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



U.S. Citizenship
and Immigration
Services

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FILE:  Office: DETROIT, MICHIGAN Date: NOV 17 2010

IN RE: SAHIR MUSA

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(i) of the
Immigration and Nationality Act, 8 U.S.C. § 1182(i)

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

f. / Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Detroit, Michigan, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the underlying application is moot. The matter will be returned to the Field Office Director for continued processing.

The applicant is a native and citizen of Iraq who was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for seeking admission into the United States by fraud or willful misrepresentation. The applicant is the spouse of a lawful permanent resident of the United States. He sought a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i). The director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. The applicant submitted a timely appeal.

On appeal, counsel asserts that the denial of the applicant's waiver application was arbitrary and capricious because U.S. Citizenship and Immigration Services (USCIS) failed to consider in the aggregate the hardship factors of the health and financial condition of the applicant's lawful permanent resident mother, that the applicant is his mother's care provider, and that she will experience emotional harm if he is removed from the country. Lastly, counsel states that USCIS failed to consider the applicant's assertion that his misrepresentations were inadvertent and were made on account of his limited understanding of English.

Although not explicitly addressed by the director, review of the record reveals that the AAO needs to make a determination as to whether the applicant's convictions for stalking, assault and battery, and harassing telephone calls render him inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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 (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....

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.

If review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. 24 I&N Dec. at 699-704, 708-709. However, this “does not mean that the parties would be free to present any and all evidence bearing on an alien’s conduct leading to the conviction. (citation omitted). 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.” *Id.* at 703.

With regard to the applicant’s criminal convictions, the certificate of conviction reflects that in Michigan on September 6, 2002 the applicant was arrested for and charged with stalking and harassing phone calls, and assault and battery (all offenses are misdemeanors). The applicant was sentenced to 12 months of non-reporting probation and ordered to pay costs for the stalking and harassing phone calls offenses. His stalking offense was dismissed on May 29, 2003 and his harassing phone calls offense was dismissed on May 15, 2004. For the assault and battery offense his sentence was 12 months of non-reporting probation and to pay costs; his case was dismissed on May 27, 2004.

The applicant was convicted under Mich. Comp. Laws § 750.81 for assault and battery. That section states, in pertinent part:

Sec. 81. (1) Except as otherwise provided in this section, a person who assaults or assaults and batters an individual, if no other punishment is prescribed by law, is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than \$500.00, or both.

Crimes of assault and battery may or may not involve moral turpitude; an assessment of both the mental state and level of harm to complete the offense is required. *See Matter of Solon*, 24 I&N Dec. 239 (BIA 2007). Intentional conduct resulting in a meaningful level of harm may be found to be morally turpitudinous, and aggravating factors are to be taken into consideration. *Id.* at 242. However, “[o]ffenses characterized as ‘simple assaults’ are generally not considered to be crimes involving moral turpitude . . . because they require general intent only and may be committed without the evil intent, depraved or vicious motive, or corrupt mind associated with moral

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turpitude.” *Id.* at 241 (internal citations omitted); *see also Matter of Fualaau*, 21 I&N Dec. 475, 478 (BIA 1996) (en banc) (holding that Hawaiian conviction for assault in the third degree was not a crime involving moral turpitude where the offense is similar to simple assault).

In *People v. Bryant*, 80 Mich.App. 428, 264 N.W.2d 13 (1978), the Michigan Court of Appeals defines the term “assault” in Mich. Comp. Laws § 750.81 as “any intentional, unlawful offer of corporal injury to another by force, or force unlawfully directed toward the person of another, under such circumstances as create a well-founded fear of imminent peril, coupled with the apparent present ability to effectuate the attempt if not prevented.” (citing *Tinkler v. Richter*, 295 Mich. 396, 401, 295 N.W. 201, 203 (1940)). *Id.* at 433. Further, the Court indicates that battery occurs in “the willful touching of the person of another by the aggressor or by some substance put in motion by him; or, as it is sometimes expressed, a battery is the consummation of the assault.” *Id.*

