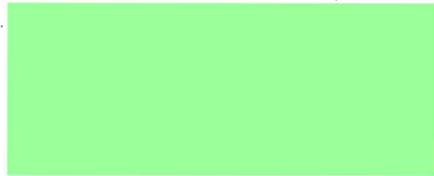




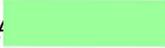
**U.S. Citizenship  
and Immigration  
Services**

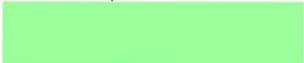
(b)(6)



Date: **APR 30 2013**

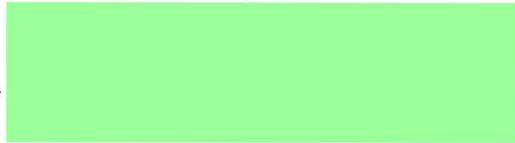
Office: ROME, ITALY

FILE: A 

IN RE: 

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, appearing to read "Ron Rosenberg", with a long horizontal flourish extending to the right.

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Morocco 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 crimes involving moral turpitude. He seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen spouse.

In a decision dated May 7, 2012, the field office director denied the Form I-601 waiver application, finding that despite the applicant showing that his U.S. citizen spouse would suffer extreme hardship upon relocation, he failed to establish extreme hardship to his U.S. citizen spouse upon separation. The application was denied accordingly.

On appeal, counsel states that the applicant's spouse is suffering and will suffer extreme hardship as a result of the applicant's inadmissibility. She submits additional documentation on 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 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.” 24 I&N Dec. 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. 24 I&N Dec. 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. (citation

omitted). 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.

The record shows that on May 30, 1997, in Illinois, the applicant was convicted of Retail Theft under \$150, pursuant to section 720 Illinois Compiled Statutes (ILCS) 5/16A-3(a), and was sentenced to 18 months probation. The maximum sentence for retail theft under \$150 in Illinois is one year in prison.

The BIA has determined that to constitute a crime involving moral turpitude, a theft offense must require the intent to permanently take another person’s property. *See Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973) (“Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended.”). In *Matter of Jurado*, 24 I&N Dec. 29, 33-34 (BIA 2006), the BIA found that a violation of a Pennsylvania retail theft statute involved moral turpitude because the nature of retail theft is such that it is reasonable to assume such an offense would be committed with the intention of retaining merchandise permanently. The reasoning in *Jurado* is applicable to the present case and the applicant was thus convicted of knowingly taking the property of another with intent to permanently deprive that person of the property, a crime involving moral turpitude.

In addition, on January 8, 2001, in Illinois, the applicant was convicted of Aggravated Battery under section 720 ILCS 5/12-4(b)(15) and was sentenced to 24 months probation.

At the time of the applicant’s conviction, section 720 ILCS 5/12-4(b)(15) stated:

(b) In committing a battery, a person commits aggravated battery if he or she:

...

(15) Knowingly and without legal justification and by any means causes bodily harm to a merchant who detains the person for an alleged commission of retail theft under Section 16A-5 of this Code. In this item (15), “merchant” has the meaning ascribed to it in Section 16A-2.4 of this Code.

At the time of the applicant’s conviction, 720 ILCS 5/12-3 stated:

(a) A person commits battery if he intentionally or knowingly without legal justification and by any means, (1) causes bodily harm to an individual...

The crimes of assault and battery may or may not involve moral turpitude, depending on the elements of the crime. *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992). For instance, the BIA considers “whether the act is accompanied by a vicious motive or corrupt mind.” *Id.* at 618. Additionally, the BIA considers aggravating circumstances such the use of a deadly weapon and whether the crime resulted in serious bodily injury. *See Matter of Fualaau*, 21 I&N Dec. 475, 476 (BIA 1996) (en banc) (“In order for an assault . . . to be deemed a crime involving moral turpitude, the element of a reckless state of mind must be coupled with an offense involving the infliction of serious bodily injury.”). The crimes of simple assault and battery involving the intent to merely cause physical injury, generally do not involve moral turpitude. *See, e.g., Matter of*

*P-*, 3 I&N Dec. 5, 7 (BIA 1947) (A.G. 1947). On the other hand, assault with intent to do great bodily harm involves moral turpitude. *Id.* at 9 (holding that Michigan conviction for assault with intent to do great bodily harm involved moral turpitude).

For a conviction under 720 ILCS 5/12-4(b)(15) it is not required that the battery have resulted in great or serious bodily harm. For purposes of battery “bodily harm” consists of some sort of physical pain or damage to body, like lacerations, bruises or abrasions, whether temporary or permanent. *People v. Rodarte*, App. 1 Dist.1989, 138 Ill.Dec. 635, 190 Ill.App.3d 992, 547 N.E.2d 1256. Although, permanent pain or damage could be considered great or serious bodily harm, we note that at the time of the applicant’s conviction, 720 ILCS 5/12-4(a) stated, “a person who, in committing a battery, intentionally or knowingly causes great bodily harm, or permanent disability or disfigurement commits aggravated battery.” We find that as the applicant was not convicted under 720 ILCS 5/12-4(a), the applicant’s conviction did not involve great or serious bodily injury. We find that his crime is akin to simple battery and, thus, does not constitute a crime involving moral turpitude.

In *Matter of Garcia-Hernandez, supra*, the Board held that a respondent who was convicted of more than one crime, only one of which was a crime involving moral turpitude, was eligible for the petty offense exception provided for under section 212(a)(2)(A)(ii) of the Act. The Board reasoned that:

The “only one crime” proviso, taken in context, is subject to two principal interpretations: (1) that it is triggered . . . by the commission of any other crime, including a mere infraction; or (2) that it is triggered only by the commission of another crime involving moral turpitude . . . . [W]e construe the “only one crime” proviso as referring to . . . only one crime involving moral turpitude.

*Matter of Garcia-Hernandez* at 594.

We find that the applicant has been convicted of one crime involving moral turpitude and that this conviction meets the petty offense exception. Therefore, the applicant is not inadmissible under Section 212(a)(2)(A) of the Act. The applicant's waiver application is thus unnecessary and the appeal will be dismissed.

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