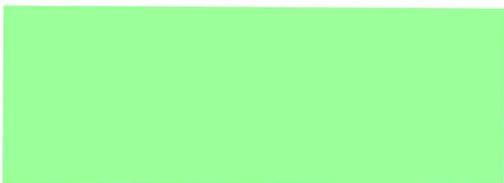
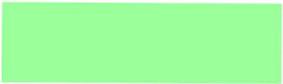


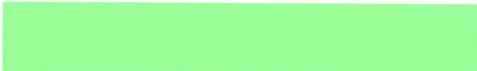
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



Date: **MAY 28 2013** Office: LOS ANGELES FILE: 

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:

SELF-REPRESENTED

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 that reads "Michael Shumway".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Los Angeles, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the Field Office Director for proceedings consistent with this decision.

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 October 28, 2011, the applicant filed an Application for Waiver of Grounds of Inadmissibility (Form I-601). 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 his U.S. citizen children.

In a decision dated March 1, 2012, the field office director denied the Form I-601 application for a waiver, finding the applicant failed to establish that his U.S. citizen children would experience extreme hardship as a consequence of his inadmissibility.

On appeal, the applicant contends that the director erred in finding that he has not established extreme hardship to his qualifying relatives, as the evidence outlining safety concerns in Mexico, as well as emotional and financial difficulties demonstrates extreme hardship to the applicant's U.S. citizen children.

The record contains, but is not limited to: the applicant's legal brief; statements by the applicant's wife and children; copies of income tax returns; school records; copies of birth certificates; 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) of the Act 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.)

The Ninth Circuit recently held that, when evaluating whether an offense constitutes a crime involving moral turpitude, immigration adjudicators must employ the categorical and modified categorical approach. *Olivas-Motta v. Holder*, 2013 WL 2128318, at *1 (9th Cir. 2013). At the first step, applying *Taylor v. United States*, 495 U.S. 575 (1990), immigration adjudicators must determine whether the crime of conviction is categorically one involving moral turpitude. *Id.* at *3. If the crime is not categorically a crime involving moral turpitude, immigration adjudicators proceed to the modified categorical approach, and may consider the judicial record of conviction including “documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea and the plea transcript.” *Id.* (citations omitted). The Ninth Circuit held that immigration adjudicators may not rely on evidence outside the record of conviction to determine if a crime involves moral turpitude. *Id.* at *10.

The field office director noted the applicant’s March 1, 2007 disturbing the peace by loud or unreasonable noise conviction in violation of section 415(2) of the California Penal Code when rendering the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act. For this offense, the applicant was sentenced to 36 months of probation. Section 415(2) of the California Penal Code provides, in pertinent part, that:

Any of the following persons shall be punished by imprisonment in the county jail for a period of not more than 90 days, a fine of not more than four hundred dollars (\$400), or both such imprisonment and fine: (2) Any person who maliciously and willfully disturbs another person by loud and unreasonable noise.

The AAO is unaware of any published federal cases addressing whether the crime of disturbing the peace by loud or unreasonable noise under California law is a crime involving moral turpitude. The Board has noted, however, that the crime of disturbing the peace is not a crime involving moral turpitude. *See Matter of H-*, 6 I&N Dec. 435, 437 (BIA 1954). In California, the offense of disturbing the peace by loud and unreasonable noise is a misdemeanor offense against the public order under the California Penal Code. Subdivision (2) of the statute makes it a misdemeanor to willfully disturb another person by loud or unreasonable noise. In *People v. Superior Court of Kern County*, 135 Cal. App. 3d 812, 816-17 (Cal. App. 1982), the California Court of Appeal for the Fifth District noted that subdivision (2) of the statute in question was designed to prohibit loud shouting and cheering designed to disrupt lawful endeavors. Similarly, in the case of *In Re Brown*, 9 Cal. 3d. 612, 619 (1973), the Supreme Court of California held that subdivision (2) encompasses communications made in loud manner only when there is clear and present danger of violence or when communication is not intended as such but is merely a guise to disturb persons. Instances where the California courts have noted the “loud and unreasonable noise” element established

include: loud laughter and shouting in the hallway of a hotel; loud knocking at doors in hotel rooms by two members of Jehovah's Witnesses; and utilizing loudspeakers in a residential neighborhood after a neighbor complained to the police about the volume level. *See People v. Superior Court of Kern County*, 135 Cal. App. at 817; *People v. Vaughan*, 150 P.2d 964, 966 (Cal. Super. 1944); *Rosenbaum v. City and County of San Francisco*, 484 F.3d 1142 (9th Cir. 2007). As such, the case law reveals that subdivision (2) of California's disturbing the peace statute proscribes conduct creating a risk of violence or a communication intended to disturb persons, not the actual causation of harm. The statute at issue in this case does not include any additional elements as aggravating factors.

