identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

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

U.S. Citizenship and Immigration Services

H2

[redacted]

Date: MAY 18 2012 Office: TEGUCIGALPA, HONDURAS FILE: [redacted]

IN RE: [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:

[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 AAO inappropriately applied the law in reaching its 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-290B, 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 any 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,

Michael Shumway

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application for waiver of inadmissibility was denied by the Field Office Director, Tegucigalpa, Honduras and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant, a native and citizen of [redacted] was admitted to the United States at the Miami, Florida port of entry as a lawful permanent resident on or about [redacted] On September [redacted], an immigration judge in Miami, Florida found that the applicant had been convicted of a crime designated as an aggravated felony. As a result of this finding the applicant was ordered removed to [redacted] The applicant departed the United States on [redacted] In applying for an immigrant visa based on an Alien Relative Petition filed by his mother, the applicant 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 crimes involving moral turpitude. 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 with his U.S. citizen mother.

In a decision, dated [redacted] the field office director found that the applicant's conviction for lewd sexual battery on a child is an aggravated felony. He also found that because the applicant was previously admitted to the United States as a lawful permanent resident and was later convicted of an aggravated felony, he is statutorily ineligible for a waiver of his inadmissibility under 212(a)(2)(A)(i)(I) of the Act for having committed crimes involving moral turpitude. The waiver application was denied accordingly.

In a Notice of Appeal to the AAO (Form I-290B), counsel states that the applicant's conviction for lewd sexual battery on a child is not an aggravated felony because the applicant was sentenced to and served less than one year imprisonment. Counsel states that the applicant's other criminal convictions occurred before 1996 and the section 212(c) waiver should apply. He states that these convictions are also not aggravated felonies. Finally, counsel states that the applicant's mother suffers from serious health problems which qualify as hardships to a qualifying relative. 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.

Section 212(h) of the Act 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) (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 . . . . and
>
> (2) the Attorney General [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status. . . .
>
> No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than seven years immediately preceding the date of initiation of proceedings to remove the alien from the United States. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.

On [redacted], in Collier County, Florida the applicant was arrested and charged with lewd sexual battery on a child under the age of 16 under Florida Statutes section 800.04(3), a second degree felony. On [redacted], the applicant was convicted of this charge.

In considering whether the applicant's conviction is an aggravated felony, we first apply the "formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." *Taylor v. United States*, 495 U.S. 575, 601 (1990). We will look to the statute under which the alien was convicted and compare its elements to the relevant definition of aggravated felony set out in section 101(a)(43) of the Act, 8 U.S.C. § 1101(a)(43). Under this categorical approach, an offense qualifies as an aggravated felony if and only if the full range of conduct covered by the criminal statute falls within the meaning of that term. *Id.*

However, if the criminal statute of conviction could be applied to conduct that would constitute an aggravated felony and conduct that would not, we then see if there is "a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime." *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). In applying this approach, the alien "may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues." *Id.*

If the alien demonstrates a "realistic probability" that the statute would be applied to conduct that falls outside the generic definition of the crime, we then apply a modified categorical approach. Under the modified categorical approach, we conduct a limited examination of documents in the

record of conviction to determine if there is sufficient evidence to conclude that the alien was convicted of the elements of the generically defined crime. *Shepard v. U.S.*, 544 U.S. 13 (2005). These documents include the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the transcript of plea proceedings. 544 U.S. at 26.

The AAO finds that a conviction under Florida Statutes section 800.04 has been found to be an aggravated felony as a crime involving sexual abuse of a minor in accordance with section 101(a)(43)(A) of the Act and as a crime involving violence in accordance with section 101(a)(43)(F) of the Act. The First Circuit Court of Appeals found that lewd and lascivious assault on a child under the physical contact provisions of [redacted] Statutes section 800.04 is sexual assault and sexual abuse of a minor and is, therefore, an aggravated felony. *United States v. Londono-Quintero*, 289 F.3d 147 (1st Cir. 2002).

In addition, in *Ramsey v. INS,* 55 F.3d 580 (11th Cir. 1995), the Eleventh Circuit found that a conviction under [redacted] Statutes section 800.04(1) for sexual assault is a crime of violence and as such an aggravated felony. The court reasoned that a violation of section 800.04 may be committed through a variety of acts, such as handling, fondling, or assaulting a child in a lewd, lascivious, or indecent manner and that although a violation of section 800.04 might be accomplished without the use of physical force, the offense is a felony which involves a substantial risk that physical force may be used against the victim in the course of committing the offense. The court also noted that two other circuits have come to the same conclusion in analyzing similar statutes, citing to *Reyes-Castro*, 13 F.3d 377 (10th Cir. 1993) and *United States of America, Appellee, v. Rodriguez*, 979 F.2d 138 (8th Cir. 1992). However, the record does not clearly establish that the applicant's conviction involved a term of imprisonment that was at least one year. The AAO notes that counsel asserts that the applicant was not imprisoned for one year, but does not submit documentation to establish this fact. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The current record, which does not include the full record of conviction, does not establish the applicant's term of imprisonment. Unlike a removal hearing in which the government bears the burden of establishing a respondent's removability, the burden of proof in the present proceedings is on the applicant to establish his admissibility for admission to the United States "to the satisfaction of the Attorney General [Secretary of Homeland Security]." *See* Section 291 of the Act, 8 U.S.C. § 1361. Regardless, the AAO finds that the applicant's term of imprisonment is inconsequential because his crime is an aggravated felony under section 101(a)(43)(A), as a crime involving sexual abuse of a minor.

The applicant is ineligible for a waiver under section 212(h) of the Act because he committed this crime subsequent to his admission to the United States as a lawful permanent resident. Since the applicant is ineligible for a waiver, the AAO need not address the field office director's decision to deny the waiver application as a matter of discretion.

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. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.