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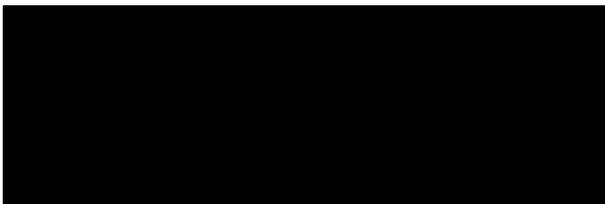
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



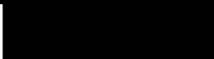
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Date: APR 21 2009

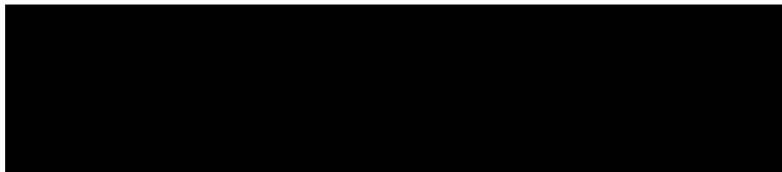
IN RE:

Applicant:



APPLICATIONS: 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:



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.

John F. Grissom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the District Director, Miami, Florida, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The District Director's decision will be withdrawn, the waiver application declared moot, and the appeal dismissed.

The record reflects that the applicant is a native and citizen of Jamaica 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 crimes involving moral turpitude. The record indicates that the applicant is the child of naturalized United States citizens and is the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his United States citizen parents.

The District Director found that the applicant failed to establish that extreme hardship would be imposed on his qualifying relatives and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the District Director*, dated December 26, 2006.

In the present application, the record indicates that the applicant entered the United States on December 20, 1986, on a B-1/B-2 nonimmigrant visa. On July 14, 1995, the applicant's father filed a Form I-130 on behalf of the applicant. On October 11, 1995, the applicant's Form I-130 was approved. On February 16, 1996, the applicant was convicted of simple battery, in violation of Florida Statutes § 784.03, and was sentenced to community service and to pay restitution. On November 5, 1997, the applicant was convicted of battery on a law enforcement officer, and was sentenced to one (1) year probation. On January 29, 1998, the applicant's probation was terminated. On February 11, 2002, the applicant filed an Application to Register Permanent Resident or Adjust Status (Form I-485). On March 15, 2004, the District Director denied the applicant's Form I-485; however, the applicant's Form I-485 was reopened on May 13, 2004. On January 26, 2006, the applicant filed a Form I-130. On December 26, 2006, the District Director denied the applicant's Form I-485 and Form I-601, finding the applicant failed to demonstrate extreme hardship to his qualifying relatives.

The record reflects that the OIC found the applicant to be inadmissible under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having committed crimes involving moral turpitude.

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.

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....

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.)

In the recently decided *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. First, in evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a “realistic probability, not a theoretical possibility,” that the statute would be applied to reach conduct that does not involve moral turpitude. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability exists where, at the time of the proceeding, an “actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien’s own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude.” *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

However, if a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, “the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude.” *Silva-Trevino*, 24 I&N Dec. at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage inquiry in which the adjudicator reviews the “record of conviction” to determine if the conviction was based on conduct involving moral turpitude. *Id.* at 698-699, 703-704, 708. The record of conviction consists of documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.* at 698, 704, 708.

If review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. *Id.* at 699-704, 708-709. However, this “does not mean that the parties would be free to present any and all evidence bearing on an alien’s conduct leading to the conviction. (citation omitted). The sole purpose of the inquiry is to ascertain the nature of the prior conviction; it is not an invitation to relitigate the conviction itself.” *Id.* at 703. Finally, in all such inquiries, the burden is on the alien to establish “clearly and beyond doubt” that he is “not inadmissible.” *Id.* at 709 (citing *Kirong v. Mukasey*, 529 F.3d 800 (8th Cir. 2008)).

The record shows that on February 16, 1996, the applicant was convicted of simple battery, in violation of Florida Statutes § 784.03, and was sentenced to community service and to pay restitution. On November 5, 1997, the applicant was convicted of battery on a law enforcement officer, and was sentenced to one (1) year probation.

Section 784.03 of the Florida Statutes provides, in pertinent part:

(1)(a) The offense of battery occurs when a person:

1. Actually and intentionally touches or strikes another person against the will of the other; or
2. Intentionally causes bodily harm to another person.

The AAO notes that the record of conviction does not state which statute the applicant was convicted under for his battery on a law enforcement officer conviction; however, the complaint/arrest affidavit states the applicant was arrested under Florida Statutes § 784.07. Florida Statutes § 784.07 is violated by “knowingly committing an assault or battery upon a law enforcement officer.”