In *People v. Mortimer*, 48 Mich. 37, 11 N.W. 776 (1882), the Supreme Court of Michigan held that intentionally shooting a person with a pistol loaded with ball is an assault. However, we note that the Supreme Court of Michigan indicates in *People v. Terry*, 217 Mich.App. 660, 553 N.W.2d 23 (Mich.App.,1996), that no bodily injury is required for culpable conduct under Mich. Comp. Laws § 750.81. Thus, the Court found the defendant’s intentional spitting on a prison employee is a battery, which is a consummated assault, and was within the prohibited conduct of the assault and battery statute. *Id.*

Based on the foregoing discussion, we find that Mich. Comp. Laws § 750.81 convicts for conduct that both does and does not involve moral turpitude. The AAO must therefore review the entire record, including the record of conviction and, if necessary, other relevant evidence, to determine if the applicant was convicted of morally turpitudinous conduct. The record contains a police report related to the applicant’s arrest for this offense. The police report indicates that the applicant made multiple threats to harm ██████ (his former girlfriend) and ██████. The applicant approached ██████ and “threatened to assault him and then attempted to grab and fight with him several times. ██████ reports that he did not fight with ██████, but only tried to get away. . . . ██████ had minor red marks on his forearms where he had been pushing and shoving with ██████”

As previously discussed, intentional conduct resulting in a meaningful level of harm may be found to be morally turpitudinous. 24 I&N Dec. 239 (BIA 2007). The AAO finds that the applicant’s conviction for assault and battery in violation of Mich. Comp. Laws § 750.81 was based on conduct that did not cause any meaningful level of bodily injury to ██████. Consequently, his conviction is not for a crime involving moral turpitude under section 212(a)(2)(A)(i)(I) of the Act.

The applicant was convicted of harassing telephone calls in violation of Mich. Comp. Laws § 750.411h. That section provides in pertinent part:

(1) As used in this section:

(a) “Course of conduct” means a pattern of conduct composed of a series of 2 or more separate noncontinuous acts evidencing a continuity of purpose.

(b) "Emotional distress" means significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling.

(c) "Harassment" means conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress. Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose.

(d) "Stalking" means a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

(e) "Unconsented contact" means any contact with another individual that is initiated or continued without that individual's consent or in disregard of that individual's expressed desire that the contact be avoided or discontinued. Unconsented contact includes, but is not limited to, any of the following:

(i) Following or appearing within the sight of that individual.

(ii) Approaching or confronting that individual in a public place or on private property.

(iii) Appearing at that individual's workplace or residence.

(iv) Entering onto or remaining on property owned, leased, or occupied by that individual.

(v) Contacting that individual by telephone.

(vi) Sending mail or electronic communications to that individual.

(vii) Placing an object on, or delivering an object to, property owned, leased, or occupied by that individual.

(f) "Victim" means an individual who is the target of a willful course of conduct involving repeated or continuing harassment.

(2) An individual who engages in stalking is guilty of a crime as follows:

(a) Except as provided in subdivision (b), a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than \$1,000.00, or both.

In *Reyes-Morales v. Gonzales*, 435 F.3d 937, 944-45 (8th Cir. 2006), harassing phone calls under Minn. Stat. § 609.749 was determined not to be a crime involving moral turpitude because the offense encompasses threatening behavior without the intent to inflict harm on another person. In consideration of *Reyes-Morales*, we find that the applicant's conviction of harassing telephone calls would not involve moral turpitude because "harassment" does not include the intent to inflict any violence on another person. See Mich. Comp. Laws § 750.411h(1)(c). Further, In *Hayford v. Hayford*, 279 Mich.App. 324, 760 N.W.2d 503 (Mich.App.,2008), the Court indicates that the emotional reaction of feeling "harassed" or "molested" in Mich. Comp. Laws § 750.411h does not necessarily require a showing of fear. Thus, the harassing telephone call conviction does not involve moral turpitude.

