

Falls Church, Virginia 22041

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File: A73 394 601 - Seattle, WA

Date: APR - 2 2008

In re: AYHAM MAJED BARBOUR

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Tom Youngjohn, Esquire

ON BEHALF OF DHS: Jonathan M. Love  
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(2)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(I)] -  
Crime involving moral turpitude

APPLICATION: Termination of proceedings; cancellation of removal

The respondent appeals from an Immigration Judge's January 17, 2008, decision denying his motion to reconsider.<sup>1</sup> The appeal will be sustained, and these removal proceedings will be terminated.

In a written decision dated December 31, 2007, an Immigration Judge found the respondent to be inadmissible as charged under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), and denied his application for cancellation of removal. Three days before the Immigration Judge's decision, the respondent filed with the Immigration Court a motion to allow him to file a brief on the issue of whether his conviction for two counts of assault in the fourth degree in violation of Wash. Rev. Code § 9A.36.041 renders him inadmissible under section 212(a)(2)(A)(i)(I) of the Act as an "alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of . . . a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime." On January 7, 2007, the respondent filed a motion to reconsider, which was opposed by the Department of Homeland Security (DHS).

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<sup>1</sup> The respondent asserts that his timely-filed Notice of Appeal was meant to appeal the Immigration Judge's decision of December 31, 2007, rather than or in addition to the Immigration Judge's January 17, 2008, decision denying his motion to reconsider. However, in the interest of judicial economy, we will review on certification of the Immigration Judge's denial of the respondent's motion to reconsider.

In his decision of January 17, 2008, the Immigration Judge noted that he had not received the respondent's motion to file a brief until after the December 31, 2007, decision had been issued. However, he found that the respondent's inadmissibility under section 212(a)(2)(A)(i)(I) had been properly established. The Immigration Judge noted the DHS's concession that assault in the fourth degree in violation of Wash. Rev. Code § 9A.36.041 is not categorically a crime involving moral turpitude. However, the Immigration Judge agreed with the DHS's position that under the modified categorical approach, the conviction records, which include a document entitled "Certification for Determination of Probable Cause" as incorporated into the respondent's guilty plea, show that the respondent's crimes "are heavily imbued with moral turpitude" (I.J. at 3). The Immigration Judge quoted *Matter of Sanudo*, 23 I&N Dec. 968, 971 (BIA 2006), in finding that the circumstances underlying the respondent's convictions, which involved disturbing and lewd conduct against a developmentally disabled woman and a 16-year-old girl, present "aggravating factors that significantly increase [the respondent's] culpability" (I.J. at 4).

The respondent challenges on appeal the Immigration Judge's finding that his convictions are for crimes involving moral turpitude. Generally, a crime involves "moral turpitude" if it is "inherently base, vile, or depraved, and contrary to accepted rules of morality and the duties owed between persons or to society in general." *Matter of Sejas*, 24 I&N Dec. 236, 237 (BIA 2007) (citations omitted). In determining whether a crime is one involving moral turpitude, we must look to the elements of the statute. *Id.*, citing *Matter of Torres-Varela*, 23 I&N Dec. 78, 84-85 (BIA 2001). Our determination is driven "by the statutory definition or by the nature of the crime *not by the specific conduct that resulted in the conviction.*" *Matter of Torres-Varela*, *supra*, at 84, quoting *McNaughton v. INS*, 612 F.2d 457, 459 (9th Cir. 1980) (emphasis added). If necessary, we also seek guidance from court decisions in the convicting jurisdiction. *Matter of Sejas*, *supra*, at 237, citing *Matter of Sanudo*, *supra*, at 970-71.

Assault may or may not involve moral turpitude. See *Matter of Solon*, 24 I&N Dec. 239, 241 (BIA 2007); *Matter of Danesh*, 19 I&N Dec. 669, 670 (BIA 1988). Offenses characterized as "simple assaults" are generally not considered to be crimes involving moral turpitude. See *Matter of Solon*, *supra*, at 241; *Matter of Perez-Contreras*, 20 I&N Dec. 615 (BIA 1992); *Matter of Short*, 20 I&N Dec. 136, 139 (BIA 1989). This is so because they require general intent only and may be committed without the evil intent, depraved or vicious motive, or corrupt mind associated with moral turpitude. *Matter of Solon*, *supra*, at 241; *Matter of J-*, 4 I&N Dec. 512, 514 (BIA 1951). In addition, we have recognized that not all crimes involving the injurious touching of another person reflect moral depravity on the part of the offender. *Matter of Solon*, *supra*, at 241. Many simple assault statutes prohibit a wide range of conduct or harm, including de minimis conduct or harm, such as offensive or provocative physical contact or insults, which is not ordinarily considered to be inherently vile, depraved, or morally reprehensible. *Matter of Solon*, *supra*, at 241 (citations omitted).

