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

U.S. Citizenship and Immigration Services

DATE: JAN 2 5 2014 OFFICE: SAN JOSE 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. 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 Field Office Director, San Jose, California denied the waiver application. A subsequent appeal was denied by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reconsider. The motion will be granted and the prior decision of the AAO will be affirmed.

The applicant is a native and citizen of Vietnam 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 in order to remain in the United States with his U.S. citizen spouse and children.

The Field Office Director concluded that the record failed to establish the existence of exceptional and extremely unusual hardship and denied the application accordingly. *See Decision of the Field Office Director*, dated February 2, 2011. The AAO also determined that the applicant failed to demonstrate the existence of exceptional and extremely unusual hardship and denied the appeal accordingly. *See Decision of the AAO*, dated October 7, 2013.

On appeal, counsel for the applicant asserts that the applicant must have been convicted of a felony for his convictions to be deemed violent or dangerous crimes pursuant to 8 C.F.R. § 212.7(d). Counsel also asserts that the United States Supreme Court decision in *Moncrieffe v. Holder*, 133 U.S. 1678 (2013), necessitates consideration of whether the applicant's conviction constitutes a crime involving moral turpitude.

In support of the motion, the applicant submitted an AAO decision from a separate case. The entire record was reviewed and considered in rendering a decision on the motion.

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.)

To determine if a crime involves moral turpitude, the Ninth Circuit Court of Appeals employs the categorical approach set forth in *Taylor v. United States*, 110 S.Ct. 2143 (1990). *See Nicanor-Romero v. Mukasey*, 523 F.3d 999, 1004 (9th Cir. 2008), *overruled on other grounds by Marmolejo-Campos v. Holder*, 58 F.3d 903, 911 (9th Cir. 2009). The purpose of the categorical approach is to determine whether the full range of conduct encompassed by the statute constitutes a crime of moral turpitude. *Cuevas–Gaspar v. Gonzalez*, 430 F.3d 1013, 1017 (9th Cir. 2005), *abrogation on other grounds recognized by Holder v. Martinez-Gutierrez*, 132 S.Ct. 2011, 2020-21 (2012). If the statute "criminalizes both conduct that does involve moral turpitude and other conduct that does not, the modified categorical approach is applied." *Marmolejo-Campos*, 558 F.3d at 912 (citing *Fernando-Ruiz v. Gonzalez*, 466 F.3d 1121, 1163 (9th Cir. 2006)); *see also Castillo-Cruz v. Holder*, 581 F.3d 1154, 1161 (9th Cir. 2009). However, there must be "a realistic probability, not a theoretical possibility, that the statute would be applied to reach conduct that did not involve moral turpitude." *Nicanor-Romero*, 523 F.3d at 1004 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). To demonstrate a "realistic probability," the applicant must point to his or her own case or other cases in which the state courts in fact did apply the statute to conduct not involving moral turpitude. 523 F.3d at 1004-05. A realistic probably also exists where the statute expressly punishes conduct not involving moral turpitude. *See U.S. v. Vidal*, 504 F.3d 1072, 1082 (9th Cir. 2007).

Once a realistic probability is established, the modified categorical approach is applied, which requires looking to the "limited, specified set of documents" that comprise what is known as the record of conviction – the charging document, a signed plea agreement, jury instructions, guilty pleas, transcripts of a plea proceeding and the judgment – to determine if the conviction entailed admission to, or proof of, the elements of a crime involving moral turpitude. *Castillo-Cruz*, 581 F.3d at 1161 (citing *Fernando-Ruiz,* 466 F.3d at 1132-33); *see also Marmolejo-Campos*, 558 F.3d at 912 (citing *Cuevas–Gaspar*, 430 F.3d at 1020). The Ninth Circuit has reaffirmed that courts may not examine evidence outside the record of conviction in determining whether a conviction was for a crime involving moral turpitude. *See Olivas-Motta v. Holder*, --- F.3d ---, 2013 WL 2128318 (9th Cir. May 17, 2013) (rejecting *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)). Where the burden of proof is on the applicant, as in the present case, the applicant cannot sustain that burden where the record of conviction is inconclusive. *Young v. Holder*, 697 F.3d 976, 989 (9th Cir. 2012).

