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U.S. Department of Homeland Security  
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U.S. Citizenship and Immigration Services

**PUBLIC COPY**

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FILE:

[Redacted]

Office: PHOENIX, AZ

Date:

SEP 17 2008

IN RE:

[Redacted]

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under section 212(a)(2)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(2)(A).

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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 waiver application was denied by the Acting District Director, Phoenix, Arizona, and the matter is now before the AAO on appeal. The acting district director's decision will be withdrawn and the appeal dismissed as the waiver application is moot.

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 is the son of lawful permanent residents and has a U.S. citizen daughter. He seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with his family.

The district director concluded that the applicant failed to show that his qualifying relatives would experience extreme hardship over and above the normal disruptions involved in the removal of a family member. The application was denied accordingly. *Decision of the Acting District Director*, dated January 26, 2006.

On appeal, the applicant states that he does not believe he should be denied as specified by the acting district director and that the record is not correct with regard to his convictions. *Form I-290B*, dated February 7, 2006.

The AAO notes that the acting district director states that the applicant was convicted of domestic violence/assault on November 8, 1998 and on November 23, 2002. The AAO finds that these statements are incorrect. The record indicates that on November 15, 2002 and on December 20, 2002 the applicant was convicted of domestic violence/assault, as a class 2 misdemeanor under Arizona Revised Statutes section 13-3601/13-1203.

Section 212(a)(2)(A) of the Act state 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.

(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).

A crime involves “moral turpitude” if it 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. *Matter of Olquin*, 23 I&N Dec. 896, 896 (BIA 2006); *Matter of Torres-Varela*, 23 I&N Dec. 78, 83 (BIA 2001); see also *Grageda v. U.S. INS*, 12 F.3d 919, 921 (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 (9<sup>th</sup> Cir. 2003), *reh’g denied* 343 F.3d 1075 (9<sup>th</sup> 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 (9<sup>th</sup> Cir. 1994).

Where a statute is divisible (broad or multi-sectional), *see, e.g., Matter of P-*, 6 I&N Dec. 193 (BIA 1954); *Neely v. U.S.*, 300 F.2d 67 (9<sup>th</sup> Cir. 1962), the court looks to the “record of conviction” to determine if the crime involves moral turpitude. *Matter of Ajami*, 22 I&N Dec. 949, 950 (BIA 1999) (look to indictment, plea, verdict, and sentence; *Zaffarano v. Corsi*, 63 F.2d 67 757 (2d Cir. 1933); *U.S. v. Kiang*, 175 F.Supp.2d 942, 950 E.D. Mich. 2001). 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.” *Shepard v. U.S.*, 125 S.Ct. 1254, 1257 (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).

Courts have described two separate ways of analyzing crimes as the “categorical” and “modified categorical” approaches. The former looks solely to the structure of the statute of conviction to determine whether a person has been convicted of a designated crime; the latter looks to a limited set of documents in the record of conviction in cases where the statute of conviction was facially over inclusive. *See, e.g., Chang v. INS*, 307 F.3d 1185, 1189-92 (9<sup>th</sup> Cir. 2002). In the applicant’s case, he was convicted under Arizona Revised Statutes sections 13-1203 and 13-3601.

Arizona Revised Statutes, section 13-1203 states:

A. A person commits assault by:

- (1). Intentionally, knowingly or recklessly causing any physical injury to another person; or
- (2). Intentionally placing another person in reasonable apprehension of imminent physical injury; or
- (3). Knowingly touching another person with the intent to injure, insult or provoke such person.

B. Assault committed intentionally or knowingly pursuant to subsection A, paragraph 1 is a class 1 misdemeanor. *Assault committed recklessly pursuant to subsection A, paragraph 1 or assault pursuant to subsection A, paragraph 2 is a class 2 misdemeanor.* Assault committed pursuant to subsection A, paragraph 3 is a class 3 misdemeanor. (*emphasis added*).

