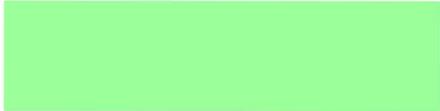


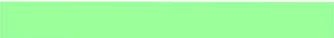
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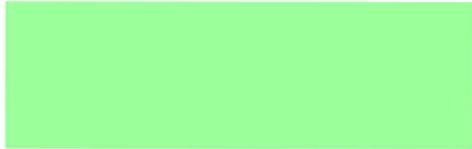


Date: **JAN 11 2013** Office: SALT LAKE CITY FILE: 

IN RE: Applicant: 

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h) and 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.

Thank you,

A handwritten signature in cursive script that reads "Michael Shumway".

for Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Salt Lake City, Utah, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed, as 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 a crime involving moral turpitude. The applicant seeks 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 U.S. citizen wife and U.S. citizen children.

In a decision dated October 15, 2010, the field office director denied the Form I-601 application for a waiver, finding that the applicant failed to establish that his U.S. citizen wife would experience extreme hardship as a consequence of his inadmissibility.

On appeal, counsel for the applicant asserts that the field office director failed to consider hardship to the applicant's U.S. citizen children. Counsel avers that the evidence outlining financial, emotional, and medical difficulties demonstrates extreme hardship to his U.S. citizen wife and children.

The record contains, but is not limited to: counsel's brief; statements from some of the applicant's family members and friends, including his U.S. citizen wife; a copy of the applicant's marriage license; a psychological evaluation of the applicant's U.S. citizen wife; copies of pay stubs and employer letters; copies of the birth certificates of the applicant's U.S. citizen children; 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:

(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.)

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. (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.

The record shows that on June 18, 2008, the applicant pled guilty in the Fourth District Court in Spanish Fork, Utah to the following offenses: intoxication in violation of Utah Code Ann. § 76-9-701, a class C misdemeanor punishable by up to 90 days in jail; simple assault in violation of Utah Code Ann. § 76-5-502(1), a class B misdemeanor punishable by up to six months in jail; “violate no contact order” in violation of Utah Code Ann. § 77-36-2.5, a class A misdemeanor punishable by up to one year in jail; and domestic violence in front of a child in violation of Utah Code Ann. § 76-5-109.1(2)(c), a class B misdemeanor punishable by up to six months in jail. The district court held all

three pleas in abeyance for one year and ordered the applicant to complete a domestic violence rehabilitation course and to pay a fine of \$175.00. The record reflects that on April 9, 2009, the district court dismissed all three charges after finding that the applicant successfully met the requirements prescribed by the court.

Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines "conviction" for immigration purposes as:

A formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where -

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

In *U.S. v. Zanudio*, 314 F.3d 517 (10th Cir. 2002), the Tenth Circuit Court of Appeals held that a guilty plea held in abeyance entered in a Utah state court satisfies the 8 U.S.C. § 1101(a)(48)(A) definition of a "conviction." 314 F.3d at 521-522. Additionally, in *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999), the BIA held that under the statutory definition of "conviction" provided in section 101(a)(48)(A) of the Act, no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. Here, the applicant met the statutory requirement of a conviction when he entered a guilty plea and the district court imposed a penalty in the form of a \$150 fine. Accordingly, the applicant has been convicted for immigration purposes.

Utah Code Ann. § 76-9-701 provides, in pertinent part, that:

- (1) A person is guilty of intoxication if he is under the influence of alcohol, a controlled substance, or any substance having the property of releasing toxic vapors, to a degree that the person may endanger himself or another, in a public place or in a private place where he unreasonably disturbs other persons.
- (5) An offense under this section is a class C misdemeanor.

In Utah, intoxication is an offense against the public order and decency under Chapter 9 of the Criminal Code. An individual is guilty of intoxication in a public place if he is under the influence of alcohol to a degree that he may endanger himself or another. *Due South Inc., v. Department of Alcoholic Beverage and Control*, 197 P.3d 82, 91 (2008). Additionally, he is guilty of intoxication in a private place if he is under the influence of alcohol to a degree where he unreasonably disturbs other persons. *Id.* Merely being intoxicated in public does not establish all the elements of the offense under section 76-9-701 of the Utah Code. See *State v. Henderson*, 159 P.3d 397, 400 (Utah App. 2007).

