

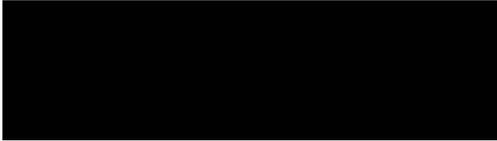
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U.S. Department of Homeland Security
Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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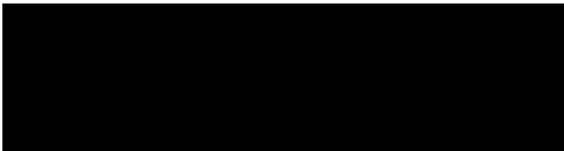
FILE: [REDACTED] Office: BALTIMORE, MARYLAND

Date: SEP 23 2009

IN RE: [REDACTED]

APPLICATION: 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.

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).

A handwritten signature in black ink, appearing to read "John F. Grissom".

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Baltimore, Maryland, and is now before the Administrative Appeals Office (AAO) on appeal. The District Director's decision will be withdrawn, and the matter will be remanded to the District Director for further proceedings in accordance with this determination.

The record reflects that the applicant is a 40-year-old native and citizen of El Salvador 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 been convicted of a crime involving moral turpitude. The applicant is married to a U.S. citizen and is the beneficiary of an approved petition for alien relative. The applicant seeks a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside with his wife and children in the United States.

The District Director denied the application finding that the applicant failed to establish extreme hardship to his U.S. citizen spouse. On appeal, the applicant contends through counsel that his conviction did not involve moral turpitude. In the alternative, the applicant claims that he qualifies for an waiver under section 212(h)(1)(A)(i) of the Act, 8 U.S.C. § 1182(h)(1)(A)(i), because the activities for which he is inadmissible occurred more than 15 years ago.

The AAO reviews these proceedings de novo. *See* 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."). The entire record was considered in rendering a decision on the appeal.

The record shows that the applicant entered the United States without being inspected and admitted in or around September 15, 1988. *See Form I-485, Application to Register Permanent Resident or Adjust Status.* The applicant filed a request for asylum in or around October 1, 1993. *See Form I-589, Request for Asylum in the United States.* The applicant's spouse filed a Petition for Alien Relative (Form I-130) on May 31, 2001, and USCIS approved the petition on February 13, 2004. *See Form I-130 Approval Notice.* The applicant filed for adjustment of status on February 28, 2004. *See Form I-485.* On May 19, 2006, the District Director denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) and the application for adjustment of status. The applicant was referred for removal proceedings on May 3, 2007, because he failed to appear for a scheduled asylum interview. *See Notice to Appear; Arlington Asylum Office Letter, dated May 3, 2007.*

The record reflects that the applicant was charged with felony assault with intent to maim [REDACTED] on March 31, 1991. On September 13, 1991, the Arlington County Circuit Court found the applicant guilty of misdemeanor assault, and sentenced him to 12 months in county jail (9 months suspended), 2 years of probation; and 40 hours of community service. *See Order of the Arlington County Circuit Court (CR91-890), dated Sept. 25, 1991; see also National Crime Information Center (NCIC) Database.* A March 27, 1991 charge for misdemeanor attempt to obstruct police [REDACTED], and an April 6, 1991 charge for misdemeanor assault of police

officer (██████████) were dismissed.¹ See *NCIC Database*. In April, 1994, the applicant was charged with failure to appear (██████████) for violating the terms and conditions of his probation, and the applicant was convicted of misdemeanor failure to appear. See *Order of the Arlington County Circuit Court (CR91-890)*, dated Apr. 20, 1994 (ordering the nine months of the sentence previously suspended into execution); *NCIC Database*. Finally, the applicant was charged with felony hit and run on October 30, 1991 (██████████). On June 7, 1994, the applicant was convicted of misdemeanor hit and run. *NCIC Database*.

Both of the Circuit Court Orders in the record reference a case styled “Commonwealth of Virginia vs. Luis A. Rodriguez, CR91-889.” See *Orders of the Arlington County Circuit Court (CR91-890)*, dated Sept. 25, 1991 and Apr. 20, 1994. In both Orders, the court ordered the sentences for assault and for failure to appear to “run concurrently with the sentence imposed by this Court on this day in . . . CR-91-889.” *Id.* However, the record does not include any documentation relating to case CR-91-889. Upon remand to the District Director, the applicant must submit copies of the documents comprising the record of conviction in case CR-91-889 so that a determination may be made as to whether this conviction affects his admissibility.

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). A discretionary waiver of this provision is available if:

(1)(A) in the case of any immigrant it is established to the satisfaction of the Attorney General that--

(i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien’s application for a visa, admission, or adjustment of status,

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien’s denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien; . . .

