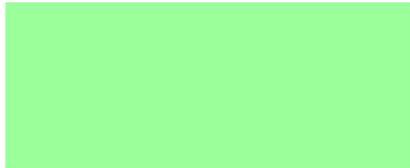




U.S. Citizenship
and Immigration
Services

(b)(6)



Date: **SEP 23 2013** Office: BANGKOK, THAILAND

FILE:

IN RE: Applicant:

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. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Bangkok, Thailand. The matter came before the Administrative Appeals Office (AAO) on appeal and the appeal was dismissed. The matter is again before the AAO on motion to reconsider. The motion will be granted and the prior AAO decision will be affirmed.

The applicant is a native and citizen of Malaysia 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 been convicted of a crime involving moral turpitude. She is married to a U.S. citizen and is the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States.

The field office director concluded that the applicant is statutorily ineligible for a waiver under section 212(h) of the Act because she was deported from the United States pursuant to section 237(a)(2)(A)(iii) of the Act for having been convicted of an aggravated felony as defined in section 101(a)(43)(F) of the Act after being admitted as a lawful permanent resident, and denied the Application for Waiver of Grounds of Inadmissibility accordingly. *See Decision of the Field Office Director*, dated March 21, 2012.

On appeal the AAO concluded that the applicant is statutorily ineligible for a waiver under section 212(h) of the Act because she was deported from the United States pursuant to section 237(a)(2)(A)(iii) of the Act for having been convicted of an aggravated felony as defined in section 101(a)(43)(F) of the Act after being admitted as a lawful permanent resident, and dismissed the appeal accordingly. *See Decision of the AAO*, dated April 8, 2013.

In response, counsel for the applicant filed *Form I-290B*, Notice of Appeal or Motion (Form I-290B), indicating that he was filing a motion to reconsider by marking box E in Part 2. *See Form I-290B*, received May 8, 2013. Counsel further indicates on Form I-290B, Part 2 that a brief "will be submitted within 30 days." The AAO notes that no such brief has been received.

A motion to reconsider must 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. A motion to reconsider a decision on an application must, when filed, also 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 contends that the applicant's conviction does not constitute a crime involving moral turpitude; the AAO should reconsider its decision because it failed to discuss the applicant's intent as it relates to her conviction; and because the applicant is no longer a lawful permanent resident, she remains eligible for a section 212(h) waiver. *See Form I-290B, at Part 3*. Counsel cites to a number of cases in support of his contentions. The AAO finds that the applicant has met the requirements of 8 C.F.R. § 103.5(a)(3), and the motion will be granted and the application reconsidered.

No supplemental evidence has been submitted on motion. The record contains, but is not limited to: Forms I-290B and counsel's statement thereon, counsel's 2007 letter in support of a Form I-212; various immigration applications and petitions; hardship letters from the applicant's spouse

and children; letters of support and character reference; financial-related records; marriage, birth and other biographical records; documents related to the applicant's criminal record; and documents related to the applicant's inadmissibilities, her deportation proceedings, numerous appeals, and deportation. The entire record was reviewed and considered in rendering this decision on motion to reconsider.

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 *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.

The record shows that the applicant was admitted to the United States as a lawful permanent resident on November 25, 1981. On August 27, 1996, the applicant was convicted in the Superior Court of Arizona, Maricopa County of Attempted Child Abuse, a Class 3 Felony and a Dangerous Crime Against Children in the Second Degree, in violation of A.R.S. sections 13-3623, 13-604.01, 13-702 and 13-801, for her conduct on or between March 1, 1995 and March 31, 1995. The applicant was sentenced to eight (8) years imprisonment.

After charging the applicant with deportability as an aggravated felon, an immigration judge found on October 1, 1997 that the applicant was ineligible for any form of deportation relief. The applicant filed a motion to reopen with the Board of Immigration Appeals (BIA) based on *INS v. St. Cyr*, 533 U.S. 289 (2001), seeking a section 212(c) waiver which the BIA denied because the applicant had already served in excess of five years imprisonment and was thus statutorily barred from relief. A writ of habeas corpus granted by the district court remanded the matter with regard to potential 212(c) relief. On May 5, 2004, an immigration judge granted 212(c) relief on remand and the Department of Homeland Security (DHS) appealed. On November 22, 2004 the BIA sustained the DHS appeal, vacated the immigration judge’s decision, and ordered the applicant deported to Malaysia. On July 18, 2005 the applicant was deported from the United States under section 241 of the Act for having

been convicted of a crime designated as an aggravated felony. Following numerous appeals, motions and petitions, a new Order and Written Decision of the Immigration Judge (Entering Order of Deportation, on remand from the BIA) was issued against the applicant on December 20, 2006.

