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

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FILE:

Office: JACKSONVILLE, FLORIDA

Date: AUG 24 2009

IN RE:

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under § 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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer in Charge, Jacksonville, Florida, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed, and the application declared moot.

The record reflects that the applicant is a native and citizen of Germany who entered the United States on a NATO visa in 2001. The applicant 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 been convicted of a crime involving moral turpitude. The record indicates that the applicant is married to a U.S. citizen and that she is the beneficiary of an approved petition for alien relative. The applicant seeks a waiver of inadmissibility in order to reside with her husband and child in the United States.

The Officer in Charge denied the application finding that the applicant failed to establish extreme hardship to her U.S. citizen spouse. On appeal, the applicant contends through counsel that her conviction did not involve moral turpitude. In the alternative, the applicant claims that she qualifies for an exception under section 212(a)(2)(A)(ii)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(ii)(II), and that her U.S. citizen child would suffer severe hardship if the waiver is denied. Although counsel indicated that a brief and/or additional evidence would be sent to the AAO within 30 days of filing the appeal, as of this date, the record contains no additional evidence. Therefore, the record is considered complete, and the AAO shall render a decision on appeal based on the existing record.

Section 212(a)(2)(A) of the Act renders inadmissible “any alien convicted of . . . a crime involving moral turpitude.” 8 U.S.C. § 1182(a)(2)(A)(i)(I). This ground shall not apply if the alien committed only one crime and:

the maximum penalty possible for the crime of which the alien was convicted . . . 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).

8 U.S.C. § 1182(a)(2)(A)(ii)(II).

The Board of Immigration Appeals (Board) has “observed that moral 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.” *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992) (holding that a Washington conviction for assault in the third degree is not a crime involving moral turpitude where the statute required no intent nor any conscious disregard of a substantial and unjustifiable risk). The crimes of assault and battery may or may not involve moral turpitude, depending on the elements of the crime. *See id.* For instance, the Board considers “whether the act is accompanied by a vicious motive or corrupt mind.” *Id.* at 618. Additionally, the Board considers aggravating circumstances such the use of a deadly weapon and whether the crime resulted in serious bodily injury. *See Matter of Fualaau*, 21 I&N Dec. 475, 476 (BIA 1996) (en banc) (“In order for an assault . . . to be deemed a crime involving moral turpitude, the element of a reckless state of mind must be coupled with an offense involving the infliction of serious bodily injury.”). The crimes of

simple assault and battery involving the intent to merely cause physical injury, generally do not involve moral turpitude. *See, e.g., Matter of P-*, 3 I&N Dec. 5, 7 (BIA 1947) (A.G. 1947). On the other hand, assault with intent to do great bodily harm involves moral turpitude. *Id.* at 9 (holding that Michigan conviction for assault with intent to do great bodily harm involved moral turpitude).

The record reflects that the applicant was convicted of misdemeanor aggravated battery in violation of section 30-3-5(B) of New Mexico Statutes Annotated, on January 6, 2005. The court sentenced the applicant to 364 days of imprisonment, which was suspended, and to 364 days of unsupervised probation.

Section 30-3-5 of New Mexico Statutes Annotated provides:

- A. Aggravated battery consists of the unlawful touching or application of force to the person of another with intent to injure that person or another.
- B. Whoever commits aggravated battery, inflicting an injury to the person which is not likely to cause death or great bodily harm, but does cause painful temporary disfigurement or temporary loss or impairment of the functions of any member or organ of the body, is guilty of a misdemeanor.
- C. Whoever commits aggravated battery inflicting great bodily harm or does so with a deadly weapon or does so in any manner whereby great bodily harm or death can be inflicted is guilty of a third degree felony.

Here, the applicant was convicted of intentional battery causing temporary injury under subsection B of the New Mexico aggravated battery provision. The applicant was not convicted of inflicting great bodily harm or use of a deadly weapon, under subsection C of the state statute. Like the Board in *Matter of Fualaau*, the AAO concludes that the applicant's offense is "fundamentally different from those that have been determined to involve moral turpitude" because the statute does not require "the death of another person, the use of a deadly weapon, or any other aggravating circumstance." 21 I&N Dec. at 478 (internal quotation marks and citations omitted); *cf. Sosa-Martinez v. Attorney General*, 420 F.3d 1338, 1342 (11th Cir. 2005) (concluding "that any intentional battery that includes, as an element of the offense either (1) that it caused great bodily harm, permanent disability, or permanent disfigurement, or (2) involved the use of a deadly weapon, constitutes a crime of moral turpitude"). Rather, the crime at issue is similar to the simple assault at issue in *Matter of Fualaau*, 21 I&N Dec. at 478 (holding that Hawaiian conviction for assault in the third degree was not a crime involving moral turpitude).

Accordingly, the applicant's conviction for aggravated battery does not constitute a crime involving moral turpitude, and the applicant is not inadmissible. The applicant does not therefore require the instant waiver. Accordingly, the appeal will be dismissed, and the application is declared moot. Given this determination, discussion of the applicant's alternative contentions would serve no purpose.

ORDER: The appeal is dismissed.