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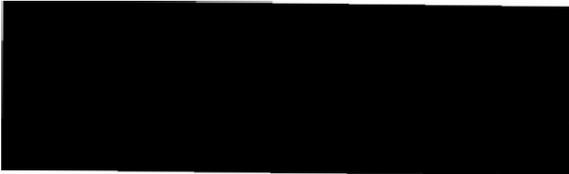
Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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FILE: [REDACTED] Office: CHICAGO, ILLINOIS

Date: APR 21 2009

IN RE: [REDACTED]

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.

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting District Director, Chicago, Illinois. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed, the previous decision of the acting district director will be withdrawn, and the application declared moot. The matter will be returned to the district director for continued processing.

The record reflects that the applicant is a native and citizen of Poland who was found to be inadmissible to the United States pursuant to section 212(a)(2)(D)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(D)(ii), for having been convicted of solicitation. 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 with his legal permanent resident mother and father in the United States.

The acting district director found that the applicant failed to establish extreme hardship to a qualifying relative and denied the application accordingly. *Decision of the District Director*, dated December 12, 2006. After the applicant filed a timely appeal with the AAO, on January 8, 2009, the AAO found that the applicant was not inadmissible under section 212(a)(2)(D)(ii) of the Act and requested additional evidence from the applicant addressing his battery charge which had been pending before a criminal court at the time of the acting district director's decision. *Request for Evidence*, dated January 8, 2009. On February 6, 2009, counsel responded to the AAO's request and submitted certified copies of court dispositions relating to the applicant's convictions.

The record contains, *inter alia*: conviction documents, including the court documents counsel submitted in response to the AAO's request for additional evidence; letters from the applicant's mother and father; and an approved Immigrant Petition for Alien Worker (Form I-140). The entire record was reviewed and considered in rendering this decision on the appeal.

As stated in the AAO's January 8, 2009 request for evidence, although the applicant was twice convicted of soliciting another for the purpose of prostitution, the crime of solicitation under Illinois law is not encompassed within the meaning of section 212(a)(2)(D)(ii) of the Act. *See Request for Evidence, supra*. The applicant's conviction under 720 ILCS 5/11-15(a)(1) does not involve the procurement or attempted procurement or importation of prostitutes or persons for the purpose of prostitution; nor did his crime involve the receipt of proceeds of prostitution. Consequently, the applicant's solicitation convictions do not render him inadmissible under section 212(a)(2)(D)(ii) of the Act.

However, the record shows that on March 10, 2006, the applicant was also convicted of battery in violation of 20 ILCS § 5/12-3, which states:

Battery. (a) A person commits battery if he intentionally or knowingly without legal justification and by any means . . . (2) makes physical contact of an insulting or provoking nature with an individual.

The record shows that the applicant “placed and grasped his hand upon the right buttock of” a minor. *Misdemeanor Complaint*, dated November 1, 2005.

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.

(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).

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. However, the AAO notes that the statute under which the applicant was convicted is not a divisible statute. 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, as a general rule, simple assault or battery is not deemed to involve moral turpitude for purposes of immigration law, even if the intentional infliction of physical injury is an element of the crime. *Matter of Fualaau*, 21 I&N Dec. 475, 476-77 (BIA 1996); *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992); *Matter of B-*, 1 I&N Dec. 52, 58 (A.G. 1941). 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 finds that even assuming battery under 20 ILCS § 5/12-3 is a crime involving moral turpitude, the applicant’s conviction falls within the petty offense exception set forth in the Act. The maximum penalty for the applicant’s conviction is less than one year imprisonment. *See* 20 ILCS § 5/12-3(b) (classifying battery as a Class A misdemeanor); 730 ILCS 5/5-1-14 (defining

“misdemeanor” as any offense having less than one year imprisonment). Counsel’s response to the AAO’s Request for Evidence indicates that the applicant was sentenced to five days of community service and one year of court supervision. The evidence in the record thus establishes that the applicant’s battery conviction falls within the petty offense exception set forth in the Act.

That the applicant has other convictions does not alter the analysis. In *Matter of Garcia-Hernandez*, 23 I&N Dec. 590 (BIA 2003), 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, 23 I&N Dec. at 594.

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 solicitation convictions was two days imprisonment, 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, 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 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 underlying waiver application is moot. The district director shall continue processing the adjustment application (Form I-485) accordingly.