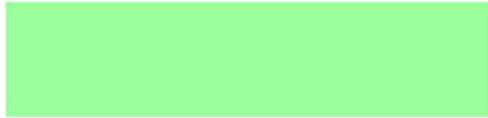




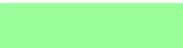
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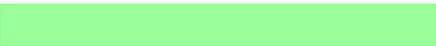


Date: JUN 21 2013

Office: SANTA ANA

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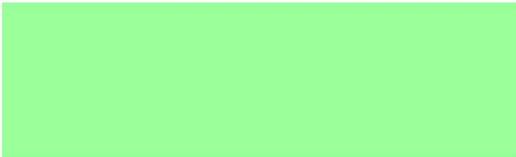
IN RE:

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:

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 our 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-190B, 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 a 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,

A handwritten signature in black ink, appearing to read "Michael Shumway".

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Field Office Director, Santa Ana, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the applicant is not inadmissible and the waiver application is unnecessary.

The applicant is a native and citizen of Mexico 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 crimes involving moral turpitude. On January 20, 2012, the applicant filed an Application for Waiver of Grounds of Inadmissibility (Form I-601). He 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 his U.S. citizen spouse.

In a decision dated April 19, 2012, the field office director denied the Form I-601 application for a waiver, finding that the applicant failed to establish that his qualifying relative spouse would experience extreme hardship as a consequence of his inadmissibility.

On appeal, counsel for the applicant asserts that the field office director erred in finding that the record evidence did not establish that the applicant's bar to admission would result in extreme hardship to his spouse. Counsel contends that the evidence outlining extensive family ties in the United States and poor country conditions in Mexico, as well as the asserted medical, emotional, and financial difficulties to the applicant's spouse, demonstrate extreme hardship to his qualifying relative.

The record contains, but is not limited to: counsel's brief; a marriage certificate; copies of birth certificates; declarations by the applicant's spouse; the applicant's spouse's medical records; a psychological evaluation; country conditions documentation; bank statements; lease agreements; utility and credit card bills; a list of the applicant's relatives residing in the United States; copies of income tax returns; and documentation regarding the applicant's criminal history.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record has been reviewed and considered in rendering a decision on the appeal.

Section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I) provides, in pertinent part, that:

- (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.

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....

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.)

To determine if a crime involves moral turpitude, the Ninth Circuit Court of Appeals employs the categorical approach set forth in *Taylor v. United States*, 110 S.Ct. 2143 (1990). See *Nicanor-Romero v. Mukasey*, 523 F.3d 999, 1004 (9th Cir. 2008), *overruled on other grounds by Marmolejo-Campos v. Holder*, 58 F.3d 903, 911 (9th Cir. 2009). The purpose of the categorical approach is to determine whether the full range of conduct encompassed by the statute constitutes a crime of moral turpitude. *Cuevas-Gaspar v. Gonzalez*, 430 F.3d 1013, 1017 (9th Cir. 2005), *abrogation on other grounds recognized by Holder v. Martinez-Gutierrez*, 132 S.Ct. 2011, 2020-21 (2012). If the statute “criminalizes both conduct that does involve moral turpitude and other conduct that does not, the modified categorical approach is applied.” *Marmolejo-Campos*, 558 F.3d at 912 (citing *Fernando-Ruiz v. Gonzalez*, 466 F.3d 1121, 1163 (9th Cir. 2006)); see also *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1161 (9th Cir. 2009). However, there must be “a realistic probability, not a theoretical possibility, that the statute would be applied to reach conduct that did not involve moral turpitude.” *Nicanor-Romero*, 523 F.3d at 1004 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). To demonstrate a “realistic probability,” the applicant must point to his or her own case or other cases in which the state courts in fact did apply the statute to conduct not involving moral turpitude. 523 F.3d at 1004-05. A realistic probability also exists where the statute expressly punishes conduct not involving moral turpitude. See *U.S. v. Vidal*, 504 F.3d 1072, 1082 (9<sup>th</sup> Cir. 2007).

Once a realistic probability is established, the modified categorical approach is applied, which requires looking to the “limited, specified set of documents” that comprise what is known as the record of conviction – the charging document, a signed plea agreement, jury instructions, guilty pleas, transcripts of a plea proceeding and the judgment – to determine if the conviction entailed admission to, or proof of, the elements of a crime involving moral turpitude. *Castillo-Cruz*, 581 F.3d at 1161 (citing *Fernando-Ruiz*, 466 F.3d at 1132-33); see also *Marmolejo-Campos*, 558 F.3d at 912 (citing *Cuevas-Gaspar*, 430 F.3d at 1020). The Ninth Circuit has reaffirmed that courts may not examine evidence outside the record of conviction in determining whether a conviction was for a crime involving moral turpitude. See *Olivas-Motta v. Holder*, --- F.3d ---, 2013 WL 2128318 (9th Cir. May 17, 2013) (rejecting *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)). Where the burden of proof is on the applicant, as in the present case, the applicant cannot sustain that burden where the record of conviction is inconclusive. *Young v. Holder*, 697 F.3d 976, 989 (9th Cir. 2012).

