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

U.S. Citizenship and Immigration Services

H2

[redacted]

FILE: [redacted] Office: PHOENIX (TUCSON) Date: MAY 12 2010

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h), 8 U.S.C. § 1182(h), of the Immigration and Nationality Act.

ON BEHALF OF APPLICANT:

[redacted]

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 law was inappropriately applied by us 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. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Phoenix, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the applicant is not inadmissible 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), and the waiver application is moot. The matter will be returned to the director for continued processing.

The applicant, [redacted], 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 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). The director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated March 5, 2007.

On appeal, the applicant's mother states in her letter dated April 30, 2007 that the applicant almost died from an accident and was taken to Tucson University Medical Center for two weeks. She contends that she wants to prevent her family from being separated. She asserts that her son does not speak or write in Spanish and needs his parents and physician. The letter by [redacted] dated June 8, 2007, conveys that the applicant was in a motor vehicle accident on July 8, 2005, and had a closed head injury, hemorrhaging, fractures, pulmonary contusion, diffuse axonal injury, and impaired communication, cognition, and mobility. He states that after discharge the applicant required twenty-four hour supervision by his family members, and that the applicant will have ongoing cognitive impairments, primarily in memory. [redacted] asserts that interference with the applicant's care will result in personal hardship as the applicant needs to continue therapy and rehabilitation, and be supervised by his family.

The AAO will first address the finding of inadmissibility.

Section 212(a)(2)(A) of the Act states, in pertinent parts:

> (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 (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.)

The record reflects that the applicant pled guilty to the charge of indecent exposure, a class six undesignated felony, in the Superior Court of the State of Arizona, Santa Cruz County, on [redacted] The judge ordered a suspended sentence for three years, placed the applicant on probation for the full term, and ordered that he be incarcerated for 12 months in the county jail.

Ariz. Rev. Stat. § 13-1402(A) provides:

> [A] person commits indecent exposure if he or she exposes his or her genitals or anus or she exposes the areola or nipple of her breast or breasts and another person is present, and the defendant is reckless about whether such other person, as a reasonable person, would be offended or alarmed by the act.

If the victim is fifteen or more years of age is a class 1 misdemeanor. Indecent exposure to a person who is under fifteen years of age is a class 6 felony. Ariz.Rev.Stat. § 13-1402(B).

To determine if a crime involves moral turpitude, the Ninth Circuit Court of Appeals first applies the categorical approach. *Ocequeda-Nunez v. Holder*, 594 F.3d 1124, 1129 (9th Cir. 2010) (citing *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 999 (9th Cir.2008). This approach requires analyzing the elements of the crime to determine whether all of the proscribed conduct involves moral turpitude. *Nicanor-Romero, supra* at 999. In *Nicanor-Romero*, the Ninth Circuit states that in making this determination 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." *Id.* at 1004 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). A realistic probability can be established by showing that, in at least one other case, which includes the alien's own case, the state courts applied the statute to conduct that did not involve moral turpitude. *Id.* at 1004-05. *See also Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008) (whether an offense categorically involves moral turpitude requires reviewing the criminal statute to determine if there is a "realistic probability, not a theoretical possibility," that the statute would be applied to conduct that is not morally turpitudinous).

If the crime does not categorically involve moral turpitude, then the modified categorical approach is applied. *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1161 (9th Cir. 2009). This approach requires looking to the "limited, specified set of documents" that comprise what has become 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 necessary elements of a crime involving moral turpitude. *Id.* at 1161 (citing *Fernando-Ruiz v. Gonzalez*, 466 F.3d 1121, 1132-33 (9th Cir. 2006)).

The AAO is unaware of any published federal cases addressing whether the crime of indecent exposure under Arizona law is a crime of moral turpitude. However, indecent exposure under California law was analyzed by the Ninth Circuit in *Ocequeda-Nunez v. Holder*, 594 F.3d 1124 (9th Cir. 2010). Cal.Penal Code § 314(1) provides:

> Every person who willfully and lewdly ... [e]xposes his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby ... is guilty of a misdemeanor.

The Ninth Circuit held that the full range of conduct proscribed by § 314 is not *categorically* morally turpitudinous. *Id.* at 1133-1134. The Ninth Circuit found that a person exposing himself in a public place is not *necessarily* acting either lewdly (as required by § 314) or basely, vilely and depravedly (as required by our traditional definition of moral turpitude)." *Id.* at 1133. The Ninth Circuit determined that under California law exposure is transformed into a criminal act when it is sexually motivated. However, the Ninth Circuit found that even by limiting § 314 to "sexually motivated" exposure, California courts have not limited it to conduct all of which is morally turpitudinous. *Id.* at 1133-1134.

