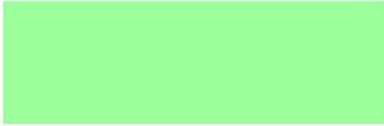


(b)(6)

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

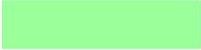


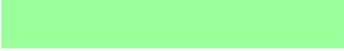
U.S. Citizenship
and Immigration
Services



DATE: AUG 16 2013

OFFICE: BALTIMORE

FILE: 

IN RE: 

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 (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
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 appeal will be dismissed as the underlying waiver application is unnecessary.

The applicant is a native of Senegal and citizen of France 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 lawful permanent resident spouse and U.S. citizen child.

The District Director concluded that the applicant had failed to establish that the bar to his admission would result in extreme hardship for a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *District Director's Decision*, dated September 26, 2011.

On appeal, counsel for the applicant submits the Form I-290B, Notice of Appeal or Motion and court documents pertaining to the applicant's 2004 arrest. The entire record was reviewed and all relevant evidence considered in reaching a decision on the appeal.

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.

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 *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. The methodology adopted by the Attorney General consists of a three-pronged approach. 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. 24 I&N Dec. at 698 (citing *Duenas-Alvarez*, 549 U.S. at 193). 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 or “modified categorical” inquiry in which the adjudicator reviews the “record of conviction” to determine if the conviction was based on conduct involving moral turpitude. 24 I&N Dec. 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. Finally, 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.

The applicant’s case, however, arises within the jurisdiction of the Fourth Circuit Court of Appeals. In *Prudencio v. Holder*, 669 F.3d 472, 484 (4th Cir. 2012), the Fourth Circuit Court of Appeals rejected *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), deferring to the categorical and modified categorical analysis as originally articulated in *Taylor v. U.S.*, 495 U.S. 575, 600–01 (1990) and *Shepard v. U.S.*, 544 U.S. 13 (2005). Thus, to determine whether a conviction is a crime involving moral turpitude in the Fourth Circuit, an adjudicator first applies the categorical approach. *Prudencio*, 669 F.3d at 484-485. (citing *Taylor*, 495 U.S. at 600–01). This analysis requires examining only the statutory elements of the crime, without considering the facts or conduct of the particular violation at issue. 669 F.3d at 484-85 (citing *Yousefi v. U.S. I.N.S.*, 260 F.3d 318, 326 (4th Cir. 2001)). However, where a statute is divisible, encompassing crimes that qualify as crimes involving moral turpitude and crimes that do not, the adjudicator proceeds under the modified categorical approach to review the record of conviction to determine whether the crime of which the alien was convicted qualifies as a crime involving moral turpitude. 669 F.3d at 484-85 (citing *Taylor*, 495 U.S. at 602, 110). The record of conviction is composed of the charging document, the plea agreement, the plea colloquy, and any explicit findings of fact made by the trial judge. 669 F.3d at 484-85 (citing *Shepard*, 544 U.S. at 15).

The record establishes that in 2001, the applicant was convicted of Assault in the Second Degree, a violation of section 12A of Article 27 of the Maryland Code. He was placed on probation for 12 months. At the time of the applicant’s conviction, Maryland Code, Article 27, provided, in pertinent part:

§ 12A Second Degree Assault.

(a) A person may not commit an assault.

(b) 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.

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. Nothing in the record indicates 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 physical injury to another and assaults with a firearm. *See* Maryland Code, Criminal Law, §3-202. 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.¹

The AAO finds that the district director erred in determining that the applicant was inadmissible based on his conviction for assault in the second degree. As such, the waiver application is unnecessary and the issue of whether the applicant established extreme hardship to a qualifying relative pursuant to the Act is moot and will not be addressed. Accordingly, the appeal will be dismissed, the previous decision of the district director is withdrawn and the instant application for a waiver is declared unnecessary.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met.

ORDER: The appeal is dismissed as the underlying waiver application is unnecessary.

¹ The AAO notes that in June 2004, the State's Attorney State of Maryland entered a nolle prosequi in regards to an arrest in April 2004 [REDACTED]. As such, the applicant was not convicted with respect to the June 2004 arrest.