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U.S. Citizenship
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Services

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[REDACTED]

FILE:

[REDACTED]

Office: LOS ANGELES, CALIFORNIA Date:

NOV 30 2007

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Interim District Director for Los Angeles, California, denied the waiver application. The matter is now on appeal before the Administrative Appeals Office (AAO) in Washington, DC. The appeal will be dismissed as the applicant is not inadmissible 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), thus the relevant waiver application is moot.

The applicant [REDACTED] is a native and citizen of Western Samoa who was found 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 committing a crime of moral turpitude. The applicant sought a waiver of inadmissibility under section 212(h) of the Act, which the Interim District Director denied, finding that the applicant failed to establish extreme hardship would be imposed on a qualifying relative. *Decision of the Interim District Director*, dated September 17, 2003.

The AAO will first address the finding of inadmissibility.

Section 212(a)(2) of the Act states that:

(A)(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.

Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines "conviction" for immigration purposes as:

A formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where -

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

The record reflects that the applicant was convicted of the following charges:

- November 20, 1986 - Cal. Penal Code § 242, battery - sentenced to 12 months probation, 20 days jail.
- August 30, 1994 - Cal. Penal Code § 422, threaten crime with intent to terrorize - sentenced to 36 months probation, 45 days jail.
- January 12, 2000 - Cal. Vehicle Code § 23152(b) for DUI/Alcohol/0.08 Percent - sentenced to 3 years probation, 13 days jail or fine.
- October 20, 1992 - Cal. Vehicle Code § 14601.1(a) - driving with a suspended license - sentenced to probation and a fine.

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

[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.

The AAO finds that there is no clear-cut definition of "moral turpitude." In *Grageda*, the Ninth Circuit Court stated that in "[d]escribing moral turpitude in general terms, courts have said that it is an "act of baseness or depravity contrary to accepted moral standards." *Grageda v. INS*, 12 F.3d 919, 921 (9th Cir.1993)(quoting *Guerrero de Nodahl v. INS*, 407 F.2d 1405, 1406 (9th Cir. 1969)) See also *McNaughton v. INS*, 612 F.2d 457, 459 (9th Cir.1980)("Whether a particular crime involves moral turpitude "is determined by the statutory definition or by the nature of the crime not by the specific conduct that resulted in the conviction.") With regard to the crime of assault, courts generally have held that a conviction for simple assault does not involve moral turpitude. See, e.g., *Reyes-Morales v. Gonzales*, 435 F.3d 937, 945 n. 6 (8th Cir.2006) (observing that simple assault does not involve moral turpitude).

The applicant was convicted under Cal. Vehicle Code § 23152(b), which states that "[i]t is unlawful for any person who has 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle." Simple DUI convictions, even if repeated, are not crimes of moral turpitude. See, *Murillo-Salmeron v. INS*, 327 F.3d 898, 902 (9th Cir. 2003)(citing *In re Torres-Varella*, 23 I&N Dec. 78 (BIA2001) (en banc)).

With regard to the applicant's conviction under Cal. Vehicle Code § 14601.1(a) for driving with a suspended license, driving with a suspended license was not found to be a crime involving moral turpitude in *Benitez v. Dunevant*, 198 Ariz. 90, 7 P.3d 99 (2000).

The applicant was convicted under Cal. Penal Code § 242 for domestic battery, which is defined as "any willful and unlawful use of force or violence upon the person of another." U.S. courts and the BIA have held that not all crimes involving assault or battery are considered crimes involving moral turpitude. For example, the BIA in *In re Sanudo*, 23 I&N Dec. 968, 970-971 (BIA 2006), stated 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 battery under the law 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)). In *Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996), the BIA held that third-degree assault under the law of Hawaii, an offense of recklessly causing bodily injury to another person, is not a crime of moral turpitude. And in *Matter of Perez-Contreras*, 20 I&N Dec. 615 (BIA 1992), it concluded that third-degree assault under the law of Washington, an offense of negligently causing bodily harm accompanied by substantial pain which caused considerable suffering, is not a crime of moral turpitude.

Normally, if a crime is “inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general” it involves moral turpitude. *In re. Sanudo* at 976. (citations omitted). Whether a crime is morally turpitudinous is determined by reference to the statutory definition of the offense and to court decisions in the convicting jurisdiction. However, the actual conduct underlying the conviction cannot be considered. *Id.* at 970-971. (citations omitted).

