identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
20 Massachusetts Avenue NW, Rm. A3000
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

H2

[redacted]

FILE: [redacted] Office: DENVER, CO Date: JAN 22 2009

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:

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.

Ellen C. Johnson

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Interim District Director, Denver, Colorado. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reconsider. The motion will be granted, the appeal will be dismissed, the previous decision of the interim district director will be withdrawn and the application declared moot. The matter will be returned to the interim district director for continued processing.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States under 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 crimes involving moral turpitude. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), so that he may reside in the United States with his U.S. citizen spouse and children.

The interim district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the Interim District Director,* dated October 23, 2003.

On motion, counsel for the applicant submits a brief, dated September 1, 2006 and referenced exhibits. The entire record was reviewed and considered in rendering a decision on the applicant's 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 . . . or an attempt or conspiracy to commit such a crime . . . is inadmissible.
>
> (ii) Exception.-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 (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) 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 (regardless of the extent to which the sentence was ultimately executed).

The record reflects that the applicant was convicted of Theft, a violation of section 10.24.080 of the City of Longmont Municipal Code[1], based on a December 3, 1999 incident and arrest. The applicant paid a fine and was sentenced to classes, an essay and community service; no prison term was imposed. In addition, the applicant was convicted of Third Degree Assault, a violation of section 18-3-204 of the Colorado Criminal Code, based on a February 2000 incident and arrest. The applicant was placed on probation for a period of two years.

Regarding the applicant's conviction for Assault in the Third Degree, the interim district director found that this offense constituted a crime involving moral turpitude. The AAO notes, however, that the Board of Immigration Appeals ("Board") 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. Assault may or may not involve moral turpitude. Simple assault is generally not considered to be a crime involving moral turpitude.
>
> 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.

---

[1] Section 10.24.080 of the City of Longmont Municipal Code states, in pertinent part:

> A. It is unlawful to knowingly obtain or exercise control over any thing or things of value of another, worth less than five hundred dollars, without authorization or by threat or deception, and:
> 1. With the intent to deprive the other person permanently of the use or benefit of the thing of value; or
> 2. Knowingly use, conceal or abandon the thing of value so as to deprive the other person permanently of its use or benefit; or
> 3. Use, conceal or abandon the thing of value intending that such use, concealment or abandonment will deprive the other person permanently of its use and benefit; or
> 4. Demand any consideration to which one is not legally entitled as a condition of restoring the thing of value to the other person.
>
> D. Except as provided in Section 1.12.020, the court shall punish every person violating this section or Section 10.24.090, if the value of the property involved is less than one hundred dollars by a fine not exceeding five hundred dollars or by imprisonment not exceeding ninety days, or both such fine and imprisonment. If the value of the property involved is one hundred dollars or more, the maximum fine and imprisonment are nine hundred ninety-nine dollars and one hundred eighty days respectively, and the fine shall be at least one hundred dollars.

(Citations omitted.) Referring to *Matter of Perez-Contreras, supra,* the Board stated in *Matter of Fualaau,* 21 I&N Dec. 475, 476 (BIA 1996) that:

> In *Perez-Contreras*, we found that assault in the third degree under the relevant state statute did not constitute a crime involving moral turpitude. The statute governing the conviction identified misconduct which simply caused bodily injury, rather than serious bodily injury. Moreover, the misconduct did not involve the use of a weapon.

In *Matter of Fualaau,* the Board examined a Hawaiian statute which stated that:

> (1) A person commits the offense of assault in the third degree if he:
>
> (a) Intentionally, knowingly, or recklessly causes bodily injury to another person; or
>
> (b) Negligently causes bodily injury to another person with a dangerous instrument.
>
> (2) Assault in the third degree is a misdemeanor

Id. at 476 (citing Haw. Rev. Stat. § 707-712 (1992)). The Board determined that the respondent in *Matter of Fualaau* was convicted under section 1(a) of the Hawaiian statute, above, and that:

> The instant assault conviction does not arise under a statute [third degree assault with a criminally reckless state of mind] which has as an element the death of another person; the use of a deadly weapon; or any other aggravating circumstance. Therefore, we find the crime at issue here is similar to a simple assault.
>
> In order for an assault of the nature at issue in this case to be deemed a crime involving moral turpitude, the element of a reckless state of mind must be coupled with an offense involving the infliction of serious bodily injury.

Id. at 478. Like the language used in the Hawaiian assault statute defined above, in the present case, the statutory language for the crime of "assault in the third degree" under CRS § 18-3-204 states:

> A person commits the crime of assault in the third degree if the person knowingly or recklessly causes bodily injury to another person **or** with criminal negligence the person causes bodily injury to another person by means of a deadly weapon. Assault in the third degree is a class 1 misdemeanor.

Thus, pursuant to the reasoning set forth in *Matter of Fualaau, supra,* if the applicant was convicted

under the first part of CRS § 18-3-204 (knowing and recklessly causing bodily injury), rather than the second part of the statute (with criminal negligence causing bodily injury by means of a deadly weapon), the applicant's crime would not be considered a crime involving moral turpitude.

The Board has held that the courts and immigration authorities may look to the record of conviction if the statute under which an alien is convicted includes some offenses which involve moral turpitude and others which do not, in order to determine the offense for which the alien was convicted. *See Matter of Short,* 20 I&N Dec. 136 (BIA 1989). *See also, Matter of Esfandiary,* 16 I&N Dec. 659 (BIA 1979). There is no indication in the instant record to indicate that the applicant caused bodily injury by means of a deadly weapon. The AAO thus finds, based on the reasoning set forth in *Matter of Fualaau, supra*, that the applicant's conviction for assault in the third degree does not constitute a crime involving moral turpitude.

With respect to the applicant's conviction for theft, a crime involving moral turpitude, the AAO concludes that said conviction falls within the petty offense exception of INA § 212(a)(2)(A)(ii)(II), as the maximum penalty possible for said crime does not exceed imprisonment for one year. As such, the applicant is not inadmissible for having been convicted of Theft.

In *Matter of Garcia-Hernandez,* 23 I&N Dec. 590 (BIA 2003), the Board held that a respondent who was convicted of more than one crime, only one of which was a crime involving moral turpitude, was eligible for the petty offense exception provided for under section 212(a)(2)(A)(ii) of the Act. The Board reasoned that:

> The "only one crime" proviso, taken in context, is subject to two principal interpretations: (1) that it is triggered . . . by the commission of any other crime, including a mere infraction; or (2) that it is triggered only by the commission of another crime involving moral turpitude . . . . [W]e construe the "only one crime" proviso as referring to . . . only one crime involving moral turpitude.

Matter of Garcia-Hernandez at 594.

The record establishes that the applicant was convicted of only one crime involving moral turpitude, namely, Theft, that the crime qualifies under the petty offense exception to inadmissibility, and that the applicant is not otherwise inadmissible. As such, the waiver application is unnecessary and the issue of whether the applicant established extreme hardship to a qualifying relative pursuant to the Act is moot and will not be addressed. Accordingly, the appeal will be dismissed, the previous decision of the interim district director is withdrawn and the instant application for a waiver is declared moot.

ORDER: The appeal is dismissed, the previous decision of the interim district director is withdrawn and the instant application for a waiver is declared moot