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



U.S. Citizenship
and Immigration
Services

DATE: DEC 18 2014

Office: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE:

Applicant: [REDACTED]

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 (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 that reads "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of El Salvador 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 crimes involving moral turpitude. The applicant's mother and two children are U.S. citizens. The applicant is a beneficiary of a Form I-130, Petition for Alien Relative, that his daughter filed on his behalf. The applicant contests this ground of inadmissibility and in the alternative seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h).

The Director found that the applicant is not eligible for a waiver, as he was convicted of an aggravated felony after admission as a lawful permanent resident; the applicant was convicted of a violent or dangerous crime; and he also is not eligible for a waiver as a matter of discretion. The Director denied the Form I-601, Application for Waiver of Grounds of Inadmissibility. *Director's Decision*, dated February 20, 2014.

On appeal, counsel asserts that the Director erred in matters of fact and law. Specifically, he asserts that the applicant was not convicted of an aggravated felony; he was not convicted of a crime involving moral turpitude; he was not convicted of a violent or dangerous crime; and alternatively, he has provided evidence that his mother would experience extreme hardship if his waiver application is denied. *Brief in Support of Appeal*, dated April 22, 2014.

The record includes, but is not limited to, counsel's brief, the applicant's statement, medical and financial records for the applicant's mother, criminal records, and statements from family members of the applicant. The entire record was reviewed and considered in arriving at 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.

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

The Attorney General [now Secretary, Department of Homeland Security (Secretary)] may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana

- (1) (A) in the case of any immigrant it is established to the satisfaction of the [Secretary] that –

- (i) the alien is inadmissible only under subparagraph (D)(i) or (D)(ii) of such subsection or 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 [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 . . .; and

(2) the [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 provided under this subsection in the case of an alien who has been convicted of (or who has admitted committing acts that constitute) murder or criminal acts involving torture, or an attempt or conspiracy to commit murder or a criminal act involving torture. 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 7 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 [Secretary] to grant or deny a waiver under this subsection.

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 assessing whether a conviction is a crime involving moral turpitude, the adjudicator must first “determine what law, or portion of law, was violated.” *Matter of Esfandiary*, 16 I&N Dec. 659, 660 (BIA 1979). The adjudicator engages in a categorical inquiry, considering the “inherent nature of the crime as defined by statute and interpreted by the courts,” not the underlying facts of the criminal offense. *Matter of Short*, 20 I&N Dec. 136, 137 (BIA 1989); see also *Matter of Louissaint*, 24 I&N Dec. 754, 757 (BIA 2009) (citing *Taylor v. United States*, 495 U.S. 575, 599-600 (1990)). If the statute “defines a crime in which turpitude necessarily inheres, then the conviction is for a crime involving moral turpitude.” *Matter of Short*, *supra*, at 137.

Where the statute includes some offenses involving moral turpitude and some which do not – where there is a *realistic probability* that the statute would be applied to conduct not involving moral turpitude – the adjudicator looks to the record of conviction to determine the offense for which the applicant was convicted. See *Matter of Guevara Alfaro*, 25 I&N Dec. 417, 421 (citing *Matter of Silva-Trevino*, 24 I&N Dec. 687, 689-90, 696-99 (A.G. 2008)); see also *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability, as opposed to a theoretical possibility, exists where there is an actual prior case, possibly the applicant’s own case, in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. *Matter of Silva-Trevino*, *supra*, at 708. The record of conviction is a narrow, specific set of documents which includes the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Matter of Louissaint*, *supra*, at 757; see also *Shepard v. U.S.*, 544 U.S. 13, 16 (2005) (finding that the record of conviction is limited to the “charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.”)

