

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



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

(b)(6)



Date: **JUN 01 2015**

FILE #: [REDACTED]  
APPLICATION #: [REDACTED]

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(h) of the Act,  
8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

Thank you,

*Ron Rosenberg*

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The District Director, New York, New York, denied the waiver application. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the applicant is not inadmissible and the underlying waiver application is unnecessary.

The applicant is a native of Jamaica and citizen of Canada and Jamaica 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. The applicant 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 with her U.S. citizen spouse and daughter.

On April 24, 2014, the 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. A previous waiver application was also denied by the Director on June 21, 2011. That waiver application was based on extreme hardship to the applicant's daughter. The applicant appealed that decision, and the appeal was dismissed on March 9, 2013, for failure to establish extreme hardship to a qualifying relative.

On appeal, the applicant states that the Director failed to consider the emotional, medical, and cumulative hardship to the qualifying relative.

In support of the waiver application, the record includes, but is not limited to: biographical information for the applicant, her spouse, her daughter and other family members; medical records for the applicant's spouse; background information concerning the medical conditions experienced by the applicant's spouse; documentation concerning the applicant and her spouse's employment; documentation concerning the applicant and her spouse's finances, insurance, and property ownership; letters from family and community members; photographs; and documentation of the applicant's immigration and criminal history. The entire record was reviewed and considered in rendering a decision on the appeal.

The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The applicant was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude.

Section 212(a)(2)(A)(i)(I) of the Act provides, in pertinent part, that an alien convicted of "a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime" is inadmissible.

The Act does not define the term "crime involving moral turpitude." In *Matter of Perez-Contreras*, the Board of Immigration Appeals (BIA or Board) provided:

[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.

20 I&N Dec. 615, 617-18 (BIA 1992) (citations omitted); *see also Matter of Solon*, 24 I&N Dec. 239, 240 (BIA 2007); *Matter of Ajami*, 22 I&N Dec. 949, 950 (BIA 1999); *Keungne v. U.S. Att'y Gen.*, 561 F.3d 1281, 1284 (11th Cir. 2009) (citing *Vuksanovic v. U.S. Att'y Gen.*, 439 F.3d 1308, 1311 (11th Cir. 2006)).

In assessing whether a conviction is a crime involving moral turpitude, we must first “determine what law, or portion of law, was violated.” *Matter of Esfandiary*, 16 I&N Dec. 659, 660 (BIA 1979). We begin with a categorical inquiry, considering the “inherent nature of the crime as defined by statute and interpreted by the courts,” not the underlying facts of the criminal offense. *Matter of Short*, 20 I&N Dec. 136, 137 (BIA 1989); *see also Matter of Louissaint*, 24 I&N Dec. 754, 757 (BIA 2009) (citing *Taylor v. United States*, 495 U.S. 575, 599-600 (1990)). This categorical inquiry focuses on whether moral turpitude necessarily inheres in the minimal conduct for which there is a realistic probability of prosecution under the statute. *See Matter of Short, supra*; *see also Matter of Louissaint, supra*; *Moncrieffe v. Holder*, 133 S.Ct. 1678, 1684-1685 (2013); *Gonzales v. Duenas-Alvarez*, 127 S.Ct. 815, 822 (2007).

Where the statute does not contain a single, indivisible set of elements but rather encompasses multiple distinct criminal offenses, “some . . . which involve moral turpitude and some which do not,” the analysis moves beyond the categorical inquiry. *Matter of Short, supra*, at 137-138. In applying the Supreme Court’s decision in *Descamps v. United States*, 133 S. Ct. 2276 (2013) to the immigration context, the Board stated that a criminal statute is divisible “only if (1) it lists multiple discrete offenses as enumerated alternatives or defines a single offense by reference to disjunctive sets of ‘elements,’ more than one combination of which could support a conviction; and (2) at least one, but not all, of those listed offenses or combinations of disjunctive elements is a categorical match” to the relevant generic offense (i.e. an offense involving moral turpitude). *Matter of Chairez-Castrejon*, 26 I&N Dec. 349, 353 (BIA 2014) (citing *Descamps, supra*, at 2283). For the purpose of determining whether a statute is divisible, an offense’s elements are those facts about the crime which “ ‘[t]he Sixth Amendment contemplates that a jury—not a sentencing court—will find . . . unanimously and beyond a reasonable doubt.’ ” 26 I&N Dec. at 353 (quoting *Descamps, supra*, at 2288). The Board indicated that absent a requirement for jury unanimity, the disjunctive language of the statute merely expresses alternative “means” of committing the crime, rather than alternative “elements” that render the statute divisible into distinct offenses. 26 I&N Dec. at 354.

If a statute is divisible, we conduct a modified categorical inquiry, reviewing the record of conviction to determine the offense within the statute for which the respondent was convicted. *See Matter of Short, supra*, at 137-38. The record of conviction is a narrow, specific set of documents

which includes the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Matter of Louissant, supra*, at 757; see also *Shepard v. U.S.*, 544 U.S. 13, 16 (2005) (finding that the record of conviction is limited to the “charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.”)

The record establishes that on [REDACTED], the applicant was convicted in [REDACTED] ( [REDACTED] ) Canada of Assault with Weapon in violation of section 267(a) of the Canadian Criminal Code for her conduct on [REDACTED]. She was given a suspended sentence, with 3 years of probation, community service, a weapons prohibition, and a victim surcharge fine.