At the time of the applicant's conviction, A.R.S. § 13-3623 provided, in pertinent part:

A. Under circumstances likely to produce death or serious physical injury, any person who causes a child or vulnerable adult to suffer physical injury or, having the care or custody of a child or vulnerable adult, who causes or permits the person or health of the child or vulnerable adult to be injured or who causes or permits a child or vulnerable adult to be placed in a situation where the person or health of the child or vulnerable adult is endangered is guilty of an offense as follows:

1. If done intentionally or knowingly, the offense is a class 2 felony and if the victim is under fifteen years of age it is punishable pursuant to section 13-705.
2. If done recklessly, the offense is a class 3 felony.
3. If done with criminal negligence, the offense is a class 4 felony.

B. Under circumstances other than those likely to produce death or serious physical injury to a child or vulnerable adult, any person who causes a child or vulnerable adult to suffer physical injury or abuse or, having the care or custody of a child or vulnerable adult, who causes or permits the person or health of the child or vulnerable adult to be injured or who causes or permits a child or vulnerable adult to be placed in a situation where the person or health of the child or vulnerable adult is endangered is guilty of an offense as follows:

1. If done intentionally or knowingly, the offense is a class 4 felony.
2. If done recklessly, the offense is a class 5 felony.
3. If done with criminal negligence, the offense is a class 6 felony.

...

At that time A.R.S. § 13-604.01 provided, in pertinent part:

A dangerous crime against children is in the first degree if it is a completed offense and is in the second degree if it is a preparatory offense, except attempted first degree murder is a dangerous crime against children in the first degree.

2. "Predicate felony" means any felony involving child abuse pursuant to section 13-3623, subsection A, paragraph 1, a sexual offense, conduct involving the intentional or knowing infliction of serious physical injury or the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument, or a dangerous crime against children in the first or second degree.

At the time of the applicant's conviction, A.R.S. § 13-702 provided, in pertinent part:

A. Unless a specific sentence is otherwise provided, the term of imprisonment for a first felony offense shall be the presumptive sentence determined pursuant to subsection D of this section. Except for those felonies involving a dangerous offense or if a specific sentence is otherwise provided, the court may increase or reduce the presumptive sentence within the ranges set by subsection D of this section. Any reduction or increase shall be based on the aggravating and mitigating circumstances listed in section 13-701, subsections D and E and shall be within the ranges prescribed in subsection D of this section.

<u>Felony</u>	<u>Mitigated</u>	<u>Minimum</u>	<u>Presumptive</u>	<u>Maximum</u>	<u>Aggravated</u>
Class 3	2 years	2.5 years	3.5 years	7 years	8.75 years

A.R.S. U.S.C. § 13-801 addresses the monetary fine amount for felonies.

As the applicant’s conviction under A.R.S. § 13-3623 was designated by the court as a class 3 felony, and as the only class 3 felony included in the full statute is a conviction under subsection (A)(2), it can be extrapolated that the applicant was convicted under A.R.S. § 13-3623(A)(2):

A. Under circumstances likely to produce death or serious physical injury, any person who causes a child or vulnerable adult to suffer physical injury or, having the care or custody of a child or vulnerable adult, who causes or permits the person or health of the child or vulnerable adult to be injured or who causes or permits a child or vulnerable adult to be placed in a situation where the person or health of the child or vulnerable adult is endangered is guilty of an offense as follows:

- 2. If done recklessly, the offense is a class 3 felony.

Counsel asserts that the record of conviction in the present case only demonstrates that the applicant was convicted under A.R.S. § 13-3623, without any specification as to the level of injury or harm, and cites to *Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996) as holding that where a statute involves reckless conduct there must be serious bodily injury to constitute a CIMT. More recently, in *Matter of Solon*, 24 I&N Dec. 239, 242 (BIA 2007), the BIA stated that:

[I]n the context of assault crimes, a finding of moral turpitude involves an assessment of both the state of mind and the level of harm required to complete the offense. Thus, intentional conduct resulting in a meaningful level of harm, which must be more than mere offensive touching, may be considered morally turpitudinous. However, as the level of conscious behavior decreases, i.e., from intentional to reckless conduct, more serious resulting harm is required in order to find that the crime involves moral turpitude. Moreover, where no conscious behavior is required, there can be no finding of moral turpitude, regardless of the resulting harm.

