

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

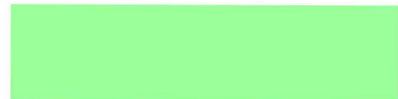


U.S. Citizenship
and Immigration
Services

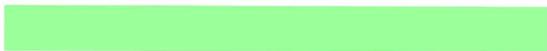
(b)(6)



Date: **FEB 20 2014** Office: VERMONT SERVICE CENTER

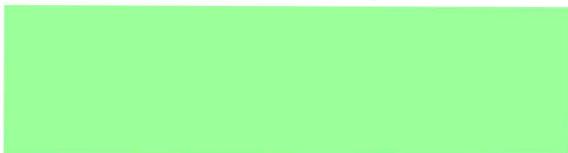


IN RE: PETITIONER:



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,

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 . . .

* * *

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.

* * *

(C) Misrepresentation.-

- (i) In General. –Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Factual and Procedural History

The petitioner is a native and citizen of Honduras who entered the United States in 1993 without admission, inspection or parole. The petitioner filed the instant Form I-918 U petition on December 16, 2011, along with an accompanying Form I-192, Application for Advance Permission to Enter as Nonimmigrant (Form I-192). The director issued a Request for Evidence (RFE) on December 18, 2012 regarding the Form I-192, noting that the petitioner was inadmissible to the United States. The petitioner, through counsel, responded with additional evidence. On April 11, 2013, the director found the petitioner's response insufficient to overcome his grounds of inadmissibility and denied the Form I-192. The director determined that the petitioner was inadmissible under sections 212(a)(2)(A)(i)(I) (conviction of crimes involving moral turpitude), 212(a)(6)(A)(i) (present without admission or parole), and 212(a)(6)(C)(i) (fraud/misrepresentation) 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 waiver of inadmissibility was denied. The petitioner, through counsel, timely appealed the denial of the Form I-918 U petition. On appeal, counsel claims that the petitioner has made some mistakes but he is rehabilitated and does not pose any risk or threat to society. He supports his four U.S. citizen children and wife, and if he returns to Honduras, they will suffer emotionally and financially.

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 section 212(a)(6)(A)(i) (present without admission or parole) of the Act.

The record shows that the petitioner was convicted of:

- giving false information to police in violation of section 609.506 of the Minnesota Statutes (M.S.A.)¹ on June 27, 2003, for which he was sentenced to 10 days incarceration and one year of probation²;
- domestic abuse – violating no contact order in violation of M.S.A. § 518B.01.22(b)³ on March 13, 2006, for which he was sentenced to one year of probation;
- aiding and abetting theft of a motor vehicle in violation of M.S.A. § 609.52.2(17)⁴ on November 9, 2006, for which he was sentenced to 364 days incarceration stayed and two years of probation; and
- domestic assault in violation of M.S.A. § 609.2242.1(1)⁵ on October 27, 2011, for which he was sentenced to 90 days incarceration.

The Board of Immigration Appeals (Board) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), 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 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.)

¹ Section 609.506 of the Minn. Stat. states, “[w]hoever with intent to obstruct justice gives the name and date of birth of another person to a peace officer, . . . when the officer makes inquiries incident to a lawful investigatory stop or lawful arrest, or inquiries incident to executing any other duty imposed by law, is guilty to a gross misdemeanor.” (West 2013).

² On June 1, 2012, the petitioner’s motion to withdraw his guilty plea and vacate the conviction was granted.

³ Section 518B.01.22(b) of the Minn. Stat. states, “[a] person who knows of the existence of a domestic abuse no contact order issued against the person and violates the order is guilty of a misdemeanor.” (West 2013).

⁴ Section 609.52.2(17) of the Minn. Stat. states whoever “takes or drives a motor vehicle without the consent of the owner or an authorized agent of the owner, knowing or having reason to know that the owner or an authorized agent of the owner did not give consent” commits theft. (West 2013).

⁵ Section 609.2242.1(1) of the Minn. Stat. states whoever “commits an act [against a family or household member] with intent to cause fear in another of immediate bodily harm or death” commits an assault. (West 2013).

Aiding and Abetting Theft of Motor Vehicle

U.S. Courts have held that the crime of theft or larceny, whether grand or petty, involves moral turpitude. *Matter of Scarpulla*, 15 I&N Dec. 139, 140 (BIA 1974). However, the Board has indicated that a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended. *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973). Section 609.52.2(17) of the Minn. Stat. does not make a distinction as to whether a conviction under this section of the statute constitutes a permanent or temporary taking. The record of conviction does not show that the petitioner's intent at the time he committed the crime was to permanently deprive the owner of the motor vehicle. Therefore, the petitioner's conviction for driving a motor vehicle without the consent of the owner is not a conviction for a crime involving moral turpitude.

