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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: MAR 15 2013 Office: SANTA ANA, CA 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Los Angeles, California, 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's stepfather (father) is a U.S. citizen. He seeks a waiver of inadmissibility in order to reside in the United States.

The field office director found that the applicant had failed to establish extreme hardship to a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Field Office Director's Decision*, dated August 25, 2011.

On appeal, counsel asserts that the applicant has not been convicted of crimes involving moral turpitude and that his father would experience extreme hardship if the waiver application is denied. *Form I-290*, received September 26, 2011.

The record includes, but is not limited to, the applicant's statements, statements of support, and the applicant's criminal records. The entire record was reviewed and considered in arriving at 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 –
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> (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or
>
> . . . .
>
> (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).

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 applicant was convicted on September 8, 2008 under California Penal Code Section 466 of possession of burglary tools and under California Penal Code Section 459 of burglary in the second degree. He received a suspended sentence and three years of informal probation.

At the time of the applicant's conviction, California Penal Code Section 466 stated:

> Every person having upon him or her in his or her possession a picklock, crow, keybit, crowbar, screwdriver, vise grip pliers, water-pump pliers, slidehammer, slim jim, tension bar, lock pick gun, tubular lock pick, floor-safe door puller, master key, ceramic or porcelain spark plug chips or pieces, or other instrument or tool with intent feloniously to break or enter into any building, railroad car, aircraft, or vessel, trailer coach, or vehicle as defined in the Vehicle Code, or who shall knowingly make or alter, or shall attempt to make or alter, any key or other instrument named above so that the same will fit or open the lock of a building, railroad car, aircraft, vessel, trailer coach, or vehicle as defined in the Vehicle Code, without being requested to do so by some person having the right to open the same, or who shall make, alter, or repair any instrument or thing, knowing or having reason to believe that it is intended to be used in committing a misdemeanor or felony, is guilty of a misdemeanor. Any of the structures mentioned in Section 459 shall be deemed to be a building within the meaning of this section.

Counsel cites to *Matter of S-*, 6 I&N Dec. 769 (BIA 1955), in asserting that possession of burglary tools is not a crime involving moral turpitude unless accompanied by intent to commit a turpitudinous offense and he states that there is no clear and convincing evidence that the applicant intended to commit a turpitudinous offense such as larceny. The BIA stated in *Matter of S-*, 6 I&N Dec. 769 (BIA 1955):

> Everyone is guilty of an indictable offense and liable to five years' imprisonment who is found (b) having in his possession by day any such instrument with intent to commit any indictable offense. It has been held that violation of a similar statute, section 408 of the New York Penal Law does not involve moral turpitude unless the record of conviction affirmatively shows that the particular crime the alien intended to commit with the burglary tools found in his possession involves moral turpitude...
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> *Matter of S-* at 770.

The record reflects that the applicant intended to enter his friend's ex-employer's establishment in order to steal money. As such, the record reflects that his intent was to commit a turpitudinous offense (larceny) and therefore his crime involved moral turpitude. He is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for this conviction.

At the time of the applicant's conviction, California Penal Code Section 459 stated:

> 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.

Counsel cites to *Hernandez-Cruz v. Holder*, 651 F.3d 1094 (9th. Cir. 2011), in asserting that commercial burglary under California Penal Code Section 459 is not a crime involving moral turpitude. The AAO notes that the applicant's case arises in the Ninth Circuit, therefore, it is bound by case law from the Ninth Circuit. The AAO agrees with counsel that *Hernandez-Cruz v. Holder* is applicable to the applicant's case and therefore, his commercial burglary conviction was not a crime involving moral turpitude.

The AAO finds that the applicant has been convicted of one crime involving moral turpitude. It notes that the maximum possible sentence under California Penal Code Section 466, a misdemeanor, is six months and his sentence was not in excess of 6 months. He is therefore eligible for the petty offense exception under section 212(a)(2)(A)(ii) of the Act, he's not inadmissible under section 212(a)(2)(A) of the Act, and his waiver application is unnecessary..

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