¹ The applicant contends that he was convicted of attempt to obstruct police (██████████) and that the assault charges (██████████) and (██████████) were dismissed. See *Respondent’s Criminal History Chart*. The record and the court’s order in case CR91-890 do not support this contention. See *Order of the Arlington County Circuit Court (CR91-890)*, dated Sept. 25, 1991 (referencing the applicant’s guilty plea to the charge of assault and battery); see also *NCIC Database*.

8 U.S.C. § 1182(h).

The AAO concludes, for the reasons set forth below, that moral turpitude is not inherent in the applicant's 1991 conviction for misdemeanor assault or his 1994 conviction for misdemeanor hit and run. 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). Additionally, "[m]oral turpitude has been defined as an act which is per se morally reprehensible and intrinsically wrong, or malum in se, so it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude." *Matter of Franklin*, 20 I&N Dec. 867, 868 (BIA 1994). In order to determine whether a conviction involves moral turpitude, the decision-maker must "look first to statute of conviction rather than to the specific facts of the alien's crime." *Matter of Silva-Trevino*, 24 I&N Dec. 687, 688 (A.G. 2008).

Here, the record shows that the applicant was convicted of misdemeanor assault in 1991. *See Court Order, supra*. The relevant section of the Virginia Code provided:

§ 18.2-57. Assault and battery.

Any person who shall commit a simple assault or assault and battery shall be guilty of a Class 1 misdemeanor.

Va. Code Ann. § 18.2-57 (1991).

Crimes of assault and battery may or may not involve moral turpitude; an assessment of both the mental state and level of harm to complete the offense is required. *See, e.g., Matter of Solon*, 24 I&N Dec. 239 (BIA 2007). Intentional conduct resulting in a meaningful level of harm may be found to be morally turpitudinous, and aggravating factors are to be taken into consideration. *See id.* at 242. However, "[o]ffenses characterized as 'simple assaults' are generally not considered to be crimes involving moral turpitude . . . because they require general intent only and may be committed without the evil intent, depraved or vicious motive, or corrupt mind associated with moral turpitude." *Id.* at 241 (internal citations omitted); *see also Perez-Contreras*, 20 I&N Dec. at 617-18 (holding that Washington conviction for assault in the third degree is not a crime involving moral turpitude where statute required no intent nor any conscious disregard of a substantial and unjustifiable risk); *Matter of Fualaau*, 21 I&N Dec. 475, 478 (BIA 1996) (en banc) (holding that Hawaiian conviction for assault in the third degree was not a crime involving moral turpitude where the offense is similar to simple assault).

The Board has held that a conviction for assault and battery against a family or household member in violation of section 18.2-57.2 of the Virginia Code is not categorically a crime involving moral turpitude. *See Matter of Sejas*, 24 I&N Dec. 236 (BIA 2007). The Board found:

A conviction for assault and battery in Virginia does not require the actual infliction of physical injury and may include any touching, however slight. *See Adams v. Commonwealth*, 534 S.E.2d 347, 351 (Va. App. 2000) (In Virginia, it is abundantly clear that a perpetrator need not inflict a physical injury to commit a battery.). While the Virginia law of assault and battery requires an intent or imputed intent to cause injury, the intended injury may be to the feelings or mind, as well as to the corporeal person. *Wood v. Commonwealth*, 140 S.E. 114, 115 (Va. 1927) (quoting 2 Am. & Eng. Ency. L. 953, 955); *see also Lynch v. Commonwealth*, 109 S.E. 427 (Va. 1921). Although some decisions have referred to an intent to do bodily harm, that term has been broadly construed to include offensive touching. *See, e.g., Gilbert v. Commonwealth*, 608 S.E.2d 509, 511 (Va. App. 2005) (stating that the requisite harm under the Virginia assault and battery statutes can include the slightest touching ... in a rude, insolent, or angry manner (quoting *Crosswhite v. Barnes*, 124 S.E. 242, 244 (Va. 1924))).

Id. at 238 (internal quotation marks omitted).

Here, the applicant was convicted of misdemeanor assault and battery under Virginia law, which does not require the actual infliction of physical injury. *Id.* The applicant was not convicted of assault with aggravating circumstances, such as assault with intent to maim, under Va. Code Ann. § 18.2-51 (1991), or assault and battery against a law enforcement officer under Va. Code Ann. § 18.2-57.1 (1991). 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. Yousefi v. INS*, 260 F.3d 318, 326 (4th Cir. 2001) (per curiam) (stating that District of Columbia conviction for assault with a dangerous weapon is a crime involving moral turpitude); *Matter of Solon*, 24 I&N Dec. at 243 (holding that New York offense of assault in the third degree, which requires both specific intent and physical injury, is a crime involving moral turpitude). Accordingly, the AAO finds that a Virginia conviction for misdemeanor assault and battery is not a crime involving moral turpitude because "none of the circumstances in which there is a realistic probability of conviction involves moral turpitude." *Silva-Trevino*, 24 I&N Dec. at 699 n.2.

