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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

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FILE:

Office: NEWARK, NEW JERSEY

Date:

JUN 09 2009

IN RE:

Applicant:



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 APPLICANT:

SELF-REPRESENTED

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Field Office Director, Newark, New Jersey, who certified her decision to the Administrative Appeals Office (AAO) for review. The director's decision will be affirmed. The application will be 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) of November 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.

A review of the record reveals the following facts and procedural history: The applicant first entered the United States on or about May 18, 1980 during the Mariel Boatlift. He was issued a Notice to Appear (NTA) in 1999 and was ordered excluded by an immigration judge on August 25, 1999. As of March 1, 2005, United States Immigration and Customs Enforcement (USICE) released the applicant from USICE custody and placed the applicant under an order of supervision with notification to periodically report to USICE. The applicant's pertinent criminal history includes:

- Convicted of Simple Assault on August 20, 1981 in Union City, New Jersey and sentenced to time served.
- Convicted of Simple Assault on June 21, 1983 in Union City, Hew Jersey and sentenced to two years probation.
- Pled guilty and convicted of violating 2C:12-1(b)(1) of the New Jersey Statutes, Aggravated Assault in the second degree on November 21, 1985 in Union City, New Jersey and sentenced to seven years in the New Jersey State Prison System.
- On January 19, 1996 convicted of violating: 2C:12-1(b)(2) - Aggravated Assault; 2C:12-1b(3) - Aggravated Assault; 2C:39-4d – Possession of a Weapon with Unlawful Purpose; and 2C:39-5d – Unlawful Possession of a Weapon and sentenced in the aggregate to serve five years in the New Jersey State Prison System. A subsequently filed appeal of the conviction was dismissed by the Superior Court of New Jersey Appellate Division on November 24, 1997.

In a March 24, 2009 decision, the director determined that the applicant was not eligible for adjustment of status because his criminal history made him inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) and inadmissible pursuant to section 212(a)(2)(B) of the Act. The director denied the application and certified her decision to the AAO for review. The director informed the applicant that he had 30 days to supplement the record with any evidence that he wished the AAO to consider. The applicant did not submit additional evidence for consideration.

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

(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, is inadmissible.

Section 212(a)(2)(B) of the INA states:

Multiple criminal convictions.-Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

As the director determined that the applicant's criminal history included crimes involving moral turpitude, the AAO will address the applicant's two aggravated assault convictions to determine whether these are crimes involving moral turpitude. 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, the statute under which the conviction occurred controls. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186 (2007)(citing *Taylor v. United States*, 495 U.S. 575, 599-600 (1990)); *Matter of Louissaint*, 24 I&N Dec. 754, 757 (BIA 2009); *Matter of Silva-Trevino*, 24 I&N Dec. at 696. A categorical analysis of the elements of the statute of conviction also includes an examination of the law of the convicting jurisdiction to determine if there is a "realistic probability" that the statute would be applied to conduct that does not involve moral turpitude. *Matter of Louissaint*, 24 I&N Dec. at 757 (citing *Matter of Silva-Trevino*, 24 I&N Dec. at 698). Such a realistic probability exists when there is an actual case in which the criminal statute was applied to conduct that did not involve moral turpitude. *Id.* If no realistic probability exists that the statute of conviction would be applied to conduct that does not involve moral turpitude, then convictions under the statute may categorically be treated as crimes involving moral turpitude. *Matter of Silva-Trevino*, 24 I&N Dec. at 697.

The record shows that the applicant pled guilty and was convicted in Union City, New Jersey, on November 21, 1985 of one count of aggravated assault in the second degree in violation of New Jersey Statute 2C:12-(b)(1). The applicant was sentenced to serve seven years in the New Jersey State Prison System for this offense.

