

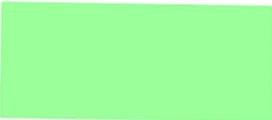
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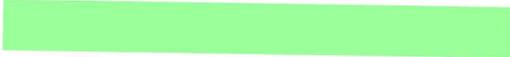
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

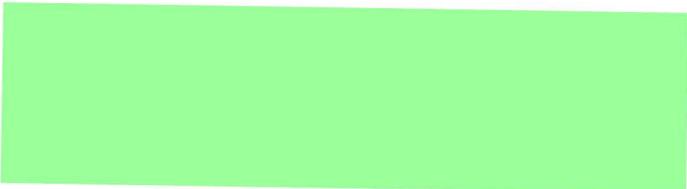


Date: FEB 06 2014 Office: VERMONT SERVICE CENTER FILE: 

IN RE: PETITIONER: 

PETITION: Petition for U Nonimmigrant Classification as a Victim of a Qualifying Crime Pursuant to Section 101(a)(15)(U) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(U)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,


for Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center (the director), denied the U nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will remain denied.

The petitioner seeks nonimmigrant classification under section 101(a)(15)(U) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(U), as an alien victim of certain qualifying criminal activity.

Applicable Law

Section 101(a)(15)(U)(i) of the Act provides for U nonimmigrant classification to alien victims of certain criminal activity who assist government officials in investigating or prosecuting such criminal activity. Section 212(d)(14) of the Act requires U.S. Citizenship and Immigration Services (USCIS) to determine whether any grounds of inadmissibility exist when adjudicating a Form I-918, Petition for U Nonimmigrant Status (Form I-918 U petition), and provides USCIS with the authority to waive certain grounds of inadmissibility as a matter of discretion.

Section 212(a) of the Act sets forth the grounds of inadmissibility to the United States, and states, in pertinent part:

(2) 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 a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . .

* * *

is inadmissible.

* * *

(6) Illegal Entrants and Immigration Violators

(A) Aliens Present Without Permission or Parole

(i) In General.-An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.

* * *

(7) Documentation requirements.-

* * *

(B) Nonimmigrants.-

(i) In general.-Any nonimmigrant who-

(I) Not in possession of a passport valid for a minimum of six months from the date of expiration . . .

* * *

is inadmissible.

Facts and Procedural History

On June 30, 1999, the petitioner, a native and citizen of El Salvador, entered the United States without inspection, admission or parole. The petitioner filed the instant Form I-918 U petition on January 9, 2012, with an accompanying Form I-192, Application for Advance Permission to Enter as Nonimmigrant (Form I-192). On February 14, 2013, the director denied the petitioner's Form I-192, finding that the petitioner was inadmissible under sections 212(a)(6)(A)(i) (present without admission or parole), 212(a)(7)(B)(i)(I) (not in possession of a valid passport), 212(a)(2)(A)(i)(I) (conviction of crimes involving moral turpitude), and 212(a)(2)(A)(i)(II) (controlled substance violation) of the Act. The director denied the petitioner's Form I-918 U petition on the same day. Although the director determined that the petitioner was statutorily eligible for U nonimmigrant status, he denied the Form I-918 U petition because the petitioner was inadmissible to the United States and his Form I-192 had been denied. The petitioner, through counsel, timely appealed the denial of the Form I-918 U petition.

On appeal, counsel contends that the director abused his discretion in denying the petitioner's Form I-192 and this case warrants a favorable exercise of discretion. He claims that the petitioner has been rehabilitated and that his U.S. citizen child would suffer extreme hardship if his Form I-192 is not approved. In support of his claims, counsel indicates that a brief or other evidence will be submitted within 30 days. As of the date of this decision, no additional statements or evidence have been submitted.

Analysis

All nonimmigrants must establish their admissibility to the United States or show that any grounds of inadmissibility have been waived. 8 C.F.R § 214.1(a)(3)(i). For aliens seeking U nonimmigrant status who are inadmissible to the United States, the regulations at 8 C.F.R §§ 212.17, 214.14(c)(2)(iv) require the

filing of a Form I-192 in conjunction with a Form I-918 U petition in order to waive any ground of inadmissibility. The regulation at 8 C.F.R. § 212.17(b)(3) states in pertinent part: “There is no appeal of a decision to deny a waiver.” As the AAO does not have jurisdiction to review whether the director properly denied the Form I-192, the AAO does not consider whether approval of the Form I-192 should have been granted. The only issue before the AAO is whether the director was correct in finding the petitioner inadmissible to the United States and, therefore, requiring an approved Form I-192 pursuant to 8 C.F.R. §§ 212.17, 214.14(c)(2)(iv).

A full review of the record supports the director’s determination that the petitioner is inadmissible under sections 212(a)(6)(A)(i) (present without admission or parole) and 212(a)(7)(B)(i)(I) (not in possession of a valid passport) of the Act. The record establishes that the petitioner entered the United States on June 30, 1999 without inspection, and he has not provided a copy of a valid passport. Accordingly, the petitioner is inadmissible under sections 212(a)(6)(A)(i) and 212(a)(7)(B)(i)(I) of the Act.

The director also found the petitioner inadmissible under section 212(a)(2)(A)(i)(I) (conviction of crimes involving moral turpitude) of the Act. The Board of Immigration Appeals (Board) has “observed that moral 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.” *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992). Additionally, “moral turpitude has been defined as an act which is per se morally reprehensible and intrinsically wrong, or malum in se, so it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude.” *Matter of Franklin*, 20 I&N Dec. 867, 868 (BIA 1994). In order to determine whether a conviction involves moral turpitude, the decision-maker must “look first to statute of conviction rather than to the specific facts of the alien’s crime.” *Matter of Silva-Trevino*, 24 I&N Dec. 687, 688 (A.G. 2008) (overruled in the Ninth Circuit Court of Appeals on other grounds).