The present case is distinguished from both *Fualaau* and *Solon*, two decisions involving assault statutes and adult victims. In the present matter, the applicant was not convicted under an assault

statute, but one specific to the abuse of children or vulnerable adults. In *Garcia v. Attorney General*, 329 F.3d 1217 (11th Cir. 2003), the Eleventh Circuit Court of Appeals held that the Florida offense of aggravated child abuse is a CIMT. In *Guerrero de Nodahl v. INS*, 407 F.2d 1405 (9th Cir. 1969), the Ninth Circuit Court of Appeals determined that the offense of child abuse under section 273d of the California Penal Code is a crime involving moral turpitude. Quoting from the statute, the court found that a person who inflicts on a child “cruel or inhuman corporal punishment or injury” has committed a heinous offense so offensive to American ethics that, when committed willfully, necessarily involves moral turpitude. *Id.* at 1406-07. In the present case, the victim of the applicant’s crime was her 11-year-old daughter. In looking to the record of conviction, transcripts from the applicant’s May 5, 2004 deportation hearing include her testimony that:

I used back end of a cleaver to hit my daughter with, to discipline her. ... I was really angry and I was frustrated and I took it out on her. *See transcript, page 20.*

The applicant went on to testify that she struck her daughter multiple times with the meat cleaver on her legs and feet because she was “trying to hurry her up to finish her meal” and get on with her other responsibilities. *See transcript, page 29.* She testified that she had similarly attacked her daughter with a meat cleaver on six or seven other occasions. *See transcript, page 31.*

The presentencing report dated April 23, 1996, part of the plea agreement in the record of conviction, indicates in pertinent part:

An investigation revealed eleven-year-old [REDACTED] had been abused on numerous occasions since March 1995, by her mother, [REDACTED]. The abuse stemmed from [REDACTED] not eating all of her meals. In an attempt to make her eat, her mother utilized the blunt side of a meat cleaver and struck [REDACTED] several times. During a medical examination in the emergency room, [REDACTED] was observed to have lacerations to both feet, ankles, and lower legs. She had old wounds which had not received medical attention, which had healed over or were in the process of healing. These wounds were consistent with the fresh wounds made by the meat cleaver. The wounds ranged in length from one to three inches and in depth from superficial to one-quarter inch. All were below the sock level on the legs.

[REDACTED] reported to police she had run away several hours earlier to escape the beatings her mother had perpetrated. She went to a neighbor’s home because she felt she would be safe there and hid outside for several hours until she saw her mother driving through the neighborhood. She then realized she would have to wake the neighbors up. When she contacted the neighbors and showed them her injuries, they phoned police.

During questioning, [REDACTED] stated nothing out of the ordinary occurred that night and she did not know what had happened to her daughter’s feet.

...During questioning by police, [REDACTED] husband, [REDACTED], acknowledged that his wife handled the children's discipline, had a bad temper, and took her frustration out on the children. ... He acknowledged that [REDACTED] had come to him four weeks prior and showed him the wounds on her feet, telling him that her mother had used the back side of a knife to inflict the wounds. [REDACTED] was unable to explain why he did not seek medical attention for his daughter. He also reported he saw one incident, during which his wife hit his daughter with the meat cleaver.

A conviction under A.R.S. § 13-3623 requires that the offense be committed "under circumstances likely to produce death or serious physical injury," and that the perpetrator "causes" physical injury or danger to the person or health of the child. The applicant grabbed a meat cleaver and repeatedly struck the child with its blunt end, causing painful and serious lacerations to her legs, feet and ankles, where wounds from prior beatings had still not healed. In its November 22, 2004 decision, the BIA referred to this applicant's conduct as "particularly heinous," specifically noting that "wounds discovered on her daughter were both old and new lacerations." The BIA further found that the circumstances of the applicant's crime would not warrant a favorable exercise of discretion even if she were considered statutorily eligible for relief. While not indicative of whether the crime involves moral turpitude, the sentence imposed upon the applicant is indicative of the severity of harm inflicted on her daughter. Though the applicant could have been sentenced to as little as two (2) years imprisonment had there been mitigating factors, she was sentenced to eight (8) years, one year more than the maximum sentence and one requiring the presence of aggravating factors. The AAO finds that the applicant's reckless state of mind was coupled with the infliction of serious bodily injury and other aggravating factors, including but not limited to the age and vulnerability of the victim, and the violation of duty owed in the mother-child relationship. Other aggravating factors, such as those included in Arizona's aggravated assault statute, A.R.S. § 13-1204, and present here include: if a person causes serious physical injury to another; if the person uses a deadly weapon or dangerous instrument; and if the person is eighteen years of age or older and commits the assault on a minor under fifteen years of age.

