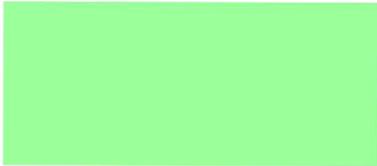




U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: JAN 08 2013

OFFICE: BANGKOK, THAILAND

File: 

IN RE:

Applicant: 

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:

SELF-REPRESENTED

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

  
Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the District Director, Bangkok, Thailand and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the waiver application is unnecessary.

The applicant is a native and citizen of Hong Kong, China 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 seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his U.S. citizen spouse and children.

The district director concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *See Decision of the District Director*, dated August 4, 2011.

On appeal the applicant asserts that his wife and children suffer extreme hardship in the United States without his care. *See Form I-290B, Notice of Appeal or Motion*, received August 23, 2011.

The record contains, but is not limited to: Form I-290B and the applicant's appeal statement; various immigration applications and petitions; hardship letters from the applicant's spouse and three children; letters from the applicant's brother-in-law; a psychiatrist's letter; and documents related to the applicant's criminal record. 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 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 the applicant was arrested in Hong Kong, China on three occasions and convicted twice. He was charged on or about May 3, 1982 with fighting in a public place (case [REDACTED]). The case was dismissed and the applicant was assessed \$500 in costs. The applicant was convicted on May 11, 1983 for obstructing a public officer in the due execution of his duty (case [REDACTED]), for which he was fined \$500. The applicant was most recently convicted on September 29, 2006 for assault occasioning actual bodily harm, in violation of Hong Kong Offenses Against the Person Ordinance, Chapter 212, Section 39, for his conduct on or about June 20, 2006 (case [REDACTED]). He was fined \$3,000. Based on the applicant’s most recent conviction, the district director determined that he is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude. The applicant does not contest his inadmissibility on appeal and the AAO notes that he does not qualify for the “petty offense” exception under section 212(a)(2)(A)(ii) of the Act because the maximum possible sentence for his conviction is three years of incarceration.

At the time of the applicant’s conviction, Hong Kong Offenses Against the Person Ordinance, Chapter 212, Section 39, provided:

Any person who is convicted of an assault occasioning actual bodily harm shall be guilty of an offence triable upon indictment, and shall be liable to imprisonment for 3 years.

It is noted that, as a general rule, simple assault or battery is not deemed to involve moral turpitude for purposes of the immigration laws. *Matter of Fualaau*, 21 I&N Dec. 475, 477 (BIA 1996). However, this general rule does not apply where an assault or battery necessarily involved some aggravating dimension, such as the use of a deadly weapon or serious bodily harm. *See, e.g., Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988), *Matter of Goodalle*, 12 I. & N. Dec. 106 (BIA 1967), *Matter of S-*, 5 I. & N. Dec. 668 (BIA 1954), and *Nguyen v. Reno*, 211 F.3d 692 (1st Cir. 2000). The Board of Immigration Appeals has also found:

[M]oral turpitude necessarily inheres in assault and battery offenses that are defined by reference to the infliction of bodily harm upon a person whom society views as deserving of special protection, such as a child, a domestic partner, or a peace officer, because the *intentional or knowing infliction of injury* on such persons reflects a degenerate willingness on the part of the offender to prey on the vulnerable or to disregard his social duty to those who are entitled to his care and protection.

*Matter of Sanudo*, 23 I&N Dec. 968, 971 (BIA 2006) (emphasis added). The AAO notes that in *Matter of B-*, 1 I. & N. Dec. 52 (BIA 1941; A.G. 1941), the BIA found second degree assault to not be a crime involving moral turpitude when a non-deadly weapon was used. The record does

not indicate that the applicant's conviction for assault occasioning actual bodily harm involved an aggravating dimension. Indeed, the AAO notes that assault crimes involving aggravating factors in Hong Kong appear to fall under chapter 212, section 19, wounding or inflicting grievous bodily harm, which includes "any person who unlawfully and maliciously wounds or inflicts any grievous bodily harm upon any other person, either with or without any weapon or instrument." See Hong Kong Offenses Against the Person Ordinance, Chapter 212, § 19. The AAO lacks example decisions from Hong Kong criminal proceedings in which Hong Kong Offenses Against the Person Ordinance, Chapter 212, Section 39, was applied. Thus, we are unable to examine to what conduct the ordinance has been applied in order to assess whether such conduct is turpitudinous. Upon examining the record of the applicant's conviction and statements from the applicant and his spouse, we can conclude that his act for which he was convicted under Hong Kong Offenses Against the Person Ordinance, Chapter 212, Section 39, was tantamount to simple assault, which is not a crime involving moral turpitude.

The police and court documents as well as the applicant's and the applicant's spouse's statements all indicate that a dispute between competing fruit stall operators erupted first in words and then with the applicant grabbing the shirt of his competitor (*the victim*) and punching him in the back which caused him to fall to the ground. While certainly not to be commended, the record does not show that the applicant used any weapon other than his fist or that the victim was seriously injured or a person whom society views as deserving of any special protection. Upon reviewing the record and the statute of conviction, the AAO finds that the applicant's conviction was not for a crime involving moral turpitude. Therefore, it is not a crime involving moral turpitude rendering the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The AAO does not find that the applicant's other convictions were for crimes involving moral turpitude.

The AAO concludes that the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act. Accordingly, the district director's findings concerning inadmissibility under section 212(a)(2)(A)(i)(I) of the Act will be withdrawn. The waiver application filed pursuant to section 212(h) of the Act will, therefore, be determined to be unnecessary as the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The applicant's file will be returned to the district director to continue processing consistent with this decision.

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