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

U.S. Citizenship and Immigration Services

(b)(6)

[redacted]

Date: FEB 0 8 2013 Office: CALIFORNIA SERVICE CENTER 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.

Thank you,

Michael Rosenberg

Ron Rosenberg
Acting Chief, Administrative Appeals Office

**DISCUSSION**: The waiver application was denied by the Director, California Service Center. An appeal of the denial was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on motion. The motion will be dismissed and the underlying application will remain denied.

The applicant is a native and citizen of Italy who was found to be 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), for having been convicted of crimes 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.

The AAO determined that the applicant established exceptional and extremely unusual hardship to a qualifying family member for purposes of relief under section 212(h) of the Act. *Notice of Intent to Dismiss*, dated September 2, 2011. In addition, the AAO found the penal certificate reflected that on February 12, 1998 the applicant was convicted of fraudulent bankruptcy, conspiracy, corruption for an act contrary to official duties, violence and threat to public official and violence to oblige others to commit a crime, and robbery and private violence. *Id.* Lastly, the AAO found that it was not clear from the evidence in the record that the conspiracy and corruption convictions were politically motivated and that the corruption conviction related to the conspiracy. *Id.*

On appeal, the AAO determined that the applicant had not demonstrated that the crimes of which he was prosecuted for against [redacted] (violence and threats to a public official, robbery, and private violence) were fabricated, that he was prosecuted and convicted for purely political reasons. The AAO stated that for the bankruptcy charge the applicant need not have been a shareholder or silent partner of [redacted] to be guilty of bankruptcy, and that the court transcript suggested that the applicant was involved in the management of [redacted] as the "direct collaborator" of [redacted], a shareholder of [redacted] We determined that even though the bankruptcy occurred three years after the applicant's arrest, the criminal acts carried out in furtherance of the illegal bankruptcy may have predated the applicant's arrest, and concluded that the applicant had not established that he was charged and convicted of bankruptcy for purely political reasons. Furthermore, the AAO determined that the applicant's allegation that his convictions were politically motivated by the owners and supporters of [redacted] was inconsistent with the newspaper article printed in [redacted] A Former President of the Court is Accused by Two Deputies of the Radical Party," in that it conveyed that the applicant and his business partner were engaged in committing crimes with the owners of [redacted] The AAO concluded that the submitted excerpts from newspaper articles, trial transcripts, and the letter by the journalist [redacted] did not demonstrate that the applicant was convicted of crimes for purely political reasons. The AAO also stated that if the applicant was convicted in Italy as a conspirator for the aforementioned crimes, in the United States a conspirator may be held liable for criminal offenses committed by a co-conspirator if those offenses are within the scope of the conspiracy, are in furtherance of it, and are reasonably foreseeable as a necessary or natural consequence of the conspiracy. *See U.S. v. Vazquez-Castro*, 640 F.3d 19, 24 (1st Cir. 2011). The AAO also stated that federal laws in the United States punish "racketeering activity." *See* 18 U.S.C. § 1962. The AAO stated that there is no requirement that a

foreign conviction must conform to U.S. Constitutional guarantees in order for it to be a conviction for immigration purposes. *Matter of Gutierrez*, 14 I&N Dec. 457, 458 (BIA 1973); *Matter of M--*, 9 I&N Dec. 132, 134 (BIA 1960). In addition, the AAO noted that the penal certificate indicated that the applicant was unsuccessful in appealing his conviction to the Milan Court of Appeal in 2000 and, later, to the Supreme Court of Milan. Lastly, the AAO found no basis to counsel's assertion that the applicant committed no "violent or dangerous crimes" as defined by 8 C.F.R. § 212.7(d).