Rather, additional aggravating factors, such as obstructing a law enforcement officer from performing his duty, using force or violence against another person, and remaining on someone else's property and refusing to leave are covered by other sections of the California Penal Code. For instance, section 242 of the California Penal Code punishes a battery, or the actual use of force or violence against another person. In addition, it is noted that section 148(a)(1) of the California Penal Code punishes any person who willfully obstructs, delays, or resists any public officer in the discharge or attempt to discharge any duty of his or her office or employment. Similarly, section 602 of the California Penal Code 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.

The AAO finds that there is not a realistic probability that California Penal Code § 415(2) includes the types of offenses that courts 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 415(2) 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 field office director also noted the applicant's June 6, 2000 "challenge to fight in public place" conviction in violation of section 415(1) of the California Penal Code when determining that the applicant was inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act. For this offense, the applicant was sentenced to one year of probation. Section 415(1) of the California Penal Code provides, in pertinent part, that:

Any of the following persons shall be punished by imprisonment in the county jail for a period of not more than 90 days, a fine of not more than four hundred dollars (\$400), or both such imprisonment and fine: (1) Any person who unlawfully ... challenges another person in a public place to fight.

The AAO is unaware of any published federal cases addressing whether the crime of "challenging another to fight" constitutes a crime involving moral turpitude. In the case *In Re Cesar V.*, the California Court of Appeals held that subdivision (1) of section 415 contains no express or implied reference to a mental state. 192 Cal. App. 4th 989, 997 (Cal. App. 6 Dist. 2011). "Because the statute is aimed at the inherent danger that a challenger will result in violence, it is irrelevant whether the challenger intended to actually cause a fight." *Id.* at 998-99. Regarding the elements of the offense, the California Court of Appeals noted that subdivision (1) was intended to regulate pure

speech, without the necessity of any other conduct, when the communication would tend to result in a violent reaction. *Id.* at 998. As such, subdivision (1) of California's disturbing the peace statute proscribes a communication creating a threat of violence. The statute at issue in this case does not include any additional elements as aggravating factors.

We note that the applicant was not convicted of actual use of force or violence against another under California Penal Code § 242; aggravated battery by the infliction of serious bodily injury against another under California Penal Code § 243(d); infliction of corporal injury against spouse or cohabitant under California Penal Code § 273.5; or of attempt to inflict violent force upon another person under California Penal Code § 240. Though it is noted that as a general rule, simple assault or battery is not deemed to involve moral turpitude for purposes of the immigration laws, *see Matter of Fualaau*, 21 I&N Dec. 475, 477 (BIA 1996), this general rule does not apply where an assault or battery necessarily involved some aggravating dimension, such as the use of a deadly weapon or serious bodily harm. *See, e.g., Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988), *Matter of Goodalle*, 12 I. & N. Dec. 106 (BIA 1967), *Matter of S-*, 5 I. & N. Dec. 668 (BIA 1954), and *Nguyen v. Reno*, 211 F.3d 692 (1st Cir. 2000).

Additionally, the AAO notes that the Board's decision in *Matter of P-*, 2 I&N Dec. 117 (BIA 1944) is relevant to this categorical analysis. In *Matter of P-*, the Board stated that one of the criteria to ascertain whether a particular crime involves moral turpitude is that the reprehensible act be accompanied by a vicious motive or corrupt mind. "It is in the intent that moral turpitude inheres." *Id.* at 121. Here, the California Appeals Court has held that the statute does not require evil intent and it does not appear that it is essential that the act be accompanied by a vicious motive or corrupt mind.