In determining whether a crime involves moral turpitude, the Ninth Circuit indicated that it applies the categorical and modified categorical approaches. *See, e.g., Galeana-Mendoza v. Gonzales*, 465 F.3d 1054 (9th Cir. 2006); *Jose Roberto Fernandez-Ruiz v. Gonzales*, 468 F.3d 1159, 1163 (9th Cir. 2006). Under the categorical approach, it looks “only to the fact of conviction and the statutory definition of the prior offense,” and determines whether “the full range of conduct proscribed by the statute constitutes a crime of moral turpitude.” *Galeana-Mendoza* at 1058 (citations and internal quotation marks omitted). If it does not, it applies the modified categorical approach, under which it may “look beyond the language of the statute to a narrow, specified set of documents that are part of the record of conviction, including the indictment, the judgment of conviction, jury instructions, a signed guilty plea, or the transcript from the plea proceedings, to determine whether the alien was in fact convicted of an offense that qualifies as a crime involving moral turpitude. *Id.* (citations and internal quotation marks omitted). The Ninth Circuit has further clarified that that the charging document, or information, is not reliable where the plea was to an offense other than the one charged. *Martinez-Perez v. Gonzales*, 417 F.3rd 1022, 1028-29 (9th Cir. 2005). It is also important to note that the record of conviction does not include the arrest report. *See In re Teixeira*, 21 I&N Dec. 316, 319-20 (BIA 1996).

In the case *In re Sanudo*, 23 I&N Dec. 968 (BIA 2006) the BIA specifically addressed section 242 of the California Penal Code, stating that:

The California courts have construed section 242 to require an unprivileged “touching of the victim” by means of force or violence. *People v. Jackson*, 91 Cal. Rptr. 2d 805, 809 (Cal. Ct. App. 2000) (quoting *People v. Marshall*, 931 P.2d 262, 282 (Cal. 1997)). However, they have also significantly qualified the statutory language, emphasizing that “[t]he word ‘violence’ has no real significance.” *People v. Mansfield*, 245 Cal. Rptr. 800, 802 (Cal. Ct. App. 1988). Thus, the courts have held that “the force used need not be violent or severe and need not cause pain or bodily harm.” *Gunnell v. Metrocolor Labs., Inc.*, 112 Cal. Rptr. 2d 195, 206 (Cal. Ct. App. 2001) (citing *People v. Rocha*, 479 P.2d 372, 377 n.12 (Cal. 1971) (quoting 1 California Crimes 243-44 (1963))). Furthermore, although battery is a “specific intent” crime in California, the requisite intent pertains only to the commission of the “touching” that completes the offense, and not to the infliction of harm on the victim. *People v. Mansfield*, supra, at 803 (“A person need not have an intent to injure to commit a battery. He only needs to intend to commit the act.”).

Id. at 970-971.

In *In re Sanudo* the BIA found that the minimal conduct required to complete a battery under section 242 “is simply an intentional “touching” of another without consent.” It stated that a person may be convicted of battery under the statute “without using violence and without injuring or even intending to injure the victim.”

The BIA found such an offense is a simple battery “and on its face it does not implicate any aggravating dimension that would lead us to conclude that it is a crime involving moral turpitude.” *Id.* at 972.

Because the BIA in *In re Sanudo* determined that the section 242 of California Penal Code relates to a simple battery that does not involve any aggravating dimension that would bring it into the ambit of a crime of moral turpitude, and because the applicant was convicted of an offense that does not require an aggravating dimension such as a serious injury, his battery conviction does not, for this reason alone, categorically qualify as a crime of moral turpitude.

Applying the modified categorical approach, the applicant’s record of conviction demonstrates only that the applicant was convicted pursuant to section 242 of California Penal Code. Although the applicant’s arrest report is contained in the record of proceeding, the record of conviction does not include the arrest report. *See In re Teixeira*, 21 I&N Dec. 316, 319-20 (BIA 1996). In the absence of admissible evidence reflecting that the applicant’s offense caused actual or intended physical harm to the victim, the record fails to establish that the applicant’s crime involves moral turpitude.

The applicant was convicted in 1994 pursuant to Cal. Penal Code § 422¹ for making a threat with the intent to terrorize. The AAO need not determine whether this conviction constitutes a crime of moral turpitude as this remaining conviction, making a threat with the intent to terrorize, meets the requirements for a petty offense exception under section 212(a)(2)(A)(ii) of the Act.

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

(ii) Exception.-Clause (i)(I) shall not apply to an alien who committed only one crime if-

¹ The statute states:

Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison.

For the purposes of this section, "immediate family" means any spouse, whether by marriage or not, parent, child, any person related by consanguinity or affinity within the second degree, or any other person who regularly resides in the household, or who, within the prior six months, regularly resided in the household.

....

(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).

In the present case, the applicant was convicted pursuant to Cal. Penal Code § 422 for making a threat with the intent to terrorize on August 30, 1994. The record indicates that the maximum penalty for this crime was imprisonment in the county jail not to exceed 1 year, or by imprisonment in the state prison. The record indicates further that the applicant was sentenced to 45 days in jail and 36 months probation. The evidence in the record thus establishes that the applicant's Cal. Penal Code § 422 conviction falls within the petty offense exception set forth in the Act.

In *Matter of Garcia-Hernandez, supra*, 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, that the crime qualifies under the petty offense exception to inadmissibility, and that the applicant is not otherwise inadmissible. Accordingly, the AAO finds that the applicant is not inadmissible. The applicant's waiver of inadmissibility application is thus moot and the September 17, 2003, Interim District Director decision will be withdrawn.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(6)(C) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. The applicant has met that burden.

ORDER: The September 17, 2003 decision of the director is withdrawn. The appeal is dismissed as the underlying application is moot.