

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave. N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

H2

[REDACTED]

FILE:

[REDACTED]

Office: PORTLAND, OR

Date: APR 03 2008

IN RE:

[REDACTED]

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:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The district director, Portland, Oregon, denied the waiver application. The matter is now on appeal before the Administrative Appeals Office (AAO) in Washington, DC. The appeal will be sustained.

The applicant (██████████) is a native and citizen of Mexico who was found 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). The applicant is the husband of a U.S. citizen ██████████, and the father of U.S. citizen children. The applicant seeks a waiver of inadmissibility under section 212(h) of the Act. The district director concluded that the applicant failed to establish extreme hardship would be imposed on a qualifying relative, and accordingly denied the Application for Waiver of Excludability (Form I-601). *Decision of the District Director*, dated June 15, 2005.

Section 212(a)(2) of the Act states that:

(A)(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.

Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines “conviction” for immigration purposes as:

A formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where –

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.

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) . . . of subsection (a)(2) . . . if -

- (1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that –
 - (i) . . . 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 . . .

The applicant's criminal record is as follows:

4/18/2007 – Assault 4th Degree – Fel-Domestic Abuse, 2 counts, no complaint filed; assault 4th degree, no complaint filed
7/11/2007 – harassment-misd., dismissed
8/25/2005 – Assault 3rd Degree (ORS 163.165), acquitted; Assault 4th Degree (ORS 163.160), acquitted
5/14/2001 – Assault 4th Degree, Count 2 (ORS 163.160), convicted, 10 days jail and 2 years probation
5/14/2001 – Interfere With Making Report, Count 3 (ORS 165.572), convicted, 2 years probation
5/14/2001 – Harassment – Physical/Misd., dismissed
05/23/1995 – HS11377(A), Possession Controlled Substance, proceedings suspended, to complete diversion, subsequently dismissed; HS11550, Use/Under Influence Control Substance, proceedings, suspended, to complete diversion, subsequently dismissed; PC853.7: held in abeyance¹
4/21/1994 – Menacing (ORS 163.190), convicted, 2 years probation
4/21/1994 – Assault 4th Degree (ORS 163.160), dismissed; Harassment-Physical (ORS 166.065), dismissed
11/28/1990 –Burglary, dismissed; petty theft (PC 488), convicted: probation and jail
11/9/1990 – Receiving stolen property, convicted, 3 years probation
12/22/1989 – HS11378, Possess Control Substance For Sale, dismissed; HS11550, Use/Under Influence Control Subst., dismissed
7/22/1987 – Illegal Entry into United States, voluntary departure granted

The AAO will first address the finding of inadmissibility.

On May 14, 2001 the applicant was convicted of fourth-degree assault, Class A Misdemeanor (OR. REV. STAT. § 163.160), and sentenced to two years probation. Section 163.160 of the OR. REV. STAT. provides that a person commits the crime of assault in the fourth degree if the person intentionally, knowingly or recklessly causes physical injury to another; or with criminal negligence causes physical injury to another by means of a deadly weapon. Assault in the fourth degree is a Class A misdemeanor.

In *In re Fualaau*, 21 I&N Dec. 475, 477 (BIA 1996), a case involving third-degree assault, the Board of Immigration Appeals (BIA) defines “moral turpitude” as follows:

Moral turpitude refers generally to conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general. Moral turpitude has been defined as an act which is per se morally reprehensible

¹ Proceedings Suspended/Diversion is not within the definition of a “conviction” under section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A). The offense, Cal. Penal Code 853.7, which was held in abeyance, relates to willfully failing to appear in court, which is not a crime involving moral turpitude.

and intrinsically wrong, or malum in se, so it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude.

In *Grageda*, the Ninth Circuit Court stated that in “[d]escribing moral turpitude in general terms, courts have said that it is an “act of baseness or depravity contrary to accepted moral standards.” *Grageda v. INS*, 12 F.3d 919, 921 (9th Cir.1993)(quoting *Guerrero de Nodahl v. INS*, 407 F.2d 1405, 1406 (9th Cir. 1969).

With regard to the crime of assault, the AAO finds that courts generally held that conviction for simple assault does not involve moral turpitude. *See, e.g., Reyes-Morales v. Gonzales*, 435 F.3d 937, 945 n. 6 (8th Cir.2006) (observing that simple assault does not involve moral turpitude) and *Matter of Fualaau* at 477, citing *Matter of Short*, 20 I&N Dec. 136, 139 and *Matter of Baker*, 15 I & N Dec. 50, 51 (BIA 1974), modified on other grounds).

