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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: JUN 17 2013 Office: CHICAGO FILE: [redacted]

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h) and 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 our 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-190B, 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 a 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 waiver application was denied by the Field Office Director, Chicago, Illinois, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the waiver application is unnecessary.

The applicant is a native and citizen of Mexico 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 crimes involving moral turpitude. The applicant is the father of two U.S. citizen children. He filed an Application for Waiver of Grounds of Inadmissibility (Form I-601) on September 19, 2011. The applicant 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 children.

In a decision dated January 17, 2012, the field office director denied the Form I-601 application for a waiver, finding that the applicant failed to establish that his U.S. citizen children would experience extreme hardship as a consequence of his inadmissibility.

On appeal, counsel for the applicant contends that the applicant's criminal convictions do not render him inadmissible to the United States. Counsel avers that the Board of Immigration Appeals has held that an aggravated driving under the influence (DUI) conviction constitutes a crime involving moral turpitude solely "when the DUI is aggravated due to the defendant driving on a suspended or revoked license." Further, counsel contends that the applicant's three driving under the influence convictions are not crimes involving moral turpitude and asserts that, in the event the AAO were to find the applicant's battery conviction to be a crime involving moral turpitude, the petty offense exception applies. Additionally, counsel states that were the AAO to find the applicant inadmissible for having been convicted of a crime involving moral turpitude, the evidence outlining emotional and financial hardships and adverse country conditions in Mexico demonstrate extreme hardship to the applicant's qualifying relatives.

The record contains, but is not limited to: counsel's brief; statements from some of the applicant's family members and friends, including his U.S. citizen children; the applicant's statement; copies of birth certificates; school enrollment documentation; copy of the applicant's judgment for dissolution of marriage; receipts for bank transfers; documentation concerning the applicant's completion of substance abuse treatment; discharge documents from the Substance Abuse Division of [redacted] Community Mental Health Center; and documentation regarding the applicant's criminal history.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record has been reviewed and considered in rendering a decision on the appeal.

Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines "conviction" for immigration purposes as:

> 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.

Section 212(a)(2)(A) of the Act provides, in pertinent part:

> (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 (Board) 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.)

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 reflects that the applicant was convicted on multiple occasions for "driving under the influence of alcoholic liquor." On September 12, 2000, the applicant was convicted in the [redacted], Illinois of driving under the influence of alcohol in violation of 625 ILCS 5/11-501(a)(1) based upon two complaints filed with the court on February 18, 1998, and April 25, 2000, respectively. It appears both cases were consolidated by the Circuit Court on September 12, 2000. For these offenses, the applicant was sentenced to two years of conditional discharge. The record indicates that on or about September 22, 2000, the applicant was convicted in the [redacted] Illinois, of driving under the influence of alcohol in violation of 625 ILCS 5/11-501(a)(2) based upon a complaint filed with the court on January 13, 2000. For this offense, the applicant was sentenced to a term of imprisonment of 105 days.

625 ILCS 5/11-501 provides, in pertinent part, that:

> (a) A person shall not drive or be in actual physical control of any vehicle within this State [Illinois] while:
>
> (1) the alcohol concentration in the person's blood or breath is 0.08 or more based on the definition of blood and breath units in Section 11-501.2;
> (2) under the influence of alcohol.

The AAO notes that Board precedent case law shows that crimes that contain, as an element, conduct under the influence of alcohol, together with an additional aggravating factor, can often be categorized as crimes involving moral turpitude. In *Matter of Lopez-Meza,* the Board held that aggravated driving under the influence under Arizona law involves moral turpitude because the State must prove that a person drove under the influence of alcohol, knowing that his or her driver's license was suspended, revoked, canceled, or refused and that he or she was, therefore, not permitted to drive. 22 I&N Dec. 1188, 1196 (BIA 1999). The Board reasoned that the combination of driving under the influence with the aggravating factor of knowledge that the license was suspended amounted to a crime involving

moral turpitude, as it represented such a deviance from the private and social duties that individuals owe to one another and to society in general. *Id.*