Accordingly, the AAO reaffirms our earlier finding that the applicant's conviction for attempted child abuse, a class 3 felony and a dangerous crime against children in the second degree, in violation of A.R.S. § 13-3623, is a crime involving moral turpitude. Based on the foregoing, the applicant is inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude. She requires a waiver under section 212(h) of the Act.

Section 212(h) of the Act provides, in pertinent part:

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

....

(1) (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]

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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 . . . and

(2) the Attorney General [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status. . . .

No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than seven years immediately preceding the date of initiation of proceedings to remove the alien from the United States. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.

Counsel does not contest whether the applicant has been convicted of an aggravated felony, and the record shows that throughout the applicant's proceedings and appeals she has been found to have been convicted of an aggravated felony under section 101(a)(43)(F) of the Act, namely a crime of violence (as defined in 18 U.S.C. § 16, but not including a purely political offense), for which the term of imprisonment is at least one year. "Crime of violence" is defined in 18 U.S.C. § 16 as: (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." The record shows that after being admitted as a lawful permanent resident, the applicant was deported from the United States pursuant to section 237(a)(2)(A)(iii) of the Act for having been convicted of an aggravated felony under section 101(a)(43)(F) of the Act. Counsel asserts that the AAO erred in "failing to conclude that Petitioner is no longer a lawful permanent resident, and thus, she remains eligible for a section 212(h) waiver." The AAO finds counsel's assertion unpersuasive. Counsel does not explain the circumstances under which an applicant who loses his or her permanent residence status after being removed for an aggravated felony conviction would thereafter remain, or become, eligible for section 212(h) relief. Instead, counsel lists a string of U.S. Circuit Court of Appeals decisions including: *Martinez v. Mukasey*, 519 F.3d 532, 544 (5th Cir. 2008); *Lanier v. Attorney General*, 631 F.3d 1363 (11th Cir. 2011); *Bracamontes v. Holder*, 675 F.3d 380 (4th Cir. 2012); *Leiba v. Holder*, 699 F.3d 346, 348-49 (4th Cir. 2012); and *Sum v. Holder*, 602 F.3d 1092 (9th Cir. April 23, 2010). A reading of these decisions reveals that none support counsel's proposition that only current lawful permanent residents are ineligible for a waiver under section 212(h) for having been convicted of an aggravated felony after admission as a lawful permanent resident. Rather, the decisions hold generally that according to the plain language of the statute, the lawful permanent resident bars to section 212(h) of the Act apply only to persons who were "admitted to the United States" at a border or equivalent as lawful permanent residents, under the definition of admission at section 101(a)(13)(A) of the Act, and not to persons who were "lawfully admitted as permanent

residents” through adjustment of status. The AAO further notes that even if the cases cited by counsel supported his contention, they would be merely instructive and not controlling as the present matter arises in Malaysia, outside the United States and the jurisdiction of the Fourth, Fifth, Ninth and Eleventh Circuit Courts of Appeal. Here the applicant was admitted as a lawful permanent resident on November 25, 1981, entering the United States in the IR-1 category as the beneficiary of an approved petition for alien relative filed by her U.S. citizen spouse. Because the applicant was subsequently convicted, on August 27, 1996, of an aggravated felony, she is statutorily ineligible for a waiver under section 212(h) of the Act.

As the applicant is statutorily ineligible for a waiver of inadmissibility under section 212(h) of the Act, there is no waiver before the AAO which may be properly examined pursuant to the present Form I-601 application. Accordingly, the application cannot be approved.

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 not been met. Therefore, the motion is granted but the prior AAO decision is affirmed.

ORDER: The prior AAO decision is affirmed.