We have also recognized, however, that assault and battery offenses may appropriately be classified as crimes of moral turpitude "if they *necessarily* involved aggravating factors that significantly increased their culpability." *Matter of Sanudo*, *supra*, at 971 (emphasis added). In *Sanudo*, we gave as examples of such offenses assault and battery with a deadly weapon, assault and battery offenses that *necessarily* involved the intentional infliction of serious bodily injury on another, and 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. *Matter of Sanudo, supra*, at 971-72.

To determine whether a crime involves moral turpitude, the United States Court of Appeals for the Ninth Circuit applies the categorical and modified categorical approaches established by the Supreme Court. *Taylor v. United States*, 495 U.S. 575, 599-602 (1990); *Tall v. Mukasey*, \_\_\_ F.3d \_\_\_, 2008 WL 509219 (9th Cir., February 27, 2008); *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1067 (9th Cir. 2007). The Immigration Judge found, and both parties agreed, that the crime of assault in the fourth degree in violation of Wash. Rev. Code § 9A.36.041 does not categorically involve moral turpitude. Therefore, the issue of whether the respondent's crimes involved moral turpitude must be determined by the modified categorical approach, which "is proper when a statute is divisible into several crimes, some of which may involve moral turpitude and some of which may not." *Navarro-Lopez v. Gonzales, supra*, at 1073.

The statute under which the respondent was convicted provides that "[a] person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another." Wash. Rev. Code § 9A.36.041. Washington courts have held that fourth degree assault can be committed in three ways: (1) an attempt, with unlawful force, to inflict bodily injury on another; (2) an unlawful touching with criminal intent; or (3) putting another in apprehension of harm. *Suazo Perez v. Mukasey*, 512 F.3d 1222, 1225-26 (9th Cir. 2008), citing *State v. Aumick*, 894 P.2d 1325, 1328 n.12 (1995) (en banc). Under Washington law, fourth degree assault can be committed by nonconsensual offensive touching. *Suazo Perez v. Mukasey, supra*, at 1226, citing *State v. Aumick, supra*, at 1328 n.12.

The Immigration Judge, although stating that he was applying the modified categorical approach, did not state which, if any, of the three categories of assault in the fourth degree he found to involve moral turpitude. Nor did the Immigration Judge specify which category of assault in the fourth degree is established by the respondent's conviction records. Rather, the Immigration Judge simply determined that the depraved conduct underlying the respondent's conviction, as related by the conviction records, indicate that the respondent's conviction involved moral turpitude. However, as we noted earlier, our "determination is driven by the statutory definition or by the nature of the crime not by the specific conduct that resulted in the conviction." *Matter of Torres-Varela, supra*, at 84. Thus, the Ninth Circuit, in applying the modified categorical approach in *Navarro-Lopez*, stated that "[e]ven if Navarro-Lopez had admitted to depraved acts, those admissions could not be used to modify the crime because they were not necessary for a conviction." *Navarro-Lopez v. Gonzales, supra*, at 1073, citing *Shepard v. United States*, 544 U.S. 13, 24 (2005).

In the instant case, the Statement of Defendant on Plea of Guilty states that the respondent has been informed and fully understands that the elements of the crime for which he pled guilty are "unlawful or offensive touching without consent or [indiscernible]." This indicates that the respondent was convicted under that category of assault in the fourth degree which criminalizes "unlawful touching with criminal intent." While the evidence indicates the respondent's actual *conduct* was reprehensible and morally turpitudinous, we cannot find under controlling case law that his *conviction* for such conduct meets the definition of a crime involving moral turpitude under the modified categorical approach.

We note that an alien may also be found inadmissible under section 212(a)(2)(A)(i)(I) as an alien who “admits committing acts which constitute the essential elements of . . . a crime involving moral turpitude.” However, a finding of inadmissibility under this section would require that the “crime involving moral turpitude” which the respondent is alleged to have admitted committing be specified and that the respondent be advised in a clear manner of the essential elements of the alleged crime before any such admission is made. *Matter of G-M-*, 7 I&N Dec. 40 , 70 (BIA 1955; A.G. 1956). We conclude that the record does not establish that the respondent is removable as charged. Accordingly, the respondent’s appeal will be sustained, and these proceedings will be terminated.

ORDER: The respondent’s appeal is sustained.

FURTHER ORDER: These removal proceedings are terminated.

  
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FOR THE BOARD