On motion, counsel argues that the applicant was convicted of "simple conspiracy" under Article 416 of the Italian Penal Code and the AAO erred in including racketeering as an adverse factor in the applicant's case. Counsel asserts that the Supreme Court of Cassation dismissed the charge of mafia-type conspiracy pursuant to Article 416-Bis of the Italian Penal Code, and the crimes of threat, violence and robbery should have dismissed as well because they were the basis of the mafia-type conspiracy charge. Counsel contends that the only evidence against the applicant for the bankruptcy charge was the speculation of the judiciary that the "defendant was bound to know," and suspicion and speculation would not have been sufficient grounds for conviction in the United States. Counsel argues that the applicant was an independent "porteur" who serviced many casinos across Europe and not responsible for the operation of a casino. Counsel argues that the corruption reported in was not the agreement between the applicant's business partner and the owner of the but the allegation that received a bribe from Counsel asserts that the applicant knew the submitted articles contained allegations relating to him, but still wanted to show the corruption of the judiciary, the political motives behind his arrest, and the defamatory reporting by the press. Counsel contends that the weight given the applicant's foreign criminal proceeding should be substantially reduced or dismissed entirely due to the absence of basic guarantees as a result of corruption, conflicts of interest, political motives and a politically controlled press, citing *Matter of F-*, 8 I&N Dec. 469, 471 (BIA 1959). Counsel asserts that in *Matter of O'Cealleagh*, 23 I&N Dec. 976, 981 (BIA 2006), the Board stated that a fabricated or trumped-up charge may regarded as a "purely political offense," as held in *Matter of B-*, 1 I&N Dec. 47 (A.G. 1941). Counsel argues that the Socialist Party was politically motivated to eliminate the applicant's company from bidding for and that the applicant's convictions therefore arose from baseless, fabricated, and trumped-up charges; and as political motives were primarily behind the applicant's convictions from the "free conviction" standard, they should be regarded as "purely political offenses" citing *Matter of B-* and *Matter of O'Cealleagh*. Counsel asserts that the criminal proceeding against the applicant lacked fundamental fairness for the prosecuting magistrate had conflicts of interest and the proceeding was based on an antiquated inquisitorial system which had no evidence that the applicant committed crimes of violence against Counsel declares that the applicant's appeals were handled by the same district of Milan where the investigation was initiated, and the district sought to protect its reputation by affirming the outcome of the trial. Lastly, counsel argues that there is no evidence that the applicant committed violent or dangerous acts, and that the record shows that the waiver should be granted as a matter of discretion.

Counsel submitted the English-language translation of a letter dated February 13, 2012 from Chief Public Prosecutor of the Italy; the English-language translation of letters from an order relating to the extradition of and the English-language translations of Articles 416 and 416-Bis of the Italian Penal Code.

Counsel claimed that was the Deputy Prosecutor at the handling the applicant's criminal case and trial, and that stated in the letter that the applicant's convictions pertain to a single investigation regarding three casinos, that the applicant was convicted of "simple conspiracy" and was not involved in a mafia-type conspiracy, that the crimes of violence refer to and no evidence indicated the applicant was responsible for these crimes, and that the applicant should not have been convicted of crimes of violence without supporting evidence. Counsel asserts that the letters from who is son, stated that his father never attributed responsibility to the applicant for the crimes committed against him. Lastly, counsel contends that the United States District Court, Southern District of Florida denied the extradition of (who was one of the co-defendants in the applicant's proceedings for the bidding of the casino contract), concluding there was no probable cause regarding the allegations against Counsel contends the applicant's offenses would not have been prosecutable or even considered crimes under the laws in the United States.

According to the English-language translation, Article 416 of the Italian Penal Code provided:

> Conspiracy/Criminal Association
>
> When three or more persons associate to commit more crimes, those that promote or constitute or organize the association are punished, for this alone, with imprisonment from three to seven years.
>
> By the mere fact of participating in the association, the penalty shall be imprisonment from one to five years.
>
> The leaders are subject to the same penalty established for the promoters.
>
> If those associated run armed in the country side or the public streets, imprisonment from five to fifteen years shall apply.
>
> The penalty is increased if the number of members associated is ten or more.
>
> . . .