The additional element of “endangerment” is required to establish a conviction for this offense: the Supreme Court of Utah has held that to satisfy the “may endanger” element, a reasonable likelihood of potential danger based on the particular circumstances of each case must be demonstrated. *Due South Inc.*, 197 P.3d at 90. For instance, in the case of *State v. Trane*, the Utah Supreme Court found that probable cause to arrest for the offense of intoxication exists in the case of a defendant who appears to be intoxicated and disturbing the peace of others. *State v. Trane*, 57 P.3d 1052, 1062 (2002). In *Trane*, when police officers arrived at the scene, the defendant acted in a potentially dangerous manner because he “puffed his chest out... [and] took a defensive posture similar to a boxer.” *Id.* The Utah Supreme Court found that this act was sufficient for probable cause to arrest to satisfy the “endangerment” element of the statute. *See id.* Additional instances where the Utah Supreme Court has noted the “may endanger” element established includes: walking down the middle of a street; buying tire chains and indicating an intent to drive; arguing in the middle of the street and resisting arrest; and sleeping in a car in front of a lounge, presenting the likelihood that the individual would wake up and drive home. *See Due South Inc.*, 197 P.3d at 90 (citations omitted). As such, the case law reveals that Utah’s intoxication statute proscribes conduct creating a potential danger, not the actual causation of harm, while being intoxicated. The intoxication statute at issue in this case does not include any additional elements as aggravating factors.

Rather, additional aggravating factors, such as the actual endangerment of another person, as well as intent to do bodily harm and the causation of such harm while under the influence of alcohol or another substance, are covered by other sections of Utah’s Criminal and Motor Vehicle Codes. For instance, section 76-5-207 of Utah’s Criminal Code punishes automobile homicide, or causing the death of another person while operating a motor vehicle while intoxicated or under the influence of alcohol. In addition, it is noted that section 41-6a-503(1)(b)(i) of Utah’s Motor Vehicle Code punishes the infliction of bodily injury upon another person as a proximate result of having operated a motor vehicle while intoxicated or under the influence of alcohol. Similarly, section 41-6a-503(2)(a) of Utah’s Motor Vehicle Code punishes the infliction of serious bodily injury while operating a motor vehicle when intoxicated or under the influence of alcohol.

BIA case law shows that crimes that contain, as an element, conduct under the influence of alcohol, together with an additional aggravating factor, can often be categorized as crimes involving moral turpitude. In *Matter of Lopez-Meza*, the BIA held that aggravated driving under the influence under Arizona law involves moral turpitude because the State must prove that a person drove under the influence of alcohol, knowing that his or her driver’s license was suspended, revoked, canceled, or refused and that he or she was, therefore, not permitted to drive. 22 I&N Dec. 1188, 1196 (BIA 1999). The BIA reasoned that the combination of driving under the influence with the aggravating factor of knowledge that the license was suspended amounted to a crime involving moral turpitude, as it represented such a deviance from the private and social duties that individuals owe to one another and to society in general. *Id.*

In contrast, in *Matter of Torres-Varela*, the BIA held that simple driving under the influence of alcohol does not constitute a crime involving moral turpitude, as it is a marginal crime that does not include aggravating factors. 23 I&N Dec. 78, 85 (BIA 2001). Section 41-6a-502 of Utah’s Motor Vehicle Code proscribes simple driving under the influence of alcohol, an offense that does not include as an additional element the causation of harm to another, though the action may result in endangerment of

others. When analyzing the statutory elements of public intoxication under section 76-9-701 of the Utah Criminal Code, under the standards set forth by the BIA in *Lopez-Meza* and *Torres-Varela*, it appears that this crime is similar in its elements to simple driving under the influence, which is not a crime involving moral turpitude.

Additionally, the AAO notes that other offenses against the public order and decency, similar to the crimes of disorderly conduct and lewdness covered in Chapter 9 of Utah's Criminal Code, have been found by the BIA not to involve moral turpitude without further evil intent. 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.

