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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



U.S. Citizenship
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Services

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FILE: [REDACTED] Office: BALTIMORE, MD Date: JUL 14 2010

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

A handwritten signature in cursive script that reads "Michael Shumway".

Perry Rhew
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 appeal will be dismissed as the underlying application is moot. The matter will be returned to the district director for continued processing.

The applicant is a native and citizen of Peru 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 a crime involving moral turpitude. The applicant 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 three U.S. citizen children and his lawful permanent resident father.

In his undated decision, the district director found the applicant inadmissible for having been convicted of second degree assault. The director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the waiver application accordingly.

In an undated brief, counsel states that the applicant was convicted of assault, which did not involve any aggravating factors and is thus not a crime involving moral turpitude. Counsel also states that the district director erred in finding that the hardship being suffered by the applicant's father and children is less than extreme.

Section 212(a)(2)(A) of the Act states, in pertinent parts:

(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-

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or

(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 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.” 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. 24 I&N Dec. 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.

The record shows that on November 23, 1998 the applicant was arrested and charged with Assault in the Second Degree under Maryland Code Art 27, § 12A (now cited as Maryland Code, Criminal Law, § 3-203) and Sexual Offense in the Fourth Degree under Maryland Code Art. 27, § 464C (now cited as Maryland Code, Criminal Law § 3-308). The applicant, who was born on March 14, 1972, was 26 years old at the time he committed the crime that resulted in his arrest. The applicant was convicted on August 20, 1999 of one count of Assault in the Second Degree under MD Code Art. 27, § 12A. The applicant was sentenced to one year imprisonment, his sentenced was suspended, and he was placed on probation for one year.

The AAO notes that the applicant's conviction does not qualify for the petty offense exception because the applicant was sentenced to more than six months imprisonment and the maximum possible sentence for his conviction is ten years.

At the time of the applicant's conviction, Maryland Code, Article 27, provided, in pertinent parts:

§ 12A Second Degree Assault.

- (a) General prohibition. -- A person may not commit an assault.
- (b) Violation; penalties. -- A person who violates this section is guilty of the misdemeanor of assault in the second degree and on conviction is subject to a fine of not more than \$2,500 or imprisonment for not more than 10 years or both.

Section 34 of the Maryland Law Encyclopedia states that:

The Maryland Criminal Pattern Jury Instructions also define second-degree assault as attempted battery. Under this definition, second-degree assault is an attempt to cause offensive physical contact or physical harm. In order to convict the defendant of the attempted battery form of second-degree assault, the State must prove:

- (1) that the defendant actually tried to cause immediate offensive physical contact with or physical harm to the victim;
- (2) that the defendant intended to bring about offensive physical contact or physical harm; and
- (3) that the defendant's actions were not consented to by the victim or not legally justified, if the defense of legal justification is raised.

It is noted that as a general rule, simple assault or battery is not deemed to involve moral turpitude for purposes of the immigration laws. *Matter of Fualaau*, 21 I&N Dec. 475, 477 (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 serious bodily harm. *See, e.g., Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988), *Matter of Goodalle*, 12 I. & N. Dec. 106 (BIA 1967), *Matter of S-*, 5 I. & N. Dec. 668 (BIA 1954), and *Nguyen v. Reno*, 211 F.3d 692 (1st Cir. 2000). The Board of Immigration Appeals has also found:

[M]oral turpitude necessarily inheres in assault and battery offenses that are defined by reference to the infliction of bodily harm upon a person whom society views as deserving of special protection, such as a child, a domestic partner, or a peace officer, because the *intentional or knowing infliction of injury* on such persons reflects a degenerate willingness on the part of the offender to prey on the vulnerable or to disregard his social duty to those who are entitled to his care and protection.

Matter of Sanudo, 23 I&N Dec. 968, 971 (BIA 2006) (emphasis added). The AAO notes that in *Matter of B-*, 1 I. & N. Dec. 52 (BIA 1941; A.G. 1941), the BIA found second degree assault to not be a crime involving moral turpitude when a non-deadly weapon was used. Neither the record of conviction nor the applicant's statement indicate that the applicant's conviction for second degree assault involved an aggravating dimension. Indeed, the AAO notes that assault crimes involving aggravating factors are generally covered by first degree assault under Maryland law, which includes assaults causing or attempting to cause serious bodily injury and assaults with a firearm. See Maryland Code, Criminal Law, §3-202. The applicant was not convicted of sexual assault and there is no evidence that he caused injury to a person "deserving of special protection." Upon reviewing the record and the statute of conviction, we find that the applicant's conviction was for simple assault. Therefore, it is not a crime involving moral turpitude that renders the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The AAO notes that the record also shows that on March 8, 1998 the applicant was convicted of driving while intoxicated under Maryland Transportation Code §21-902. On February 12, 1995 the applicant was again convicted of driving while intoxicated under Maryland Transportation Code § 21-902 and also of driving without a license under Maryland Transportation Code § 16-101. In *Matter of Torres-Varela*, 23 I&N Dec. 78 (BIA 2001), the Board of Immigration Appeals (BIA) held that a simple DUI conviction is not a crime involving moral turpitude unless the alien is convicted under a state statute that requires a culpable mental state. *In re Lopez-Meza*, 22 I.&N. Dec. 1188, (BIA 1999) and *Marmolejo-Campos v. Holder*, 558 F.3rd 903 (9th Cir. 2009), the BIA and Ninth Circuit Court of Appeals found that a conviction under an Arizona statute for aggravated DUI was a conviction for a crime involving moral turpitude. In those cases the Arizona statute required a showing that the offender was "knowingly" driving with a suspended, canceled, revoked, or refused license while driving under the influence of alcohol or drugs.

In determining whether a crime involves moral turpitude, the specific statute under which the conviction occurred is controlling. *Matter of Khourn*, 21 I&N Dec. 1041 (BIA 1997), *Matter of Franklin*, 20 I&N Dec. 867 (BIA 1994). If the statute defines a crime in which turpitude necessarily inheres, then, for immigration purposes, the offense is a crime involving moral turpitude. *Matter of Short*, 20 I&N Dec. 136, 137 (BIA 1989).

Maryland Transportation Code §21-902 states:

- (a) Driving while intoxicated. — (1) A person may not drive or attempt to drive any vehicle while intoxicated.
- (2) A person may not drive or attempt to drive any vehicle while the person has an alcohol concentration of 0.10 or more as measured by grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath as determined at the time of testing.

Maryland Transportation Code § 16-101 states in pertinent parts:

Drivers must be licensed.

(a) In general. — An individual may not drive or attempt to drive a motor vehicle on any highway in this State unless:

(1) He holds a driver's license issued under this title...

In the applicant's case, he was convicted under two separate statutes, neither of which required a culpable mental state. As stated above, the specific statute under which the conviction occurred is controlling and the AAO cannot combine the applicant's two convictions under two different statutes for a finding that the applicant committed acts which constitute a crime involving moral turpitude. Thus, the AAO finds that the applicant's convictions for two counts of driving while intoxicated and one count of driving without a license do not constitute crimes involving moral turpitude.

Accordingly, the applicant is not inadmissible as a result of his convictions. The district director's findings are withdrawn. The applicant's waiver of inadmissibility application is thus moot and the appeal will be dismissed.

ORDER: The applicant's waiver application is declared moot and the appeal is dismissed. The district director shall reopen the denial of the Form I-485 application on motion and continue to process the adjustment application.