At the time of the applicant's 1985 conviction for aggravated assault, New Jersey Statute § 2C:12 provided, in pertinent part:

b. Aggravated assault. A person is guilty of aggravated assault if he:

(1) Attempts to cause serious bodily injury to another, or causes such injury purposely or knowingly or under circumstances manifesting extreme

indifference to the value of human life recklessly causes such injury

The AAO notes that the statute under which the applicant was convicted is not a divisible statute and is violated by either knowingly or purposely causing such injury or under circumstances manifesting extreme indifference to the value of human life recklessly causes such injury; thus there is required some degree of scienter, be it specific intent, deliberateness, willfulness or recklessness within this statute. The AAO also notes that aggravated assault is generally held to be a crime involving moral turpitude. *Matter of Chavez-Calderon*, 20 I. & N. Dec. 744 (BIA 1993), Penal Code of New Mexico. In *Matter of Medina*, 15 I. & N. Dec. 611 (BIA 1976), the Board of Immigration Appeals (BIA) established the general principle that reckless conduct can be a crime involving moral turpitude if the person acting recklessly consciously disregarded a substantial and unjustifiable risk, and such disregard constituted a gross deviation from the standard of care, which a reasonable person would exercise in the situation. This definition of recklessness requires an *actual awareness* of the risk created by the criminal violator's action. See, *Matter of Gantus-Bobadilla*, 13 I. & N. Dec. 777 at 778 (BIA 1971); *Matter of Szegedi*, 10 I. & N. Dec. 28 (BIA 1962). In this matter, the record includes: a copy of the complaint ([REDACTED] in the Superior Court of New Jersey, Hudson County) wherein the applicant was accused of "attempt to cause serious bodily injury to [name withheld], by striking him over the head with a tire iron;" and the applicant's statement to the Hudson County Probation Department regarding the incident "I was walking down the street and this man started hitting me in the face, so I hit him in the head with a pipe." As noted above, the applicant pled guilty to the charge and was sentenced to seven years in the New Jersey State Prison. The record includes sufficient evidence, including the charging document, the applicant's statement, and guilty plea, to establish that the applicant consciously disregarded a substantial and unjustifiable risk of which he was aware. Thus, the incident constituted a crime involving moral turpitude.

At the time of the applicant's 1996 conviction for aggravated assault, New Jersey Statute § 2C:12 provided, in pertinent part:

b. Aggravated assault. A person is guilty of aggravated assault if he:

* * *

(2) Attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon; or

(3) Recklessly causes bodily injury to another with a deadly weapon;

The applicant was also convicted of possession of weapons for unlawful purposes pursuant to New Jersey Statute § 2C:39-4d and for unlawful possession of weapons pursuant to New Jersey Statute § 2C:39-5d which state in pertinent part:

2C:39-4d. Other weapons. Any person who has in his possession any weapon, except a firearm, with a purpose to use it unlawfully against the person or property of another is guilty of a crime of the third degree.

2C:39-5d. Other weapons. Any person who knowingly has in his possession any other weapon under circumstances not manifestly appropriate for such lawful uses as it may have is guilty of a crime of the fourth degree.

The documents comprising the record of conviction show that the above four counts were aggregated and resulted in a sentence of five years and that the conviction was upheld on appeal. The applicant was charged with and convicted of attempting to cause or purposely or knowingly causing bodily injury to another with a deadly weapon, a baseball bat. In addition, the applicant was charged with and convicted of possession of weapons for unlawful purposes and for knowingly possessing weapons not manifestly appropriate for lawful uses. The record includes the victim's statement wherein the victim indicates that as he stepped out of the grocery store onto the sidewalk, to confront the applicant who was yelling at him, the applicant "opened his jacket took out a baseball bat and struck [him] on the head, the arm, and the rib." The victim indicated that when the police came the applicant ran away. The victim stated that he had received six stitches in the head and bruising on his arm and back.

For the same reasons as discussed above, the applicable statute is not divisible. In this instance, the applicant was convicted, among other charges that were aggregated into the charge, of aggravated assault comprised of an attempt to cause or purposely or knowingly causing injury to another with a deadly weapon. The applicant's conviction was upheld on appeal. The record includes sufficient evidence, including the charging document, the applicant's statement, conviction, the victim's statement, and the appeal decision to establish that the incident constituted a crime involving moral turpitude.

The applicant is inadmissible pursuant to Section 212(a)(2)(A)(i)(I) of the Act. In addition, the applicant's multiple convictions of aggravated assault make him inadmissible under section 212(a)(2)(B) of the INA. There is also no waiver available to the applicant for these grounds of inadmissibility because the applicant does not have a qualifying U.S. citizen or lawful permanent resident relative. Pursuant to section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361, the burden of proof is upon the applicant to establish that he is eligible for adjustment of status. The applicant has not met his burden. Accordingly, the AAO affirms the decision of the director to deny the applicant's application to adjust status pursuant to section 1 of the CAA.

ORDER: The director's decision is affirmed. The application is denied.