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U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-D-A-

DATE: MAR. 3, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Applicant, a native of Guinea, seeks a waiver of grounds of inadmissibility for crimes involving moral turpitude and multiple criminal convictions so he can be admitted to the United States to live with his U.S. citizen spouse. *See* Immigration and Nationality Act (the Act) section 212(h), 8 U.S.C. § 1182(h). A foreign national seeking to be admitted to the United States as an immigrant or to adjust status to lawful permanent residence must be admissible or receive a waiver of inadmissibility. U.S. Citizenship and Immigration Services may grant this discretionary waiver if refusal of admission would result in extreme hardship to a qualifying relative or qualifying relatives, or because the activities for which the foreign national is inadmissible occurred at least 15 years ago, if the foreign national's admission would not be contrary to the national welfare, safety, or security of the United States and the foreign national has been rehabilitated.

The record reflects that the U.S. Department of State (DOS) consular office in Germany (U.S. consular office) found the Applicant to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act for having been convicted of crimes involving moral turpitude, and section 212(a)(2)(B) of the Act for having been convicted of 2 or more offenses for which the aggregate sentence to confinement was 5 years or more. The Applicant is married to a U.S. citizen and seeks a waiver of inadmissibility under section 212(h) of the Act.

The Director, Nebraska Service Center, concluded that the Applicant submitted sufficient evidence to establish that his U.S. citizen spouse would experience extreme hardship if he were denied admission. He therefore met the extreme hardship standard set forth in section 212(h) of the Act. The Director found, however, that the Applicant's offenses were violent and dangerous crimes, and that he must also demonstrate that exceptional and extremely unusual hardship would be imposed on his spouse, as set forth in 8 C.F.R. § 212.7(d). The Director determined that the Applicant provided insufficient evidence to show that his spouse would experience exceptional and extremely unusual hardship if he were denied admission to the United States. The Form I-601 was denied accordingly.

The matter is now before us on appeal. Upon *de novo* review, the matter will be remanded to the Director, as the Applicant is no longer found to be inadmissible.

I. LAW

Section 212(a)(2)(A)(i)(I) of the Act provides that any foreign national convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime is inadmissible.

The Act provides two definitions of conviction: 1) a formal judgment of guilt entered by a court, or 2) if adjudication of guilt has been withheld, where a judge or jury has found the person guilty or the person has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, *and* the judge has ordered some form of punishment, penalty, or restraint on the person's liberty. Section 101(a)(48)(A) of the Act.

A "term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part." Section 101(a)(48)(B) of the Act.

The Act provides at section 212(a)(2)(B) that any foreign national convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

Individuals found inadmissible under sections 212(a)(2)(A)(i)(I) and 212(a)(2)(B) of the Act may seek a discretionary waiver of inadmissibility under section 212(h) of the Act. Section 212(h)(1)(A) of the Act provides for a waiver where the activities occurred more than 15 years before the date of the application if admission to the United States would not be contrary to the national welfare, safety, or security of the United States, and the foreign national has been rehabilitated. Section 212(h)(1)(B) of the Act provides for a waiver if denial of admission would result in extreme hardship to a United States citizen or lawful permanent resident spouse, parent, son, or daughter.

The regulation at 8 C.F.R. § 212.7(d) states, however, that:

> The Attorney General, in general, will not favorably exercise discretion under section 212(h)(2) of the Act . . . to consent to an application or reapplication for a visa, or admission to the United States, or adjustment of status, with respect to immigrant aliens who are inadmissible under section 212(a)(2) of the Act in cases involving violent or dangerous crimes, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an 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. Moreover, depending on the gravity of the alien's

> underlying criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act.

II. ANALYSIS

In the present case, the DOS found the Applicant to be inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of crimes involving moral turpitude, specifically for rape of a minor in 1997, and for two counts of causing bodily harm in 2011. The DOS also found the Applicant to be inadmissible under section 212(a)(2)(B) of the Act for having been convicted of 2 or more offenses for which the aggregate sentence to confinement was 5 years or more.

