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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: JAN 02 2013 Office: Baltimore, MD FILE: [REDACTED]

IN RE: Applicant: [REDACTED]

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

ON BEHALF OF APPLICANT:

[REDACTED]

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 that reads "Michael Shumway".

for Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the District Director, Baltimore Field Office, and is now before the Administrative Appeals Office (AAO) on appeal. As the applicant is not inadmissible, the appeal will be dismissed as unnecessary.

The applicant is a native and citizen of India 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 crimes involving moral turpitude. He seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in conjunction with an application for adjustment of status, in order to remain in the United States as a lawful permanent resident.

The director, in his decision dated August 23, 2010, found that the applicant had failed to establish a qualifying relative, as required under section 212(h) of the Act, and denied his Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly.

On appeal, counsel contests the finding of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act. *See Appeal Brief*, dated September 17, 2010.<sup>1</sup>

The record of evidence includes, but is not limited to, counsel's briefs; statement of the applicants; supporting letters from parishioners and the community; and the applicant's immigration and criminal records. 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 –

<sup>1</sup> Counsel, on brief, also challenges the decision of the director, dated March 22, 2010, denying the applicant's Form I-485, Application to Register Permanent Residence or Adjust Status. The director found that at the time the applicant had filed his Form I-485, he had not been in lawful nonimmigrant status for a period in excess of six months. As an initial matter, the applicant has only filed a Form I-290B, Notice of Appeal or Motion, with respect to the director's August 23, 2010 decision. Thus, the denial of the Form I-485 is not properly before the AAO on appeal. Moreover, even if the applicant had properly filed a Form I-290B, appealing the denial of his adjustment application, the AAO does not have appellate jurisdiction over an appeal from the denial of that application. The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in her through the Homeland Security Act of 2002, Pub. L. 107-296. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003), with one exception - petitions for approval of schools and the appeals of denials of such petitions are now the responsibility of Immigration and Customs Enforcement.

The AAO cannot exercise appellate jurisdiction over additional matters on its own volition, or at the request of an applicant or petitioner. As a "statement of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy," the creation of appeal rights for adjustment application denials meets the definition of an agency "rule" under section 551 of the Administrative Procedure Act. The granting of appeal rights has a "substantive legal effect" because it is creating a new administrative "right," and it involves an economic interest (the fee). "If a rule creates rights, assigns duties, or imposes obligations, the basic tenor of which is not already outlined in the law itself, then it is substantive." *La Casa Del Convaleciente v. Sullivan*, 965 F.2d 1175, 1178 (1<sup>st</sup> Cir. 1992). All substantive or legislative rule making requires notice and comment in the Federal Register. The AAO does not have jurisdiction to consider counsel's arguments on appeal relating to the denial of a Form I-485 adjustment application filed under section 245 of the Act.

- (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 record reflects that the applicant was admitted to the United States on April 5, 2002 on a R1 nonimmigrant religious worker visa. He is the beneficiary of a Form I-360, Petition for Special Immigrant-Religious Worker, approved on March 21, 2006. His second application for adjustment of status was denied by the District Director because the applicant had been in unlawful status in the United States for more than six months at the time the application was filed on October 26, 2007.

The record also discloses that the applicant was arrested on or about September 1, 2006 and charged with misdemeanor assault in the second degree in violation of section 3-203 of the Maryland Code, Criminal Law (Md. Code, CL) (2006), sexual offense in the fourth degree in violation of Md. Code CL § 3-308, and false imprisonment. On March 30, 2007, the applicant pled guilty to assault in the second degree, as charged, and was sentenced to probation for 359 days and fined \$2,500. The remaining charges were not prosecuted.

The applicant on appeal disputes the finding of inadmissibility pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude, based on his assault conviction.

At the time of the applicant's 2006 arrest, Md. Code CL § 3-203, provided, in pertinent part:

§ 3-203. Assault in the second degree

Prohibited

- (a) A person may not commit an assault.

Penalty

(b) Except as provided in subsection (c) of this section, a person who violates subsection (a) of this section is guilty of the misdemeanor of assault in the second degree and on conviction is subject to imprisonment not exceeding 10 years or a fine not exceeding \$2,500 or both.

The AAO notes that if the second degree assault offense here constitutes a crime involving moral turpitude, the applicant's conviction would not qualify for the petty offense exception because the maximum possible sentence for his conviction is ten years. See Section 212(a)(2)(A)(ii)(II) of the Act. We now consider whether the offense is a crime involving moral turpitude.

A simple assault or battery offense is generally not considered to involve moral turpitude. See *Matter of Ahortalejo-Guzman*, 25 I&N Dec. 465 (BIA 2011); *Matter of Fualaau*, 21 I&N Dec. 475, 477 (BIA 1996); *Matter of Short*, 20 I&N Dec. 136, 139 (BIA 1989). However, "assault and battery offenses that necessarily involved the *intentional* infliction of *serious* bodily injury on another have been held to involve moral turpitude because such intentionally injurious conduct reflects a level of immorality that is greater than that associated with a simple offensive touching." *In re Sanudo*, 23 I. & N. Dec. 968 (BIA 2006) (finding that a battery conviction involving only minimal, nonviolent touching does not inhere moral turpitude even when inflicted upon a spouse); *Sosa-Martinez v. U.S. Atty. Gen.*, 420 F.3d 1338, 1342 (11<sup>th</sup> Cir. 2005); *Matter of Tran*, 21 I. & N. Dec. 291 (BIA 1996) (holding that a conviction for willful infliction of corporal injury on the parent of one's child under section 273.5(a) of the California Penal Code is a conviction for a crime involving moral turpitude); *Grageda v. U.S. INS*, 12 F.3d 919 (9<sup>th</sup> Cir. 1993) (same).

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. Here, the record of conviction does not indicate that the applicant's conviction for second degree assault involved an aggravating dimension, such as the use of a weapon or the infliction of serious bodily injury. Indeed, the AAO notes that assault crimes involving such aggravating factors are generally covered by first degree assault under Maryland law. See Md. Code CL, §3-202. In addition, the applicant was not convicted of the sexual offense charge. 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.

As we have found that the applicant's assault convictions is not a crime involving moral turpitude, the AAO concludes that the applicant is not inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Act. Accordingly, as the applicant is not inadmissible, the waiver application is unnecessary and the appeal will be dismissed. We note, however, that despite our determination concerning the waiver application before us, the applicant's adjustment application remains denied on a separate basis, namely his failure to maintain his nonimmigrant status at the time of the filing of the application. On appeal, counsel has included substantial argument and supporting documents on this issue. However, as noted, the AAO is without jurisdiction over the denial of the adjustment application.

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**ORDER:** As the applicant is not inadmissible, the waiver application is unnecessary and the appeal is dismissed.