The Ninth Circuit and the BIA have found that with regard to a domestic violence crime, which is the case with the applicant’s conviction, the special relationship between the parties is not sufficient, by itself, to turn every battery or assault into a crime of moral turpitude. For example, in *Galeana-Mendoza*, 465 F.3d 1054, 1060 (9th Cir. 2006), the court found that in the context of a domestic relationship, when there is force that is neither violent nor severe and that causes neither pain nor bodily harm, yet is considered battery under a statute, the domestic relationship between the parties is not sufficient to, by itself, transform every battery under the statute into a crime that is grave, base, or deprived.

In determining whether a domestic violence crime involves moral turpitude, the Ninth Circuit indicated that it first applies the categorical approach, and then the modified categorical approach. *See, e.g., Galeana-Mendoza* at 1057-1058; *Jose Roberto Fernandez-Ruiz vs. Gonzales*, 468 F.3d 1159, 1163 (9th Cir. 2006).

Under the categorical approach, the court looks “only to the fact of conviction and the statutory definition of the prior offense,” and determines whether “the full range of conduct proscribed by the statute constitutes a crime of moral turpitude.” With the categorical approach, if a statute’s elements lack an injury requirement and has no other element showing “grave acts of baseness or depravity,” a conviction under the statute would not qualify as a crime categorically involving moral turpitude. *Galeana-Mendoza* at 1060. To find moral turpitude, the domestic violence statute must also have a “willful” or “intentional” element. *See, e.g., Jose Roberto Fernandez-Ruiz* at 1166. (statute must have element of willfulness and conduct resulting in bodily injury that is more than insubstantial); *Grageda v. INS*, 12 F.3d 919, 922 (9th Cir.1993) (finding that when a person willfully beats his or her spouse severely enough to cause ‘a traumatic condition,’ he or she has committed an act of baseness or depravity contrary to accepted moral standards.)

In *Jose Roberto Fernandez-Ruiz*, the Ninth Circuit found Arizona's class 2 misdemeanor assault offense does not involve moral turpitude. The court stated that “[a] simple assault statute which permits a conviction for acts of recklessness, or for mere threats, or for conduct that causes only the most minor or insignificant injury is not limited in scope to crimes of moral turpitude.” *Id.* at 1167. (emphasis added) The court indicated that “[b]ecause the offenses set forth in Arizona's battery statute . . . include conduct that does not necessarily involve moral turpitude, Fernandez-Ruiz's class 2 misdemeanor offense cannot, under the categorical approach, constitute a crime involving moral turpitude.” *Id.* It stated that spousal contact that causes minor injury does not constitute a crime of moral turpitude. *Id.*

Here, OR. REV. STAT. § 163.160, the statute under which the applicant was convicted, criminalizes conduct that causes physical injury to another. The statute requires the person to act intentionally, knowingly, or recklessly in causing physical injury to another; or act with criminal negligence to cause physical injury to another by means of a deadly weapon.

Applying the categorical approach, which requires looking only to the conviction and the statutory definition of the offense, the full range of conduct proscribed by the statute must constitute a crime of moral turpitude. The AAO finds that the full range of conduct proscribed by OR. REV. STAT. § 163.160 would not constitute a crime involving moral turpitude as a person may be convicted for causing minor or insubstantial injury. Under the categorical approach, and in the context of the aforementioned cases, *Jose Roberto Fernandez-Ruiz*, *Grageda*, and *Galeana-Mendoza*, a conviction under the Oregon statute would not constitute a crime involving moral turpitude.

The next step in determining whether there is moral turpitude in the offense is to apply the modified categorical approach, which requires looking beyond the statute's language to a narrow set of documents that are part of the record of conviction. This includes the indictment, the judgment of conviction, jury instructions, a signed guilty plea, or the transcript from the plea proceedings. The Ninth Circuit stated that it does not look beyond the record of conviction itself to the particular facts underlying the conviction. *Galeana-Mendoza* at 1057-1058.

