

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



U.S. Citizenship  
and Immigration  
Services



H2

DATE: DEC 03 2012

Office: ATLANTA, GEORGIA

FILE: [REDACTED]

IN RE:

APPLICANT: [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:

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,

A handwritten signature in black ink that reads "Ron Rosenberg".

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Field Office Director, Atlanta, Georgia. The matter is now before the Administrative Appeals Office (AAO) on appeal. As the applicant is not inadmissible, the appeal will be dismissed as unnecessary.

The record reflects that the applicant is a native and citizen of Guatemala who 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 been convicted of a crime involving moral turpitude. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in conjunction with an application for adjustment of status, in order remain in the United States with his U.S. citizen wife and minor stepchildren.

The Field Office Director found that the applicant had failed to establish extreme hardship to his qualifying relatives, and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Field Office Director's Decision*, dated February 25, 2010.

On appeal, the applicant notes that the director made factual errors regarding his criminal history and submitted additional evidence of extreme hardship.

The record of evidence includes, but is not limited to, the applicant's statement; the statement of the applicant's citizen wife; birth certificates of the applicant's stepchildren; background country conditions materials for Guatemala; and the applicant's conviction records. The entire record was reviewed and considered in rendering this decision on the appeal.

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 record indicates that the applicant was admitted to the United States on or about December 17, 2000 as a nonimmigrant B2 visitor, and thereafter, remained in the United States without permission. On February 11, 2008, the applicant was convicted of Theft by Shoplifting in violation of section 16-8-14 of the Official Code of Georgia Annotated (O.C.G.A.) and three counts of Simple Battery in violation of section 16-5-23 of the O.C.G.A. in the Superior Court of [REDACTED] State of Georgia under case number 07-B-4671-5. He was sentenced to 90 days on each count and eight months of probation.

Based on these convictions, the director 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.

The Board of Immigration Appeals (BIA) 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. The methodology adopted by the Attorney General consists of a three-pronged approach. 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. *Silva-Trevino*, 24 I&N Dec. at 698 (citing *Duenas-Alvarez*, 549 U.S. at 193). 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.” *Silva-Trevino*, 24 I&N Dec. at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage or “modified categorical” inquiry in which the adjudicator reviews the “record of conviction” to determine if the conviction was based on conduct involving moral turpitude. *Silva-Trevino*, 24 I&N Dec. 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. Finally, 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. *Id.* at 699-704, 708-709.

The applicant’s case, however, arises within the jurisdiction of the Eleventh Circuit Court of Appeals (Eleventh Circuit), which has declined to follow the administrative framework set forth by the Attorney General in *Silva-Trevino*, and reaffirmed the traditional categorical approach for determining whether a crime involves moral turpitude. See *Fajardo v. Attorney General*, 659 F.3d 1303, 1310 (11th Cir. 2011) (finding that the U.S. Congress intended that the traditional categorical/modified categorical approach be used in determinations of whether offenses are crimes involving moral turpitude). Under the traditional categorical approach, courts look “only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions.” *Taylor v. United States*, 495 U.S. 575, 600 (1990) (cited in *Fajardo*, 659 F.3d at 1305). Where the statutory definition of a crime includes “conduct that categorically would be grounds for removal as well as other conduct that would not,” courts may then apply a modified categorical approach and review the underlying the record of conviction, namely, the charging document, plea, verdict, and sentence. *Fajardo*, 659 F.3d at 1305 (citing *Jaggernaut v. U.S. Att’y Gen.*, 432 F.3d 1346, 1354-55 (11th Cir. 2005)). However, pursuant to *Fajardo*, the AAO may not look beyond the record of conviction in determining whether a conviction is for an offense that constitutes a crime involving moral turpitude in cases such as this arising in the Eleventh Circuit. 659 F.3d at 1311.

At time of the applicant’s arrest and conviction for simple battery, section 16-5-23 of the O.C.G.A. provided in pertinent part:

- (a) A person commits the offense of simple battery when he or she either:
  - (1) Intentionally makes physical contact of an insulting or provoking nature with the person of another; or
  - (2) Intentionally causes physical harm to another.
- (b) Except as otherwise provided in subsections (c) through (i) of this Code section, a person convicted of the offense of simple battery shall be punished as for a misdemeanor.