The record shows that on September 6, 2006, the applicant was convicted in the Superior Court of California, County of Orange, of “injuries to a telephone line,” in violation of section 591 of the California Penal Code. For this offense, the applicant was placed on informal probation for a period of three years. California Penal Code § 591 provides, in pertinent part, that:

“A person who unlawfully and maliciously ..., injures, ... any line of telephone ..., is punishable by imprisonment pursuant to subdivision (h) of Section 1170, or by a fine not exceeding five hundred dollars (\$500), or imprisonment in the county jail not exceeding one year.”

In California, to be guilty of the crime of injuring or disabling a telephone line, it is enough to simply tamper with a telephone line in such a way as to preclude its use for receiving or placing calls. *People v. Johnson*, 59 Cal.Rptr.3d 405, 415 (App. 6 Dist. 2007). By using the word “unlawfully” in section 591, the California Legislature did not intend that the proscribed conduct be unlawful independent of the prohibition contained in section 591 of the Penal Code. *Id.* at 417. Proof that a person did the act with malice is sufficient to demonstrate that the act was unlawful. *Id.* Instances where the California courts have found a violation of California Penal Code § 591 include: opening a telephone mechanism to place a long distance call without paying for it, *see People v. Kreiling*, 259 Cal. App. 2d 699 (1968); removing a telephone from a residence, *see People v. Johnson*, 59 Cal. Rptr 3d at 408; and the destruction of a telephone wire, *see Davis v. Pacific Tel. & Tel. Co.*, 127 Cal. 312 (1899). As such, the case law reveals that California Penal Code § 591 statute solely proscribes conduct that obstructs or interferes with a telephone line.

The AAO is unaware of any published or unpublished Ninth Circuit or Board decisions addressing whether the crime of unlawfully and maliciously injuring a telephone line under section 591 of the California Penal Code constitutes a crime involving moral turpitude. However, the Board has found that the similar crime of malicious mischief did not involve moral turpitude in a case where the alien broke the glass door of a building. *Matter of C-*, 2 I&N Dec. 716 (BIA 1947). The Board also found that malicious mischief by damaging a mailbox did not involve moral turpitude. *Matter of B-*, 2 I&N Dec. 867 (BIA 1947). However, the Board has also found that destruction of property can be a crime involving moral turpitude where done with “malicious” and “wanton” intent. *In Re M-*, 3 I&N Dec. 272 (BIA 1948) (killing of another’s hogs with an ax). We note, however, that this case arises in the Ninth Circuit. The Ninth Circuit Court of Appeals held in *Rodriguez-Herrera v. INS* that the Washington State crime of criminal mischief, defined by the Washington statute as knowingly and maliciously causing physical damage to the property of another, did not rise to the level of depravity or fraud that would qualify it as one involving moral turpitude. 52 F.3d 238, 240 (9th Cir. 1995). The Ninth Circuit noted that for crimes similar to malicious mischief that are not of the gravest character, a requirement of fraud has ordinarily been required to find moral turpitude. *Id.* Though the Ninth Circuit acknowledged that the use of the term “maliciously” in the Washington criminal mischief statute gave rise to evil intent, it found that “outside of the fraud context, the bare presence of some degree of evil intent is not enough to convert a crime that is not serious into one of moral turpitude leading to deportation.” *Id.* at 241.

The AAO notes that the applicant was not convicted of obtaining telephone services by fraud under section 205.7(a) of the California Penal Code. In *People v. Krailing*, the California Court of Appeals

for the Second District held that sections 591 and 502.7 of the Penal Code do not duplicate one another, but each creates a separate and distinct offense. 259 Cal. App. 2d at 703. The Court of Appelas noted that section 591 penalizes a person who maliciously injures, obstructs or makes any unauthorized connection with a telephone line or the apparatus connected with a telephone line. *Id.* However, section 502.7 of the Penal Code proscribes the use of specified means of conduct to defraud a telephone company of charges for telephone service. *Id.* Further, we note that the plain language of California Penal Code § 591 includes no fraud element or any other additional elements as aggravating factors.

