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



U.S. Citizenship  
and Immigration  
Services

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FILE:

Office: VERMONT SERVICE CENTER Date: MAY 03 2010

IN RE:

Applicant:

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h), 8 U.S.C. § 1182(h) of the Immigration and Nationality Act.

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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).

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant, [REDACTED] is a native of Guyana and a citizen of Canada. The director stated that the applicant was inadmissible under 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 sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h). The director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of Director*, dated May 4, 2007. The director also stated that the applicant is inadmissible for committing an “aggravated felony,” as that term is defined under section 101(a)(43) of the Act, 8 U.S.C. § 1101(a)(43).

Section 212(a)(2) of the Act states that:

(A)(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.

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 July 12, 1994, the applicant was convicted for “assault causing bodily harm” in violation of section 267(1)(b) of the Criminal Code of Canada. The applicant’s sentence was suspended and he was placed on probation for a period of 12 months. On August 24, 1983 the applicant was convicted for “assault with a weapon” in violation of section 245.1(1)(a) of the Criminal Code of Canada. He was sentenced to serve 10 days intermittently, and was placed on probation for a period of one year.

Section 267(1) of the Criminal Code of Canada provides that:

Every one who, in committing an assault,

- (a) carries, uses or threatens to use a weapon or an imitation thereof, or
- (b) causes bodily harm to the complainant,

is guilty of an indictable offense and liable to imprisonment for a term not exceeding ten years.

- (2) For the purposes of this section and section 269 and 272, “bodily harm” means any hurt or injury to the complainant that interferes with the health or comfort of the complainant and that is more than merely transient or trifling in nature.

- (3) Any person who causes hurt or injury that is not transient or trifling in nature and which interferes with the complainant's health or comfort is guilty of the offense of assault causing bodily harm.

Although the AAO does not have the applicant's complete record of conviction, the applicant admits in his letter dated October 3, 2006, that in 1994 he had an argument with his wife and that they pushed and shoved each other. In *Matter of Tran*, 21 I&N Dec. 291, 294 (BIA 1996), the BIA held that the willful infliction of corporal injury on "a person with whom one has ... a familial relationship is an act of depravity which is contrary to accepted moral standards." The statute at issue in *Tran*, section 273.5(a) of the California Penal Code, required the willful infliction of "corporal injury resulting in a traumatic condition" upon the perpetrator's spouse, a person with whom he or she was cohabiting, or the mother or father of his or her child. *Id.* at 292. The BIA concluded that the crime involved moral turpitude.

The holding in *Tran* is applicable in the instant case. A conviction for "assault causing bodily harm" in violation of section 267(1)(b) of the Criminal Code of Canada requires the actual infliction of bodily harm that is "more than merely transient or trifling in nature." In that the applicant's assault involved a person with whom he has a familial relationship, his spouse, and the bodily harm he inflicted upon her was more than merely transient or trifling in nature, the AAO finds that the crime of which the applicant was convicted involved moral turpitude.

Section 245.1 of the Criminal Code of Canada provides:

- (1) Every one who, in committing an assault,
  - (a) carries, uses or threatens to use a weapon or an imitation thereof, or
  - (b) causes bodily harm to the complainant,is guilty of an indictable offence and is liable to imprisonment for ten years.
- (2) For the purposes of this section and section 245.3 and 246.2, "bodily harm" means any hurt or injury to the complainant that interferes with the health or comfort of the complainant and that is more than merely transient or trifling in nature.

Even though the AAO does not have the applicant's complete record of conviction, we note that the applicant states in his letter dated October 3, 2006, that in 1983 he had an altercation with a co-worker, who started to kick and punch him at their place of employment. The applicant indicates that in self-defense he struck the co-worker a couple of times with a piece of wood.

The BIA in *In re Sanudo*, 23 I&N Dec. 968 (BIA 2006), states that assault and battery offenses are crimes of moral turpitude if they involve aggravating factors, such as a deadly weapon, that significantly increases culpability. *Id.* at 971. Assault and battery with a deadly weapon is a crime involving moral turpitude because "the knowing use or attempted use of deadly force is deemed to be an act of moral depravity that takes the offense outside the "simple assault and battery" category." *Id.* Assault and battery offenses involving the intentional infliction of serious bodily injury on

another involves moral turpitude because “such intentionally injurious conduct reflects a level of immorality that is greater than that associated with a simple offensive touching.” *Id.*

With the instant case, although the applicant claims to have struck his co-worker with a piece of wood in self-defense, the record reflects that he was convicted of assault with a weapon under section 245.1 of the Criminal Code of Canada. In view of the fact that the applicant repeatedly struck his co-worker with a stick of wood, which is more than the simple offensive touching constituting a simple assault, we find that the conduct for which the applicant was convicted under section 245.1 of the Criminal Code of Canada constitutes a crime involving moral turpitude.