If review of the record of conviction is inconclusive, an adjudicator may consider “probative evidence beyond the record of conviction” to resolve whether the offense constitutes a crime involving moral turpitude. *Matter of Guevara Alfaro*, *supra*, at 422 (citing *Matter of Silva-Trevino*, *supra*, at 690, 699-704, 709). However, 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.” *Matter of Silva-Trevino*, *supra*, at 703; see also *Matter of Ahortalejo-Guzman*, 25 I&N Dec. 465, 468 (BIA 2011) (An adjudicator may not “undermine plea agreements by going behind a conviction to use sources outside the record of conviction to determine that an alien was convicted of a more serious turpitudinous offense.”).

According to the Form I-601 denial decision, the applicant was convicted of false imprisonment on [REDACTED] 2006 in the District Court of [REDACTED] Maryland. The record, however, does not reflect his conviction, as that term is defined in section 101(a)(48) of the Act.

Section 101(a)(48) provides:

- (A) The term “conviction” means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—
- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
 - (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.

The criminal records in the file reflect that the applicant was charged with this crime but the disposition was "stet." The Maryland Code of Criminal Procedure, Rule 4-248 states:

- (a) Disposition by Stet. On motion of the State's Attorney, the court may indefinitely postpone trial of a charge by marking the charge “stet” on the docket. The defendant need not be present when a charge is steted but if neither the defendant nor the defendant's attorney is present, the clerk shall send notice of the stet to the defendant, if the defendant's whereabouts are known, and to the defendant's attorney of record. Notice shall not be sent if either the defendant or the defendant's attorney was present in court when the charge was steted. If notice is required, the clerk may send one notice that lists all of the charges that were steted. A charge may not be steted over the objection of the defendant. A steted charge may be rescheduled for trial at the request of either party within one year and thereafter only by order of court for good cause shown.
- (b) Effect of Stet. When a charge is steted, the clerk shall take the action necessary to recall or revoke any outstanding warrant or detainer that could lead to the arrest or detention of the defendant because of the charge, unless the court orders that any warrant or detainer shall remain outstanding.

The record includes no evidence that the applicant was found guilty or pled guilty to the charge of false imprisonment or that his case was subsequently rescheduled. As the definition of conviction under section 101(a)(48) of the Act has not been met, the record reflects that the applicant was not convicted of this crime.

The record reflects that the applicant was convicted on [REDACTED] 2006 of assault in the second degree under Maryland Code, Criminal Law, § 3-203, and he received a suspended sentence of 364 days in jail and three years of supervised probation under § 3-203(b).

Maryland Code, Criminal Law, § 3-203 provides, in pertinent part:

- (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.

Maryland Code, Criminal Law, § 3-201 defines assault as:

(b) “Assault” means the crimes of assault, battery, and assault and battery, which retain their judicially determined meanings.

Under Maryland law, assault has been judicially determined to mean: (1) an attempt to commit a battery or (2) an unlawful intentional act which places another in reasonable apprehension of receiving an immediate battery. *Lamb v. State*, 613 A.2d 402, 411 (Md. 1992) (citations omitted). The attempted battery variety of second-degree assault has been judicially determined to mean: (1) that the defendant actually tried to cause physical harm to the victim; (2) the defendant intended to bring about physical harm to the victim; and (3) the victim did not consent to the conduct. *Snyder v. State*, 63 A.3d 128, 134 (Md. 2013). An unlawful intentional act which places another in reasonable apprehension of receiving an immediate battery requires: (1) that the defendant commit an act with the intent to place another in fear of immediate physical harm; (2) that the defendant had the apparent ability, at that time, to bring about the physical harm; and (3) that the victim be aware of the impending battery. *Jones v. State*, 217 73 A.3d 1136, 1142 (Md. 2013), quoting *Snyder*.

Battery has been judicially determined to mean: (1) the defendant caused offensive physical contact with, or harm to, a victim; (2) the contact was the result of an intentional or reckless act of the defendant and was not accidental; and (3) the contact was not consented to by the victim or was not legally justified. *Nicolas v. State*, 44 A.3d 396, 407 (Md. 2012) (citations omitted). In *U.S. v. Royal*, 731 F.3d 333 (4th Cir. 2013), the court, considering Maryland jury instructions, found that Maryland’s second degree assault statute is facially indivisible and that the categorical approach applies. *U.S. v. Royal*, 731 F.3d at 340-341.

