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

DATE: JUN 2 5 2013 Office: LOS ANGELES, CA

IN RE: Applicant:

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:

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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Administrative Appeals Office (AAO) previously dismissed the applicant's appeal in a decision dated May 2, 2012. The matter is now before the AAO on motion. The motion will be dismissed.

The applicant is a native and citizen of Bolivia 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. He seeks a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h). The Field Office Director, Los Angeles, California, concluded that the applicant had failed to establish that the bar to admission would impose extreme hardship on a qualifying relative, and denied the application accordingly. *See Decision of Field Office Director*, dated July 30, 2009.

The applicant appealed to the AAO, asserting that the director had erred in finding that his convictions for burglary in violation of Cal. Penal Code § 459 and disorderly conduct involving prostitution in violation of Cal. Penal Code § 647(b) were crimes involving moral turpitude. Additionally, the applicant contended that even if one of his convictions qualified as a crime involving moral turpitude, he qualified for the petty offense exception. Furthermore, the applicant claimed on appeal that he had demonstrated that a qualifying relative would suffer extreme hardship if his waiver application were denied. The AAO dismissed the appeal, finding that the record of conviction regarding the applicant's burglary conviction was inconclusive and incomplete, and that he had therefore failed to meet his burden of establishing that it was not a crime involving moral turpitude. *See AAO Decision*, dated May 2, 2012. Additionally, the AAO found that the applicant's conviction for disorderly conduct involving prostitution was a crime involving moral turpitude. *Id.* The AAO also found that although the applicant demonstrated that his qualifying relatives would experience extreme hardship upon separation from the applicant, he had not demonstrated that they would experience such hardship upon relocation to Bolivia. *Id.* Accordingly, we dismissed the appeal. *Id.*

In his motion to reconsider, counsel for the applicant asserts that the AAO erred in finding that the applicant failed to meet his burden of demonstrating that his burglary conviction was not for a crime involving moral turpitude. Counsel cites *Sandoval-Lua v. Gonzales*, 499 F.3d 1121 (9th Cir. 2007), in support of his assertion that an applicant meets his burden of demonstrating that he is not inadmissible for a crime involving moral turpitude when he presents an inconclusive record of conviction. As a result, counsel maintains that the applicant is not inadmissible because his only crime involving moral turpitude is his disorderly conduct conviction, which falls under the petty offense exception at section 212(a)(2)(A)(ii)(II) of the Act. Counsel does not contest the AAO's finding regarding extreme hardship on relocation.

A motion to reconsider must establish that the decision was based on an incorrect application of law or Service policy. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). 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 was reviewed and considered in rendering a decision on the motion.

Section 212(a)(2)(A) of the Act states, 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.)

The record reflects that on May 17, 1995, the applicant was convicted of burglary in violation of Cal. Penal Code § 459. The judge suspended imposition of a sentence and placed the applicant on summary probation for 24 months. On October 5, 1999, the applicant was arrested for disorderly conduct involving prostitution in violation of Cal. Penal Code § 647(b). He was convicted of that charge on January 12, 2001. The judge suspended imposition of a sentence, placing the applicant on summary probation for 12 months and ordering that he serve 14 days in jail.

To determine if a crime involves moral turpitude, the Ninth Circuit Court of Appeals employs the categorical approach set forth in *Taylor v. United States*, 110 S.Ct. 2143 (1990). *See Nicanor-Romero v. Mukasey*, 523 F.3d 999, 1004 (9th Cir. 2008), *overruled on other grounds by Marmolejo-Campos v. Holder*, 58 F.3d 903, 911 (9th Cir. 2009). The purpose of the categorical approach is to determine whether the full range of conduct encompassed by the statute constitutes a crime of moral turpitude. *Cuevas–Gaspar v. Gonzalez*, 430 F.3d 1013, 1017 (9th Cir. 2005), *abrogation on other grounds recognized by Holder v. Martinez-Gutierrez*, 132 S.Ct. 2011, 2020-21 (2012). If the statute "criminalizes both conduct that does involve moral turpitude and other conduct that does not, the modified categorical approach is applied." *Marmolejo-Campos*, 558 F.3d at 912 (citing *Fernando-Ruiz v. Gonzalez*, 466 F.3d 1121, 1163 (9th Cir. 2006)); *see also Castillo-Cruz v. Holder*, 581 F.3d 1154, 1161 (9th Cir. 2009). However, there

must be "a realistic probability, not a theoretical possibility, that the statute would be applied to reach conduct that did not involve moral turpitude." *Nicanor-Romero*, 523 F.3d at 1004 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). To demonstrate a "realistic probability," the applicant must point to his or her own case or other cases in which the state courts in fact did apply the statute to conduct not involving moral turpitude. 523 F.3d at 1004-05. A realistic probably also exists where the statute expressly punishes conduct not involving moral turpitude. *See U.S. v. Vidal*, 504 F.3d 1072, 1082 (9th Cir. 2007).