The waiver for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act is found under section 212(h) of the Act. That section provides, in pertinent part:

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if -

(1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] 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 [Secretary] 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 . . .

Section 212(h)(1)(A) of the Act provides that the Attorney General may, in his discretion, waive the application of subparagraph (A)(i)(I) of subsection (a)(2) if 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. Since the applicant's convictions occurred in 1994 and 1983, which is more than 15 years ago, they are waivable under section 212(h)(1)(A)(i) of the Act.

Section 212(h)(1)(A)(ii) and (iii) of the Act requires that the applicant's admission to the United States not be contrary to the national welfare, safety, or security of the United States; and that the applicant establish his rehabilitation. Evidence in the record to establish the applicant's eligibility under section 212(h)(1)(A)(ii) and (iii) of the Act consists of two letters. In his letter dated October 3, 2006, the applicant acknowledges that he behaved wrongly regarding the two crimes of which he was convicted. He states that he has never been involved or committed anything wrongful since. He contends that he pursued an education in finance and accounting and has held jobs in those fields for

more than 15 years with General Electric and is now with Dupont Companies. He states that he is active in his community. In her letter dated June 16, 2005, the applicant's spouse maintains that her husband regrets his crimes, which happened while he was young and prior to their marriage. She states that her husband is devoted to her and their children and is an integral part of their lives. In view of the record, which shows that the applicant regrets his wrongful acts and has not committed any crimes since, and that he has furthered his education and has been steadily employed, the AAO finds that the applicant has provided sufficient evidence to demonstrate that his admission to the United States is not contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated, as required by section 212(h)(1)(A)(ii) and (iii) of the Act.

Once eligibility for a waiver is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion in favor of the waiver. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996). A favorable exercise of discretion is limited in the case of an applicant who has been convicted of a violent or dangerous crime. Specifically, 8 C.F.R. § 212.7(d) states:

The Attorney General, in general, will not favorably exercise discretion under section 212(h)(2) of the Act (8 U.S.C. 1182(h)(2)) to consent to an application or reapplication for a visa, or admission to the United States, or adjustment of status, with respect to immigrant aliens who are inadmissible under section 212(a)(2) of the Act in cases involving violent or dangerous crimes, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of the application for adjustment of status or an immigrant visa or admission as an immigrant would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the alien's underlying criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act.

The applicant's convictions for assault causing bodily harm and assault with a weapon qualify as violent or dangerous crimes under 8 C.F.R. § 212.7(d). Accordingly, the applicant must show that "extraordinary circumstances" warrant approval of the waiver. 8 C.F.R. § 212.7(d). Extraordinary circumstances may exist in cases involving national security or foreign policy considerations, or if the denial of the applicant's admission would result in exceptional and extremely unusual hardship. Finding no evidence of foreign policy, national security, or other extraordinary equities, the AAO will consider whether the applicant has "clearly demonstrate[d] that the denial of . . . admission as an immigrant would result in exceptional and extremely unusual hardship" to a qualifying relative.

In the instant case, the applicant must demonstrate that denial of admission would result in exceptional and extremely unusual hardship to a qualifying relative, who is the applicant's lawful permanent resident wife. The applicant's wife conveys in her letter dated June 16, 2005, that she has a close relationship with her husband and will be separated from him if he is not granted admission as an immigrant to the United States. She states that she wants her husband to be with her in the United States when schools are selected for their two daughters and a house is chosen, and she asserts that her daughters need their father.

The asserted hardship factors in this case are the applicant's wife's separation from her husband and her concern about the effect of his separation on their daughters. The AAO gives considerable weight to the hardship that flows from family separation. *See Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998). Although we acknowledge that family separation will be difficult for the applicant's spouse and recognize her concern about the impact of separation from the applicant on their daughters, the applicant has failed submit any corroborating evidence to demonstrate the severity of the hardship. Furthermore, the applicant has not addressed whether his spouse and children would experience hardship if they relocated to Canada. When the hardship is considered cumulatively, it does not rise to the level of being "exceptional and extremely unusual hardship," as required in 8 C.F.R. § 212.7(d).

Accordingly, although the applicant established his eligibility for a waiver under section 212(h)(1)(A) of the Act, he did not demonstrate that he merits a favorable exercise of discretion under 8 C.F.R. § 212.7(d), and the appeal will be dismissed.

**ORDER:** The appeal is dismissed.