

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



U.S. Citizenship
and Immigration
Services

[REDACTED]

tlc

DATE: OCT 12 2012 Office: PHILADELPHIA, PA FILE: [REDACTED]

IN RE: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section
212(a)(9)(B) of the Immigration and Nationality Act, 8 U.S.C.
§ 1182(a)(9)(B)

ON BEHALF OF APPLICANT:

[REDACTED]

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.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Philadelphia, Pennsylvania and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the applicant is not inadmissible and the underlying waiver application is unnecessary.

The applicant is a native and citizen of Serbia who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(I), for having been unlawfully present in the United States for more than 180 days but less than one year and seeking readmission within three years of his last departure from the United States. The applicant seeks a waiver of inadmissibility to reside in the United States with his U.S. citizen spouse.

In a decision, dated April 11, 2011, the field office director found that the applicant had two periods of unlawful presence during a single stay in the United States, one for 113 days and one for 114 days. The field office director combined these periods of unlawful presence to find that the applicant had accrued over 180 days of unlawful presence and was inadmissible under section 212(a)(9)(B)(i)(I) of the Act. The field office director then found that the applicant had failed to show that his spouse would suffer extreme hardship as a result of his inadmissibility and denied the application accordingly.

Section 212(a)(9) of the Act provides:

(B) ALIENS UNLAWFULLY PRESENT.-

(i) In general.- Any alien (other than an alien lawfully admitted for permanent residence) who-

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 244(e) prior to the commencement of proceedings under section 235(b)(1) or section 240), and again seeks admission within 3 years of the date of such alien's departure or removal, or

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

The record indicates that the applicant first entered the United States on June 9, 2007, as a J-1 exchange visitor, departing on October 26, 2007. On February 21, 2008 the applicant again entered the United States as a J-1, exchange visitor, departing on March 18, 2008. The applicant's next entry into the United States occurred on December 29, 2008, when he entered as a B-2 visitor, departing on April 7, 2009. On May 9, 2009, the applicant entered the United States for a second time as a B-2 visitor with an authorized period of stay until November 7, 2009. On October

29, 2009, the applicant was married to a U.S. citizen and on March 1, 2010 he filed his first Application to Register Permanent Residence or Adjust Status (Form I-485), which was denied on May 25, 2010. On May 6, 2010, in connection with this Form I-485, the applicant was issued Authorization for Parole of an Alien into the United States (Form I-512), valid until May 5, 2011. On September 15, 2010 the applicant filed his second Form I-485 and on October 19, 2010 used his advance parole authorization to depart and reenter the United States. The applicant reentered the United States on November 8, 2010.

The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary] as a period of stay for purposes of determining bars to admission under section 212(a)(9)(B)(i)(I) and (II) of the Act. Furthermore, an applicant's unlawful presence is counted based on any single stay in the United States. If, during any single stay, the applicant has more than one period in which he or she accrues unlawful presence, the length of each period of unlawful presence is added together to determine the total period of unlawful presence accrued during that single stay. See *Memorandum on Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act*, dated May 6, 2009.

Although the applicant was in unlawful status from November 7, 2009, when his period of authorized stay under his B-2 visitor's visa expired, to March 1, 2010, when his first Form I-485 was filed, and May 25, 2010, when the applicant's first Form I-485 was denied, to September 15, 2010, when the applicant filed his second Form I-485, he did not accrue unlawful presence. The applicant's periods of unlawful status did not become periods of unlawful presence after his October 19, 2010 departure because he departed the United States temporarily pursuant to advance parole under section 212(d)(5)(A) of the Act.

In *Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012), the Board of Immigration Appeals (BIA) held that an alien who leaves the United States temporarily pursuant to advance parole under section 212(d)(5)(A) of the Act does not make a departure from the United States within the meaning of section 212(a)(9)(B)(i)(I) of the Act. Here, the applicant obtained advance parole under section 212(d)(5)(A) of the Act, temporarily left the United States pursuant to that grant of advance parole, and was paroled into the United States to pursue a pending application for adjustment of status. In accordance with the BIA's decision in *Matter of Arrabally*, the applicant did not make a departure from the United States for the purposes of section 212(a)(9)(B)(i)(I) of the Act. Accordingly, the applicant is not inadmissible under section 212(a)(9)(B)(i)(I) of the Act.

The AAO notes that the applicant has a criminal record in the United States including convictions for Driving Under the Influence, Disorderly Conduct, and Assault in the 3rd degree, but none of these convictions render him inadmissible under section 212(a)(2)(A)(i)(I) of Act because they are not convictions for crimes involving moral turpitude.

