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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: JUN 0 4 2013 Office: VIENNA, AUSTRIA FILE: [redacted]

IN RE: Applicant: [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:

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.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Vienna, Austria. The matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the field office director will be withdrawn and the appeal will be dismissed as unnecessary.

The applicant is a native and citizen of Bosnia and Herzegovina who was found to be inadmissible to the United States under 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's father and fiancée are U.S. citizens. The applicant is applying for a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States.

The field office director determined that the applicant failed to establish extreme hardship to a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director*, dated February 17, 2012.

On appeal, the applicant's fiancée details the hardship that she would experience if the waiver application is denied. *Brief in Support of Appeal*, undated.

The record includes, but is not limited to, the applicant's brief, school records, an employer letter, photographs and criminal records. The entire record was reviewed and considered in rendering a decision on the appeal.

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

> Criminal and related grounds. —
>
> (A) Conviction of certain crimes. –
>
> (i) In general. – Except as provided in clause (ii), any 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 (BIA) 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.)

In *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. First, in evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a "realistic probability, not a theoretical possibility," that the statute would be applied to reach conduct that does not involve moral turpitude. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). A realistic probability exists where, at the time of the proceeding, an "actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien's own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude." *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

However, if a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, "the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude." 24 I&N Dec. at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage inquiry in which the adjudicator reviews the "record of conviction" to determine if the conviction was based on conduct involving moral turpitude. *Id.* at 698-699, 703-704, 708. The record of conviction consists of documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.* at 698, 704, 708.

If review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. 24 I&N Dec. at 699-704, 708-709. However, this "does not mean that the parties would be free to present any and all evidence bearing on an alien's conduct leading to the conviction. The sole purpose of the inquiry is to ascertain the nature of the prior conviction; it is not an invitation to relitigate the conviction itself." *Id.* at 703 (citation omitted).

The record reflects that on April 23, 2010 the applicant was convicted of "violent behavior" in violation of Article 362(1) of the Criminal Code of [redacted] The applicant received a four month sentence (suspended) and one year of probation.

Article 362 of the Criminal Code of [redacted] states:

(1) Whoever, by harsh insult or maltreatment of another, through violence toward another, by provoking a fight or by particularly insolent or arrogant behaviour, disturbs the public peace,

shall be punished by imprisonment for a term between three months and three years.

(2) Whoever perpetrates the criminal offence referred to in paragraph 1 of this Article within a group of people or if, by the criminal offence referred to in paragraph 1 of this Article, a serious humiliation of number of persons is caused, or a slight bodily injury is inflicted upon a person, the perpetrator

shall be punished by imprisonment for a term between six months and five years.

The AAO notes that Article 362 of the Criminal Code of encompasses acts that vary greatly, ranging from insulting another person and being "insolent" to engaging in violence toward another. We find that the offense could be comparable to the crime of assault in the United States. As a general rule, simple assault or battery is not deemed to involve moral turpitude for purposes of immigration law. *Matter of Fualaau*, 21 I&N Dec. 475, 477 (BIA 1996). Assault can be a crime involving moral turpitude where it involves 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), *Nguyen v. Reno*, 211 F.3d 692 (1st Cir. 2000), and *Matter of Sanudo*, 23 I&N Dec. 968, 971 (BIA 2006). The Board has also viewed assault or battery crimes on a sliding scale, assessing both the mental state (*mens rea*) of the offender and the level of harm required to complete the offense. *Matter of Solon*, 24 I&N Dec. 239 (BIA 2007). Crimes committed intentionally or knowingly and where the offender specifically intends to inflict a particular harm involve moral turpitude if a meaningful level of harm results, but as the level of conscious behavior decreases, going from intentional to reckless conduct, more serious resulting harm is required for a finding of moral turpitude. In this case, only section (2) of Article 362 involves causing "slight bodily injury" to another person, while the record of conviction demonstrates that the applicant was convicted under section (1). The Criminal Code of also contains separate provisions for "Slight Bodily Injury" (Article 173) and "Aggravated Bodily Injury" (Article 172). Therefore, the AAO finds that there is not a realistic probability that the statute under which the applicant was convicted encompasses morally turpitudinous behavior.

Even were we to find that Article 362(1) could extend to conduct involving moral turpitude, the record of conviction shows that the applicant was not convicted for such behavior. According to the written decision of the court in which the applicant was convicted, the applicant himself did not physically accost the victim, and there is no indication that the victim suffered any type of physical injury or that any other aggravating circumstance, such as the use of a deadly weapon, was involved. *See Matter of Danesh,* 19 I&N Dec. 669 (BIA 1988). Therefore, the applicant was not convicted of a crime involving moral turpitude and he is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

Having found that the applicant is not inadmissible for having been convicted of a crime involving moral turpitude, the AAO finds that his application for a waiver of inadmissibility under section 212(h) is unnecessary.

ORDER: As the applicant is not inadmissible, the waiver application is declared unnecessary and the appeal is dismissed.