In contrast, in *Matter of Torres-Varela*, the Board noted that simple driving under the influence of alcohol does not constitute a crime involving moral turpitude, as it is a marginal crime that does not include aggravating factors. 23 I&N Dec. 78, 85 (BIA 2001). Section 625 ILCS 5/11-501(a)(2) of the Illinois Vehicle Code proscribes operating a motor vehicle under the influence of alcohol, an offense that does not include as an additional element the causation of harm to another, though the action may result in endangerment of others. When analyzing the statutory elements of Illinois driving under the influence of alcohol as proscribed by 625 ILCS 5/11-501(a)(2), under the standards set forth by the Board in *Lopez-Meza* and *Torres-Varela*, it appears that this crime is similar in its elements to simple driving under the influence, which is not a crime involving moral turpitude. Accordingly, the AAO cannot conclude that the applicant's three simple driving under the influence convictions render him inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The record also indicates that the applicant was arrested in , Illinois in July 2003 and was charged with "driving under the influence while license suspended or revoked" and "aggravated driving under the influence with three or more priors." On or about December 17, 2003, the applicant was convicted in the of "aggravated driving under the influence with three priors," in violation of 625 ILCS 5/11-501(d)(1)(A) of the Illinois Vehicle Code. The record reflects that the counts for "driving under the influence while license suspended or revoked" were dismissed *nolle prosequi*. The applicant received a sentence of two years of probation.

625 ILCS 5/11-501 provides, in pertinent part, that:

> (d) Aggravated driving under the influence of alcohol, other drug or drugs, or intoxicating compound or compounds, or any combination thereof.
>
> (1) Every person convicted of committing a violation of this Section shall be guilty of aggravated driving under the influence of alcohol, other drug or drugs, or intoxicating compound or compounds, or any combination thereof if:
>
> (A) the person committed a violation of subsection (a) or a similar provision for the third or subsequent time;

In *Torres-Varela*, the Board considered whether an alien convicted for an aggravated driving under the influence offense under Arizona law based upon his having multiple prior convictions for simple driving under the influence constitutes a conviction for a crime involving moral turpitude. *Torres-Varela.* 23 I&N Dec. at 82. The Board noted that in determining whether a crime involves moral turpitude, the specific statute under which the conviction occurred is controlling. *Id.* at 84. The Board further noted that in the case where the "aggravating" factor for an aggravated driving under the influence conviction is the fact that an individual has previously been convicted of simple driving under the influence, the alien has not been convicted of a crime involving moral turpitude. *Id.* at 86. Thus, multiple convictions for the same driving under the influence offense, which individually is not a crime involving moral turpitude, do not, by themselves, aggregate into a conviction for a crime involving moral turpitude. *Id.*

In the opinion of the Board, "nonturpitudinous conduct is not rendered turpitudinous through multiple convictions for the same offense." Accordingly, an aggravated driving under the influence conviction based upon multiple simple driving under the influence offenses does not constitute a crime involving moral turpitude.

In this case, even though the record reflects that the applicant was arrested and charged with DUI on the basis of a suspended or revoked license, we note that the applicant was convicted for driving under the influence based upon his having multiple prior convictions for simple driving under the influence. The "driving under the influence while license suspended or revoked" charges were all dismissed by the It is a well-established principle of immigration law that immigration adjudicators cannot go behind the judicial record of conviction to relitigate the facts that led to the applicant's convictions. *See Matter of Madrigal*, 21 I&N Dec. 323, 327 (BIA 1996); *see also Matter of Fortis*, 14 I&N Dec. 576, 577 (BIA 1974); *see also Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988) (observing that for purposes of deportability, immigration adjudicators cannot go behind the record of conviction to determine the alien's guilt or innocence); *see also Matter of Ahortalejo-Guzman,* 25 I&N Dec. 465, 468-69 (BIA 2011) *(Silva-Trevino* "does not permit an adjudicator to "undermine plea agreements by going behind a conviction to use sources outside the record of conviction to determine that an alien was convicted of a more serious turpitudinous offense."

