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



U.S. Citizenship  
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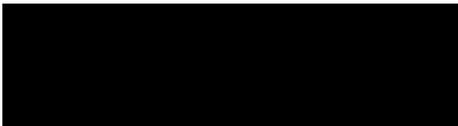
Office: LONDON, ENGLAND

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IN RE: 

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(h) and (i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(h) and (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, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

*for* Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Field Office Director, London, England. The field office director's decision was appealed to the Administrative Appeals Office (AAO) and the appeal was dismissed. The matter is now before the AAO on a motion to reconsider. The motion will be dismissed and the previous decisions of the field office director and the AAO will be affirmed.

The record reflects that the applicant is a native and citizen of the United Kingdom 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 been convicted of a crime involving moral turpitude, and section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for attempting to enter the United States or obtain an immigration benefit by fraud or willful misrepresentation of a material fact. The applicant is married to a lawful permanent resident and seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), and section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to reside with his wife in the United States.

In a decision, dated May 29, 2008, the field office director found that the applicant failed to establish extreme hardship to a qualifying relative and denied the application accordingly.

On appeal, counsel contended that the field office director erred in failing to address counsel's assertion that the applicant's 1971 conviction was not a crime involving moral turpitude and therefore, the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act. Counsel further stated that even if the applicant did commit a crime involving moral turpitude, because the conviction occurred over fifteen years ago, the field office director should have evaluated the waiver application under section 212(h)(1)(A) of the Act instead of for extreme hardship under section 212(h)(1)(B) of the Act. In addition, counsel stated that the applicant is not inadmissible under section 212(a)(6)(C)(i) of the Act as his failure to list his conviction on his visa application was neither material nor willful or intentional. Counsel alternatively argues that the applicant's wife would suffer extreme hardship if the applicant's waiver application were denied.

In a decision dated July 24, 2009, the AAO found that the applicant had failed to demonstrate that his conviction is not a crime involving moral turpitude, and that the applicant is also inadmissible under section 212(a)(6)(C)(i) of the Act for fraud or willful misrepresentation of a material fact for failing to disclose his criminal record on his visa application. The AAO concluded that the applicant had not demonstrated that denial of the admission would result in extreme hardship to a qualifying relative and dismissed the appeal accordingly.

In his motion to reconsider, dated August 23, 2009, counsel asserts that the applicant's conviction for assault occasioning actual bodily harm is the equivalent of simple assault and does not constitute a crime involving moral turpitude. In addition, counsel asserts that when the applicant applied for a B2 visitor's visa in 2002 he did not commit a willful misrepresentation when he failed to state that he had been convicted of assault occasioning actual bodily harm because his conviction had been "spent" under the United Kingdom's Rehabilitation of Offenders Act 1974. In his motion, counsel does not contest the AAO's previous finding regarding extreme hardship to the applicant's spouse.

We will now address the applicant's inadmissibility under section 212(a)(2)(A) of the Act.

Section 212(a)(2)(A) of the Act states in pertinent part:

(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. 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." *Id.* 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. *Id.* 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.’ 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 (internal citation omitted).

The record indicates that on May 13, 1971, the applicant was convicted of “assault occasioning actual bodily harm” in violation of section 47 of the Offenses Against the Person Act 1861 in the Crown Court in England, and sentenced to six months imprisonment. The AAO notes that although the applicant was only sentenced to six months in prison, a conviction for assault occasioning actual bodily harm is punishable for up to five years imprisonment and does not qualify for the petty offense exception.

As stated in our prior decision, assault occasioning actual bodily harm under section 47 of the Offenses Against the Person Act 1861 includes any assault that results in “any hurt or injury calculated to interfere with the health or comfort of the [victim]. Such hurt or injury need not be permanent, but must, no doubt, be more than merely transient and trifling.”<sup>1</sup> *Rex v. Donovan*, 2 K.B. 498, 509 (1934).

In contrast, assault occasioning grievous bodily harm has been defined to mean “really serious bodily harm”: *DPP v Smith*, AC 290, HL (1961); *R v. Cunningham*, AC 566, HL (1982); *R v. Brown (A.)*, 1 AC 212, HL (1994); *R v. Brown and Stratton*, Crim LR 485, CA (1988).