We note that in *Matter of H-*, 7 I&N Dec. 301 (BIA 1956), the BIA analyzed whether indecent exposure under Michigan law was a crime involving moral turpitude. The offense of indecent exposure under section 28.567 (1) of the Michigan Statutes, Annotated (sec. 335a, Michigan Penal Code) reads as follows:

> *Sec. 28.567 (1). Open or indecent exposure; commission by sexually delinquent person; penalty; triable in court of record.* Sec. 335a. Any person who shall knowingly make any open or indecent exposure of his or her person or of the person of another shall be guilty of a misdemeanor, punishable by imprisonment in the county jail for not more than 1 year, or by a fine not more than $500.00, or if such person was at the time of the said offense a sexually delinquent, may be punishable by imprisonment in the state prison for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life: Provided, That any other provision of any other statute notwithstanding, said offense shall be triable only in a court of record. (C. L. '48, Sec. 750.335a.)

Id. at 302. The BIA determined that indecent exposure under Michigan law "was not an act of baseness, vileness or depravity." *Id.* at 303. It found that the offense of indecent exposure under section 335 of the Michigan Penal Code does not involve moral turpitude. *Id.*

Furthermore, in *Matter of Mueller*, 11 I&N Dec. 268 (BIA 1965), the BIA analyzed whether indecent exposure under Wisconsin law involved moral turpitude. In *Mueller*, the defendant violated section 944.20(2) of the Wisconsin Statutes, which provided that:

> "Whoever does any of the following may be fined not more than $500 or imprisoned not more than one year in the county jail or both:
>
> (1) Commits an indecent act of sexual gratification with another with knowledge that they are in the presence of others; or

(2) Publicly and indecently exposes a sex organ; or

(3) Openly cohabits and associates with a person he knows is not his spouse under circumstances that imply sexual intercourse.

Essentially, the BIA stated that the term "moral turpitude" refers to "an act of baseness, vileness, or depravity" that is dependent upon a "depraved or vicious motive." *Id.* at 269. In holding that violation of section 942.20(2) of the Wisconsin Statutes does not involve moral turpitude, the BIA found that the section 942.20(2) of the Wisconsin Statutes does not require a specific intent or that a violator has a vicious motive or corrupt mind. *Id.* It stated that all that is required for conviction under the statute is for the act to be done consciously, even though it may have been done carelessly. *Id.* The BIA stated that "the offense is not one which is not one which is malum in se," that is, inherently and essentially evil. *Id.*

The reasoning and holdings in *Ocequeda-Nunez, Matter of H-,* and *Mueller* are relevant to the instant case. Under A.R.S. § 1402(A) a person commits the sexual offense of indecent exposure if he or she exposes his or her genitals or anus or a woman exposes the areola or nipple of her breast or breasts and another person is present, and the defendant is reckless about whether such other person, as a reasonable person, would be offended or alarmed by the act. Although indecent exposure to a victim who is under fifteen years old is a more serious crime than if the victim is fifteen or older, the statute does not appear to have the stated purpose of protecting a particular class of victim. The Court of Appeals of Arizona in *Norgord v. State ex rel. Berning*, 201 Ariz. 228, 33 P.3d 1166 (2001), states that the purpose of A.R.S. section 1402(A) is two-fold: to protect community morals and prevent "the infliction of nudity upon a beholder's moral sensibilities." *Id.* at 232. Furthermore, in *State v. Sandoval*, 175 Ariz. 343, 857 P.2d 395 (1993), the Court of Appeals in Arizona states that A.R.S. § 1402(A) contains no requirement expressed or implied requiring that the acts proscribed be sexually motivated or done with some sexual intent to commit indecent exposure." *Id.* at 346-347. For conviction under the statute all that is required is for the act to be done recklessly. Even though indecent exposure under A.R.S. § 1402(A) involves conduct that may offend or alarm a reasonable person, the AAO finds that a person's conduct under A.R.S. § 1402(A) would not be such that it "is inherently base, vile, or depraved" or is dependent upon a "depraved or vicious motive." In view of the fact that the Ninth Circuit found that a person exposing himself in a public place is not *necessarily* acting basely, vilely and depravedly (as required by its traditional definition of moral turpitude), and in light of the BIA's finding that indecent exposure under Michigan or Wisconsin law was not a crime involving moral turpitude, the AAO finds that indecent exposure under A.R.S. § 1402(A) is not a crime involving moral turpitude.

Based on the record, the AAO finds that the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The waiver filed pursuant to section 212(h) of the Act is therefore moot. As the applicant is not required to file a waiver application, the appeal of the denial of the waiver will be dismissed.

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. The applicant has met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed as the waiver application is moot.