Giving False Information to Police

On June 1, 2012, the petitioner's conviction for giving false information to police in violation of Minn. Stat. § 609.506 was vacated by a District Court Judge in the [REDACTED] Minnesota. In applying the definition of a conviction under section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), the Board found that there is a distinction between convictions vacated on the basis of a procedural or substantive defect in the underlying proceedings and those vacated because of post-conviction events such as rehabilitation or immigration hardships. *See Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006) (holding that a conviction vacated for failure of the trial court to advise the alien defendant of the possible immigration consequences of a guilty plea is no longer a valid conviction for immigration purposes); *Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006) (reversing *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003)). Thus, where the action is taken to address a procedural or substantive defect in the criminal proceedings, the conviction ceases to exist for immigration purposes, but where the underlying purpose is to avoid the effect of the conviction on an alien's immigration status, the court's action does not eliminate the conviction for immigration purposes. *Pickering* at 266. To establish that his conviction has been vacated for immigration purposes, the petitioner must prove that in vacating his guilty plea, the District [REDACTED] Minnesota, acted to correct a procedural or substantive defect in its proceedings. A copy of the Order Granting Petitioner's Motion to Withdraw Plea Agreement dated June 1, 2012, indicates that the petitioner was "unrepresented and was not advised by the court or the prosecutor of the risk of deportation due to a guilty plea." Therefore, the petitioner's conviction for giving false information to police is no longer a valid conviction for immigration purposes, and it cannot be determined that this is a conviction for a crime involving moral turpitude.

Domestic Abuse – Violating No Contact Order

The record further shows that the petitioner was convicted of domestic abuse – violating a no contact order, in violation of Minn. Stat. § 518B.01.22(b). A review of the statute reveals that the minimum conduct required to sustain a conviction is for the defendant, who knows of the existence of the domestic abuse no contact order, to contact the domestic abuse victim. The minimum conduct necessary does not require that any element of the offense involve base, vile, or reprehensible conduct. *See Matter of Perez-Contreras*, 20 I&N Dec. at 617-18. Moreover, the statute does not indicate that an evil intent is required to sustain a

conviction for the offense. *See Matter of P-*, 2 I&N Dec. 117, 121 (BIA 1944) (“It is in the intent that moral turpitude inheres.”). Therefore, the petitioner’s conviction for domestic abuse – violating a no contact order is not a conviction for a crime involving moral turpitude.

Domestic Assault

The record of conviction shows that on the evening of May 25, 2011, the petitioner and the mother of his children got into a physical altercation. Based on the police officer narrative, the petitioner strangled and hit the victim, pulled her hair, and threatened her with a knife. The record establishes that the petitioner was convicted of domestic assault against the mother of his child, in violation of Minn. Stat. § 609.2242.1(1).

To determine whether a particular conviction qualifies as a crime involving moral turpitude, the statutory language of the crime must be reviewed, not the underlying facts. *See Hernandez-Perez v. Holder*, 569 F.3d 345, 348 (8th Cir. 2009). Minn. Stat. § 609.2242.1(1) requires a specific intent to cause fear of immediate harm or death in a family or household member.⁶ Thus, to be found guilty of violating Minnesota Statute section 609.2242.1(a), a defendant must be shown to have acted with the intent to cause his victim fear of immediate harm or death, but the statute does not require that the defendant inflict an actual injury. Causing someone to fear harm, without the infliction of actual harm, does not involve moral turpitude. Moreover, even though the police officer narrative shows possible physical injury to the victim, a police report is not part of the petitioner’s record of conviction. *See Matter of Teixeira*, 21 I&N Dec. 316, 319 (BIA 1996); *see also Shepard v. U.S.*, 125 S.Ct. 1254, 1257 (2005) (a narrow, specific set of documents comprises the record: “[the] charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.”). Therefore, based on the record of conviction, the petitioner’s conviction for domestic assault is not a conviction for a crime involving moral turpitude. 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.

Fraud/Misrepresentation

The director found the petitioner inadmissible under section 212(a)(6)(C)(i) of the Act for fraudulently or willfully misrepresenting a material fact in an attempt to procure a U.S. immigration benefit. However, the evidence in the record does not establish that the petitioner attempted to procure a U.S. immigration benefit through fraud or willful misrepresentation. Therefore, he is not inadmissible under section 212(a)(6)(C)(i) of the Act. This portion of the director’s decision will be withdrawn.

Present Without Admission or Parole

A full review of the record supports the director’s determination that the petitioner is inadmissible under section 212(a)(6)(A)(i) of the Act. The record establishes and the petitioner admits that he entered the United States

⁶ Family or household members, as defined in section 518B.01.2(b) of the Minn. Stat., includes “persons who have a child in common regardless of whether they have been married or have lived together at any time.” (West 2013).

in 1993 without inspection. Accordingly, the petitioner is inadmissible under section 212(a)(6)(A)(i) of the Act, as an alien present without admission or parole.

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 ground of inadmissibility has 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.