As a general rule, simple assault or battery is not deemed to involve moral turpitude for purposes of immigration law, even if the intentional infliction of physical injury is an element of the crime. *Matter of Fualaau*, 21 I&N Dec. 475, 477 (BIA 1996). However, this general rule does not apply where an assault or battery necessarily involves 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), *Nguyen v. Reno*, 211 F.3d 692 (1st Cir. 2000), and *Matter of Sanudo*, 23 I&N Dec. 968, 971 (BIA 2006).

Assault in the second degree does not involve an aggravating dimension, such as the use of a deadly weapon or serious bodily harm. This type of language is found in Maryland Code, Criminal Law, § 3-202, assault in the first degree, which states:

(a)(1) A person may not intentionally cause or attempt to cause serious physical injury to another.

(2) A person may not commit an assault with a firearm

In addition, moral turpitude is present “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) (citing *Garcia v. Att’y Gen. of U.S.*, 329 F.3d 1217, 1222 (11th Cir. 2003)).

The section of Maryland Code, Criminal Law, §3-203 under which the applicant was convicted is not 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. The record is not clear as to whether the applicant committed the crime of assault, battery or assault and battery. Regardless of which type of assault in the second degree he committed, however, based on the judicially determined meanings of those crimes, we find that the applicant's conviction for second degree assault is not a crime involving moral turpitude.

The applicant was also convicted on [REDACTED] 2004 of violating a protective order under Maryland Code, Family Law, § 4-509, and he received a suspended sentence of 90 days and one year of supervised probation.

Maryland Code, Family Law, § 4-509 provides, in pertinent part:

(a) A person who fails to comply with the relief granted in an interim protective order under § 4-504.1(c)(1), (2), (3), (4)(i), (7), or (8) of this subtitle, a temporary protective order under § 4-505(a)(2)(i), (ii), (iii), (iv), (v), or (viii) of this subtitle, or a final protective order under § 4-506(d)(1), (2), (3), (4), or (5), or (f) of this subtitle is guilty of a misdemeanor and on conviction is subject, for each offense, to:

(1) for a first offense, a fine not exceeding \$1,000 or imprisonment not exceeding 90 days or both; and

(2) for a second or subsequent offense, a fine not exceeding \$2,500 or imprisonment not exceeding 1 year or both.

As discussed earlier in our decision:

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.

Matter of Perez-Contreras, 20 I&N Dec. 615, 617-18 (BIA 1992).

Considering the act and the relevant statutory language, a conviction under Maryland Code, Family Law, § 4-509 does not appear to require knowing or intentional conduct. Therefore, we find that it is not a crime involving moral turpitude.

As the applicant was not convicted of a crime involving moral turpitude, a waiver under section 212(h) is not required. Therefore, he does not have to establish extreme hardship to a qualifying relative. Moreover, because the applicant was not convicted for a crime involving moral turpitude, 8 C.F.R. § 212.7(d) is not applicable to his case and we will not address whether the applicant committed a violent or dangerous crime.

In addition, because the applicant has not been convicted of a crime involving moral turpitude, the issue of whether he was convicted of an aggravated felony after being admitted to the United States as an alien lawfully admitted for permanent residence, which would prohibit him from being granted a waiver under section 212(h), is not an issue, because he is not inadmissible under section 212(h) of the Act. Section 101(a)(43)(F) of the Act defines aggravated felony as a crime of violence with a term of imprisonment of at least one year. Even if the applicant had been found to have committed a crime of violence, his term of imprisonment was not at least one year.

As the applicant has not been convicted of a crime involving moral turpitude, he is not required to file a waiver under section 212(h) of the Act. The appeal will be dismissed as the waiver application is moot.

ORDER: The appeal is dismissed as the waiver application is moot.