(b)(6)

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

[redacted]

Date: AUG 2 7 2013 Office: TAMPA, FL FILE: [redacted]

IN RE: [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.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Tampa, Florida, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as applicant is not inadmissible and the underlying waiver application is unnecessary.

The record reflects that the applicant is a native and citizen of Cuba 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), to remain in the United States with his lawful permanent resident parents.

In a decision dated December 20, 2012, the field office director concluded that the applicant had failed to provide detailed supporting evidence 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.

On appeal, counsel states that the field office director erred in finding that the applicant's conviction was for a crime involving moral turpitude and in concluding that the applicant's removal from the United States would not result in an extreme hardship to his qualifying relatives.

Section 212(a)(2) of the Act states that:

> (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 . . . 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 applicant's case arises within the jurisdiction of the Eleventh Circuit Court of Appeals, which has

reaffirmed the traditional categorical and modified categorical approach for determining whether a crime involves moral turpitude, declining to follow the framework set forth by the Attorney General in *Matter of Silva-Trevino,* 24 I&N Dec. 24 I&N Dec. 687 (A.G. 2008). *See Fajardo v. Attorney General*, 659 F.3d 1301, 1310 (11th Cir. 2011). In rejecting the Attorney General's approach in *Silva-Trevino*, the Eleventh Circuit found that section 212(a)(2)(A)(i)(I) of the Act unambiguously requires courts to apply only the categorical and modified categorical approaches, which do not permit an evaluation of information outside the record of conviction, in determining whether a crime involves moral turpitude. *Id.* at 1307-08; *see also Vuksanovic v. U.S. Att'y Gen.*, 439 F.3d 1308, 1311 (11th Cir. 2006) ("[T]he determination that a crime involves moral turpitude is made categorically based on the statutory definition or nature of the crime, not the specific conduct predicating a particular conviction.").

The Eleventh Circuit defines the categorical approach as "looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." *Id.* at 1305 (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990)); *see also Itani v. Ashcroft*, 298 F.3d 1213, 1215-16 (11th Cir. 2002) ("Whether a crime involves . . . moral turpitude depends upon the inherent nature of the offense, as defined in the relevant statute, rather than the circumstances surrounding a defendant's particular conduct."); *Sosa-Martinez v. U.S. Att'y Gen.*, 420 F.3d 1338, 1342 (11th Cir. 2004) ("[W]e must determine whether an . . . offense . . . is a crime involving moral turpitude without reference to the facts underlying [the] conviction.")However, where the statute under which an alien was convicted is "'divisible'—that is, it contains some offenses that are [crimes involving moral turpitude] and others that are not[,] . . . the fact of conviction and the statutory language alone are insufficient to establish . . . under which subpart [the alien] was convicted." *Jaggernauth v. U.S. Att'y Gen.*, 432 F.3d 1346, 1354-55 (11th Cir. 2005). Under such circumstances, "the record of conviction – i.e., the charging document, plea, verdict, and sentence – may also be considered." *Fajardo*, 659 F.3d at 1305 (citing *Jaggernauth*, 432 F.3d at 1354-55).

On March 2, 2003, the applicant was arrested and charged with Aggravated Stalking under Florida Statutes § 784.048(3) and Aggravated Assault under Florida Statutes § 784.021. On August 22, 2003, the applicant pled guilty to Stalking, (Lesser Included Offense) under Florida Statutes § 784.048(2) and was sentenced to 364 days in jail and one year probation.[1]

Section 784.048 of the Florida Statutes provides, in part, that:

> (1) As used in this section, the term:
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> (a) "Harass" means to engage in a course of conduct directed at a specific person that causes substantial emotional distress in such person and serves no legitimate purpose.
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> (b) "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of "course of conduct." Such constitutionally protected activity includes picketing or other organized protests.

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[1] The record also indicates that on June 6, 2001, the applicant was fined for leaving the scene of an accident under Florida Statutes §316.061, a violation of the motor vehicle code. The complaint in the applicant's case indicates that only property damage resulted from the accident. This conviction does not involve a crime involving moral turpitude.

> (c) "Credible threat" means a threat made with the intent to cause the person who is the target of the threat to reasonably fear for his or her safety. The threat must be against the life of, or a threat to cause bodily injury to, a person.
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> (d) "Cyberstalk" means to engage in a course of conduct to communicate, or to cause to be communicated, words, images, or language by or through the use of electronic mail or electronic communication, directed at a specific person, causing substantial emotional distress to that person and serving no legitimate purpose.
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> . . .
>
> (2) Any person who willfully, maliciously, and repeatedly follows or harasses another person commits the offense of stalking, a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.
>
> (3) Any person who willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another person, and makes a credible threat with the intent to place that person in reasonable fear of death or bodily injury of the person, or the person's child, sibling, spouse, parent, or dependent, commits the offense of aggravated stalking, a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
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> . . .

We find that the applicant's conviction for stalking is not a crime involving moral turpitude. We note that the crime of aggravated stalking was held to involve moral turpitude in *Matter of Ajami*, 22 I&N Dec. 949, 952 (BIA July 13, 1999), when the course of conduct for commission of the crime included the making of one or more "credible threats" against the victim, a member of the victim's family, or another individual living in the victim's household. 22 I&N Dec. 949, 952 (BIA July 13, 1999). The Board found that "the intentional transmission of threats is evidence of a vicious motive or a corrupt mind." *Id.* The crime addressed in *Matter of Ajami*, therefore, is similar to the aggravated stalking offense set forth in Florida Statutes § 784.048(3). However, the applicant was not convicted of aggravated stalking.

Rather, the applicant was convicted under Florida Statutes § 784.048(2), which does not require a threat intended to place a person in reasonable fear of death or bodily injury. A conviction under Florida Statutes § 784.048(2) requires following or, at most, harassment which causes the victim substantial emotional distress, but does not place the victim in any fear of harm. Florida courts have found a person guilty of stalking under Florida Statutes § 784.048(2) for minor conduct not involving fear of harm, such a derogatory name-calling on three occasions during a ninety-minute time period, *T.B. v. State*, App. 4 Dist., 990 So. 2d 651 (2008), and for calling the victim on ten occasions from jail, despite the existence of an injunction prohibiting contact. See *Jordan v. State*, App. 3 Dist., 802 So.2d 1180 (2001). Thus, we find that though Florida Statutes § 784.048(2) involves intentional behavior of a distressing nature, as it does not require intentional threats causing fear of death or physical harm, it is distinguishable to the crime addressed to *Ajami*. We do not find

legal support for the conclusion that it is "inherently base, vile, or depraved," and "accompanied by a vicious motive or corrupt mind." Therefore, we find it not to be a crime involving moral turpitude.

Accordingly, the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The applicant's waiver application is thus unnecessary and the appeal will be dismissed.

ORDER: The appeal is dismissed as the underlying waiver application is unnecessary.