsequently closed.

In *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining inadmissibility under section 212(a)(2)(i)(I) of the Act, adopting the "realistic probability" standard used by the Supreme Court in *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183 (2007). The methodology requires an adjudicator to review the criminal statute at issue to determine if there is a "realistic probability, not a theoretical possibility," that the statute could be applied to reach conduct that does not involve moral turpitude. 24 I&N Dec. 687, 698 (A.G. 2008)(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 has been 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 accurately the moral turpitude question. 24 I&N Dec. at 699-704, 708-709. However, this "does not mean that the parties would be free to present any and all evidence bearing on an alien's conduct leading to the conviction. (citation

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[1] The AAO notes the disorderly conduct charge under NYPL § 240.20 listed on the applicant's criminal history but does not find that it represents a third charge brought against the applicant. The record indicates that the applicant was arraigned only on the assault and harassment charges noted above.

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.

At the time of the applicant's conviction, NYPL § 120.00(1) provided, in pertinent part:

> A person is guilty of assault in the third degree when:
>
> 1. With intent to cause physical injury to another person, he causes such injury to such person or to a third person . . . .

Pursuant to NYPL § 70.15, the maximum sentence of imprisonment for a Class A misdemeanor is one year.

The AAO finds it unnecessary to conduct a *Silva-Trevino* analysis of the applicant's violation of NYPL § 120.00(1) as the Board of Immigration Appeals (BIA) has previously found it to be a crime involving moral turpitude. *Matter of Solon,* 24 I&N Dec. 239 (BIA 2007). Accordingly, the applicant has been convicted of at least one crime involving moral turpitude.

It is not entirely clear from the record whether the applicant, concurrent with his assault conviction, was also convicted of harassment under NYPL § 240.26(1), which at the time of his arrest stated:

> A person is guilty of harassment in the second degree if with intent to harass, annoy or alarm another person:
>
> 1. He or she strikes, shoves, kicks, or otherwise subjects such other person to physical contact, or attempts or threatens to do the same . . . .
>
> Harassment in the second degree is a violation.

The AAO does not, however, require a disposition for this charge in order to reach a determination as to the applicant's possible admissibility under the Act as we do not find a violation of NYPL § 240.26(1) to constitute a crime involving moral turpitude.

The AAO notes that NYPL § 240.26(1) punishes a form of assaultive behavior where an individual intentionally engages in or attempts or threatens to engage in behavior resulting in "physical contact" with another individual, rather than the infliction of "physical injury," defined in NYPL § 10.00(9) as "impairment of physical condition or substantial pain." We further observe that the type of behavior identified in NYPL § 240.26 appears to have been intentionally excluded in the drafting of the definition of physical injury. In *People v. Henderson*, 92 N.Y.2d 677, 680 (N.Y. 1999), the court noted that:

> [i]n defining 'physical injury' as consisting of 'substantial pain,' the Legislature intended to set a threshold of something more than a mere technical battery (*see, People v. Rojas,* 61 N.Y.2d 726, 727, 472 N.Y.S.2d 615, 460 N.E.2d 1100). Thus the Temporary Commission on Revision of the Penal Law and Criminal Code in drafting the statute noted that 'petty slaps, shoves, kicks and the like delivered out of hostility, meanness and similar motives, are not within the definition of the statute (*Matter of Philip A.*, 49 N.Y.2d 198, 200, 424 N.Y.S.2d 418, 400 N.E.2d 358, quoting

> Temporary Commission on Revision of the Penal Law and Criminal Code, Proposed Penal Law, at 330).

As further evidence that the types of physical contact identified as harassment in the second degree are not to be construed as physical injury, we observe that NYPL § 240.25, Harassment in the First Degree, does refer to physical injury, punishing individuals who repeatedly commit acts that place another individual "in reasonable fear of physical injury."

The BIA has repeatedly found that not all crimes that involve unwelcome, injurious contact with another person are crimes involving moral turpitude. In judging the nature of such offenses, the BIA has held that neither the offender's state of mind nor the resulting level of harm is, by itself, determinative of moral turpitude. *Matter of Solon, supra,* at 241. Instead, it has determined that to be morally turpitudinous, the offender's conduct must be intentional and must result in a meaningful level of harm. *Id.* In the present case, the applicant was charged with assaultive behavior resulting in physical contact with another person, rather than physical injury. Therefore, although a conviction for harassment in the second degree under NYPL § 240.26(1) requires a specific intent on the part of the offender, it cannot be found to involve actual physical injury to the victim. Relying on the reasoning in *Matter of Solon,* we conclude that a violation of NYPL § 240.26(1) is not a crime involving moral turpitude.

In that the applicant has been convicted of a single crime involving moral turpitude, we will consider whether or not he is eligible for an exception from inadmissibility under section 212(a)(2)(A)(i)(I) of the Act.

> (ii) Exception
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> Clause (i)(I) shall not apply to an alien who committed only one crime if –
>
> > (II) the maximum penalty possible for the crime of which the alien was convicted . . . 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 . . . .

The applicant's violation of NYPL § 240.26(1) is a Class A Misdemeanor, punishable by no more than one year in prison and the record indicates that the applicant was not sentenced to any time in jail for his crime. Accordingly, he is eligible for the petty offense exception noted above and is not inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Act.

The AAO also finds that the applicant is not inadmissible under section 212(a)(9)(B)(i)(I) of the Act for having accrued more than 180 days of unlawful presence in the United States.

Section 212(a)(9)(B) states in pertinent part:

> (B) Aliens Unlawfully Present.-
>
> > (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

. . . .

> (I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . and again seeks admission within 3 years of the date of such alien's departure or removal . . . .

The record includes an October 28, 2008 consular memorandum issued by the Consular Section at the U.S. Embassy in Cairo that indicates the applicant entered the United States as a B-1/B-2 nonimmigrant in April 2006 and remained until he departed voluntarily for Egypt in September 2007. The memorandum further indicates that the applicant never applied for an extension of his nonimmigrant visa or a change in his nonimmigrant status. Based on this history, the AAO finds that the applicant began accruing unlawful presence as of October 2006, when his nonimmigrant visa would have expired, until the date he departed the United States, which the record establishes as September 7, 2007. As the applicant accrued unlawful presence in excess of 180 days, but less than one year, he was barred from seeking admission to the United States for three years from the date of his September 7, 2007 departure. The three-year period of the applicant's inadmissibility has elapsed and he is no longer inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(I) of the Act. An application for admission is a continuing application and admissibility is determined on the basis of the facts and the law at the time the application is finally considered. *Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992)(citations omitted).

In that the record establishes that the applicant is not inadmissible to the United States under either section 212(a)(2)(A)(i)(I) or section 212(a)(9)(B)(i)(I) of the Act, he is not required to file a waiver. Accordingly, the appeal will be dismissed as the waiver application is moot.

ORDER: The appeal is dismissed as the underlying waiver application is moot. The matter is returned to the field officer director for further consular processing.