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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: JUN 14 2013 Office: HIALEAH, FL [redacted]

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to 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 request 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

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Jamaica who was found to be inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. He 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 spouse and step-children.

The field office director found that the applicant failed to establish extreme hardship to a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director*, dated October 3, 2012. The field office director also found that the applicant had failed to show that he merited a waiver in the exercise of discretion. The applicant filed a timely appeal.

On appeal, counsel contends that the field office erred in finding that the applicant's spouse would not experience extreme hardship if the waiver application were denied. Counsel also alleges that the applicant's conviction occurred over 15 years ago and that he therefore qualifies for a waiver based on rehabilitation.

The record includes, but is not limited to: statements from the applicant and his qualifying spouse; a psychological evaluation of the qualifying spouse; documentation relating to the applicant's criminal conviction; a letter from the applicant's former employer; and country conditions information.

The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(2) of the Act states in pertinent part:

> Criminal and related grounds. —
>
> (A) Conviction of certain crimes. –
>
> (i) In general. – Except as provided in clause (ii), any 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 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). 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." 659 F.3d at 1305 (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990)). Where the statutory definition of a crime includes "conduct that would categorically be grounds for removal as well as conduct that would not, then the record of conviction – i.e., the charging document, plea, verdict, and sentence – may also be considered." 659 F.3d at 1305 (citing *Jaggernauth v. U.S. Att'y Gen.*, 432 F.3d 1346, 1354-55 (11th Cir. 2005)).

The record reflects that on June 20, 1993, the applicant was arrested in Florida for Lewd and Lascivious Act on a Child. The applicant entered a plea of nolo contendere and on [redacted] 1993, the court withheld adjudication and placed the applicant on probation for two years. Section 101(a)(48)(A) of the Act provides:

> The term "conviction" means, with respect to an alien, 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.

Because the applicant entered a plea of nolo contendere and the judge placed him on probation, he was convicted for immigration purposes.

The record does not specify the statute under which the applicant was convicted. However, a certified summary of the applicant's criminal history from the Circuit and County Courts of the Eleventh Judicial Circuit of Florida in and for Miami-Dade County states that the charge for which he was sentenced to probation was "L&L ASSAULT/CHILD." A court order also states that the applicant was "found guilty of the charge of LEWD ASSAULT ACT." *See Finding of Guilt and Order Withholding Adjudication and Special Conditions*, dated 1993.[1] Counsel also states that the applicant was arrested for "Lewd and Lascivious Assault on a child." *Counsel's Brief*, dated November 30, 2012. Therefore, it appears that the applicant was convicted under Fla. Stat. Ann. § 800.4, "Lewd, lascivious, or indecent assault or act upon or in presence of child."

At the time of the applicant's conviction in 1993, Fla. Stat. Ann. § 800.4 provided:

> Any person who:
>
> (1) Handles, fondles or makes an assault upon any child under the age of 16 years in a lewd, lascivious, or indecent manner;
> (2) Commits actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sadomasochistic abuse, actual lewd exhibition of the genitals, or any act or conduct which simulates that sexual battery is being or will be committed upon any child under the age of 16 years or forces or entices the child to commit any such act;
> (3) Commits an act defined as sexual battery under s. 794.011(1)(h) upon any child under the age of 16 years; or
> (4) Knowingly commits any lewd or lascivious act in the presence of any child under the age of 16 years,
>
> without committing the crime of sexual battery, commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. Neither the victim's lack of chastity nor the victim's consent is a defense to the crime proscribed by this section.

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[1] This document also indicates that the applicant entered a guilty plea. However, other conviction records state that the applicant entered a plea of nolo contendere. Regardless of the applicant's plea, the record clearly demonstrates that he was convicted for immigration purposes in that adjudication was withheld based on his plea and he was placed on probation.

The field office director found the applicant's conviction to be a crime involving moral turpitude. As the applicant has not contested his inadmissibility on appeal, and the record does not show that determination to be in error, we will not disturb the finding that the applicant is inadmissible under section 212(a)(2)(A) of the Act.