We find the record does not support findings of inadmissibility Applicant under sections 212(a)(2)(A)(i)(I) or 212(a)(2)(B) of the Act. The Applicant's 1997 rape of a minor offense occurred *in absentia* in Belgium and does not constitute a "conviction" for immigration purposes. *See* 22 C.F.R. § 40.21(a)(4). In addition, the Applicant's convictions for causing bodily injury do not constitute crimes involving moral turpitude, as the minimal conduct under the statute for the offenses does not involve moral turpitude. Further, the aggregate sentences to confinement for the Applicant's convictions are for less than 5 years. As he is not inadmissible under those two subsections of the Act, the Applicant cannot remain inadmissible for a violent or dangerous crime as described in 8 C.F.R. § 212.7(d).

A. *In Absentia* Conviction

The record reflects that in 1997 (offense date 1995), the Applicant was found guilty of rape of an underage person, over 14 years but under 16, in violation of article 375 of the Belgian penal code.[1] The Applicant does not contest that the offense is a crime involving moral turpitude. He asserts, however, that pursuant to Title 22 of the Code of Federal Regulations (C.F.R.) § 40.21(a)(4), the offense does not constitute a conviction for immigration purposes because it occurred *in absentia* in Belgium.

The regulation at 22 C.F.R. § 40.21(a)(4) states that a conviction *in absentia* of a crime involving moral turpitude does not constitute a conviction within the meaning of section 212(a)(2)(A)(i)(I) of the Act.[2]

The Board of Immigration Appeals (the Board) also touched on the issue in *Matter of Piraino*, when it stated:

> If a conviction in absentia cannot be the basis for a finding of excludability under [former] section 212(a)(9) or (10) . . . or for a finding of deportability based on

> conviction of crime . . . it follows that the Service claim that respondent is deportable as one who was excludable for crime, based only on an Order of Arrest issued in absentia, must fail.

12 I&N Dec. 508, 511-12 (BIA 1967) (Citations omitted.)

The U.S. Seventh Circuit Court of Appeals discussed a foreign *in absentia* conviction in its decision, *Esposito v. INS,* 936 F. 2d 911, 914 (7th Cir. 1991), stating that:

> at the very least, *in absentia* convictions properly constitute probable cause to believe that the petitioner is guilty of the crimes in question. . . . We do not believe that *in absentia* convictions are, solely by virtue of their *in absentia* nature, so fundamentally infirm as to preclude the Board from considering them for this limited purpose.
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> . . . .
>
> That is not to say that *in absentia* convictions are in all circumstances beyond reproach; our presumption that they are probative of probable cause is a rebuttable one. In the individual case, a petitioner may present evidence that calls into question the fundamental fairness of the proceedings which generated an *in absentia* conviction, and if that evidence is sufficiently compelling, the Board would be precluded from giving it any weight at all. . . .

Id. (Citations omitted.)

In the Applicant's case, his Belgian conviction record reflects that, although duly summoned, the Applicant was not present at his judicial proceedings for the rape of a minor charge. The record also contains no evidence to indicate that the Applicant was represented by counsel during the proceedings. Further, the record does not reflect that the Applicant challenged the *in absentia* ruling or participated in any other way in the judicial proceedings against him in Belgium. The Applicant's *in absentia* conviction therefore does not meet the definition of a "conviction" for immigration purposes. He is therefore not inadmissible under § 212(a)(2)(A)(i)(I) of the Act based on the rape of a minor offense.

B. Crimes Involving Moral Turpitude

The Applicant is also not inadmissible under § 212(a)(2)(A)(i)(I) of the Act, for his convictions for causing bodily injury.

The Board stated in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992):

> [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.

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 Louissant*, 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 Matter of Short, supra*; *Moncrieffe v. Holder*, 133 S.Ct. 1678, 1684-1685 (2013); *Gonzales v. Duenas-Alvarez,* 127 S.Ct. 815, 822 (2007).

