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U.S. Citizenship
and Immigration
Services

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FILE:

Office: DENVER (SALT LAKE CITY)

Date:

DEC 15 2008

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:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

John F. Grissom, Acting Chief
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 dismissed as the underlying application is moot. The matter will be returned to the district director for continued processing.

The applicant, [REDACTED], is a native and citizen of El Salvador 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 sought a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(i), which the district director denied, finding the applicant failed to establish that extreme hardship would be imposed on a qualifying relative, *Decision of the District Director*, dated June 13, 2006.

The AAO will first address the finding of inadmissibility. 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 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines “conviction” for immigration purposes as:

A formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where –

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.

The record reflects that the applicant pled guilty to or was found guilty of the following:

- March 17, 1998, Simple Assault, Class B Misdemeanor, sentenced to 30-days jail and ordered to pay a fine.
- March 1, 2001, Simple Assault, Attributes: Woman, Domestic Violence, Class B Misdemeanor, sentenced to 10 days jail and to probation, and ordered to pay a fine and attend anger management class.
- March 14, 2001, Theft, Class B Misdemeanor, sentenced to 30 days jail, 12-months probation, and ordered to pay a fine.

In determining whether the applicant's convictions involve moral turpitude, the Board of Immigration Appeals (BIA) in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), held 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.

The AAO finds that there is no clear-cut definition of "moral turpitude." In *Grageda*, the Ninth Circuit states that in "[d]escribing moral turpitude in general terms, courts have said that it is an "act of baseness or depravity contrary to accepted moral standards." *Grageda v. INS*, 12 F.3d 919, 921 (9th Cir.1993)(quoting *Guerrero de Nodahl v. INS*, 407 F.2d 1405, 1406 (9th Cir. 1969)) See also *McNaughton v. INS*, 612 F.2d 457, 459 (9th Cir.1980)("Whether a particular crime involves moral turpitude "is determined by the statutory definition or by the nature of the crime not by the specific conduct that resulted in the conviction.") With regard to the crime of assault, courts generally have held that a conviction for simple assault does not involve moral turpitude. See, e.g., *Reyes-Morales v. Gonzales*, 435 F.3d 937, 945 n. 6 (8th Cir.2006) (observing that simple assault does not involve moral turpitude).

U.S. courts and the BIA have held that not all crimes involving assault or battery are considered as crimes involving moral turpitude. For example, the BIA in *In re Samudo*, 23 I&N Dec. 968, 970-971 (BIA 2006), states that not all crimes involving the injurious touching of another reflect moral depravity on the part of the offender, even though the crimes are labeled assault, aggravated assault, or battery. (citing *Matter of B-*, 1 I&N Dec. 52, 58 (BIA, A.G. 1941) (finding that second-degree assault under Minnesota law does not qualify categorically as a crime involving moral turpitude (following *United States ex rel. Zaffarano v. Corsi*, 63 F.2d 757, 758 (2d Cir. 1933))). In *Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996), the BIA held that third-degree assault under the law of Hawaii, an offense that involved recklessly causing bodily injury to another person, is not a crime involving moral turpitude. And in *Matter of Perez-Contreras*, 20 I&N Dec. 615 (BIA 1992), the BIA concluded that that third-degree assault under the law of Washington, an offense that involved negligently causing bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering, is not a crime involving moral turpitude.

However, that determination can be altered if there is an aggravating factor such as the use of a deadly weapon, the intentional infliction of serious bodily harm, or the infliction of bodily harm upon persons whom society views as deserving of special protection, such as children or domestic partners or intentional serious bodily injury to the victim. *In re Sanudo*, 23 I&N Dec. 968 (BIA 2006). Battery offenses committed against the members of a protected class found to involve moral turpitude were “defined by statute to require proof of the actual infliction of some tangible harm on a victim.” *Id.* at 972. If a statute lacks an injury requirement and includes no other inherent element evidencing “grave acts of baseness or depravity,” a conviction under the statute does not qualify as a crime categorically involving moral turpitude. *Galeana-Mendoza*, 465 F.3d 1054, 1060 (9th Cir. 2006). Whether a particular crime involves moral turpitude is determined by reference to the statutory definition of the offense. *In re. Sanudo* at 970-971.