Given these definitions, the AAO finds counsel’s arguments regarding the applicant’s conviction as the equivalent of simple assault to be unpersuasive. Counsel does not cite any legal authority, from the United States or the United Kingdom, to support his assertions that the categories in British law for assault occasioning actual bodily harm and assault occasioning grievous bodily harm coincide with the categories within U.S. immigration law of simple assault that does not involve moral turpitude and assault that does. The AAO finds that, by its terms, assault occasioning actual bodily harm likely includes acts that would constitute simple assault for purposes of section

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<sup>1</sup> Section 47 of the Offenses Against The Person Act 1861 states:

47. Assault occasioning bodily harm. Common assault.

Whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm shall be liable . . . to be kept in penal servitude . . . .

212(a)(2)(A)(i)(II) of the Act, but the statutory definition does not preclude conviction for acts that caused serious harm or injury such that the offense could be considered a crime involving moral turpitude.

As stated, crimes involving assault 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” 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. *See Matter of Sanudo*, 23 I&N Dec. 968, 971 (BIA 2006).

More recently, in *Matter of Solon*, 24 I&N Dec. 239, 242 (BIA 2007), the BIA stated:

[I]n the context of assault crimes, a finding of moral turpitude involves an assessment of both the state of mind and the level of harm required to complete the offense. Thus, intentional conduct resulting in a meaningful level of harm, which must be more than mere offensive touching, may be considered morally turpitudinous. However, as the level of conscious behavior decreases, i.e., from intentional to reckless conduct, more serious resulting harm is required in order to find that the crime involves moral turpitude. Moreover, where no conscious behavior is required, there can be no finding of moral turpitude, regardless of the resulting harm.

For the applicant’s crime to constitute a crime involving moral turpitude, it must have resulted in a meaningful level of bodily harm. In an effort to establish what harm resulted from the applicant’s crime, the AAO issued a Request for Further Evidence, dated May 7, 2009, giving the applicant an opportunity to submit further evidence addressing whether or not the conduct for which the applicant was convicted involved moral turpitude, including a sworn statement from the applicant detailing the circumstances of the assault, whether a weapon was used, the resulting injuries sustained, and whether or not the applicant was arrested for the crime. The applicant’s response to the Request for Evidence did not contain a sworn statement from the applicant as requested. Rather, the applicant’s response included a lengthy response from counsel, copies of e-mails from individuals who do not have personal knowledge of the circumstances surrounding the assault, a copy of an internet printout, and a copy of a letter to U.S. Department of Homeland Security Secretary, Janet Napolitano. As stated in the Request for Evidence, “submission of only some of the requested evidence will be considered a request for a decision based on the record.” *Id.* (citing 8 C.F.R. § 103.2(b)(11)).

The record in the applicant’s case contains an undated “Personal Affidavit” from the applicant. According to the applicant, he “came to the aid of a friend who was being accosted by a male [and t]he perpetrator pressed charges with regards to [the applicant’s] intervention.” *Personal Affidavit of [REDACTED]* undated. The applicant claims the perpetrator was charged by the police for causing bodily harm and “was known to both the police and the legal community.” *Id.* The applicant states he “appeared before the Crown Court and had a jury trial in anticipation of having

the charges dismissed[, but u]nfortunately, this did not occur.” The applicant further states that the “entire situation was unfortunate” and that he “deeply regret[s] that it ever happened.” *Id.*

Again, an analysis of whether the applicant’s criminal conviction is a crime involving moral turpitude requires a modified categorical approach, 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. *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), at 698-699, 703-704, 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. *Id.* at 699-704, 708-709. The applicant has now been given two opportunities to provide documentation to show the precise nature and extent of the injury sustained by the victim of his crime, thus resolving the question of moral turpitude. On both occasions the applicant has refused to provide such evidence. Therefore, the applicant has failed to meet his burden of proof in these proceedings.

