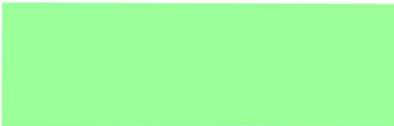


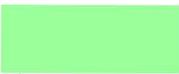
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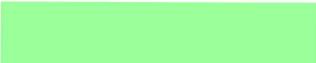


**U.S. Citizenship
and Immigration
Services**



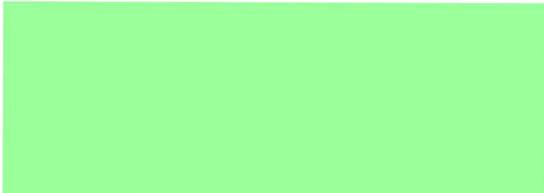
DATE: **FEB 07 2013** Office: HIALEAH, FL

FILE: 

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:



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 black ink, appearing to read "Ron Rosenberg", with a long horizontal flourish extending to the right.

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Hialeah, Florida. An appeal of the denial was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on motion. The motion will be approved and the application will be found to be unnecessary.

The applicant is a native and citizen of Honduras 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's two children are U.S. citizens. 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 children.

The field office 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. *Decision of Field Office Director*, dated February 24, 2010. The AAO found that the applicant did not establish extreme hardship to a qualifying relative and dismissed the appeal accordingly. *AAO Decision*, dated May 30, 2012.

On motion, counsel asserts that the applicant did not commit a crime involving moral turpitude and that the applicant's children would experience extreme hardship if the waiver application remains denied. *Brief in Support of Motion to Reconsider*, dated June 28, 2012.

A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

Counsel has submitted a brief in support of the motion to reconsider, criminal records, a statement from the applicant, a statement from the applicant's spouse and information on melon crops in Brazil. The entire record was reviewed and considered in rendering this decision.

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.)

As mentioned in the initial AAO decision, the applicant's case arises within the jurisdiction of the Eleventh Circuit Court of Appeals, which has recently reaffirmed the traditional categorical approach for determining whether a crime involves moral turpitude, declining to follow the "administrative framework" set forth by the Attorney General in *Silva-Trevino*. See *Fajardo v. Attorney General*, 659 F.3d 1303 (11th Cir. 2011) (finding the U.S. Congress to have intended that determinations of whether offenses are crimes involving moral turpitude be made using the traditional categorical/modified categorical approach). In its decision, the Eleventh Circuit defined the categorical approach as "looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." *Id.* at 1305 (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990)). The court noted that where the statutory definition of a crime included "conduct that would categorically be grounds for removal as well as conduct that would not, then the record of conviction – i.e., the charging document, plea, verdict, and sentence – [might] also be considered." *Id.* (citing to *Jaggernaut v. U.S. Att'y Gen.*, 432 F.3d 1346, 1354-55 (11th Cir. 2005)). Pursuant to *Fajardo v. Attorney General*, the AAO will limit any modified categorical inquiry in this matter to the applicant's records of conviction.

The record reflects that the applicant was convicted on April 12, 2002 of resisting an officer with violence to his or her person in violation of Florida Statutes § 843.01, a third degree felony punishable by a maximum of five years imprisonment, and that he was placed on probation for a period of two years and ordered to take an anger management course and pay court costs.

At the time of the applicant's conviction, Florida Statutes § 843.01 provided, in pertinent part, that "[w]hoever knowingly and willfully resists, obstructs, or opposes any officer . . . by offering or doing violence to the person of such officer . . . is guilty of a felony of the third degree"

Assault on a law enforcement officer has been found to be a crime involving moral turpitude where the perpetrator knows the victim to be a law enforcement officer performing his official duty and the assault results in bodily injury to the officer. See *Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988) (distinguishing cases in which knowledge of the police officer's status was not an element of the crime and where bodily injury or other aggravating factors were not present to elevate offense beyond "simple" assault); see also *Matter of O-*, 4 I&N Dec. 301 (BIA 1951) (German law involving an assault on a police officer was not a crime involving moral turpitude because knowledge that the person assaulted was a police officer engaging in the performance of his duties was not an element of the crime); *Matter of B-*, 5 I&N Dec. 538 (BIA 1953) (as modified by *Matter of Danesh, supra.*)

(assault on prison guard not a crime involving moral turpitude because offense charged appeared to be only “simple” assault and no bodily injury was alleged); *Ciambelli ex rel. Maranci v. Johnson*, 12 F.2d 465 (D. Mass 1926) (assault on an officer was not a crime involving moral turpitude in spite of fact that defendant was armed with a razor because the razor was not used in the assault).

The Florida Supreme Court has ruled that the phrase “knowingly and willfully resists, obstructs, or opposes any officer” in Florida Statutes § 843.01 imposes a requirement that a defendant have knowledge of the officer’s status as a law enforcement officer. *See Polite v. State of Florida*, 973 So.2d 1107, 1112 (Fla. 2007). However, the AAO notes that Florida Statutes § 843.01 is violated by either “offering” to do violence, or by “doing” violence. Thus, based solely on the statutory language, it appears that Florida Statute § 843.01 encompasses conduct that involves moral turpitude and conduct that does not. The AAO notes that a conviction for “doing” violence does not always result in a finding of moral turpitude as a simple assault, which does not involve moral turpitude, can result in a conviction. *See G.L.N. v. State*, App. 2 Dist., 432 So.2d 623 (1983).

In *Wright v. State*, 681 So.2d 852, 853-54 (Fla. 5th Dist. App. 1996), the court found that the state was not required to prove that the appellant, who had denied under oath that he had hit, kicked or otherwise resisted the officers apprehending him, had actually struck either of the officers because evidence that he “struggled, kicked, and flailed his arms and legs was sufficient to show that he offered to do violence to the officers within the meaning of section 843.01.”

Counsel asserts on motion that the conviction record does not establish whether the applicant was charged and prosecuted for “offering” to do violence or “doing” violence. Counsel states that the AAO should consider the minimal conduct described by the statute and find that this was not a crime involving moral turpitude.

Counsel states that the information document charges that applicant with “offering or doing violence to the person of said officer” and that there is a reference to “fighting with and kicking [the officer].” Counsel then asserts that the purpose of reviewing the record of conviction is not to consider the underlying circumstance of the crime, but to determine which statutory phase was the basis for the crime. Lastly, counsel states that struggling, kicking and flailing arms is sufficient to show “offering” to do violence as opposed to “doing” violence per *Wright v. State*.

Florida Statutes § 843.01 is a divisible statute and it includes language that involves moral turpitude and language that does not. As such, the modified categorical approach is applied. The AAO notes that under the modified categorical approach, the record of conviction may be examined to determine which prong of the statute an applicant has been convicted under. The record includes the information document which reflects that the applicant was fighting with and actually kicked the officer and this reflects that he was “doing” violence and not “offering” to do violence. In *Wright v. State* the defendant did not actually physically kick the officer which distinguishes that case from the applicant’s case.

However, the record of conviction does not reflect that the applicant caused bodily injury to the officer. As such, the AAO finds that the applicant has not committed a crime involving moral

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turpitude and is not inadmissible under 212(a)(2)(A)(i)(I) of the Act. Therefore, his waiver application is not necessary.

ORDER: The motion is granted and the application is determined to be unnecessary.