Article 416 Bis of the Italian Penal Code provided:

> Mafia Type Conspiracies Even Foreign/Mafia-type
>
> Anyone who is part of an association of mafia type formed by three or more persons, is punished with imprisonment from seven to twelve years. (4)
>
> Those who promote, manage or organize the association are punished, for this alone, by imprisonment from nine to fourteen years. (5)
>
> The association is of mafia type when those who belong to it exercise the power of intimidation of the associative bond and the condition of subjection and conspiracy of silence that derives from it to committing crimes, to acquire directly or indirectly the

> management or anyway the control of economic activities, of concessions, of permits, contracts and public services or to achieve profits or unjust advantages for themselves or for others, or to prevent or hinder the free exercise of voting . . . during elections. (3)
>
> . . .

A motion to reconsider must establish that the decision was based on an incorrect application of law or Service policy. *See* 8 C.F.R. § 103.5(a)(3). A motion to reopen must state new facts. *See* 8 C.F.R. § 103.5(a)(2).

As discussed below, counsel fails to establish that the decision was based on an incorrect application of law, and fails to state new facts. Thus, we will dismiss counsel's motions for the reasons set forth in this decision and will deny the underlying waiver application.

Counsel contends that stated that the applicant was not convicted of mafia-type conspiracy, but of "simple conspiracy," and that the applicant never committed any acts of violence against Upon review of the letter, stated that the applicant was held criminally responsible for crimes due to his association with stated that even though the applicant and his co-defendants were not "material authors" of crimes, they were "moral participants" because the crimes could not have been committed without their deliberation and approval. stated that the applicant was convicted under Article 416-bis of the Italian Penal Code for mafia-type conspiracy, and that the Supreme Court of Cassation characterized the applicant's associative offense as simple conspiracy/criminal association under Article 416 because the intimidation activities were not proven under Article 416-bis. However, the characterization of the applicant's conviction as "simple conspiracy" does not alter the fact that the applicant was convicted as a conspirator of violence and threat to a public official, violence and threat to force others to commit a crime, robbery, and private violence. stated that the Supreme Court's final judgment of conspiracy/criminal association is inconsistent with the principle that even if the accused held a prominent role in the association, evidence of personal contribution is required for conviction of "simple conspiracy." Under the laws of the United States, the applicant would have been held liable for crimes committed by a co-conspirator where those offenses are within the scope of the conspiracy, are in furtherance of it, and are reasonably foreseeable as a necessary or natural consequence of the conspiracy. *See U.S. v. Vazquez-Castro*, 640 F.3d 19, 24 (1st Cir. 2011). In light of statement about the applicant's management role and decision-making in the association, the applicant would have been liable for the crimes committed by co-conspirators.

Counsel asserts that the Supreme Court should have dismissed the crimes of threat, violence and robbery along with the mafia-type conspiracy charge, but provides no legal basis for the assertion. A "collateral attack" on a conviction does not negate the finality of the conviction unless and until the conviction is overturned. *See In Re Max Alejandro Madrigal-Calvo*, 21 I&N Dec. 323, 327 (BIA 1996). Unless the judgment is void on its face, a collateral attack on a judgment of conviction cannot be entertained, and the AAO cannot go behind the judicial record to determine the guilt or innocence of the alien. *Id.*

Counsel asserts that the applicant was convicted of bankruptcy on the basis of the speculation of the judiciary, that the applicant was an independent "porteur" and not responsible for the operation of a casino, and that the applicant's criminal proceeding lacked fundamental fairness because of corruption, conflicts of interest, political motives, trumped-up charges, and a politically controlled press, but previously made these assertions on appeal. Counsel argues that [redacted] stated that his father never held the applicant responsible for the crimes committed against him. As counsel argued on appeal that [redacted] testified that he did not know the applicant and had never spoken to him, this does not constitute a new legal argument or new fact.

Counsel's contention, that in light of the denial of the extradition request for [redacted] the conduct for which the applicant was convicted in Italy was not criminal or prosecutable under the legal standards in the United States, is made without producing the complete records of conviction of the applicant. Counsel's argument that there is no evidence that the applicant committed violent or dangerous acts is inconsistent with [redacted] statement that the violent crimes committed against [redacted] would not have been committed without the applicant's knowledge and consent.

Lastly, counsel argues that the record shows that the waiver should be granted as a matter of discretion, but states no new facts.

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 not met that burden. Accordingly, the motion will be dismissed.

**ORDER:** The motion is dismissed.