As noted previously, the record reflects that the applicant was convicted of four counts of assault with deadly weapon pursuant to section 245(a)(1) of the California Penal Code in the Superior Court of California, County of Santa Clara, on January 10, 2003. Though the applicant's conviction was reduced pursuant to section 17(b)(3) and dismissed pursuant to section 1203.4 of the California Penal Code, the applicant's original conviction remains in place for immigration purposes. The Board of Immigration Appeals held that if a court vacates a conviction for reasons unrelated to a procedural or substantive defect in the underlying criminal proceedings, the alien remains "convicted" for immigration purposes. *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003).

As cited in the previous AAO decision, the Ninth Circuit Court of Appeals, in *Gonzales v. Barber*, determined that assault with a deadly weapon under the California Penal Code is categorically a crime involving moral turpitude. 207 F.2d 398, 400 (9th Cir. 1953). It is noted that the Ninth Circuit in *Carr v. INS* determined that "assault upon the person of another with a firearm" in violation of Cal. Penal Code § 245(a)(2) is not a crime involving moral turpitude. 86 F.3d 949, 951 (9th Cir. 1996). However, unlike the decision in *Gonzales v. Barber*, the Ninth Circuit provided no analysis for its decision. Moreover, *Carr v. INS* was decided before the Ninth Circuit adopted the "realistic probability" approach. The AAO notes that although not explicitly applying the "realistic probability" test, the BIA in *Matter of G-R-* and the Ninth Circuit in *Gonzales v. Barber* followed the realistic probability approach by viewing whether a case exists in which a conviction for "assault with a deadly weapon" was applied to conduct not involving moral turpitude. 207 F.2d at 400. The AAO therefore concludes, in accordance with the Ninth Circuit's finding in *Gonzales v. Barber,* that assault with a deadly weapon or instrument is categorically a crime involving moral turpitude.

Counsel for the applicant asserts that the United States Supreme Court decision in *Moncrieffe v. Holder*, 133 U.S. 1678 (2013) changed the law as to whether a noncitizen is barred from relief based upon a prior conviction and removes the burden of proof from the alien. Counsel also cites the Ninth Circuit Court of Appeals in *Olivas-Motta v. Holder*, --- F.3d ---, 2013 WL 2128318 (9th Cir. May 17, 2013), stating that the Ninth Circuit rejected the Attorney General's decision in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008). Counsel contends that these two holdings

necessitate consideration of whether the applicant's conviction constitutes a crime involving moral turpitude.

In *Moncrieffe v. Holder*, the Supreme Court held that a conviction for marijuana distribution necessitates a finding that the offense involves remuneration or more than a small amount of marijuana in order to constitute an aggravated felony under the Act. *Id.* The applicant's convictions are for four counts of assault with a deadly weapon, which has been deemed a crime involving moral turpitude by the Ninth Circuit. *Gonzales v. Barber*, *207* F.2d 398, 400 (9th Cir. 1953). There is no indication that the applicant's actions leading to his convictions failed to satisfy the elements of the crimes; indeed, the applicant was convicted of four counts of assault with deadly weapon pursuant to section 245(a)(1) of the California Penal Code. Further, it is noted that the AAO, in its previous decision, cited and relied upon *Olivas-Motta v. Holder*, --- F.3d ---, 2013 WL 2128318 (9th Cir. May 17, 2013) in its inadmissibility determination.

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 –
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> > (1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General 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 Attorney General [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 . . . .

As the applicant has been convicted of felony assault with a deadly weapon other than a firearm, a dangerous and violent crime, he must also demonstrate that the denial of his application would result in exceptional and extremely unusual hardship.

8 C.F.R. § 212.7(d) provides, in pertinent part:

> Criminal grounds of inadmissibility involving dangerous or violent crimes. The Attorney General [Secretary], in general, will not favorably exercise discretion under section 212(h)(2) of the Act . . .in cases involving violent or dangerous crimes, except...in cases in which the alien clearly demonstrates that the denial of the application for adjustment of status or an immigrant visa or admission as an immigrant would result in exceptional and extremely unusual hardship. . . .

Section 245(a)(1) of the California Penal Code provides, in pertinent part:

> Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm . . . shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars ($10,000), or by both the fine and imprisonment.