In affirming our previous decision, the AAO again notes that unlike a removal hearing in which the government bears the burden of establishing an alien’s removability, the burden of proof in the present proceedings is on the applicant to establish his admissibility “to the satisfaction of the Attorney General [Secretary of Homeland Security].” *See* Section 291 of the Act, 8 U.S.C. § 1361. Therefore, as the current record does not indicate through independent and objective evidence whether serious injury to the victim occurred in the commission of the applicant’s crime, the AAO must find that the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having committed a crime involving moral turpitude.

In our previous decision we noted that the applicant is eligible for consideration of a waiver under section 212(h)(1)(A) of the Act because the activities which render him inadmissible under section 212(a)(2)(A)(i)(I) of the Act occurred more than 15 years ago. However, given that the record fails to establish that the harm which resulted from the applicant’s actions was not serious bodily harm, we must affirm the finding that the applicant has been convicted of a crime involving moral turpitude which is also a violent or dangerous crime that subjects the applicant to the discretionary standard found at 8 C.F.R. § 212.7(d). For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Matter of Mendez-Morales*, 21 I&N Dec. 296, 299 (BIA 1996).

The regulation at 8 C.F.R. § 212.7(d) provides:

The Attorney General [Secretary, Department of Homeland Security], in general, will not favorably exercise discretion under section 212(h)(2) of the Act (8 U.S.C. 1182(h)(2)) to consent to an application or reapplication for a visa, or admission to the United States, or adjustment of status, with respect to immigrant aliens who are inadmissible under section 212(a)(2) of the Act in cases involving violent or dangerous crimes, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of the application for adjustment of status or an immigrant visa or admission as an immigrant would result in exceptional and

extremely unusual hardship. Moreover, depending on the gravity of the alien's underlying criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act.

Furthermore, we also affirm the previous finding of the AAO that the applicant is also inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for willful misrepresentation of a material fact.

Section 212(a)(6)(C)(i) of the Act provides:

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

The record shows that the applicant submitted a visa application, dated April 2, 2002, at the American Embassy in London, England. The applicant responded “no” to the question, “Have you ever been arrested or convicted for any offense or crime, even though subject of a pardon, amnesty or other similar legal action?” The applicant contends that he “fully and honestly believed that [his] 1971 conviction no longer had to be disclosed in any circumstances as [he] no longer was deemed to have been convicted. Since 1981, it was [the applicant's] honest belief that [he] had a fresh and new beginning to [his] life, without any convictions.” *Personal Affidavit of* [REDACTED] *supra*. The applicant's wife contends that “[i]t was a genuine misunderstanding.” *Affidavit of* [REDACTED] [REDACTED] undated. However, counsel contends that “prior to completing the subject I-94 on June 12, 2001 and again on November 3, 2001, [the applicant] specifically asked his Barrister whether he needed to admit that he had ever been arrested and charged with a crime . . . [and t]he Barrister gave an unequivocal ‘no’ . . . .” *Letter from* [REDACTED] at 5, *supra*.

In his motion, counsel asserts that the applicant clearly knew he had not been given a pardon or amnesty and did not believe that “other similar legal action” would include “spent” convictions. Counsel then asks in reference to the decisions in *Mercer v. Lence*, 96 F.2d 122 (10<sup>th</sup> Cir. 1938), what would be needed to “wipe out” a foreign pardon. Although the AAO cited to *Mercer v. Lence* in its previous decision, the applicant's conviction was not pardoned and thus, *Mercer v. Lence* is not relevant to this case.

Counsel claims further that it is unclear what version of the visa application the applicant was using in 2002 and states that the question the applicant answered “no” to was, “have you ever been arrested or convicted of two or more crimes involving moral turpitude.” This assertion is incorrect as the completed and signed visa application from 2002 is in the record. The visa application clearly asked whether the applicant had “ever been arrested or convicted for any offense or crime, even though subject of a pardon, amnesty or other similar legal action?”

The record indicates that the applicant had been convicted after a jury trial and that he was incarcerated for four months as a result of his conviction. In addition, the applicant's claim that he believed since 1981 that he had a new beginning to his life without any convictions is contradicted by counsel's assertion that the applicant specifically sought legal advice regarding whether or not he needed to disclose his prior conviction to U.S. immigration authorities.