We note that a simple battery offense is generally not considered to involve moral turpitude. See *Matter of Ahortalejo-Guzman*, 25 I&N Dec. 465 (BIA 2011); *Matter of Fualaau*, 21 I&N Dec. 475, 477 (BIA 1996); *Matter of Short*, 20 I&N Dec. 136, 139 (BIA 1989). However, “assault 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.” *In re Sanudo*, 23 I. & N. Dec. 968 (BIA 2006) (finding that a battery conviction involving only minimal, nonviolent touching does not inhere moral turpitude even when inflicted upon a spouse); *Sosa-Martinez v. U.S. Atty. Gen.*, 420 F.3d 1338, 1342 (11<sup>th</sup> Cir. 2005); *Matter of Tran*, 21 I. & N. Dec. 291 (BIA 1996) (holding that a conviction for willful infliction of corporal injury on the parent of one’s child under section 273.5(a) of the California Penal Code is a conviction for a crime involving moral turpitude); *Grageda v. U.S. INS*, 12 F.3d 919 (9<sup>th</sup> Cir. 1993) (same).

Pursuant to *Fajardo*, looking only to the elements of the offense, a conviction for simple battery under O.C.G.A. § 16-5-23 does not require an “aggravating factor that indicates the perpetrator’s moral depravity.” *Ahortalejo-Guzman*, 25 I&N Dec. 465. Rather, it encompasses offenses that include merely an offensive touching or physical harm. *See Williams v. State*, 248 Ga. App. 316, 318-19 (2001). Thus, the minimum conduct required for a conviction under either section of Georgia’s simple battery statute does not involve moral turpitude. *Matter of Ahortalejo-Guzman*, 25 I&N Dec. 465; *In re Sanudo*, 23 I. & N. Dec. 968. Moreover, we observe that offenses that include an aggravating factor indicating moral depravity, such as substantial physical harm or visible bodily harm, are covered under Georgia’s separate battery statute found under O.C.G.A. § 16-5-23.1. *See Williams*, 248 Ga. App. at 318-19. As the applicant was convicted under a statute the language of which encompasses only simple battery, we find that his three convictions under O.C.G.A. § 16-5-23 are not for offenses that involve moral turpitude and cannot support the finding of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act.

We now turn to the applicant’s remaining conviction for theft by shoplifting to determine whether it renders the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act. At the time of the arrest and conviction for theft by shoplifting, section 16-8-14 of the O.C.G.A. provided in pertinent part:

- (a) A person commits the offense of theft by shoplifting when he alone or in concert with another person, with the intent of appropriating merchandise to his own use without paying for the same or to deprive the owner of possession thereof or of the value thereof, in whole or in part, does any of the following:
  - (1) Conceals or takes possession of the goods or merchandise of any store or retail establishment;
  - (2) Alters the price tag or other price marking on goods or merchandise of any store or retail establishment;
  - (3) Transfers the goods or merchandise of any store or retail establishment from one container to another;
  - (4) Interchanges the label or price tag from one item of merchandise with a label or price tag for another item of merchandise; or
  - (5) Wrongfully causes the amount paid to be less than the merchant's stated price for the merchandise.

- (b) (1) A person convicted of the offense of theft by shoplifting . . . shall be punished as for a misdemeanor;

However, the applicant's record of conviction indicates that the conviction is for a misdemeanor offense. The applicant was sentenced to 90 days and eight months of probation for the crime. Pursuant to section 17-10-3 of the O.C.G.A., a misdemeanor crime is punishable by a term of imprisonment not to exceed twelve months. Accordingly, his conviction falls within the petty offense exception for crimes involving moral turpitude found under section 212(a)(2)(A)(ii)(II) of the Act, in that the maximum term of imprisonment possible for the conviction did not exceed one year and the applicant was not sentenced to a term in excess of six months. As such, even were we to find that the theft conviction constitutes a crime involving moral turpitude, it does not by itself render the applicant inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act. The record does not disclose any other convictions for the applicant, excluding the previously discussed simple battery convictions.

As we have found that the applicant's simple battery convictions are not crimes involving moral turpitude and his conviction for theft by shoplifting qualifies as a petty offense exception, the AAO concludes that the applicant is not inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Act. Accordingly, as the applicant is not inadmissible, the waiver application is unnecessary and the appeal will be dismissed.

**ORDER:** As the applicant is not inadmissible, the waiver application is unnecessary and the appeal is dismissed. The matter will be returned to the field office director for further action consistent with this decision.