Here, 625 ILCS 5/11-501(d)(1)(A) criminalizes driving under the influence of alcohol when the person has committed such an offense for the third or subsequent time. It appears that there are no published or unpublished Seventh Circuit Court of Appeals decisions addressing whether an aggravated DUI under 625 ILCS 5/11-501(d)(1)(A) is a crime involving moral turpitude. Further, the applicant was not convicted of aggravated DUI under subsection 5/11-501(d)(1)(G) of the statute, for driving under the influence of alcohol during a period in which the person's driving privileges are revoked or suspended. Nor was the applicant convicted of aggravated DUI under subsection 5-11-501(d)(1)(H) of the statute for driving under the influence of alcohol while he or she did not possess a driver's license or permit. Thus, when analyzing the statutory elements of Illinois aggravated driving under the influence of alcohol as proscribed by 625 ILCS 5/11-501(d)(1)(A), with the standards set forth by the Board in *Lopez-Meza* and *Torres-Varela*, it appears that this crime is analogous in its elements to the aggravated driving under the influence statute considered in *Torres-Varela*, which is not a crime involving moral turpitude. Accordingly, the AAO cannot conclude that the applicant's aggravated driving under the influence conviction renders him inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The record further indicates that on February 8, 2000, the applicant was convicted in the Illinois, of battery in violation of 720 ILCS 5/12-3(a) of the Illinois Criminal Code, which is a class A misdemeanor punishable by a determinate sentence of less than one year of imprisonment. *See* 730 ILCS 5/5-4.5-55. For this offense, the applicant was placed on conditional discharge for one year, was fined $125.00, and was ordered to pay court costs.[1]

[1] The record shows that the applicant was arrested on May 4, 1995, for battery in violation of 720 ILCS 5-12-3A1 of the Illinois Statutes. The record reflects that on May 26, 1995, the Illinois entered the disposition of "stricken from docket with leave to reinstate" the battery charge. In Illinois, a case is "stricken with leave to reinstate" by entering an order of dismissal when the State's Attorney runs out of time to prosecute a case. A

720 ILCS 5/12-3(a) of the Illinois Criminal Code provides that:

> (a) A person commits a battery if he or she knowingly without legal justification by any means (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual.
>
> (b) Battery is a class A misdemeanor.

However, even in the event that the AAO concurred that this is a crime involving moral turpitude, the petty offense exception in section 212(a)(2)(A)(ii)(II) of the Act applies. Section 212(a)(2)(a)(ii) of the Act states in pertinent part, that:

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

Illinois law indicates that for a class A misdemeanor, a person may be sentenced to imprisonment for a term of less than one year. *See* 730 ILCS 5/5-4.5-55. Here, the record also shows that the applicant was not sentenced to a term of imprisonment; the applicant was placed on one year of conditional discharge, which is a form of probation pursuant to 730 ILCS 5/5-4.5-55(d). The Board has held that when a criminal court issues an order placing a defendant on probation, "the alien has not had a sentence imposed of him in excess of six months for purposes of the petty offense exception." *Matter of Castro*, 19 I&N Dec. 692, 694 (BIA 1988); *see also Matter of Gonzalez-Zoquiapan*, 24 I&N Dec. 549, 554 (BIA 2008) (noting that an alien sentenced to probation is eligible for the petty offense exception); *Matter of Cortez Canales*, 25 I&N Dec. 301, 306 (BIA 2010) (finding that an alien sentenced to 60 days imprisonment and five years of probation was eligible for the petty offense exception). The evidence in the record thus establishes that the applicant's conviction for battery falls within the petty offense exception set forth in the Act.

In *Matter of Garcia-Hernandez*, 23 I&N Dec. 590 (BIA 2003), the BIA held that a respondent who was convicted of more than one crime, only one of which was a crime involving moral turpitude, was eligible for the petty offense exception provided for under section 212(a)(2)(A)(ii) of the Act. The BIA reasoned that:

"stricken with leave to reinstate" is a procedure similar to a *nolle prosequi*, which does not result in a conviction and, therefore, will not be considered.

> The "only one crime" proviso, taken in context, is subject to two principal interpretations: (1) that it is triggered . . . by the commission of any other crime, including a mere infraction; or (2) that it is triggered only by the commission of another crime involving moral turpitude . . . . [W]e construe the "only one crime" proviso as referring to . . . only one crime involving moral turpitude.

23 I&N Dec. at 594.

Based on the aforementioned discussion, the applicant is not required to file a section 212(h) waiver. As such, the waiver application is unnecessary.

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 is not required to file a waiver. Accordingly, the appeal will be dismissed as the waiver application is unnecessary.

ORDER: The appeal will be dismissed as the applicant is not inadmissible and the waiver application is unnecessary.