Id. at 302. The BIA determined that indecent exposure under Michigan law "was not an act of baseness, vileness or depravity." *Id.* at 303. That is, the BIA found that the crime of indecent exposure, which is substantially similar to the crime of lewdness under section 76-9-702 of the Utah Criminal Code, did not involve conduct that shocks the public conscience as being inherently base, vile, depraved, or contrary to the rules of morality and the duties owed between man and man, or society in general. Consequently, 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." The BIA stated that all that is required for a conviction under the Wisconsin statute is for the act to be done consciously, even though it may have been done carelessly. *Id.* The BIA further stated that the offense is not one which is inherently and essentially evil. *Id.* Consequently, the crime was not one involving moral turpitude.

Here, the reasoning and holding in *Matter of H-* is relevant to the instant case. Section 76-9-701 of the Utah Criminal Code punishes a person for being under the influence of alcohol in public to a degree that he may endanger others, and the intoxication offense has no element of a specific intent or a vicious motive or corrupt mind. In consideration of *Matter of H-*, wherein the BIA concluded

that an indecent exposure was not an act of baseness, vileness or depravity; *Matter of Mueller*, where the BIA found that committing an act of sexual gratification or exposing a sex organ in public was not a crime involving moral turpitude; and the Utah Supreme Court case law referencing the conduct that “may endanger” others in the context of the intoxication statute, we find that there is not a realistic probability that the offense of intoxication under Utah Code § 76-9-701 involves reprehensible conduct so contrary to the accepted rules of morality as to constitute a crime involving moral turpitude.

By the language of section 76-9-701 of Utah’s Criminal Code, public intoxication does not fit into the types of offenses that courts and the BIA have found to involve moral turpitude. A review of the Utah Code reveals that offenses with conduct requiring additional criminal elements, such as driving under the influence of alcohol causing bodily injury under section 41-6a-503(2)(a), automobile homicide while driving under the influence of alcohol under section 76-5-207, and disorderly conduct under 76-9-102, are covered by other sections of Utah’s Criminal and Motor Vehicle Codes. Accordingly, the applicant’s conviction for misdemeanor intoxication is not a crime involving moral turpitude because “none of the circumstances in which there is a realistic probability of conviction involves moral turpitude.” *Silva-Trevino*, 24 I&N Dec. at 699 n.2.

The applicant was also convicted of simple assault, a class B misdemeanor, under Utah Code Ann. § 76-5-102. Subsection (1) of Utah Code Ann. § 76-5-102 provides that “[a]ssault is: (a) an attempt, with unlawful force or violence, to do bodily injury to another; (b) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; or (c) an act, committed with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another.” Subsection (2) states that assault is a class B misdemeanor; and subsection (3) states that it is a class A misdemeanor if the person causes substantial bodily injury to another; or the victim is pregnant and the person has knowledge of the pregnancy. Utah Code Ann. § 76-1-601(3) states that “bodily injury” means physical pain, illness, or any impairment of physical condition.

It is noted that as a general rule, a simple assault and battery offense does not involve moral turpitude. *Matter of Fualaau*, 21 I&N Dec. 475, 477 (BIA 1996). However, this general rule does not apply where an assault or battery necessarily involves an aggravating factor that significantly increases their culpability. See, e.g., *Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988). Assault and battery offenses requiring the “intentional infliction of serious bodily injury on another have been held to involve moral turpitude because such intentionally injurious conduct reflects a level of immorality that is greater than that associated with a simple offensive touching.” *Matter of Sanudo*, 23 I&N Dec. 968, 971 (BIA 2006) (emphasis in the original). In *Matter of Fualaau*, the BIA held that third-degree assault under the law of Hawaii, an offense that involved recklessly causing bodily injury to another person, is not a crime involving moral turpitude. *Matter of Fualaau*, 21 I&N Dec. at 478.