In *Silva-Trevino*, the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. First, 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.” *Silva-Trevino*, 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. *Id.* 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 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 record shows that the petitioner was convicted of:

- assault in the fourth degree in violation of section 9A.36.041 of the Revised Code of Washington (R.C.W.)¹ by the [REDACTED] on May [REDACTED], 2000, for which he was sentenced to 365 days incarceration, suspended;
- assault in the second degree in violation of R.C.W. § 9A.36.021² by the [REDACTED] on July [REDACTED] 2003, for which he was sentenced to three months incarceration and 12 months of probation; and
- driving under the influence in violation of R.C.W § 46.61.502 by the [REDACTED] on March [REDACTED], 2005, for which he was sentenced to 365 days incarceration.

In *Matter of Sanudo*, 23 I&N Dec. 968, 971 (BIA 2006), the Board explained that “[i]t has long been recognized that not all crimes involving the injurious touching of another reflect moral depravity on the part of the offender, even though they may carry the label of assault, aggravated assault, or batter under the law

¹ Section 9A.36.041 of the Rev. Code of Wash. states, “[a] person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another.” (West 2013).

² At the time of the petitioner’s conviction, section 9A.36.021 of the Wash. Rev. Code stated,

- (1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:
 - (a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or
 - (b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or
 - (c) Assaults another with a deadly weapon; or
 - (d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or
 - (e) With intent to commit a felony, assaults another; or
 - (f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture.

(West 2001)

of the relevant jurisdiction.” Citing *Matter of B-*, 1 I&N Dec. 52, 58 (BIA, A.G. 1941) (finding that second-degree assault under Minnesota law does not qualify categorically as a crime involving moral turpitude (following *United States ex rel. Zaffarano v. Corsi*, 63 F.2d 757, 758 (2d Cir. 1933))). However, if the assault and battery offenses involve aggravating factors, such as a deadly weapon, this significantly increases culpability. *Id.* at 971. In addition, assault and battery offenses involving the intentional infliction of serious bodily injury on another involve moral turpitude because “such intentionally injurious conduct reflects a level of immorality that is greater than that associated with a simple offensive touching.” *Id.*

Because “assault” is not defined by statute, Washington courts apply the common-law definition of assault in criminal cases. *Clark v. Baines*, 84 P.3d 245, 247 n.3 (Wash. 2004). Three common law definitions of criminal assault are recognized in Washington: “(1) an attempt, with unlawful force, to inflict bodily injury upon another; (2) an unlawful touching with criminal intent; and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is capable of inflicting that harm.” *Id.* (quoting *State v. Walden*, 841 P.2d 81, 83 (Wash. Ct. App. 1992)).

Fourth degree assault under section 9A.36.041 of the Revised Code of Washington is “essentially an assault with little or no bodily harm, committed without a deadly weapon – so-called simple assault.” *State v. Hahn*, 174 Wash.2d 126, 129, 271 P.3d 892, 893 (2012). Simple assault is not considered to be a crime involving moral turpitude. See *Matter of Short*, 20 I&N Dec. 136, 139 (BIA 1989); see also *Matter of Faulaau*, 21 I&N Dec. 475, 477 (BIA 1996). Therefore, the petitioner’s conviction for assault in the fourth degree in violation of section 9A.36.041 of the Revised Code of Washington is not a conviction for a crime involving moral turpitude.

The full range of conduct prohibited by section 9A.36.021 of the Revised Code of Washington does not categorically constitute a crime involving moral turpitude because while it includes assault with a deadly weapon or intent to inflict bodily harm, a second degree assault can also occur when a (non-morally turpitudinous) felony is being committed. The record of conviction shows that the petitioner’s assault conviction included domestic violence, and based on case law and the Revised Code of Washington, domestic violence can be an aggravating factor. See section 9.94A.535(3)(h) of the Rev. Code of Wash.; see also *Matter of Sanudo*, 23 I&N Dec. at 971-72. However, even with the aggravating factor of domestic violence, it is unclear from the evidence the petitioner submitted whether he was convicted of conduct that involved moral turpitude. The record of conviction does not contain sufficient information regarding the petitioner’s conviction for assault in the second degree in violation of R.C.W. § 9A.36.021. Nevertheless, under 8 C.F.R § 214.1(a)(3)(i), the burden is on the petitioner to show that he is admissible to the United States, and counsel does not contest that the petitioner is inadmissible under section 212(a)(2)(A)(i) of the Act.

The director also found the petitioner inadmissible under section 212(a)(2)(A)(i)(II) of the Act for violating any law relating to a controlled substance. The evidence in the record does not establish that the petitioner violated any law relating to a controlled substance. Therefore, he is not inadmissible under section 212(a)(2)(A)(i)(II) of the Act. This portion of the director’s decision will be withdrawn.

On appeal, counsel does not contest the petitioner's inadmissibility but instead focuses his assertions on why the director should have favorably exercised his discretion, determined that the petitioner had been rehabilitated, and approved the petitioner's Form I-192 waiver application. The director denied the petitioner's application for a waiver of inadmissibility and we have no jurisdiction to review the denial of a Form I-192 submitted in connection with a Form I-918 U petition. 8 C.F.R. § 212.17(b)(3).

Conclusion

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Although the petitioner has met the statutory eligibility requirements for U nonimmigrant classification, he has not established that he is admissible to the United States or that his grounds of inadmissibility have been waived. He is consequently ineligible for nonimmigrant classification under section 101(a)(15)(U)(i) of the Act, pursuant to 8 C.F.R. § 214.1(a)(3)(i).

ORDER: The appeal is dismissed. The petition remains denied.