U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF D-H-A-

DATE: DEC. 17, 2015

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

APPLICATION: FORM I-601, APPLICATION FOR WAIVER OF GROUNDS OF INADMISSIBILITY

The Applicant, a native and citizen of Guatemala, seeks a waiver of inadmissibility. *See* Immigration and Nationality Act (the Act) § 212(h), 8 U.S.C. § 1182(h). The Field Office Director, Indianapolis, Indiana, denied the application. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before us on a motion to reopen and a motion to reconsider. The motions will be granted, and the matter will be remanded to the Director for further proceedings consistent with this opinion.

The Applicant was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having committed a crime involving moral turpitude (CIMT). The Applicant is the spouse of a legal permanent resident and the parent of a U.S. citizen. He seeks a waiver of inadmissibility in order to reside in the United States with his family.

In a decision dated December 18, 2013, the Director found that the Applicant did not establish that any qualifying family members would experience extreme hardship as a consequence of his inadmissibility. The application was denied accordingly.

On appeal, we determined in an August 26, 2014, decision that the Applicant did not demonstrate that his qualifying relatives would experience extreme hardship should they remain in the United States without him. As such, we denied the application.

On motion, the Applicant asserts that his spouse and daughter would face emotional and financial hardships if he were removed. The Applicant provides additional evidence regarding these hardships on motion.

In addition to evidence already considered on appeal, the Applicant provides an additional brief; identification documents for the Applicant, his spouse and child; letters from the Applicant, his spouse and friends; photographs; a psychological assessment of the spouse; medical and academic records for the child; and financial documentation.

We conduct appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

We will first readdress the finding of inadmissibility. Section 212(a)(2)(A)(i)(I) 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 –
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> > (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.
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> (ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-
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> > (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 (the Board) 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....
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> 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, we must first "determine what law, or portion of law, was violated." *Matter of Esfandiary*, 16 I&N Dec. 659, 660 (BIA 1979). We engage 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)). This categorical inquiry focuses on whether moral turpitude necessarily inheres in the minimal conduct for which there is a realistic probability of prosecution under the statute. *See Short, supra*; *Moncrieffe v. Holder*, 133 S.Ct. 1678, 1684-1685 (2013); *Gonzales v. Duenas-Alvarez,* 127 S.Ct. 815, 822 (2007).

The record reflects that, on the Applicant was convicted of Section 35-44-3-3(a)(1) of the Indiana Criminal Code, resisting law enforcement, a class A misdemeanor, and sentenced to one suspended year of state incarceration, one year of probation, and fines.

Section 35-44-3-3 of the Indiana Code states in part:

> (a) A person who knowingly or intentionally:
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> (1) forcibly resists, obstructs, or interferes with a law enforcement officer or a person assisting the officer while the officer is lawfully engaged in the execution of the officer's duties;
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> (2) forcibly resists, obstructs, or interferes with the authorized service or execution of a civil or criminal process or order of a court; or
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> (3) flees from a law enforcement officer after the officer has, by visible or audible means, including operation of the law enforcement officer's siren or emergency lights, identified himself or herself and ordered the person to stop; commits resisting law enforcement, a Class A misdemeanor, except as provided in subsection (b).
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> (b) The offense under subsection (a) is a:
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> (1) Class D felony if:
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> (A) the offense is described in subsection (a)(3) and the person uses a vehicle to commit the offense; or
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> (B) while committing any offense described in subsection (a), the person draws or uses a deadly weapon, inflicts bodily injury on or otherwise causes bodily injury to another person, or operates a vehicle in a manner that creates a substantial risk of bodily injury to another person;

Resisting a law enforcement officer, akin to resisting arrest, has been examined by the Board, which determined that such a crime may constitute a CIMT if the statute in question involves knowledge

that someone is a law enforcement officer and the officer suffers a bodily injury or assault. *See In the Matter of O-----*, 4 I&N Dec. 301 (BIA 1951) (examining whether a German law for resisting an official involved moral turpitude and determining that there must be knowledge that someone is a law enforcement officer and that there must be an assault or bodily injury of some sort); *see also Matter of Danesh* 19 I&N Dec. 669 (BIA 1988) (factors in determining whether moral turpitude is involved in an assault on an officer are the employment of force or violence and bodily injury suffered by the officer).).

An individual who "knowingly or intentionally forcibly resists, obstructs, or interferes with a law enforcement officer or person assisting the officer while the officer is lawfully engaged in the execution of the officer's duties," is in violation of section 35-44.3(a)(1) of the Indiana Code. The statutory language of this section does not include a requirement of bodily harm to the officer or person assisting the officer. It is noted that section 35-44.3(a)(1) of the Indiana Code is a class A misdemeanor and it is only the additional requirement of causing bodily injury that results in a violation of section 35-44-3(b)(1)(B) of the Indiana Code, a Class D Felony. Indiana state courts have also determined that a violation of section 35-44.3(a)(1) through force is not required to include bodily injury. *See Glenn v. State*, 949 N.E.2d 859 (evidence that a defendant aggressively pulled away from an officer more than one time is sufficient to establish forcible resistance); *see also Adetokunbou v. State*, 29 N.E.3d 1277 (forcible resistance can include a threatening gesture or movement that presents imminent danger of bodily injury to the officer). As the minimum conduct needed for a conviction under section 35-44.3(a)(1) of the Indiana Code does not involve moral turpitude, we cannot find that a violation of this section is categorically a crime involving moral turpitude.

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, because the Applicant has not been convicted of a CIMT, he is not inadmissible and not required to file a waiver application.

As the present record establishes that the Applicant is not inadmissible, the Form I-601 is moot.

ORDER: The motion to reopen and reconsider is granted, and the matter is remanded to the Field Office Director, Indianapolis, Indiana for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Cite as *Matter of D-H-A-*, ID# 13011 (AAO Dec. 17, 2015)