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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: APR 0 8 2013 OFFICE: BANGKOK, THAILAND 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:

[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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Form I-601 waiver application was denied by the Field Office Director, Bangkok, Thailand and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Malaysia 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 in order to reside in the United States with her U.S. citizen spouse and children.

The field office director concluded that the applicant is statutorily ineligible for a waiver under section 212(h) of the Act because she was removed from the United States pursuant to section 237(a)(2)(A)(iii) of the Act for having been convicted of an aggravated felony as defined in section 101(a)(43)(F) of the Act after being admitted as a lawful permanent resident, and denied the Application for Waiver of Grounds of Inadmissibility accordingly. *See Decision of the Field Office Director,* dated March 21, 2012.

On appeal counsel contends that the applicant's conviction does not constitute a crime involving moral turpitude; the applicant qualifies for a waiver under section 212(h) of the Act; there is no ground of inadmissibility for an aggravated felony conviction pursuant to section 212(a)(2) of the Act; and the field office director erred in denying the form I-601 on the basis that there is no waiver for an aggravated felony conviction. *See Form I-290B, Notice of Appeal or Motion,* received April 20, 2012.

The record contains, but is not limited to: Form I-290B and counsel's statement thereon, counsel's 2007 letter in support of a Form I-212; various immigration applications and petitions; hardship letters from the applicant's spouse and children; letters of support and character reference; financial-related records; marriage, birth and other biographical records; documents related to the applicant's criminal record; and documents related to the applicant's inadmissibilities, her deportation proceedings, numerous appeals, and deportation. The entire record was reviewed and considered in rendering this decision on the appeal.

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.
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> (ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-

> (I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or
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> (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).

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....
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> 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 the applicant was admitted to the United States as a lawful permanent resident on November 25, 1981. On August 27, 1996, the applicant was convicted in the Superior Court of [redacted] of Attempted Child Abuse, a Class 3 Felony and a Dangerous Crime Against Children in the Second Degree, in violation of A.R.S. sections 13-3623, 13-604.01, 13-702 and 13-801, for her conduct on or between March 1, 1995 and March 31, 1995. The applicant was sentenced to eight (8) years imprisonment.

After being charged with deportability as an aggravated felon, an immigration judge found on October 1, 1997 that the applicant was ineligible for any form of deportation relief. The applicant filed a motion to reopen with the Board of Immigration Appeals (BIA) based on *INS v. St. Cyr*, 533 U.S. 289 (2001), seeking a section 212(c) waiver which the BIA denied because the applicant had already served in excess of five years imprisonment and was thus statutorily barred from relief. A writ of habeas corpus granted by the district court remanded the matter with regard to potential 212(c) relief. On May 5, 2004, an immigration judge granted 212(c) relief on remand and the Department of Homeland Security (DHS) appealed. On November 22, 2004 the BIA sustained the DHS appeal, vacated the immigration judge's decision, and ordered the applicant deported to Malaysia. On July 18, 2005 the applicant was deported from the United States under section 241 of the Act for having been convicted of a crime designated as an aggravated felony. Following numerous appeals, motions and petitions, a new Order and Written Decision of the Immigration Judge (Entering Order of Deportation, on remand from the BIA) was issued against the applicant on December 20, 2006.

At the time of the applicant's conviction, A.R.S. § 13-3623 provided, in pertinent part:

> A. Under circumstances likely to produce death or serious physical injury, any person who causes a child or vulnerable adult to suffer physical injury or, having the care or custody of a child or vulnerable adult, who causes or permits the person or health of the child or vulnerable adult to be injured or who causes or permits a child or vulnerable adult to be placed in a situation where the person or health of the child or vulnerable adult is endangered is guilty of an offense as follows:

...

2. If done recklessly, the offense is a class 3 felony.

At that time A.R.S. § 13-604.01 provided, in pertinent part:

> A dangerous crime against children is in the first degree if it is a completed offense and is in the second degree if it is a preparatory offense, except attempted first degree murder is a dangerous crime against children in the first degree.
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> 2. "Predicate felony" means any felony involving child abuse pursuant to section 13-3623, subsection A, paragraph 1, a sexual offense, conduct involving the intentional or knowing infliction of serious physical injury or the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument, or a dangerous crime against children in the first or second degree.

At the time of the applicant's conviction, A.R.S. § 13-702 provided, in pertinent part:

> A. Unless a specific sentence is otherwise provided, the term of imprisonment for a first felony offense shall be the presumptive sentence determined pursuant to subsection D of this section. Except for those felonies involving a dangerous offense or if a specific sentence is otherwise provided, the court may increase or reduce the presumptive sentence within the ranges set by subsection D of this section. Any reduction or increase shall be based on the aggravating and mitigating circumstances listed in section 13-701, subsections D and E and shall be within the ranges prescribed in subsection D of this section.
>
> ...

