



U.S. Citizenship
and Immigration
Services

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FILE: 

Office: PHOENIX, AZ

Date: **AUG 05 2008**

IN RE: 

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(h) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT:



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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting District Director, Phoenix, Arizona and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the waiver application declared moot.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act for having been convicted of two crimes involving moral turpitude. The applicant has a lawful permanent resident spouse and three U.S. citizen children. He seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), so that he may remain in the United States with his family.

The record reflects that the applicant was convicted of Battery on a Person in California in 1992 and Domestic Assault and Battery in Nevada on May 24, 1995 and December 3, 1998. The AAO notes that the Citizenship and Immigration Service (CIS) records show an arrest for the applicant on July 30, 1991 in California for Spousal Battery, but these records do not reflect that a conviction resulted from this arrest.

The Acting District Director concluded that the crimes committed by the applicant in 1992 and 1998 involved moral turpitude and found that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative. He denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly, based on the requirements of section 212(h)(1)(B) of the act. *Acting District Director's Decision*, dated November 25, 2005.

On appeal, counsel asserts that the acting district director's decision is arbitrary and does not take into consideration all of the factors set forth in the Board of Immigration Appeals' decision in *Matter of Cervantes-Gonzalez, Form I-290B*, undated.

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 (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

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 BIA and U.S. courts have found that it is the “inherent nature of the crime as defined by statute and interpreted by the courts and as limited and described by the record of conviction” and not the facts and circumstances of the particular person’s case that determines whether the offense involves moral turpitude. See, e.g., *Matter of Short*, 20 I&N Dec. 136, 137 (BIA 1989); *Omagah v. Ashcroft*, 288 F.3d 254, 260 (5th Cir. 2002); *Goldeshtein v. INS*, 8 F.3d 645 (9th Cir. 1993). Neither the seriousness of the criminal offense nor the severity of the sentence imposed is determinative of whether a crime involves moral turpitude. *Matter of Serna*, 20 I&N Dec. 579, 581 (BIA 1992). Before one can be convicted of a crime of moral turpitude, the statute in question by its terms, must necessarily involve moral turpitude. *Matter of Esfandiary*, 16 I&N Dec. 659 (BIA 1979); *Matter of L-V-C*, 22 I&N Dec. 594, 603 (BIA 1999) (finding no moral turpitude where the “statutory provision . . . encompasses at least some violations that do not involve moral turpitude”). As a general rule, if a statute encompasses acts that both do and do not involve moral turpitude, deportability cannot be sustained. *Hernandez-Martinez v. Ashcroft*, 329 F.3d 1117 (9th Cir. 2003), reh’g denied 343 F.3d 1075 (9th Cir. 2003). Although evil intent signifies a crime involving moral turpitude, willfulness in the commission of the crime does not, by itself, suggest that it involves moral turpitude. *Goldeshtein v. INS*, supra. Under the statute, evil intent must be explicit or implicit given the nature of the crime. *Gonzalez-Alvarado, v. INS*, 39 F.3d 245, 246 (9th Cir. 1994).

As a general rule, simple assault or battery is not deemed to involve moral turpitude for purposes of the immigration laws, even if the intentional infliction of physical injury is an element of the crime. *Matter of Fualaau*, 21 I&N Dec. 475, 477 (BIA 1996). This general rule does not apply, however, where an assault or battery necessarily involved some aggravating dimension, such as the use of a deadly weapon or the infliction of serious injury on persons whom society views as deserving of special protection, such as children, domestic partners or peace officers. See, e.g., *Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988).

Regarding the applicant’s conviction in 1992 for Battery, the California Penal Code Section 242 states:

A battery is any willful and unlawful use of force or violence upon the person of another.

Therefore, based on current case law, the applicant’s conviction for Battery in 1992 was not an offense that is considered to be a crime involving moral turpitude.

Regarding the applicant’s convictions in 1995 and 1998 for domestic assault and battery under City of Sparks Municipal Code 9.12.020 and 9.12.020A. Counsel submitted a letter from the Municipal Court Clerk for the City of Sparks, Nevada. The letter states that due to a minimum records retention schedule the record of the applicant’s misdemeanor convictions were disposed of after the fifth anniversary of the date the citation was completed. *Letter from City of Sparks*, dated September 7, 2007. Although the AAO notes that the applicant’s convictions are for domestic violence, the record does not indicate that any aggravating factors were present in either conviction, i.e., the crimes involved the use of a weapon or the infliction of serious injury. Therefore, the applicant’s convictions do not constitute crimes involving moral turpitude and he is not inadmissible to the United States under section 212(a)(2)(A) of the Act.

The AAO notes that the applicant in this matter may still be inadmissible to the United States under section 212(a)(2)(B) of the Act if his multiple convictions resulted in jail sentences totaling five or more years. The record indicates that the applicant was sentenced to 36 months probation and 31 days in jail in connection with his 1992 conviction for battery. For his 1995 conviction, he was sentenced to 30 days in jail; in 1998 he was sentenced to three years in jail of which he served 146 days in jail and under house arrest. As the aggregate of the applicant’s sentences is less than five years, he is not inadmissible to the United States under

section 212(a)(2)(B) of the Act. Accordingly, the waiver filed pursuant to section 212(h) of the Act is moot. As the applicant is not required to file the waiver, the appeal of the denial of the waiver will be dismissed.

ORDER: The decision of the district director is withdrawn. The appeal is dismissed as the underlying application is moot.