Where the statute does not contain a single, indivisible set of elements but rather encompasses multiple distinct criminal offenses, "some . . . which involve moral turpitude and some which do not," we engage in a modified categorical inquiry. *Matter of Short*, 20 I&N Dec. at 137-138. A criminal statute can be considered divisible "only if (1) it lists multiple discrete offenses as enumerated alternatives or defines a single offense by reference to disjunctive sets of 'elements,' more than one combination of which could support a conviction; and (2) at least one, but not all, of those listed offenses or combinations of disjunctive elements is a categorical match" to the relevant generic offense (i.e. an offense involving moral turpitude). *Matter of Chairez-Castrejon*, 26 I&N Dec. 349, 353 (BIA 2014) (*citing Descamps v. United States,* 133 S. Ct. 2276, 2283 (2013)).

For the purpose of determining whether such a statute is truly divisible, an offense's elements are those facts about the crime which " '[t]he Sixth Amendment contemplates that a jury—not a sentencing court—will find . . . unanimously and beyond a reasonable doubt.' " *Matter of Chairez-Castrejon*, 26 I&N Dec. at 353 (*quoting Descamps v. U.S.,* 133 S.Ct. at 2288). Absent a requirement for jury unanimity, the disjunctive language of the statute merely expresses alternative "means" of committing the crime, rather than alternative "elements," and the statute therefore is not divisible. *Matter of Chairez-Castrejon*, 26 I&N Dec. at 354. Consequently, a conviction under the statute would only be a crime of moral turpitude if moral turpitude necessarily inheres in each of the alternative means of committing the crime. *Id.*

If the statute is divisible, we then conduct a modified categorical inquiry by reviewing the record of conviction to determine which statutory phrase was the basis for the conviction. *See Matter of Short,* 20 I&N Dec. at 137-38. 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 Louissant*, 24 I&N Dec. 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.")

In the present matter the record reflects that in 2011, the Applicant was convicted of two counts of causing bodily harm, in violation of section 223 of the German criminal code.

Section 223 of the German criminal code states:

1) Whosoever physically assaults or damages the health of another person, shall be liable to imprisonment not exceeding five years or a fine.

2) The attempt shall be punishable.

Assault may or may not involve moral turpitude. *See Matter of Danesh*, 19 I&N Dec. 669, 670 (BIA 1988). The Board has stated that offenses characterized as "simple assaults" are generally not considered to be crimes involving moral turpitude. *See Matter of Perez-Contreras*, 20 I&N Dec. at 618-20) (finding that third-degree assault is not a crime involving moral turpitude because neither intent nor recklessness is required for a conviction); *Matter of Short*, 20 I&N Dec. at 139. In addition, the Board has recognized that not all crimes involving the injurious touching of another person reflect moral depravity on the part of the offender. *See Matter of Sanudo*, 23 I&N Dec. 968, 971 (BIA 2006). However, the Board determined that assault and battery offenses involve moral turpitude where there is an aggravating factor such as the use of a deadly weapon, the intentional infliction of serious bodily injury, and bodily harm upon individuals deserving of special protection such as a child, domestic partner, or a peace officer. *Id; Matter of Medina*, 15 I&N Dec.611 (BIA 1976), *aff'd*, 547 F.2d 1171 (7th Cir. 1977) (finding assault with a deadly weapon to be a crime involving moral turpitude).

"[A]n assessment of both the state of mind and the level of harm required to complete the offense" are also involved in a determination if a crime constitutes a crime involving moral turpitude. *Matter of Solon*, 24 I&N Dec. 239, 242 (BIA 2007). Crimes committed intentionally or knowingly with the specific intent to inflict a particular harm, and with a resulting meaningful level of harm, constitute crimes involving moral turpitude, but "as the level of conscious behavior decreases, i.e., from intentional to reckless conduct, more serious resulting harm is required" for a finding of moral turpitude. *Id.* "[W]here no conscious behavior is required, there can be no finding of moral turpitude, regardless of the resulting harm." *Id.; see also Matter of Perez-Contreras*, 20 I&N Dec. at 617-18; *Matter of Fualaau*, 21 I&N Dec. 475, 478 (BIA 1996) (third-degree assault in Hawaii, an offense that involves recklessly causing bodily injury to another person, is not a crime involving moral turpitude).