Felony	Mitigated	Minimum	Presumptive	Maximum	Aggravated
Class 3	2 years	2.5 years	3.5 years	7 years	8.75 years

A.R.S. U.S.C. § 13-801 addresses the monetary fine amount for felonies.

Counsel asserts without providing a legal or factual basis and without citing any relevant case law, that the applicant's conviction does not constitute a crime involving moral turpitude. The AAO finds counsel's assertion unpersuasive. A conviction under A.R.S. § 13-3623 requires that the offense be committed "under circumstances likely to produce death or serious physical injury," and that the perpetrator "causes" physical injury or danger to the person or health of the child. Therefore, the AAO concurs with the field office director that the applicant's conviction for Attempted Child Abuse, a Class 3 Felony and a Dangerous Crime Against Children in the Second Degree, in violation of A.R.S. §§ 13-3623 and 13-604.01 constitutes a crime involving moral turpitude. The applicant requires a waiver under section 212(h) of the Act.

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. . . .
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> 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.

The Board of Immigration Appeals held in *Matter of E.W. Rodriguez*, 25 I&N Dec. 784 (BIA 2012), that in removal proceedings arising outside the Fourth, Fifth, and Eleventh Circuits, section 212(h) relief is unavailable to any alien who has been convicted of an aggravated felony after acquiring lawful permanent resident status, without regard to the manner in which such status was acquired. *Matter of Koljenovic*, 25 I&N Dec. 219 (BIA 2010), reaffirmed. In considering whether the respondent'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). First, 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.

Counsel does not directly contest on appeal whether the applicant's conviction is for an aggravated felony. He asserts, however that the field office director "erred in denying the Application for Waiver of Inadmissibility (Form I-601) on the basis that there is no waiver for an 'aggravated felony' conviction," and erred in denying the waiver application "inasmuch as there is no ground of inadmissibility for an 'aggravated felony' conviction pursuant to § 212(a)(2)." While counsel indicated on the Form I-290B that: "a brief and/or additional evidence will be submitted to the AAO within 30 days," no such brief or evidence has been received. As counsel has provided no legal or factual basis supporting these assertions and cites no relevant case law, the AAO finds counsels assertions unpersuasive. Moreover, as discussed above, there is no relief available under section 212(h) of the Act to an alien admitted as a lawful permanent resident who is subsequently convicted, as the applicant was in the Ninth Circuit, of an aggravated felony.

The record shows that after being admitted as a lawful permanent resident, the applicant was deported from the United States pursuant to section 237(a)(2)(A)(iii) of the Act for having been convicted of an aggravated felony under section 101(a)(43)(F) of the Act, namely a crime of violence (as defined in 18 U.S.C. § 16, but not including a purely political offense), for which the term of imprisonment is at least one year. "Crime of violence" is defined in 18 U.S.C. § 16 as: (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." The applicant was sentenced to eight (8) years imprisonment for her conviction of Attempted Child Abuse, a Class 3 Felony and a Dangerous Crime Against Children in the Second Degree, in violation of A.R.S. sections 13-3623 and 13-604.01. As noted by the BIA in its November 22, 2004 decision regarding the present applicant: "The circumstances of this crime were particularly heinous; the respondent admitted to repeatedly abusing her 11-year-old daughter with the blunt side of a meat cleaver on at least four or five occasions, causing wounds to both of her daughter's feet, ankles and lower legs." The AAO finds that the applicant's conviction under A.R.S. §§ 13-3623 and 13-604.01 constitutes not only a crime involving moral turpitude, but an aggravated felony under section 101(a)(43)(F) of the Act as a crime of violence as defined in 18 U.S.C. § 16. Accordingly, the applicant is statutorily ineligible for a waiver under section 212(h) of the Act.

The record shows that on May 18, 2010 the applicant filed a Form I-212 application for permission to reapply for admission after deportation which was approved on August 3, 2010. The AAO notes that approval of a Form I-212 does not overcome the applicant's inadmissibility under section 212(a)(2)(A)(i)(I) or her permanent statutory bar for having been deported from the United States pursuant to section 237(a)(2)(A)(iii) of the Act as an alien who, subsequent to being admitted as a

lawful permanent resident is convicted of an aggravated felony as defined in section 101(a)(43)(F) of the Act.

As the applicant is statutorily ineligible for a waiver of inadmissibility under section 212(h) of the Act, there is no waiver before the AAO which may be properly examined pursuant to the present Form I-601 application. Accordingly, the application cannot be approved and the appeal will be dismissed.

ORDER: The appeal is dismissed.