Arizona Revised Statutes, section 13-3601 states, in pertinent part:

A. "Domestic violence" means ... an offense defined in section 13-1201 through 13-1204, ... if any of the following applies:

- (1). The relationship between the victim and the defendant is one of marriage or former marriage or of persons residing or having resided in the same household....

Historically, a case-by-case approach has been employed to decide whether battery (or assault and battery) offenses involve moral turpitude. It has long been recognized 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. *Matter of B-*, 1 I&N Dec. 52, 58 (BIA, A.G. 1941); *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992); *Matter of Fualaau*, 21 I&N Dec. 475, 476 (BIA 1996). However, this general rule does not apply, 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).

The AAO notes that in *Matter of Tran*, 21 I&N Dec. 291 (BIA 1996), the Board of Immigration Appeals found the abuse of a spouse or cohabitant to be a crime involving moral turpitude when it involved the willful infliction of corporal injury.<sup>1</sup> In the present matter, the Arizona statute under which the applicant was twice convicted broadly defines assault as the result of both intentional and reckless acts, and does not require the victim of the assault to have sustained injury. As the language of section 13-203 encompasses violations that may involve moral turpitude as well as those that do not, the AAO will look to the record of conviction to determine whether the applicant has been convicted of a crime involving moral turpitude.

The record of conviction for the applicant's first offense is complete and includes the court disposition, plea agreement and judgment and sentence. However, none of these documents indicate the type of assault committed by the applicant, or whether it was willful or the result of recklessness. Neither do these documents demonstrate that the applicant's victim was injured in the assault. As the record of conviction does not establish that the applicant was convicted of a domestic assault in which he willfully inflicted injury, the AAO finds that the applicant's conviction on November 15, 2002 does not constitute a conviction for a crime involving moral turpitude.

The record does not offer a similarly complete record of conviction for the applicant's December 20, 2002 conviction for assault. With regard to his second offense, the applicant has submitted only a judgment and sentence, and the AAO is, therefore, unable to determine whether the full record of conviction would demonstrate that the applicant was not convicted of a willful infliction of injury. As the burden is on the applicant to establish his admissibility to the United States, the AAO finds that, with regard to his second conviction, the applicant has failed to prove he is admissible pursuant to section 212(a)(2)(A)(i)(I) of the Act. However, based on the record before it, the AAO finds the applicant to be eligible for the petty offense exception found in section 212(a)(2)(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-

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<sup>1</sup> In reaching its conclusions, the BIA followed the lead of the Ninth Circuit Court of Appeals in *Grageda v. INS*, 12 F.3d 919 (9<sup>th</sup> Cir. 1993), where the court found that when combined with spousal abuse, an act of baseness and depravity contrary to accepted moral standards, the willfulness of the action made it a crime of moral turpitude.

(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 indicates that the maximum penalty for the applicant's December 20, 2002 domestic violence/assault conviction under Arizona Revised Statutes section 13-3601/13-1203 was six months in jail. The record indicates further that the applicant was sentenced to a 30-day term of imprisonment. The evidence in the record thus establishes that the applicant's section 13-3601/13-1203 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.

As the applicant has been found to have been convicted of only one crime involving moral turpitude he is eligible for the petty offense exception and the crime qualifies under the petty offense exception to inadmissibility.

The record also indicates that the applicant is not inadmissible under Section 212(a)(2)(B) of the Act for having multiple criminal convictions.

Section 212(a)(2)(B) of the Act state in pertinent part:

(B) Multiple criminal convictions.-Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

The aggregate sentence to confinement for the applicant's two convictions is 60 days, not more than five years. Thus, the applicant is not inadmissible under section 212(a)(2)(B) of the Act. Accordingly, the AAO finds that the record does not establish that the applicant is inadmissible to the United States.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361.

Here, the applicant has met that burden. The January 26, 2006 decision of the acting district director will be withdrawn and the appeal will be dismissed as the underlying waiver application is moot.

**ORDER:** The acting district director's decision is withdrawn and the appeal is dismissed as the waiver application is moot.