In Utah, simple assault is either an attempt or threat to do bodily injury, or an act that causes bodily injury to another person. See *State v. Jones*, 878 P.2d 1175, 1177-78 (1994). A conviction for assault and battery in Utah does not require the actual infliction of physical injury and may include an unwarranted or offensive touching. See *Id.* (stating that an offensive touching may support a simple assault conviction if done to threaten or cause bodily injury). That is, a conviction for

assault in Utah under section 76-5-102 does not require the causing or intent to cause physical injury; assault could happen through an act that has no such intent to harm and only creates risk of injury. Further, the applicant was not convicted of assault with aggravating circumstances, such as aggravated assault, under Utah Code Ann. § 103, assault against a peace officer, under Utah Code § 102.4, or disarming a peace officer, under Utah Code Ann. § 102.8. Like the Board in *Matter of Fualaau*, the AAO concludes that the applicant's offense is "fundamentally different from those that have been determined to involve moral turpitude" because the statute does not require "the death of another person, the use of a deadly weapon, or any other aggravating circumstance." 21 I&N Dec. at 478 (internal quotation marks and citations omitted). Rather, the elements of the crime at issue are essentially the same as those at issue in *Matter of Fualaau*, 21 I&N Dec. at 478 (holding that Hawaiian conviction for assault in the third degree was not a crime involving moral turpitude). Accordingly, the AAO finds that a Utah conviction for misdemeanor simple assault is not a crime involving moral turpitude because "none of the circumstances in which there is a realistic probability of conviction involves moral turpitude." *Silva-Trevino*, 24 I&N Dec. at 699 n.2.

The record further shows that the applicant was convicted of "violate no-contact order," a class A misdemeanor. The applicant submitted a document from the 4th District Court, Orem County, Utah, certifying that the record pertaining to the applicant's "violate condition/release after arrest for domestic violence" conviction has been destroyed according to the state's case retention schedule. However, the document references Utah Code Ann. § 77-36-2.5 as the statute of conviction. A review of the statute at issue reveals that it is broad in scope. Additionally, it appears there are no published or unpublished court or administrative cases finding that a violation of a no-contact order involves moral turpitude. Nevertheless, a plain reading of the statute shows that the minimum conduct required to sustain a conviction is for a defendant to personally contact or communicate with the alleged victim of domestic violence. The minimum conduct necessary for a violation of the no-contact order related to domestic violence does not require that any element of the offense involve base, vile, or reprehensible conduct. Moreover, the statute under which the applicant was convicted does not indicate that an evil intent is required to sustain a conviction for the offense. See *Matter of P-*, 2 I&N Dec. at 121 (BIA 1944) ("It is in the intent that moral turpitude inheres."). The applicant has submitted the available documents comprising the record of conviction, and they are inconclusive to determine whether his conviction involved moral turpitude. Accordingly, the AAO cannot find that the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The applicant was also convicted of domestic violence in front of a child, in violation of Utah Code Ann. § 76-5-109.1(2)(c), which is a class B misdemeanor punishable by up to six months in jail. That section provides, in pertinent part, that:

- (2) A person commits domestic violence in the presence of a child if the person:
 - (a) commits or attempts to commit criminal homicide, as defined in section 76-5-201, against a cohabitant in the presence of the child; or,
 - (b) intentionally causes serious bodily injury to a cohabitant or uses a dangerous weapon . . . or other means of force likely likely to produce death or serious bodily injury against a cohabitant, in the presence of a child; or,

(c) under circumstances not amounting to a violation of Subsection 2(a) or (b), commits an act of domestic violence in the presence of a child.

(3)(b) A person who violates Subsection (2)(c) is guilty of a class B misdemeanor.

However, even in the event that the AAO concurred that this is a crime involving moral turpitude, 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).

Utah law indicates that for a class B misdemeanor, a person may be sentenced to imprisonment for a term not exceeding six months. *See* Utah Code Ann. § 76-3-204, enacted by Chapter 196, 1973 General Session. Here, the record also shows that the applicant was not sentenced to a term of imprisonment; the applicant was ordered to pay a fine and attend a domestic violence rehabilitation course. The evidence in the record thus establishes that the applicant's conviction for domestic violence in front of a child falls within the petty offense exception set forth in the Act.

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

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,

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8 U.S.C., § 1361. Here, the applicant is not required to file a waiver. Accordingly, the appeal will be dismissed as the waiver application is unnecessary.

ORDER: The appeal will be dismissed as the applicant is not inadmissible and the waiver application is unnecessary.