The AAO finds that there is not a realistic probability that California Penal Code § 415(1) includes the types of offenses that courts and the Board have found to involve moral turpitude. The statute at hand does not require the endangerment of another, the use of force or violence, or a resulting injury to another. As mentioned above, such additional aggravating factors are covered under separate provisions of the California Penal Code. Therefore, under the categorical approach followed in the Ninth Circuit, the AAO finds that the applicant's conviction under section 415(2) 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 field office director further noted the applicant's February 25, 1992 conviction for burglary in violation of section 459 of the California Penal Code when rendering the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act. For this offense, the applicant was sentenced to 270 days in jail and was placed in formal probation for 36 months. Section 459 of the California Penal Code provides, in pertinent part, that:

Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, railroad car, locked or sealed cargo container, whether or not mounted on a vehicle, trailer coach, as defined in Section 635 of the Vehicle Code, any house car, as defined in Section 362 of the Vehicle Code, inhabited camper, as defined in Section 243 of the Vehicle

Code, vehicle as defined by the Vehicle Code when the doors of such vehicle are locked, aircraft as defined by the Harbors and Navigation Code, mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary. As used in this chapter, “inhabited” means currently being used for dwelling purposes, whether occupied or not.

The Board has maintained that the determinative factor in assessing whether burglary involves moral turpitude is whether the crime intended to be committed at the time of entry or prior to the breaking out involves moral turpitude. *Matter of M-*, 2 I&N Dec. 721, 723 (BIA 1946). For example, the Board has held that burglary with intent to commit theft is a crime involving moral turpitude. *See Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982). The Ninth Circuit Court of Appeals has similarly held that burglary with the intent to commit theft is a crime involving moral turpitude. *See Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1020 (9th Cir. 2005) (“Because the underlying crime of theft or larceny is a crime of moral turpitude, unlawfully entering a residence with intent to commit theft or larceny therein is likewise a crime involving moral turpitude.”).

Here, the applicant did not submit the relevant documents comprising the judicial record of conviction, such as the judgment, criminal information or indictment for his case, nor did he submit any other documents relating to his conviction which can be examined to determine whether the crime intended to be committed at the time of entry involved moral turpitude. 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 or demonstrated that it is unavailable, he has failed to overcome the director’s finding that his conviction for burglary involved moral turpitude. As such, the director’s determination regarding inadmissibility will not be disturbed. The applicant does not dispute his inadmissibility from this conviction on appeal.

The waiver for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act is found under section 212(h) of the Act. That section provides, in pertinent part:

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), . . . of subsection (a)(2) . . . if –

(1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that –

- (i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien’s application for a visa, admission, or adjustment of status,
- (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
- (iii) the alien has rehabilitated.

(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 AAO notes that the applicant's most recent conviction for a crime involving moral turpitude occurred on or about February 25, 1992. As the conduct underlying the conviction took place over 15 years ago, he meets the requirement of section 212(h)(1)(A)(i) of the Act. An application for admission or adjustment is a "continuing" application, and inadmissibility is adjudicated on the basis of the law and facts in effect at the time of admission. *Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992). However, the record reflects that the field office director solely considered a waiver of inadmissibility under section 212(h)(1)(B) of the Act. Therefore, the AAO remands the matter to the Field Office Director for further examination of the applicant's Form I-601 waiver application. The field office director will give the applicant an opportunity to present evidence related to inadmissibility for his burglary conviction and to establish eligibility for a waiver of inadmissibility under section 212(h)(1)(A) of the Act. Should the Field Office Director determine upon submission of further evidence that the applicant's burglary conviction is not a crime involving moral turpitude, then the Form I-601 application will be terminated as unnecessary, and the Field Office Director will continue processing of the applicant's Form I-485 application. Otherwise the Field Office Director will issue a new decision addressing the merits of the applicant's Form I-601 waiver application. In determining whether the applicant warrants a favorable exercise of discretion, the field office director should note the applicant's August 30, 2005 conviction for driving while license suspended and his June 2, 2008 conviction for driving under the influence of alcohol/drugs. In evaluating the applicant's burglary conviction, the field office director should also determine whether it is violent of dangerous crime requiring application of 8 C.F.R. § 212.7(d). If that decision is adverse to the applicant, it will be certified to the AAO for review in accordance with the procedure set forth in 8 C.F.R. § 103.4.

ORDER: The matter is remanded to the Field Office Director for further proceedings consistent with this decision.