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U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
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U.S. Citizenship  
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FILE: [REDACTED]

Office: BALTIMORE, MD

Date: JUN 01 2009

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)i

ON BEHALF OF APPLICANT:

[REDACTED]

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, Baltimore, Maryland. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed, the previous decision of the district director will be withdrawn and the application declared moot. The matter will be returned to the district director for continued processing.

The applicant, a native and citizen of Bolivia, was found 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 sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his lawful permanent resident spouse and step-children, born in 1985 and 1992.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Ground of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated June 22, 2006.

In support of the appeal, counsel for the applicant submits a psychological evaluation pertaining to the applicant's spouse, dated July 15, 2006 and documents relating to the applicant's criminal history. The entire record was reviewed and considered in rendering this decision.

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

(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, or

Section 212(h) of the Act provides, in pertinent part:

The Attorney General [now Secretary, Homeland Security, (Secretary)] may, in his discretion, waive the application of ... subparagraph (A)(i)(II) of ... subsection [(a)(2)] insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if -

- (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 . . . .

- (2) The Attorney General (Secretary), in his discretion . . . has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

The record establishes that in May 2004, the applicant was convicted of Assault in the Second Degree, a violation of section 3-203(a) of the Maryland Criminal Code. He was placed on probation for 12 months. *See Defendant Trial Summary*, dated May 21, 2004.<sup>1</sup>

Regarding the applicant's conviction for Assault in the Second Degree, the district director found that this offense constituted a crime involving moral turpitude. The AAO notes, however, that 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. 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.

Historically, a case-by-case approach has been employed to decide whether battery (or assault and battery) offenses involve moral turpitude. It has long been recognized that not all crimes involving the injurious touching of another reflect moral depravity on the part of the offender, even though they may carry the label of assault, aggravated assault, or battery under the law of the relevant jurisdiction. *Matter of B-*, 1 I&N Dec. 52, 58 (BIA, A.G. 1941); *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992); *Matter of Fualaau*, 21 I&N Dec. 475, 476 (BIA 1996). However, 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 the infliction of serious injury on persons whom society views as deserving of special protection, such as children, domestic partners or peace officers. *See, e.g., Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988).

The statutory language for the crime of "assault in the second degree" under section 3-203 of the Maryland Criminal Code states:

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<sup>1</sup> The AAO notes that the applicant was also charged with first degree assault, but the record reflects that that charge was nolle prossed.

- (a) A person may not commit an assault.<sup>2</sup>
- (b) A person who violates this section is guilty of the misdemeanor of assault in the second degree and on conviction is subject to imprisonment not exceeding 10 years or a fine...or both.

The AAO finds that the Board's decision in *Matter of P*, 2 I. & N. Dec. 117 (BIA 1944) is relevant to this analysis. In *Matter of P*, the Board stated that one of the criteria adopted to ascertain whether a particular crime involves moral turpitude is that it be accompanied by a vicious motive or corrupt mind. "It is in the intent that moral turpitude inheres." *Id.* at 121. In this case, the statute does not outline a requirement that the act of assault in the second degree show a vicious motive or a corrupt mind, as referenced in *Matter of P*. Moreover, the statutory language does not have as an element the death of another person; the use of a deadly weapon; or any other aggravating circumstances, such as serious bodily injury.

In the recently decided *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. 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. (citation omitted). 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. Finally, in all such inquiries, the burden is on the alien to establish "clearly and beyond doubt" that he is "not inadmissible." *Id.* at 709 (citing *Kirong v. Mukasey*, 529 F.3d 800 (8th Cir. 2008))

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<sup>2</sup> Section 3-201 of the Maryland Criminal Code states, in pertinent part:

(b) "Assault" means the crimes of assault, battery, and assault and battery.

In the present case, documents contained in the record indicate that the applicant was convicted of second degree assault based on injuries he inflicted by means of hair pulling and hitting under the eye. There is no indication in the record to indicate that the applicant caused serious death, used a deadly weapon and/or that other aggravating circumstances existed, such as serious bodily injury. The AAO thus finds that the applicant's conviction for assault in the second degree does not constitute a crime involving moral turpitude.

The AAO finds that the district director erred in determining that the applicant was inadmissible based on his conviction for assault in the second degree. As such, the waiver application is unnecessary and the issue of whether the applicant established extreme hardship to a qualifying relative pursuant to the Act is moot and will not be addressed. Accordingly, the appeal will be dismissed, the previous decision of the district director is withdrawn and the instant application for a waiver is declared moot.

**ORDER:** The appeal is dismissed, the previous decision of the district director is withdrawn and the instant application for a waiver is declared moot. The district director shall reopen the denial of the Form I-485 application on motion and continue to process the adjustment application