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



U.S. Citizenship
and Immigration
Services

[REDACTED]

H2

DATE: JUL 10 2012

OFFICE: KENDALL, FL

FILE: [REDACTED]

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:

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,

for Perry Rhew

Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Kendall, Florida and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the underlying waiver application is unnecessary.

The applicant is a native and citizen of Cuba who was found to be 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), for having committed a crime involving moral turpitude. The applicant is the son of a lawful permanent resident, and the spouse and father of U.S. citizens. He seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States.

The Field Office Director concluded that the applicant had failed to establish that the bar to his admission would result in extreme hardship for a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Field Office Director's Decision*, dated December 10, 2009.

On appeal, counsel asserts that United States Citizenship and Immigration Services (USCIS) erred in finding the applicant to be inadmissible under section 212(a)(2)(A)(i)(I) of the Act and, alternately, that the applicant has established that a qualifying relative would experience extreme hardship if he is removed from the United States. *Form I-290B, Notice of Appeal or Motion*, dated January 8, 2010. The AAO notes that the Form I-290B indicates that the applicant will submit a brief in support of the appeal. However, no brief is found in the record and, as of this date, the record is considered complete.

The record of evidence includes, but is not limited to: statements from the applicant's father and spouse; country conditions information on Cuba; professional certificates awarded to the applicant; tax and business records for the applicant and his spouse; letters of support from friends and business associates of the applicant; and court records relating to his conviction. The entire record was reviewed and all relevant evidence considered in reaching a 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.

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. 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.” 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. 24 I&N Dec. at 698-699, 703-704, 708. The record of conviction consists of documents such as the indictment, the judgment or 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. 24 I&N Dec. at 699-704, 708-709.

The applicant’s case, however, arises within the jurisdiction of the Eleventh Circuit Court of Appeals (11th Circuit), which has recently reaffirmed the traditional categorical approach for determining whether a crime involves moral turpitude, declining to follow the “administrative framework” set forth by the Attorney General in *Silva-Trevino*. See *Fajardo v. Attorney General*, 659 F.3d 1301, 1310 (11th Cir. 2011) (finding that the Congress intended the traditional categorical or modified categorical approach to be used to determine whether convictions were convictions for crimes involving moral turpitude and declining to follow the “realistic probability approach” of *Matter of Silva-Trevino*). In its decision, the 11th Circuit defined the categorical approach as “‘looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions.’ ” 659 F.3d at 1305 (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990)). The Court indicated, however, that where the statutory definition of a crime includes “conduct that would categorically be grounds for removal as well as conduct that would not, then the record of conviction – i.e., the charging document, plea, verdict, and sentence – may also be considered.” 659 F.3d at 1305 (citing *Jaggernaut v. U.S. Att’y Gen.*, 432 F.3d 1346, 1354-55 (11th Cir. 2005)).

An application for admission is a "continuing" application, and admissibility is adjudicated on the basis of the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992).

In the present case, the record reflects that, on August 26, 1998, the applicant pled nolo contendere to False Imprisonment, Florida Statutes (Fl. St.) § 787.02(2), a third degree felony punishable by a term of imprisonment not to exceed five years. The applicant was found guilty with adjudication withheld, placed on probation for three years and ordered to pay court charges and costs, and restitution in the amount of \$1,575.

At the time of the applicant's conviction, Fl. St. § 787.02 stated in pertinent part:

(1)(a) The term 'false imprisonment' means forcibly, by threat, or secretly confining, abducting, imprisoning, or restraining another person without lawful authority and against her or his will.

....

(2) A person who commits the offense of false imprisonment is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084

The AAO notes that the crime of false imprisonment, Fl. St. § 787.02, is the offense considered by the 11th Circuit in *Fajardo*. In its decision, the Court noted that the charge of false imprisonment brought against the respondent had "merely tracked" the language of Fl. St. § 787.02(1)(a), which punished false imprisonment accomplished through the use of forcible threat or by secretly confining or restraining another individual, "for example by locking or barring a door." *Id.* at 1306. It concluded that the Board of Immigration Appeals (BIA) and the immigration judge had erred in relying on evidence outside the record of conviction to determine that the respondent had been convicted of a crime involving moral turpitude and had assumed rather than decided that the offense of false imprisonment was not categorically a crime involving moral turpitude. Accordingly, the Court remanded the matter to the BIA to determine "in the first instance," whether a violation of Fl. St. § 787.02 is a crime involving moral turpitude.