As discussed above, assault and battery offenses may appropriately be classified as crimes of moral turpitude if they necessarily involve aggravating factors that significantly increased their culpability. For example, "(a)ssault 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." *Matter of Sanudo*, 23 I&N Dec. at 970, (internal citations omitted); *Sosa-Martinez v. U.S. Att'y Gen., supra; Nguyen v. Reno*, 211 F.3d 692, 695 (1st Cir. 2000); *Matter of P-*, 7 I&N Dec. 376, 377 (BIA 1956)); *see also Matter of Sejas*, 24 I&N Dec. 236, 238 (BIA 2007) (holding that a Virginia assault statute did not categorically involve moral turpitude despite the presence of an aggravating factor --assault against a member of one's family or household -- because it "does not require the actual infliction of physical injury and may include any touching, however slight.")

In the Applicant's case, we do not find that a conviction under section 223 of the German criminal code is categorically a crime involving moral turpitude. The law is not divisible into separate offenses with distinct *mens rea*, and the minimal conduct needed for a conviction does not require specific intent to inflict bodily injury with a resulting meaningful level of harm. The law also does not require an aggravating factor such as serious bodily injury or the use of a weapon. Because the minimal conduct does not involve moral turpitude, the Applicant's convictions for causing bodily harm under section 223 of the German criminal code are not considered to be crimes involving moral turpitude.[3] Accordingly, the Applicant's convictions for causing bodily harm do not render him inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

C. Aggregate Sentences to Confinement

The Applicant is also not inadmissible under section 212(a)(2)(B) of the Act for being convicted of 2 or more offenses for which the aggregate sentences to confinement were 5 years of more.

As discussed above, the Applicant's sentence to confinement for rape of a minor is not considered a "conviction" for immigration purposes. His sentence to confinement for this offense may therefore not be counted for purposes of section 212(a)(2)(B) of the Act.

The record reflects, with regard to the Applicant's 2 convictions for causing bodily harm, that he was sentenced to 7 months suspended imprisonment, 2 years of probation, and fines. Because the aggregate sentences for these convictions are less than 5 years, the Applicant is not inadmissible under § 212(a)(2)(B) of the Act.

D. Violent and Dangerous Crimes

The record establishes that the Applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act for convictions for crimes involving moral turpitude, and section 212(a)(2)(B) of the Act for convictions for 2 or more offenses for which the aggregate sentences to confinement were 5 years. Accordingly, there is no longer a need to address the discretionary relief issue of whether his offenses constitute violent or dangerous crimes, as contemplated under 8 C.F.R. § 212.7(d).

III. CONCLUSION

After the Applicant filed this appeal, we requested the U.S. consular office to remove their inadmissibility findings under sections 212(a)(2)(A)(i)(I) and 212(a)(2)(B) of the Act. The consular office agreed to do so. Consequently, the inadmissibility findings have been removed from the consular database and the consular office has reopened the Applicant's immigrant visa case for continued processing.

Because the record establishes that the Applicant is no longer inadmissible under sections 212(a)(2)(A)(i)(I) and 212(a)(2)(B) of the Act, this appeal is moot. As such, the matter will be remanded to the Director for further proceedings consistent with this decision.

ORDER: The decision of the Director, Nebraska Service Center, is withdrawn. The matter is remanded to the Director, Nebraska Service Center, for further proceedings consistent with the foregoing opinion.

Cite as *Matter of S-D-A-*, ID# 109989 (AAO Mar. 3, 2017)