Section 212(h) of the Act provides, in pertinent part:

The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if -

> (1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that -
>
> > (i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,
> >
> > (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
> >
> > (iii) the alien has been rehabilitated; or
>
> (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 . . . .

Section 212(h)(1)(A) of the Act provides that the Secretary may, in her discretion, waive the application of subparagraph (A)(i)(I) of subsection (a)(2) if the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status. An application for admission to the United States is a continuing application, and admissibility is determined on the basis of the facts and the law at the time the application is finally considered. *Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992).

On appeal, counsel asserts that the field office director erred in requiring the applicant to demonstrate extreme hardship to his qualifying spouse. Instead, counsel contends that the applicant is eligible for a waiver based on rehabilitation under section 212(h)(1)(A) of the Act because his conviction occurred more than 15 years ago. Counsel is correct. The conduct which rendered the applicant inadmissible occurred on June 20, 1993, over 19 years ago, so he meets the requirement under section 212(h)(1)(A)(i) of the Act.

However, sections 212(h)(1)(A)(ii) and (iii) of the Act require that the applicant's admission to the United States not be contrary to the national welfare, safety, or security of the United States;

and that the applicant establish his rehabilitation. The applicant has not made such a showing. Although the applicant claims that he was falsely charged with the crime for which he was convicted, collateral attacks on a conviction do not operate to negate the finality of the conviction unless and until the conviction is overturned. *Matter of Madrigal-Calvo,* 21 I&N Dec. 323, 327 (BIA 1996). A collateral attack on a judgment of conviction cannot be entertained "unless the judgment is void on its face," and "it is improper to go behind the judicial record to determine the guilt or innocence of an alien." *Id.* In this case, the applicant entered a plea of nolo contendere to the offense of lewd assault on a child and was sentenced to probation. Although the applicant's conviction occurred over 19 years ago, he continues to deny responsibility for his crime and has not submitted any evidence of efforts of rehabilitation which might outweigh the seriousness of his conviction. Therefore, the AAO finds that the applicant has not demonstrated eligibility for a waiver based on rehabilitation under section 212(h)(1)(A) of the Act.

Section 212(h)(1)(B) of the Act also allows for a waiver of inadmissibility for an alien who demonstrates that denial of his application would create extreme hardship to a qualifying relative. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996).

However, even assuming that the applicant could demonstrate extreme hardship to his spouse or stepchildren, the AAO would deny his application in the exercise of discretion. In discretionary matters, the applicant bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-,* 7 I&N Dec. 582 (BIA 1957).

> In evaluating whether . . . relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

Matter of Mendez-Moralez at 301. The AAO must then "balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations

presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Id.* at 300. (Citations omitted).

In this case, the AAO considers the applicant's conviction for lewd assault on a child to be a very serious negative factor. The positive factors are the 19 years that have passed since the crime, his marriage of 16 years to his U.S. citizen spouse, and the support he provides to his spouse and his four stepchildren. While the applicant has established close ties in the United States, has resided in this country for many years, and plays an important role in his family, he has not offered any evidence to overcome his serious criminal conviction. As noted above, the applicant has not taken responsibility for his conviction, nor has he offered sufficient evidence of good moral character or demonstrated that he has made any efforts to become rehabilitated. Therefore, the AAO finds that even if the applicant had demonstrated extreme hardship to a qualifying relative, the favorable factors in the present matter cannot outweigh the negative factors.[2] Accordingly, we will not favorably exercise the Secretary's discretion.

In discretionary matters, the applicant bears the full burden of proving his eligibility for discretionary relief. *See Matter of Ducret,* 15 I&N Dec. 620 (BIA 1976). Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

[2] We also note that the applicant's conviction appears to be a violent or dangerous crime, in which case he must be meet the requirements of 8 C.F.R. § 212.7(d) to be considered for a favorable exercise of discretion.