Once a realistic probability is established, the modified categorical approach is applied, which requires looking to the "limited, specified set of documents" that comprise what is known as the record of conviction – the charging document, a signed plea agreement, jury instructions, guilty pleas, transcripts of a plea proceeding and the judgment – to determine if the conviction entailed admission to, or proof of, the elements of a crime involving moral turpitude. *Castillo-Cruz*, 581 F.3d at 1161 (citing *Fernando-Ruiz,* 466 F.3d at 1132-33); *see also Marmolejo-Campos*, 558 F.3d at 912 (citing *Cuevas–Gaspar*, 430 F.3d at 1020). The Ninth Circuit has reaffirmed that courts may not examine evidence outside the record of conviction in determining whether a conviction was for a crime involving moral turpitude. *See Olivas-Motta v. Holder*, --- F.3d ---, 2013 WL 2128318 (9th Cir. May 17, 2013) (rejecting *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)). Where the burden of proof is on the applicant, as in the present case, the applicant cannot sustain that burden where the record of conviction is inconclusive. *Young v. Holder*, 697 F.3d 976, 989 (9th Cir. 2012).

At the time of the applicant's conviction, Cal. Penal Code § 459 provided that:

> Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, as defined in Section 21 of the Harbors and Navigation Code, floating home, as defined in subdivision (d) of Section 18075.55 of the Health and Safety Code, railroad car, locked or sealed cargo container, whether or not mounted on a vehicle, trailer coach, as defined in Section 635 of the Vehicle Code, any house car, as defined in Section 362 of the Vehicle Code, inhabited camper, as defined in Section 243 of the Vehicle Code, vehicle as defined by the Vehicle Code, when the doors are locked, aircraft as defined by Section 21012 of the Public Utilities Code, or mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary. As used in this chapter, "inhabited" means currently being used for dwelling purposes, whether occupied or not. A house, trailer, vessel designed for habitation, or portion of a building is currently being used for dwelling purposes if, at the time of the burglary, it was not occupied solely because a natural or other disaster caused the occupants to leave the premises.

A conviction under Cal. Penal Code § 459 requires proof of three essential elements: 1) entry; 2) into any building, certain vehicles and vessels, or other listed structures and containers; and 3)

the intent to commit larceny or any felony. *See People v. Davis*, 18 Cal. 4th 712, 958 P.2d 1083 (1998). We must determine whether there is "a realistic probability, not a theoretical possibility," that Cal. Penal Code § 459 would be applied to reach conduct that did not involve moral turpitude. 523 F.3d at 1004. The act of entering with the intent to commit larceny under California law is a crime involving moral turpitude. *See Rashtabadi v. INS*, 23 F.3d 1562 (9th Cir. 1994); *U.S. v. Esparza-Ponce*, 193 F.3d 1133, 1136-37 (9th Cir. 1999). Therefore, even assuming Cal. Penal Code § 459 applies to some conduct that does not involve moral turpitude, it also applies to some conduct that does. Therefore, we must apply a modified categorical approach, evaluating the record of conviction to determine whether the applicant's conviction was based on conduct that involved moral turpitude. In this case, the applicant has failed to submit the entire record of conviction to resolve the moral turpitude question in his favor. In our decision on appeal, we noted that the applicant bears the burden of proving that he is not inadmissible. Therefore, we found that he had failed to show—through a conclusive record of conviction or other relevant evidence—that his conviction under Cal. Penal Code § 459 was not for a crime involving moral turpitude. Since our decision on appeal, the Ninth Circuit has specified that we cannot consider any evidence outside the record of conviction. *Olivas-Motta*, *supra*.

In the motion to reconsider, counsel for the applicant asserts that the AAO erred in finding that the applicant had not met his burden under section 212(h) of the Act. Citing *Sandoval-Lua v. Gonzales*, 499 F.3d 1121 (9th Cir. 2007), counsel avers that according to the Ninth Circuit Court of Appeals, "where a conviction under a divisible statute is a potential bar to relief, a noncitizen meets his burden of proving eligibility for relief if the record is inconclusive." *Counsel's Brief.* However, the Ninth Circuit overruled *Sandoval-Lua* in its decision in *Young v. Holder*, noting that "the REAL ID Act established that an inconclusive record of conviction does not demonstrate eligibility. . . ." 697 F.3d at 989. The court explained:

> By demonstrating that the record of conviction is inconclusive, the alien has failed to establish the absence of a predicate crime. Instead, the alien has simply demonstrated that the evidence about the nature of the conviction is in equipoise. The alien therefore cannot carry the burden of proof with an inconclusive record.

Id. Furthermore, as noted above, it is not clear that the applicant has submitted the entire record of conviction. The applicant's burden of proof in these proceedings, as defined in section 291 of the Act, includes a burden to submit the available documents that comprise the record of conviction and show that these fail to establish that his conviction is a crime involving moral turpitude. To the extent that such documents are unavailable, this fact must be established pursuant to the requirements in 8 C.F.R. § 103.2(b)(2). The applicant has not made such a showing. Therefore, the applicant has also failed to meet his burden of proof because he has submitted an incomplete record of conviction. *Id.*

We therefore find that our previous decision, in which we found that the applicant had failed to meet his burden of demonstrating that his burglary conviction was not a crime involving moral turpitude, was correct. The applicant has two convictions for crimes involving moral turpitude

and it is unnecessary to address his assertion that his conviction for disorderly conduct involving prostitution falls under the petty offense exception.

The applicant has failed to establish that the AAO's prior decision was based on an incorrect application of law or Service policy. 8 C.F.R. § 103.5(a)(3). As his motion to reconsider does not meet the requirements of a motion, it must be dismissed. 8 C.F.R. § 103.5(a)(4).

ORDER: The motion is dismissed.