The AAO notes that the words "violent" and "dangerous" and the phrase "violent or dangerous crimes" are not further defined in the regulation, and the AAO is aware of no precedent decision or other authority containing a definition of these terms as used in 8 C.F.R. § 212.7(d). A similar phrase, "crime of violence," is found in section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F). It provides that a "crime of violence," as defined under 18 U.S.C. § 16, for which the term of imprisonment is at least one year, is an aggravated felony. As such, "crime of violence" is limited to those crimes specifically listed in 18 U.S.C. § 16. It is not a generic term with application to any crime involving violence, as that term may be commonly defined. However, that the DOJ chose not to use the language of section 101(a)(43)(F) of the Act or 18 U.S.C. § 16 in promulgating 8 C.F.R. § 212.7(d) indicates that "violent or dangerous crimes" and "crime of violence" are not synonymous. The Department of Justice clarified the relationship between these distinct terms in the interim final rule codifying 8 C.F.R. § 212.7(d):

> [I]n general, individuals convicted of aggravated felonies would not warrant the Attorney General's use of this discretion. In fact, the proposed regulations stated that even if the applicant can meet the "exceptional and extremely unusual hardship" standard for the exercise of discretion, depending upon the severity of the offense, this might "still be insufficient" to obtain the waiver. See 67 FR at 45407. That language would substantially limit the circumstances under which an individual convicted of an aggravated felony would be granted a waiver as a matter of discretion. Therefore, the Department believes that this language achieves the goal of the commenter while not unduly constraining the Attorney General's discretion to render waiver decisions on a case-by-case basis.

67 Fed. Reg. 78675, 78677-78 (December 26, 2002).

Therefore, the fact that a conviction constitutes an aggravated felony under the Act may be indicative that an alien has also been convicted of a violent or dangerous crime, but it is not

dispositive. Decisions to deny waiver applications on the basis of discretion under 8 C.F.R. § 212.7(d) are made on a factual "case-by-case basis." The AAO interprets the phrase "violent or dangerous crimes" in accordance with the plain or common meaning of its terms, consistent with any published precedent decisions addressing discretionary denials under 8 C.F.R. § 212.7(d) or the standard originally set forth in *Matter of Jean*. Given the plain language of the statute under which the applicant was convicted, committing assault upon a person with a deadly weapon, the AAO finds that the applicant's conviction renders him subject to the heightened discretion standard of 8 C.F.R. § 212.7(d).

Accordingly, the applicant must show that "extraordinary circumstances" warrant approval of the waiver. 8 C.F.R. § 212.7(d). Extraordinary circumstances may exist in cases involving national security or foreign policy considerations, or if the denial of the applicant's admission would result in exceptional and extremely unusual hardship. *Id.* Finding no evidence of foreign policy, national security, or other extraordinary equities, the AAO will consider whether the applicant has "clearly demonstrate[d] that the denial of . . . admission as an immigrant would result in exceptional and extremely unusual hardship" to a qualifying relative. *Id.*

The exceptional and extremely unusual hardship standard is more restrictive than the extreme hardship standard. *Cortes-Castillo v. INS*, 997 F.2d 1199, 1204 (7th Cir. 1993). Since the applicant is subject to 8 C.F.R. § 212.7(d), merely showing extreme hardship to his qualifying relatives under section 212(h) of the Act is not sufficient. He must meet the higher standard of exceptional and extremely unusual hardship.

Counsel for the applicant asserts that the reduction of the applicant's sentence from a felony to misdemeanor term of imprisonment indicates that the applicant was not convicted of an aggravated felony. Counsel contends that, pursuant to the AAO's prior decision, the applicant must have been, at least, convicted of a felony in order to be convicted of an aggravated felony and dangerous and violent crime.

The AAO's decision, including its prior decision in this case, specifically states that a conviction constitutes an aggravated felony under the Act may be indicative that an alien has also been convicted of a violent or dangerous crime, *but it is not dispositive* (emphasis added). As such, despite the fact that the applicant has not been convicted of an aggravated felony because his sentence was reduced to less than one year, the applicant's conviction for assault with a deadly weapon constitutes a dangerous and violent crime pursuant to 8 C.F.R. § 212.7(d).

Counsel asserts that the applicant's waiver application should be adjudicated pursuant to the extreme hardship standard of section 212(h)(1)(B) of the Act. Counsel does not make any assertions concerning the determination that the applicant has failed to meet his burden of demonstrating exceptional and extremely unusual hardship. As the record does not contain sufficient evidence to show that denial of the present waiver application would result in exceptional and extremely unusual hardship, the applicant has not established the requisite level of hardship and has not shown that he qualifies for a favorable exercise of discretion. 8 C.F.R. § 212.7(d).

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the prior decision of the AAO is affirmed, and the underlying application remains denied.

ORDER: The motion is granted and the prior decision of the AAO dismissing the appeal is affirmed