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.

\ The record indicates that on October 5, 2007 the applicant pled guilty to driving under the influence under Chapter 21, Section 4177, Code of the State of Delaware. The record does not indicate that there were any aggravating factors associated with this conviction. On August 25, 2010, also in Delaware, the applicant pled guilty to Disorderly Conduct (Engaging in a Fight) under Chapter 5, Section 1301 and Assault in the 3rd degree under Chapter 5, Section 0611. The applicant was fined for each of these convictions.

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 determining whether a crime involves moral turpitude, the Third Circuit Court of Appeals, per *Jean-Louis v. Holder*, 582 F.3d 462 (3rd Cir. 2009), makes a categorical inquiry, which consists of looking “to the elements of the statutory offense . . . to ascertain that least culpable conduct hypothetically necessary to sustain a conviction under the statute.” *Id.* at 465-66. The “inquiry concludes when we determine whether the least culpable conduct sufficient to sustain conviction under the statute “fits” within the requirements of a CIMT.” *Id.* at 470.

However, if the “statute of conviction contains disjunctive elements, some of which are sufficient for conviction of [a CIMT] and other of which are not . . . [an adjudicator] examin[es] the record of conviction for the narrow purpose of determining the specific subpart under which the defendant was convicted.” *Id.* at 466. This is true “even where clear sectional divisions do not

delineate the statutory variations.” *Id.* In so doing, an adjudicator may only look at the formal record of conviction. *Id.*

In *In Re Lopez-Meza, Id. 3423 (BIA Dec. 21, 1999)* and *Matter of Torres-Varela, 23 I. & N. Dec. 78 (BIA 2001)*, the BIA held that a simple driving while intoxicated conviction, without any aggravating factors, would not be a crime involving moral turpitude.

At the time of the applicant’s conviction Chapter 5, § 1301 of the Delaware Code stated:

A person is guilty of disorderly conduct when:

- (1) The person intentionally causes public inconvenience, annoyance or alarm to any other person, or creates a risk thereof by:
 - a. Engaging in fighting or in violent, tumultuous or threatening behavior.

At the time of the applicant’s conviction Chapter 5, § 611 of the Delaware Code stated:

(a) A person is guilty of offensive touching when the person:

- (1) Intentionally touches another person either with a member of his or her body or with any instrument, knowing that the person is thereby likely to cause offense or alarm to such other person; or
- (2) Intentionally strikes another person with saliva, urine, feces or any other bodily fluid, knowing that the person is thereby likely to cause offense or alarm to such other person.

The BIA has held that disorderly conduct generally is not a crime involving moral turpitude where evil intent is not necessarily involved. *See Matter of S-, 5 I. & N. Dec. 576 (BIA 1953); Matter of P-, 2 I. & N. Dec. 117 (BIA 1944); and Matter of Mueller, 11 I. & N. Dec. 268 (BIA 1965)*. Furthermore, in addition to his conviction for assault, we find that the applicant’s disorderly conduct conviction for engaging in a fight is akin to assault or battery. Assault and battery crimes may or may not involve moral turpitude. *See Matter of Danesh, 19 I&N Dec. 669, 670 (BIA 1988)*. The BIA has stated that offenses characterized as simple assaults or batteries are generally not considered to be crimes involving moral turpitude. *See Matter of Perez-Contreras, supra; Matter of Short, 20 I&N Dec. 136, 139 (BIA 1989)*. In addition, the BIA has recognized that not all crimes involving the injurious touching of another person reflect moral depravity on the part of the offender. [REDACTED]

The BIA has found further that a finding of moral turpitude involves an assessment of both the state of mind and the level of harm required to complete the offense. *See In re Solon, 24 I&N Dec.*

239, 242 (BIA 2007). Thus, intentional conduct resulting in a meaningful level of harm, which must be more than mere offensive touching, may be considered morally turpitudinous.

The statute in regards to the applicant's disorderly conduct conviction fails to indicate that any harm must result to sustain a conviction. In addition, the statute for the applicant's assault conviction does not indicate that anything more than offensive touching must occur to sustain a conviction. Likewise, a review of the record does not show that any harm resulted from the applicant's actions. Thus, we find that the applicant's convictions are not for crimes involving moral turpitude and the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of Act.

As the applicant is not inadmissible under either section 212(a)(9)(B) of the Act for unlawful presence or section 212(a)(2)(A)(i)(I) of the Act for a crime involving moral turpitude, the applicant's waiver application is unnecessary and the appeal will be dismissed.

ORDER: The appeal is dismissed as the underlying waiver application is unnecessary.