Moreover, counsel's assertions that *Kirong v. Mukasey*, 529 F.3d 800 (8th Cir. 2008), supports his claim that the applicant did not intentionally, materially, or willfully misrepresent the truth is unfounded. In *Kirong*, the applicant checked the box on a Form I-9 that he was a "citizen or national of the United States" when, in fact, he was not. 529 F.3d at 801. The Court rejected the applicant's contention that he checked the box for employment purposes only, that he purportedly "did not know what a national was," and that "he did not mean to claim anything by that action." *Id.* at 804-05. The Court agreed with the Board of Immigration Appeals that "the evidence in this case, at best, is equivocal as to whether his attestation involved a claim of citizenship or nationality," and held that the applicant failed to satisfy his burden of proving clearly and beyond doubt that he was admissible. *Id.* at 805. In the applicant's case he is claiming that he did not fully understand the meaning of "other similar legal actions" to include "spent" or expunged convictions and that in answering "no" to the visa question regarding criminal arrests or convictions he did not mean to misrepresent his criminal record. In the applicant's case, the record is less ambiguous than in *Kirong v. Mukasey* and more supportive of a finding that the applicant misrepresented himself, indicating that the applicant was aware that he was arrested and convicted of a crime, but was unsure as to whether he had to reveal this conviction after it was "spent". His awareness of the issue is evidenced by counsel's statements regarding the applicant seeking legal counsel as to whether he had to disclose his criminal record. Furthermore, it is unclear as to why he would not have disclosed at the very least his arrest.

The AAO affirms its prior finding. The visa application question is unequivocal in asking if the applicant has ever been arrested or convicted. Moreover, the additional phrase, "even though subject of a pardon, amnesty or other similar legal action," is clearly intended to emphasize that an applicant is required to disclose *all* arrests or convictions regardless of subsequent legal actions, and not to justify misinterpreting the plain language of the question to exclude whole categories of arrests or convictions. In determining whether a misrepresentation was willful, a factual inquiry, we cannot rely entirely on the applicant's subsequent explanations, but must consider all the circumstances surrounding the misrepresentation. We do not interpret the willfulness requirement to excuse willful ignorance. The applicant likely understood that the consequences of such disclosure included possible exclusion from the United States, an incentive for nondisclosure. We find it unlikely that the applicant did not understand the plain meaning of the word *ever*, but rather sought out an alternative interpretation that would justify him in not answering an easily understood question in the affirmative. He has not established that he informed the barrister with whom he consulted that he was requesting advice concerning disclosure to U.S. officials, in accordance with U.S. law, rather than for purposes within the United Kingdom, or that he had any reason to believe that the barrister was knowledgeable about U.S. immigration law. We find that the applicant's misrepresentation of his criminal record was willful and the applicant has not met his burden of demonstrating otherwise.

Furthermore, although, counsel does not contest the issue of materiality on motion, the AAO affirms the previous finding that counsel's assertion that the applicant's conviction was not material is unpersuasive as it relies on counsel's contention that the applicant's conviction is not a crime involving moral turpitude.

Therefore, the AAO finds that the applicant is also inadmissible under section 212(a)(6)(C)(i) of the Act for attempting to enter the United States through willful misrepresentation of a material fact.

The AAO notes that counsel makes various assertions regarding the applicant's record and the applicant not being a threat to the security of the United States. He asserts that the applicant was able to gain admission to the White House through the U.S. Secret Service and that British soldiers with "spent" convictions have served alongside U.S. troops in Iraq and Afghanistan. However, this information is not relevant to the legal determinations made in this decision and will not be discussed further.

An applicant inadmissible under section 212(a)(6)(C)(i) and section 212(a)(2)(A) of the Act is eligible to apply for a waiver of his or her inadmissibility under sections 212(i) and sections 212(h) of the Act. In his motion to reconsider, counsel does not contest the AAO's previous finding that the applicant's spouse would not suffer extreme hardship as a result of his inadmissibility. Thus, we affirm our prior determination on that issue.

In proceedings for application for waiver of grounds of inadmissibility, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the motion will be dismissed and the previous decisions of the field office director and the AAO will be affirmed.

**ORDER:** The motion is dismissed.