Section 267(a) of the Canadian Criminal Code, states that:

Every one who, in committing an assault,  
(a) Carries, uses or threatens to use a weapon or an imitation thereof, ....  
is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

Criminal Code (R.S.C., 1985, c. C-46).

Section 265 of the Canadian Criminal Code, defines assault, stating that:

(1) A person commits an assault when  
(a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;  
(b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or  
(c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

Criminal Code (R.S.C., 1985, c. C-46).

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*, 20 I&N Dec. 615, 618-20 (BIA 1992) (finding that third-degree assault under section 9A.36.031(1)(f) of the Revised Code of Washington is not a crime involving moral turpitude because neither intent nor recklessness is required for a conviction); *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). However, the Board determined that assault and battery offenses involve moral turpitude where there is an aggravating factor such as the use of a deadly weapon, the intentional infliction of serious bodily injury, and bodily harm upon individuals deserving of special protection such as a

child, domestic partner, or a peace officer. *Id.*; *Matter of Medina*, 15 I&N Dec.611 (BIA 1976), *aff'd*, 547 F.2d 1171 (7th Cir. 1977) (finding assault with a deadly weapon to be a crime involving moral turpitude).

“[A]n assessment of both the state of mind and the level of harm required to complete the offense” are also involved in a determination if a crime constitutes a crime involving moral turpitude. *Matter of Solon*, 24 I&N Dec. at 242. Crimes committed intentionally or knowingly with the specific intent to inflict a particular harm, and with a resulting meaningful level of harm, constitute crimes involving moral turpitude, but “as the level of conscious behavior decreases, i.e., from intentional to reckless conduct, more serious resulting harm is required” for a finding of moral turpitude. *Id.* “[W]here no conscious behavior is required, there can be no finding of moral turpitude, regardless of the resulting harm.” *Id.*; *see also Matter of Perez-Contreras*, 20 I&N Dec. at 617-18; *Matter of Fualaau*, 21 I&N Dec. 475, 478 (third-degree assault in Hawaii, an offense that involves recklessly causing bodily injury to another person, is not a crime involving moral turpitude).

As noted above, assault and battery offenses may appropriately be classified as crimes of moral turpitude if they necessarily involve aggravating factors that significantly increased their culpability. The Board found that “(A)ssault 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.” *Matter of Sanudo*, 23 I&N Dec. at 970 (citing *Sosa-Martinez v. U.S. Att’y Gen.*, *supra*; *Nguyen v. Reno*, 211 F.3d 692, 695 (1st Cir. 2000); *Matter of P-*, 7 I&N Dec. 376, 377 (BIA 1956)); *see also Matter of Sejas*, 24 I&N Dec. 236, 238 (BIA 2007) (holding that a Virginia assault statute did not categorically involve moral turpitude despite the presence of an aggravating factor --assault against a member of one’s family or household -- because it “does not require the actual infliction of physical injury and may include any touching, however slight.”)

The applicant was convicted of assault with weapon under Section 267(a) of the Canadian Criminal Code, and to determine the mental state required to commit this offense, we must examine Section 265, which defines assault. A conviction for assault under these sections does not require specific intent to physically injure another person, but rather only requires a general intent to apply force along with the carrying, using, or threatening to use a weapon. We cannot find that a conviction under Section 267(a) of the Canadian Criminal Code is categorically a crime involving moral turpitude because the minimum conduct needed for a conviction does not require “intent to inflict a particular harm, and with a resulting meaningful level of harm.” *See Matter of Solon*, 24 I&N Dec. at 242. It is thus necessary to determine whether the statute is divisible into separate offenses with distinct mens rea. There is no language in the specific sections at issue in this case to suggest that such a reading is possible.

Moreover, section 267(a) of the Canadian Criminal Code, which prohibits carrying, using, or threatening with “a weapon or an imitation thereof” and requires no bodily injury to the victim for a conviction, contains none of the aggravating factors the Board had found to render assault and battery offenses to be crimes involving moral turpitude, such as use of a deadly weapon or infliction of serious bodily injury. We note that the term “weapon,” which is defined in section 2 of the Canadian Criminal Code as “anything used, designed to be used or intended for use (a) in causing

death or injury to any person, or (b) for the purpose of threatening or intimidating any person...” is not equivalent to a deadly or dangerous weapon found to be such an aggravating factor by the BIA and federal courts. *See, e.g. Yousefi v. INS*, 260 F.3d 318 (4th Cir. 2001) (finding assault with a dangerous weapon, defined as “one that is likely to produce death or serious bodily injury” is closely analogous to assault with a deadly weapon and is a crime involving moral turpitude); *Matter of J-*, 4 I&N Dec. 512, 514 (BIA 1951) (finding assault and battery with a dangerous weapon to be a crime involving moral turpitude where “dangerous weapon” is defined as “any instrument or instrumentality so constructed or so used as to be likely to produce death or great bodily harm; or . . . because of the manner in which it is used . . . endangers life or inflicts great bodily harm; or is likely to produce death or serious bodily injury.”).

Upon reviewing the record and the statute of conviction, we find that the applicant’s conviction for assault with weapon is not a crime involving moral turpitude that renders the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The waiver application is not necessary.

In application proceedings, it is the applicant’s burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met. Accordingly, the appeal will be dismissed as the applicant is not inadmissible and the underlying waiver application is unnecessary.

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