The applicant was not convicted of destruction of property under section 594 of the Penal Code nor of willfully and knowingly destroying evidence under California Penal Code § 135. Similarly, the applicant was not convicted under section 602 of the California Penal Code, which punishes entering or occupying the lands or structure of another without the consent of the owner and refusing to leave upon being requested by the owner of the lands or structure. Likewise, the applicant was not convicted under section 293b of the Penal Code for, without the written permission of the owner, lessee, or person or corporation operating any electrical transmission line, climbing upon any pole, tower or other structure which is a part of such line or system and is supporting a wire or cable for the transmission or distribution of electric energy.

By these standards, the AAO concludes that the crime of “injuries to a telephone line” as defined by section 591 of the California Penal Code does not rise to the level of either depravity or fraud that would qualify it as a crime involving moral turpitude. Like the Ninth Circuit in *Rodriguez-Herrera*, we note that in contrast to the bulk of other non-fraud crimes necessarily involving moral turpitude for being base, vile, or contrary to the accepted rules of morality, the crime of “injuries to a telephone line” is a relatively minor offense. 52 F.3d at 240 (noting that certain crimes necessarily involving acts of baseness or depravity, such as spousal abuse, child abuse, incest, and rape, all involve moral turpitude).

Therefore, we find that there is not a realistic probability that California Penal Code § 591 includes the types of offenses that the Ninth Circuit has found to involve moral turpitude. Under the categorical approach followed in the Ninth Circuit, the AAO finds that the applicant’s conviction under section 591 of the California Penal Code is not a crime involving moral turpitude that renders him inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The record also shows that on May 31, 2001, the applicant was convicted in the Superior Court of Fullerton, California, of disobeying a court order in violation of section 166(4) of the California Penal Code. The applicant was sentenced to 20 days in jail and was placed on probation for a period of three years. California Penal Code § 166(4) provides that:

“a person guilty of any of the following contempts of court is guilty of a misdemeanor: (4) Willful disobedience of the terms as written of any process or court order or out-of-state court order, lawfully issued by a court, including orders pending trial.”

In California, the purpose of the contempt charge is to enable courts to vindicate their authority and

maintain dignity and respect. *People v. Gonzalez* 50 Cal. Rptr. 2d 74 (1996). The crime of contempt requires no specific intent; rather, the knowledge defendant must be shown to possess, in order to be found guilty of willful violation of court order, may be shown by evidence that he was served with the order and knew it. *See People v. Greenfield*, 184 Cal. Rptr. 604 (1982); *People v. Von Blum*, 47 Cal. Rptr. 679 (1965).

The AAO is unaware of any published or unpublished Ninth Circuit or Board decision addressing whether disobeying a court order in violation of section 166(4) of the California Penal Code involves moral turpitude. However, the Board has found that the crime of contempt of court generally does not involve moral turpitude. *Matter of P-*, 6 I&N Dec. 400, 403 (BIA 1954) (holding criminal contempt of court is not a crime involving moral turpitude although it “publicly depreciated the authority of the court tending to bring the administration of justice into scorn”); *Matter of C-*, 9 I&N Dec. 524, 541 (BIA 1962) (finding that the alien’s convictions for contempt of Congress and contempt of court did not render him deportable as an alien who has been convicted of crimes involving moral turpitude).

Applying the foregoing standards to the present case, we note that while the elements of the statute of conviction require willful conduct, it does not require any intent to avoid prosecution or obstruct the administration of justice. Moreover, we note that the applicant was not convicted of obstruction of justice under section 148 of the California Penal Code. Similarly, the applicant was not convicted of a crime requiring an intent to deceive, such as preparing any kind of false evidence under section 134 of the California Penal Code or submitting false evidence under section 132 of the California Penal Code.

In consideration of *Matter of P-* and *Matter of C-*, the AAO finds that California Penal Code § 166(4) does not include the types of offenses that the Ninth Circuit and the Board have found to involve moral turpitude. Therefore, under the categorical approach followed in the Ninth Circuit, the AAO finds that the applicant’s conviction under section 166(4) of the California Penal Code is not a crime involving moral turpitude that renders him inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The record further shows that on or about September 6, 2006, the applicant was convicted in the Superior Court of California, County of Orange, of misdemeanor inflicting corporal injury on a spouse or cohabitant, in violation of section 273.5(a) of the California Penal Code. The applicant was sentenced to 30 days in jail, was placed on informal probation for a term of three years, and was ordered to pay restitution. The field office director found the applicant was inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of crimes involving moral turpitude.

California Penal Code § 273.5(a) provides that:

Any person who willfully inflicts upon a person who is his or her spouse, former spouse, cohabitant, former cohabitant, or the mother or father of his or her child, corporal injury resulting in a traumatic condition is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for two,

three, or four years, or in a county jail for not more than one year, or by a fine of up to six thousand dollars (\$6,000) or by both that fine and imprisonment.

