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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street N.W.
Washington, D.C. 20536

[redacted]

FILE: [redacted] Office: DENVER, CO Date: NOV 05 2003

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:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Denver, Colorado, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Nicaragua 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 has two United States (U.S.) citizen children (ages 9 and 4) and she seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), so that she may remain in the U.S. with her children and adjust her status to that of a lawful permanent resident.

The district director concluded that the applicant had failed to establish extreme hardship would be imposed upon her qualifying relatives. The application was denied accordingly.

On appeal, counsel asserts generally that the Immigration and Naturalization Service ("Service", now Citizenship and Immigration Services, "CIS") erred in finding that the crimes that the applicant committed involved moral turpitude. Counsel asserts further that the applicant's children would suffer extreme hardship if the applicant were ordered removed from the United States. Counsel submitted no legal brief or new evidence on appeal.

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

> (A)(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.

Section 212(h) of the Act provides, in pertinent part, that:

> (h) The Attorney General [now Secretary, Homeland Security, "Secretary"] may, in his discretion,

waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) . . . if -

. . . .

(1) (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . . .

The record reflects that on December 14, 1999, the applicant was convicted of the offenses of "Harassment - Strike, Shove, Kick", in violation of the Colorado Revised Statute, Criminal Code (CRS) § 18-9-111(1)(a). The record reflects further that on June 16, 2000, the applicant was convicted of the offense of "Third Degree Assault", in violation of CRS § 18-3-204.

Counsel provides no legal argument, basis or legal authority for his general assertion that the applicant's crimes are not crimes involving moral turpitude. The AAO notes, however, that the Board of Immigration Appeals (Board) 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. Assault may or may not involve moral turpitude. Simple assault is generally not considered to be a crime involving moral turpitude.
>
> 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.) Referring to *Matter of Perez-Contreras, supra,* the Board stated in *Matter of Fualaau,* 21 I&N Dec. 475, 476 (BIA 1996) that:

> In *Perez-Contreras*, we found that assault in the third degree under the relevant state statute did not constitute a crime involving moral turpitude. The statute governing the conviction identified misconduct which simply caused bodily injury, rather than serious bodily injury. Moreover, the misconduct did not involve the use of a weapon.

In *Matter of Fualaau,* the Board examined a Hawaiian statute which stated that:

> (1) A person commits the offense of assault in the third degree if he:
>
> (a) Intentionally, knowingly, or recklessly causes bodily injury to another person; or
>
> (b) Negligently causes bodily injury to another person with a dangerous instrument.
>
> (2) Assault in the third degree is a misdemeanor
>
> . . . .

Id. at 476 (citing Haw. Rev. Stat. § 707-712 (1992)). The Board determined that the respondent in *Matter of Fualaau* was convicted under section 1(a) of the Hawaiian statute, above, and that:

> The instant assault conviction does not arise under a statute [third degree assault with a criminally reckless state of mind] which has an element of death of another person; the use of a deadly weapon; or any other aggravating circumstance. Therefore, we find

> the crime at issue here is similar to a simple assault.
>
> . . . .
>
> In order for an assault of the nature at issue in this case 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.

Id. at 478. Like the language used in the Hawaiian assault statute defined above, in the present case, the statutory language for the crime of "assault in the third degree" under CRS § 18-3-204 states:

> A person commits the crime of assault in the third degree if he knowingly or recklessly causes bodily injury to another person **or** with criminal negligence he causes bodily injury to another person by means of a deadly weapon. Assault in the third degree is a class 1 misdemeanor. (Emphasis added).

Thus, pursuant to the reasoning set forth in *Matter of Fualaau, supra,* if the applicant was convicted under the first part of CRS § 18-3-204 (knowing and recklessly causing bodily injury), rather than the second part of the statute (with criminal negligence causing bodily injury by means of a deadly weapon), the applicant's crime would not be considered a crime involving moral turpitude.

The Board has held that the courts and immigration authorities may look to the record of conviction if the statute under which an alien is convicted includes some offenses that involve moral turpitude and others which do not, in order to determine the offense for which the alien was convicted. *See Matter of Short,* 20 I&N Dec. 136 (BIA 1989). *See also, Matter of Esfandiary,* 16 I&N Dec. 659 (BIA 1979). In the present case, a review of the record indicates that the applicant was convicted of 3rd degree assault based on injuries she inflicted upon her common-law husband by means of pushing and scratching him on the chest and neck area with her fingernails. There is no indication in the record to indicate that the applicant caused bodily injury by means of a deadly weapon. The AAO thus finds,

that based on the reasoning set forth in *Matter of Fualaau, supra,* the applicant's conviction for assault in the 3rd degree does not constitute a crime involving moral turpitude.

Moreover, the statutory language for the crime of harassment under CRS § 18-9-111(1)(a) states:

> (1) A person commits harassment if, with intent to harass, annoy, or alarm another person, he or she:
>
> (a) Strikes, shoves, kicks, or otherwise touches a person or subjects him to physical contact.

Because the harassment statute under which the applicant was convicted contains no aggravating circumstance or serious bodily injury element in its definition, the AAO also holds that the applicant's conviction for harassment does not constitute a crime involving moral turpitude. *See Matter of Fualaau, supra.* It has therefore been established that the crimes for which the applicant was convicted do not constitute crimes involving moral turpitude, and that they do not support the district director's finding of inadmissibility.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(2)(A) of the Act, 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 met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.