Similarly, the applicant's conviction for misdemeanor hit and run does not involve moral turpitude. The relevant section of the Virginia Code in 1994 provided:

§ 46.2-894 Duty of driver to stop, etc., in event of accident involving injury or death or damage to attended property.

The driver of any vehicle involved in an accident in which a person is killed or injured or in which an attended vehicle or other attended property is damaged shall immediately stop as close to the scene of the accident as possible without obstructing

traffic and report his name, address, driver's license number, and vehicle registration number forthwith to the State Police or local law-enforcement agency, to the person struck and injured if such person appears to be capable of understanding and retaining the information, or to the driver or some other occupant of the vehicle collided with or to the custodian of other damaged property. The driver shall also render reasonable assistance to any person injured in such accident, including taking such injured person to a physician, surgeon, or hospital if it is apparent that medical treatment is necessary or is requested by the injured person. Where, because of injuries sustained in the accident, the driver is prevented from complying with the foregoing provisions of this section, the driver shall, as soon as reasonably possible, make the required report to the State Police or local law-enforcement agency and make a reasonable effort to locate the person struck, or the driver or some other occupant of the vehicle collided with, or the custodian of the damaged property, and report to such person or persons his name, address, driver's license number, and vehicle registration number.

Va. Code Ann. § 46.2-894 (1994). The Virginia Code further provided:

Any person convicted of violating the provisions of §§ 46.2-894 through 46.2- 897 shall, if such accident results in injury to or the death of any person, be guilty of a Class 6 felony. If such accident results only in damage to property, the person so convicted shall be guilty of a Class 1 misdemeanor; however, if the vehicle or other property struck is unattended and such damage is less than \$250, such person shall be guilty of a Class 4 misdemeanor. A motor vehicle operator convicted of a Class 4 misdemeanor under this section shall be assigned three demerit points by the Commissioner of the Department of Motor Vehicles.

Va. Code Ann. § 46.2-900 (1994). Although the U.S. Court of Appeals for the Fifth Circuit has held that failure to stop and render aid following a fatal auto accident in violation of Texas law is a crime involving moral turpitude, *see Garcia-Maldonado v. Gonzales*, 491 F.3d 284 (5th Cir. 2007), the applicant's conviction is distinguishable. Here, the applicant was convicted of misdemeanor hit and run, which necessarily resulted only in damage to property. *See* Va. Code Ann. § 46.2-900 (1994). This conduct does not reflect the "inherently base, vile, or depraved," behavior found in moral turpitude offenses. *Perez-Contreras*, 20 I&N Dec. at 617-18. Further, a violation of the Virginia hit and run statute does not require evil intent. *See* Va. Code Ann. § 46.2-894 (1994); *cf. Matter of M-*, 3 I&N Dec. 272 (BIA 1948) (holding that maliciously and wantonly injuring and destroying personal property of another is an offense involving moral turpitude). Accordingly, there is no basis to find that moral turpitude inheres in this misdemeanor conviction.

The AAO concludes that the applicant's 1991 conviction for misdemeanor assault () and his 1994 conviction for misdemeanor hit and run () are not crimes of moral turpitude, and do not render him inadmissible section 212(a)(2)(A)(i)(I) of the Act. Therefore, the District Director's decision will be withdrawn.

However, because the record reflects that the applicant may be subject to other grounds of inadmissibility, this case will be remanded to the District Director for further proceedings. First, a review of the applicant's request for asylum indicates that the applicant may have provided material support to a terrorist organization in El Salvador, as defined in section 212(a)(3)(B)(vi) of the Act, 8 U.S.C. § 1182(a)(3)(B)(vi). *See Form I-589*, Part C (stating that the applicant was forced to transport weapons for the guerrillas before he escaped). Upon remand, the District Director shall determine whether applicant is inadmissible under section 212(a)(3)(B) of the Act, 8 U.S.C. § 1182(a)(3)(B). If inadmissible, the District Director shall determine whether the applicant warrants a discretionary exemption under section 212(d)(3)(B)(i) of the Act, 8 U.S.C. § 1182(d)(3)(B)(i). Second, the District Director shall determine whether the applicant's 1991 conviction by the Arlington County Circuit Court in Commonwealth of Virginia vs. Luis A. Rodriguez (CR91-889) renders the applicant inadmissible, and if so, whether a waiver of inadmissibility under section 212(h)(1)(A) or (B) of the Act is warranted.

ORDER: The District Director's decision is withdrawn, and the case is remanded to the District Director for further proceedings in accordance with this determination.