The Ninth Circuit Court of Appeals has held that a conviction under California Penal Code § 273.5(a) for spousal abuse is categorically a crime involving moral turpitude. In *Grageda v. INS*, the Ninth Circuit held: “Because spousal abuse is an act of baseness or depravity contrary to accepted moral standards, and willfulness is one of its elements . . . *spousal abuse* under section 273.5(a) is a crime of moral turpitude.” 12 F.3d 919, 922 (9th Cir. 1993) (Emphasis added); *See Guerrero de Nodahl v. INS*, 407 F.2d 1405, 1406-07 (9th Cir. 1969) (“[W]e rule that inflicting ‘cruel or inhuman corporal punishment or injury’ upon a child is so offensive to American ethics that the fact that it was done purposely or willingly (the California definition of ‘willful’) ends debate on whether moral turpitude was involved. When the crime is this heinous, willful conduct and moral turpitude are synonymous terms.”). However, the Ninth Circuit has also held that a conviction under California Penal Code § 273.5(a) for abuse of a cohabitant is not categorically a crime involving moral turpitude. *Morales-Garcia v. Holder*, 567 F.3d 1058, 1065 (9th Cir. 2009).

From the judicial record of conviction as submitted by the applicant, the AAO is unable to determine whether the applicant was convicted of inflicting corporal injury upon a spouse *or* cohabitant. It is noted that, unlike a removal hearing in which the government bears the burden of establishing an alien’s removability, the burden of proof (including the burden of production) in the present proceedings is on the applicant to establish that he is not inadmissible. *See* Section 291 of the Act, 8 U.S.C. § 1361. As the applicant has not submitted the full record of conviction, he has failed to overcome the director’s finding that his conviction for inflicting corporal injury upon a spouse of cohabitant involved moral turpitude.

Even though the applicant would be inadmissible under section 212(a)(2)(A)(i)(I) of the Act, the petty offense exception in section 212(a)(2)(A)(ii)(II) of the Act applies. 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).

According to section 273.5(a) of the California Penal Code, a person convicted under the statute is “guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not more than one year, or by a fine of up to six thousand dollars (\$6,000) or by both that fine and imprisonment.” Because the offense can

result in a range of punishments, it is referred to as a “wobbler” statute, providing for either a misdemeanor or a felony conviction. *Garcia-Lopez v. Ashcroft*, 334 F.3d 840, 844 (9th Cir. 2003).

Here, both the court certified minutes record and the FBI rap sheet reflect that on September 6, 2006, the applicant was convicted of a misdemeanor offense under section 273.5(a) of the California Penal Code. California law indicates that for misdemeanor offenses, a person may be sentenced to imprisonment for a term not exceeding one year. *See* Cal. Penal Code § 19.2. Additionally, the record shows that the applicant was not sentenced to a term of imprisonment in excess of 6 months; he was only sentenced to 30 days in jail with seven days credit for time served. The AAO acknowledges that the applicant was sentenced to three years of informal probation. However, the Board has held that when a criminal court issues an order placing a defendant on probation, “the alien has not had a sentence imposed of him in excess of six months for purposes of the petty offense exception.” *Matter of Castro*, 19 I&N Dec. 692, 694 (BIA 1988); *see also Matter of Gonzalez-Zoquiapan*, 24 I&N Dec. 549, 554 (BIA 2008) (noting that an alien sentenced to probation is eligible for the petty offense exception); *Matter of Cortez Canales*, 25 I&N Dec. 301, 306 (BIA 2010) (finding that an alien sentenced to 60 days imprisonment and five years of probation was eligible for the petty offense exception). The evidence in the record thus establishes that the applicant’s conviction for misdemeanor infliction of injury upon a spouse or cohabitant in violation of California Penal Code § 273.5(a) falls within the petty offense exception set forth in the Act.

In *Matter of Garcia-Hernandez*, 23 I&N Dec. 590 (BIA 2003), the Board 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 Board 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.

23 I&N Dec. at 594.

Based on the aforementioned discussion, the applicant is not required to file a section 212(h) waiver. As such, the waiver application is unnecessary.

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. *See* Section 291 of the Act, 8 U.S.C., § 1361. Here, the applicant is not required to file a Form I-601 waiver. Accordingly, the appeal will be dismissed as the waiver application is unnecessary.

**ORDER:** The appeal will be dismissed as the applicant’s crimes do not render him inadmissible under section 212(a)(2)(A)(i)(I) of the Act and the waiver application is unnecessary.