We need not make a determination as to whether the applicant's stalking conviction is a crime involving moral turpitude, which would render him inadmissible under 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), because the record establishes that his stalking conviction is a misdemeanor, and the maximum penalty possible for this crime is imprisonment for not more than 1 year. His conviction meets the requirements set forth for a petty offense exception under section 212(a)(2)(A)(ii) of the Act.¹

The director found the applicant to be inadmissible under section 212(a)(6)(C)(i) of the Act for his failure to disclose arrests, charges, citations, and fines in his adjustment application and during his adjustment of status interview. Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

- (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other

¹ Section 212(a)(2)(a)(ii) of the Act states in pertinent part, that:

- (ii) Exception.-Clause (i)(I) shall not apply to an alien who committed only one crime if-

....

- (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).

documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

To find the applicant inadmissible under section 212(a)(6)(C)(i) of the Act, his failure to disclose his criminal convictions must be a material misrepresentation, and by the misrepresentation he must have sought to procure a visa, other documentation, or admission into the United States or other benefit provided under the Act. The Supreme Court has ruled that a misrepresentation or concealment must be shown by clear, unequivocal, and convincing evidence to be predictably capable of affecting, that is, having a natural tendency to affect, the official decision in order to be considered material. See *Kungys v. United States*, 485 U.S. at 771-72. In *Matter of S- and B-C-*, 9 I&N Dec. 436, 447 (BIA 1960; AG 1961), the Attorney General held that a misrepresentation made in connection with an application for visa or other documents, or with entry into the United States, is material if either:

1. the alien is excludable on the true facts, or
2. the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well result in proper determination that he be excluded.

The Attorney General further stated that "a misrepresentation as to identity will generally have the effect of shutting off an investigation, so also will misrepresentations as to place of residence, prior exclusion or deportation from the United States, criminal record, Communist Party membership, etc." *Id.* at 448.

The AAO finds that based on the evidence, the applicant's misrepresentation of his criminal record in the adjustment of status application and during his adjustment of status interview was willful in that it was deliberately made with knowledge of its falsity. His misrepresentation was made in connection with an adjustment of status application. However, in applying the first prong in *Matter of S- and B-C-*, we find that the applicant was not excludable on the true facts. A misrepresentation as to a criminal record necessarily shuts off an opportunity to investigate part or all of an alien's past history, and thus it shuts off a relevant investigation, the second prong. Though the applicant cut off a relevant line of inquiry by his failure to disclose his criminal record, that inquiry would not have resulted in a determination that the applicant be excluded. As we have previously discussed, the applicant's assault and battery, stalking, and making harassing telephone call convictions do not render him inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having committed a crime involving moral turpitude. His traffic violations (speeding, not wearing a seat belt, expired plate, no registration on person, no proof of insurance on person) are not for acts that are "inherently base, vile, or depraved" or are "accompanied by a vicious motive or corrupt mind." See *Matter of Perez-Contreras*, 20 I&N Dec. at 617-18. Further, a protective order, which the director indicates was issued against the applicant, is not a criminal conviction. Thus, we find that the applicant's failure to disclose his criminal record does not render him inadmissible under section 212(a)(6)(C)(i) of the Act. Had the applicant disclosed his criminal record, the resultant investigation would not have revealed a ground of inadmissibility.

Based upon the foregoing discussion, the AAO finds that the field office director erred in finding the applicant inadmissible under section 212(a)(6)(C)(i) of the Act. Therefore, as the applicant is not inadmissible, the waiver application is moot. The appeal will be dismissed and the matter returned to the field office director.

ORDER: The appeal is dismissed as the applicant is not inadmissible and the underlying waiver application is moot. The field office director shall reopen the denial of the Form I-485 application on motion and continue to process that application.