Counsel asserts that the “only convictions the applicant has for immigration purposes are for misdemeanor battery and battery on a law enforcement officer.... Neither crimes are crimes involving moral turpitude.” *Form I-290B*, filed January 25, 2007. Under Florida Statutes § 784.03, the offense of battery occurs when a person actually or intentionally touches or strikes another person against the will of the other; or intentionally causes harm to another person. The AAO notes that the Ninth Circuit Court of Appeals held battery is “not categorically [a] crime involving moral turpitude.” *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 998 (9<sup>th</sup> Cir. 2008), citing *Galeana-Mendoza v. Gonzales*, 465 F.3d 1054, 1055 (9<sup>th</sup> Cir. 2006). Additionally, the AAO notes that the Eleventh Circuit Court of Appeals has held that aggravated battery, which includes the use of a deadly weapon or when the battery results in serious bodily injury, to be a crime involving moral turpitude; however, simple battery is not a crime involving moral turpitude. *See Sosa-Martinez v. U.S. Atty. Gen.*, 420 F.3d 1338, 1342 (11<sup>th</sup> Cir. 2005). The AAO notes that such aggravated forms of battery are punished by provisions of Florida law distinct from section 784.03. *See, e.g.*, Fla. Stat. §§ 784.041, 784.045, 784.07, 784.074-085. As the applicant was convicted under a statute the language of which encompasses only simple battery, the AAO finds that there is not a “realistic probability” that the applicant’s conviction for battery is a crime involving moral turpitude.

In regards to the applicant’s conviction for battery on a law enforcement officer, counsel relies on *Partyka v. Attorney General of the United States*, 417 F.3d 408 (3d Cir. 2005), where the Third Circuit Court of Appeals (Third Circuit) held that an assault on a law enforcement officer with bodily injury was not a crime involving moral turpitude. The AAO notes that like the alien in *Partyka*, the applicant was convicted of battery on a law enforcement officer; however, the criminal court disposition does not specify under which section of the battery statute the applicant was convicted. In *Partyka*, the Third Circuit held that “[a]lthough recognizing that assaulting a law enforcement officer during the course of his duties is more serious than assaulting a private person...there is no moral turpitude inherent in ‘putting forth the mildest form of intentional resistance against an officer attempting to...apprehend or detain the accused or another.’” *Id.* at 414-15, citing *Zaffarano v. Corsi*, 63 F.2d 757, 758 (2d Cir. 1933).

The AAO notes, however, that assault on a law enforcement officer has been found to be a crime involving moral turpitude where the perpetrator knows the victim to be a law enforcement officer performing his

official duty and the assault results in bodily injury to the officer. *See Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988) (distinguishing cases in which knowledge of the police officer's status was not an element of the crime and where bodily injury or other aggravating factors were not present to elevate offense beyond "simple" assault); *see also Matter of O-*, 4 I&N Dec. 301 (BIA 1951) (German law involving an assault on a police officer was not a crime involving moral turpitude because knowledge that the person assaulted was a police officer engage in the performance of his duties was not an element of the crime); *Matter of B-*, 5 I&N Dec. 538 (BIA 1953) (*as modified by Matter of Danesh, supra*) (assault on prison guard not a crime involving moral turpitude because offense charged appeared to be only "simple" assault and no bodily injured was alleged); *Ciambelli ex rel. Maranci v. Johnson*, 12 F.2d 465 (D. Mass 1926) (assault on an officer was not a crime involving moral turpitude in spite of fact that defendant was armed with a razor because the razor was not used in the assault).

Based solely on the statutory language, it appears that Florida Statutes § 784.07 hypothetically encompasses conduct that involves moral turpitude and conduct that does not. The Florida Supreme Court has ruled that knowledge of the officer's status is an element of the crime of battery upon a law enforcement officer under Florida Statutes § 784.07, an aggravating factor that precludes a finding that such an offense is merely a "simple" battery based solely on the language of the statute itself. *See Street v. State*, 383 So.2d 900, 901 (Fla. 1980). In accordance with *Silva-Trevino*, the AAO must determine if an actual case exists in which these criminal statutes were applied to conduct that did not involve moral turpitude. In *Hendricks v. State*, 444 So.2d 542, 542-43 (Fla. 1st Dist. App. 1999), the court noted that the appellant had been charged and convicted of battery in the form of touching or striking a law enforcement officer, but not for intentionally causing bodily harm to an officer. Therefore, the AAO cannot find that the offense described in Florida Statutes § 784.07 is categorically a crime involving moral turpitude. The AAO notes that even though the record of conviction establishes that the victim was a uniformed law enforcement officer, the record does not establish that the law enforcement officer was injured.<sup>1</sup> The applicant's conviction for battery on a law enforcement officer is not therefore a crime involving moral turpitude.

The AAO finds that the District Director erred in concluding that the applicant is inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having committed crimes involving moral turpitude. Therefore, the AAO finds that the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act, for committing crimes involving moral turpitude.<sup>2</sup>

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<sup>1</sup> "...def. pushed ofc. Vu aside and tried to leave." *See Complaint/Arrest Affidavit*, dated August 10, 1997.

<sup>2</sup> The AAO conducts the final administrative review and enters the ultimate decision for USCIS on all immigration matters that fall within its jurisdiction. The AAO reviews each case *de novo* as to all questions of law, fact, discretion, or any other issue that may arise in an appeal that falls under its jurisdiction. Because the AAO engages in *de novo* review, the AAO may deny an application or petition that fails to comply with the technical requirements of the law, without remand, even if the district or service center director does not identify all of the grounds for denial in the initial decision. The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The AAO finds that since the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), he is not required to file a Form I-601. As such, the issue of whether the applicant established extreme hardship to a qualifying relative pursuant to section 212(h) of the Act is moot and need not be addressed.

**ORDER:** The District Director's decision is withdrawn, the waiver application declared moot and the appeal dismissed. The matter is returned to the District Director for continued processing of the applicant's adjustment application.