

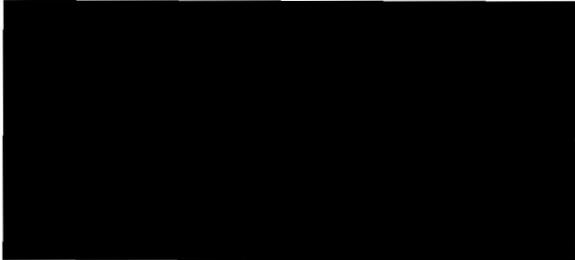
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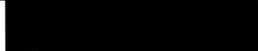
U.S. Citizenship
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Services

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FILE:



Office: ATHENS, GREECE

Date:

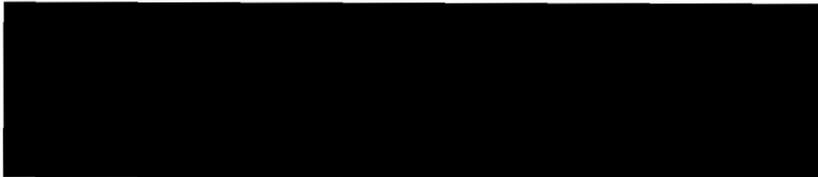
JUL 22 2008

IN RE:



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

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 that reads "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer in Charge (OIC), Athens, Greece, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the underlying application is moot.

The applicant is a native and citizen of Iran who was found to be 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 having committed a crime involving moral turpitude, and under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for having attempted to procure admission to the United States by fraud or willful misrepresentation. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), and section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to return to his U.S. citizen mother in the United States.

The record reflects that the applicant's mother filed a Petition for Alien Relative (Form I-130) on the applicant's behalf on December 8, 1994. The petition was approved on January 25, 1995. The applicant filed an Application for Immigrant Visa (Form DS-230) on January 28, 2004. The applicant filed an Application for Waiver of Grounds of Inadmissibility (Form I-601) on March 30, 2006.

The record reflects that the applicant was convicted in Superior Court of California, County of San Diego, on August 10, 1982 of violation of section 245(a) (Assault with a Deadly Weapon) of the California Penal Code (C.P.C.) and sentenced to 90 days incarceration and three years probation. The record also reflects that the applicant responded no to the question "Have you ever been charged, arrested or convicted of any offense or crime" on his Form DS-230 application.

In her decision, the OIC found the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having committed a crime involving moral turpitude and section 212(a)(6)(C) of the Act for having willfully misrepresented a material fact to obtain a visa. *Decision of OIC*, dated February 2, 2007. The OIC concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the waiver application accordingly. *Id.*

On appeal, counsel asserts that if the applicant cannot reside in the United States with his mother—to look after her and work for his brother's company—the applicant's mother will be forced to relocate to Tehran in Iran. Counsel contends that the applicant's mother will experience extreme hardship Iran because she has no source of income there, she will be unable to find a place of residence, she has no medical insurance and will not get proper medical care for her various conditions, she will be immobilized by the lack of "disability access" and the air pollution, she will be separated from her other children and her friends, she will experience the financial expenses attendant to relocation.

Section 212(a)(2)(A) of the Act states in pertinent part:

- (i) In general.— . . . [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.

The record reflects that the applicant was convicted in Superior Court of California, County of San Diego, on August 10, 1982 of violation of section 245(a) (Assault with a Deadly Weapon) of the California Penal Code and sentenced to 90 days incarceration and three years probation.

The AAO first considers whether the applicant's conviction for Assault with a Deadly Weapon in violation of C.P.C. § 245(a) is a crime involving moral turpitude that renders the applicant inadmissible pursuant to 212(a)(2)(A)(i)(I) of the Act. Section 245(a) of the C.P.C. provides:

- (1) Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars (\$10,000), or by both the fine and imprisonment.
- (2) Any person who commits an assault upon the person of another with a firearm shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not less than six months and not exceeding one year, or by both a fine not exceeding ten thousand dollars (\$10,000) and imprisonment.

The AAO notes that at the time the applicant was arrested and convicted, C.P.C. § 245(a) was not divided into separate subparagraphs for assault with a firearm and assault with a deadly weapon or instrument other than a firearm, but was a single provision preventing assault with a "deadly weapon or instrument or by any means or force likely to produce great bodily injury." Ann. Cal. Penal Code § 245(a) (Historical and Statutory Notes).

The AAO notes that the Board of Immigration Appeals ("BIA") 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.

(Citations omitted.)

The BIA has generally found that assault with a deadly weapon is a crime involving moral turpitude. See, e.g., *Matter of G-R-*, 2 I. & N. Dec. 733 (BIA 1946); see also *Matter of Danesh*, 19 I. & N. Dec. 669 (BIA

1988). However, the Ninth Circuit Court of Appeals has specifically addressed the statute at issue, and has held that violation of C.P.C. § 245(a)(2) (Assault *With* a Firearm) is not a crime involving moral turpitude. *See Carr v. INS*, 86 F.3d 949, 951 (9th Cir. 1996) (citing *Komarenko v. INS*, 35 F.3d 432, 435 (9th Cir. 1994)). Although the court in the *Carr* and *Komarenko* cases did not provide a detailed rationale for this finding, it is noted that violation of C.P.C. § 245(a)(1), which occurs when “any person . . . commits an assault upon the person of another with a firearm”, differs from violation of C.P.C. § 245(a)(2) only in the means employed to commit the assault rather than in the motive or intent of the offender. On the basis of the finding in the *Carr* and *Komarenko* cases, the AAO determines that the applicant’s conviction under C.P.C. § 245(a) is not a crime involving moral turpitude, and no waiver of inadmissibility is necessary for this conviction. Consequently, the OIC’s determination to the contrary is withdrawn.

The AAO also concludes that the applicant is not inadmissible under section 212(a)(6)(C)(i) of the Act. The BIA enumerated the elements of material misrepresentation in *Matter of S- and B-C-*, 9 I&N Dec. 436 (BIA 1960; AG 1961):

A misrepresentation made in connection with an application for visa or other documents, or with entry into the United States, is material if either:

1. the alien is excludable on the true facts, or
2. the misrepresentation tends to shut off a line of inquiry which is relevant to the alien’s eligibility and which might well resulted in proper determination that he be excluded.

9 I&N Dec. 448-449, *see also* 9 FAM 40.63 N61. A misrepresentation is generally material only if by it the alien received a benefit for which he would not otherwise have been eligible. *See Kungys v. United States*, 485 U.S. 759 (1988); *see also Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998); *Matter of Martinez-Lopez*, 10 I&N Dec. 409 (BIA 1962, AG 1964). Because the applicant’s 1982 conviction does not render him inadmissible to the United States, the AAO concludes that the applicant would have been eligible to receive an immigrant visa even if he had revealed this conviction on his visa application. Consequently, the applicant’s misrepresentation is not material and the applicant is not inadmissible under Section 212(a)(6)(C)(i) for having willfully misrepresented a material fact to obtain a visa.

As it has been established that the crime for which the applicant was convicted is not a crime involving moral turpitude, and that the applicant’s misrepresentation concerning this conviction is not material, the OIC’s finding of inadmissibility must be withdrawn. The applicant is not inadmissible, therefore, the waiver application is moot.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(2)(A) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. Accordingly, the appeal will be dismissed as the waiver application is moot.

ORDER: The appeal is dismissed.