Courts have described two separate ways of analyzing crimes as the “categorical” and “modified categorical” approaches. The former looks solely to the structure of the statute of conviction to determine whether a person has been convicted of a designated crime; the latter looks to a limited set of documents in the record of conviction in cases where the statute of conviction was facially over inclusive. *See, e.g., Chang v. INS*, 307 F.3d 1185, 1189-92 (9th Cir. 2002).

The applicant here was convicted of simple assault, a class B misdemeanor, under Utah Code Ann. § 76-5-102. Subsection (1) of Utah Code Ann. § 76-5-102 provides that “[a]ssault is: (a) an attempt, with unlawful force or violence, to do bodily injury to another; (b) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; or (c) an act, committed with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another.” Subsection (2) states that assault is a class B misdemeanor; and subsection (3) states that it is a class A misdemeanor if the person causes substantial bodily injury to another; or the victim is pregnant and the person has knowledge of the pregnancy. Utah Code Ann. § 76-1-601(3) states that “bodily injury” means physical pain, illness, or any impairment of physical condition.

Applying the categorical approach to Utah Code Ann. § 76-5-102, the AAO finds that it has an injury requirement, but does not have a *mens rea* element of knowing or intentional conduct. Subsections (a), (b), and (c) refer to the injury suffered rather than to the intent. For a finding of moral turpitude, a domestic statute must have a “willful” or “intentional” element. *See, e.g., Jose Roberto Fernandez-Ruiz vs. Gonzales*, 468 F.3d 1159, 1166 (9th Cir. 2006) (statute must have element of willfulness and conduct resulting in bodily injury that is more than insubstantial); *Grageda v. INS*, 12 F.3d 919, 922 (9th Cir.1993) (finding that when a person willfully beats his or her spouse severely enough to cause ‘a traumatic condition,’ he or she has committed an act of baseness or depravity contrary to accepted moral standards.) The recent case, *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), indicates that to qualify as a crime involving moral turpitude a crime must involve both reprehensible conduct and some degree of scienter, whether specific intent, deliberateness, willfulness, or recklessness. Because the Utah simple assault statute under consideration here lacks a *mens rea* element, the applicant’s convictions under the statute do not involve moral turpitude.

Although the applicant's theft conviction involves moral turpitude, *see, Hashish v. Gonzales*, 442 F.3d 572, 576-77 (7th Cir. 2006), the AAO finds the applicant to be eligible for the petty offense exception found in section 212(a)(2)(ii) of the Act.

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

(ii) Exception.-Clause (i)(I) shall not apply to an alien who committed only one crime if-

....

(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).

Utah law indicates that for a class B misdemeanor a person may be sentenced to imprisonment for a term not exceeding six months, *see* Utah Code Ann. § 76-3-204, enacted by Chapter 196, 1973 General Session; which complies with the requirement that the maximum penalty possible for the crime of which the applicant was convicted not exceed imprisonment for one year. His imprisonment was not in excess of six months; the record indicates that the applicant was sentenced to a 30-day term of imprisonment. The evidence in the record thus establishes that the applicant's theft conviction falls within the petty offense exception set forth in the Act.

In *Matter of Garcia-Hernandez, supra*, the BIA 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 BIA 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.

As the applicant has been found to have been convicted of only one crime involving moral turpitude, he is eligible for the petty offense exception and the crime qualifies under the petty offense exception to inadmissibility.

The record also indicates that the applicant is not inadmissible under Section 212(a)(2)(B) of the Act for having multiple criminal convictions.

Section 212(a)(2)(B) of the Act state in pertinent part:

(B) Multiple criminal convictions.-Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

The aggregate sentence to confinement for the applicant's three convictions is 70 days, not more than five years. Thus, the applicant is not inadmissible under section 212(a)(2)(B) of the Act. Accordingly, the AAO finds that the record does not establish that the applicant is inadmissible to the United States.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. The decision of the district director will be withdrawn and the appeal will be dismissed as the underlying waiver application is moot.

ORDER: The district director's decision is withdrawn and the appeal is dismissed as the waiver application is moot. The matter will be returned to the district director for continued processing.