The BIA has not yet issued its decision in response to the 11th Circuit's remand in *Fajardo* and the AAO is unaware of any published federal court cases addressing whether the crime of false imprisonment under Florida law is a crime of moral turpitude. However, we note that in *Saavedra-Figueroa v. Holder*, 625 F.3d 621 (9th Cir. 2010), the Ninth Circuit Court of Appeals (9th Circuit) held that a misdemeanor false imprisonment violation under California Penal Code § 236 ("False imprisonment is the unlawful violation of the personal liberty of another.") was not a categorical crime involving moral turpitude as it did not require "an intent to harm the victim." We also note that in *People v. Cornelio*, 207 Cal.App.3d 1580, 255 Cal.Rptr. 775 (1989), the California Court of Appeals, Fifth Appellate District, in considering a violation of California Penal Code § 236, stated that the addition of one or more of the elements of violence, menace, fraud or deceit to the simple violation of personal liberty of another makes the crime one involving moral turpitude. *Cf. Chen v. INS*, 87 F.3d 5 (1st Cir. 1996) (acknowledging that an applicant's conviction for second degree robbery and false imprisonment under California law were considered to involve moral turpitude by the Board of Immigration Appeals). The AAO finds the analyses offered in *Saavedra* and *Cornelio* to provide useful guidance in the present matter.

False imprisonment in Florida is a general intent crime, describing a particular offense without reference to any intent to commit a further act or achieve a further result, and may be violated by the use of a forcible threat or by secretly confining or restraining another individual. Therefore, relying

on the reasoning in *Saavedra* and *Cornelio*, the AAO concludes that the applicant has not been convicted of an offense that categorically involves moral turpitude. While we find the violation of another's personal liberty accomplished through force or threat is a crime involving moral turpitude, the second portion of the statute, which punishes the restriction of another person's liberty without the intent to harm, is not an offense that involves moral turpitude.

As Fl. St. § 787.02 punishes conduct that categorically would be grounds for removal as well as conduct that would not, the AAO will, pursuant to *Fajardo*, review the applicant's record of conviction for evidence identifying the basis on which he was found to have committed False Imprisonment. The applicant's record of conviction includes: the information charging the applicant under Fl. St. § 787.02; the August 26, 1998 finding of guilt and the August 26, 1998 order of probation, which were provided to the applicant by the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida in response to his August 15, 2007 Request to Reopen Sealed File. Also included in the documentation released to the applicant are the Complaint/Arrest Affidavit and Booking Record relating to his false imprisonment arrest. The applicant's arrest report and booking record will not, however, be considered by the AAO as they are not identified by *Fajardo* as being part of the record of conviction.

The AAO's review of the applicant's record of conviction does not find it to establish the nature of the applicant's conviction. The charging language in the information simply restates the text of Fl. St. § 787.02 and the sentencing documents offer no information as to whether or not the applicant was convicted specifically under those provisions of the statute involving force. Although the arrest and booking report suggest that such was the case, we are not permitted to base our determination on information in those documents. The burden of proof in this matter is upon the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. However, given the limits of our review, we find that the applicant has met his burden by submitting the available documents comprising his record of conviction. Accordingly, the applicant's record of conviction does not establish that he has been convicted of a crime involving moral turpitude.

In that the record does not establish that the applicant has been convicted of a crime involving moral turpitude, we find him admissible to the United States. Therefore, the appeal will be dismissed as the underlying waiver application is unnecessary.

ORDER: The appeal is dismissed as the underlying waiver application is unnecessary. The matter will be returned to the field office director for further processing.