The Ninth Circuit in *Jose Roberto Fernandez-Ruiz* did not apply the modified categorical approach because the record did not contain any "documentation or judicially noticeable facts that clearly establish that the conviction is a [crime of moral turpitude]." (citations omitted). *Id.* at 1168. A domestic violence/assault conviction will not qualify as a crime of moral turpitude if the administrative record does not specify whether an alien pled guilty to a particular subsection of a statute, and if any of the subsections cover conduct that does not involve moral turpitude. *Id.*

With the instant case, the District Attorney's Information states that the defendant "did unlawfully and recklessly cause physical injury to [his wife]." The record does not indicate whether the nature of the "physical injury" caused by the applicant was of a serious or minor nature. In the absence of this information, the record lacks evidence to establish that the applicant's conviction under OR. REV. STAT. § 163.160 qualifies as a crime of moral turpitude.

The applicant was convicted of Interfere With Making Report, OR. REV. STAT. § 165.572. The District Attorney's Information states that the defendant "did unlawfully, by interfering with a telephone, intentionally hinder another person from making a report to a 911 emergency reporting system." Because the offense does not have an injury requirement, it would not qualify as a crime of moral turpitude under the categorical approach. The District Attorney's Information reveals that the applicant did not cause physical injury to another; consequently, the offense would not involve moral turpitude under the modified approach.

The applicant was convicted of theft and receive/etc. known stolen property, which are crimes of moral turpitude. *See, e.g., U.S. v. Esparza-Ponce*, 193 F.3d 1133, 1135-37 (9th Cir. 1999) (petty theft under California law involves moral turpitude) and *Matter of Serna*, 20 I&N Dec. 579 (BIA 1992) at 11 n.10 (possession of stolen property with the knowledge it is stolen).

For a waiver under section 212(h)(1)(A) of the Act, a person needs to establish that the activities for which he or she is inadmissible occurred more than 15 years before the date of his or her application for a visa, admission, or adjustment of status. In the context of an adjustment application, such as the situation presented here, the BIA has held that adjustment is an admission. In *Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992), the BIA states that an application for admission to the United States is a continuing application, and admissibility is determined on the basis of the facts and the law at the time the application is finally considered.

The district director denied the waiver application on June 15, 2005, which the applicant is appealing. The convictions for theft and receive/etc. known stolen property, which are the crimes involving moral turpitude for which the applicant was found inadmissible, occurred in 1990, which is more than 15 years prior to his application for a visa, admission, or adjustment of status, as required by section 212(h)(1)(A)(i) of the Act.

Section 212(h)(1)(A)(ii) of the Act requires that the applicant's admission to the United States not be contrary to the national welfare, safety, or security of the United States.

The record contains letters from the applicant's family, neighbors, and friends attesting to his good character. It reflects that the applicant attended marital counseling in the month of March 2001 and from January 2003 to March 2003. It conveys that the applicant has been gainfully employed over the years and the record contains his employment certificates of achievement. The applicant was acquitted of the third degree and fourth degree assault charges on August 24, 2005. *Judgment of Acquittal*. In 2007, the applicant was charged with, but not convicted of, fourth degree assault and fourth degree felony domestic abuse, and harassment-misdemeanor. Notwithstanding the recent criminal charges in 2005 and 2007, the AAO finds that the record establishes that the applicant's admission to the United States is not contrary to the national welfare, safety, or security of the United States.

Section 212(h)(1)(A)(ii) of the Act requires that the applicant establish that he has been rehabilitated. More than 15 years have passed since the applicant's conviction for theft and receive/etc. known stolen property, and the record does not indicate any subsequent conviction for this type of crime. It is noted that in 2005, the applicant was acquitted of the charges of assault in the third and fourth degree; and in 2007, the applicant was charged with domestic violence, assault, and harassment. However, no complaint was filed for the domestic violence and assault charges, and the harassment charge was dismissed. The AAO therefore finds that the record suggests that the applicant has been rehabilitated.

The applicant has established that the favorable factors in the application outweigh the unfavorable factors. The applicant has an approved Form I-130. The record reflects that he has a steady work history, pays taxes, owns a home, and financially supports his family. The record contains positive letters of recommendation about the applicant. It reflects that the applicant attended marital counseling sessions in 2001 and 2003 and domestic violence counseling sessions. He completed a diversion program in 1995.

The negative factors in the case are the applicant's convictions, his entry without inspection in the United States, and his periods of unauthorized presence. It is noted that in 2005, the applicant was acquitted of the charges of assault in the third and fourth degree; and in 2007, the applicant was charged with domestic violence, assault, and harassment. However, no complaint was filed for the domestic violence and assault charges, and the harassment charge was dismissed.

The AAO finds that the favorable factors here outweigh the unfavorable factors.

In discretionary matters, the applicant bears the full burden of proving his eligibility for discretionary relief. *See Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976). Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained and the application is approved.