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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: MAR 27 2013 Office: SAN JOSE, 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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry 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 in accordance with the instructions on Form I-290B, 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 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 Rumsey

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, San Jose, California. 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.

The record reflects that the applicant is a native and citizen of Nicaragua. He 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 director stated that the applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act. 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.

In a decision dated July 26, 2012, the AAO determined that the applicant was inadmissible under section 212(a)(2)(A)(i)(I) of Act for having been convicted of felony false imprisonment, a crime involving moral turpitude. In addition, the AAO concluded that the applicant failed to establish a qualifying relative would experience exceptional and extremely unusual hardship if the waiver application is denied, and that there were no extraordinary circumstances warranting a favorable exercise of discretion.

On motion, counsel argues that the AAO committed legal and factual errors in denying the waiver application. Counsel contends that "Mr. entire record of conviction regarding his 1992 case is missing from the administrative record." Counsel asserts that "[t]here is no information that definitively addresses the particular penal code section or subsection under which he was convicted. Nor is there any conclusive evidence regarding the judge's imposed sentence and Mr. actual time served in county jail." Counsel argues that the AAO's determination that the applicant was convicted under Cal. Penal Code §§ 236 and 237 for felony false imprisonment is wrong. Counsel contends that "the entire record of conviction concerning Mr. 1992 false imprisonment case was purged and destroyed over nine (9) years ago by the criminal court." Counsel asserts that "[u]pon information and belief, Mr. was convicted under Cal. Penal Code §236-237 for false imprisonment on or about August 13, 1992. . . . Upon information and belief, the County of Santa Clara criminal court judge suspended imposition of Mr. ' 12-month sentence to county jail and instead, placed him on probation for a period of one-year." Counsel declares that there are "conflicting versions and factual accounts of the details pertaining to Mr. ' 1992 convictions." Counsel asserts that the AAO made a "damaging assumption that Mr. was convicted of felony false imprisonment and not, as Mr. himself contends . . . the misdemeanor version of the statute." Counsel contends that the applicant's record of conviction is "inconclusive, contradictory, and permanently unavailable" and "the Palo Alto Courthouse purged and destroyed Mr. ' entire criminal case file pursuant to Cal. GC §68152 on August 12, 2003." Counsel cites *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 1007-08 (9th Cir. 2008), for the proposition that where the criminal statute "encompasses behavior that is not morally turpidinous [sic], and that the record of conviction provided no information that the defendant acted with moral turpitude requires an "entirely unmanageable standard" to establish criminal grounds for removal." Counsel asserts that "due to the nonexistence of the relevant record of conviction" of the applicant's crime, "the AAO should vacate its July 26, 2012 decision and grant Mr. I-601."

Counsel argues that the AAO erred in finding the applicant was convicted under both Cal. Penal Code §§ 236 and 237. Counsel asserts that "[t]he AAO's legal conclusion conflicts with . . . "wobbler" crimes. . . . [A]s is the situation in Mr. case, convictions that result in a sentence of confinement in a county jail for less than one year, or payment of a fine, or probation, are, in most cases, considered to be misdemeanors." Counsel contends that "[t]he California legislature drafted the penal code section for False Imprisonment deliberately as "236-237" in order to provide Criminal Court Judges and juries with flexibility in sentencing." Counsel cites *Saavedra-Figueroa v. Holder*, 625 F.3d 621, 625 (9th Cir. 2010), to assert that "a conviction under Cal. Penal Code § 236 was not categorically a crime involving moral turpitude. In light of this, Mr. conviction should also not be considered a bar to his inadmissibility." Counsel argues that the AAO "applied flawed legal analysis" and "despite the missing evidence from the record" found the applicant inadmissible. Counsel contends that "[t]he AAO incorrectly assumed Mr. had been convicted under two (2) separate penal code sections for two (2) separate crimes, one being for felony false imprisonment. . . . Evidence in the record shows that Mr. was, in fact, convicted under Cal. Penal Code §236-237 –there was only one (1)."

Counsel declares that the applicant has never been involved in a similar incident, is rehabilitated, takes care of his family, and has not been arrested or convicted for the past 20 years. Counsel asserts that the submitted letters and affidavits are written "in support of Mr. good moral character and rehabilitation."

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 to reconsideration, counsel essentially makes no new arguments in which to establish that the applicant's crime does not involve moral turpitude. In a brief dated February 8, 2010, counsel asserts that Cal. Penal Code §§ 236 and 237

> can be a divisible statute which is not considered a crime of violence or of moral turpitude if it involved fraud or deceit. USCIS cannot hold this crime as a crime of violence or of moral turpitude if the [applicant's] Record of Proceeding does not identify violence or menace. The applicant complied with USCIS requirements and diligently provided letters from the courts . . . indicating the criminal files . . . have been purged by the criminal courts.

Counsel's primary argument is that the applicant's conviction cannot be found to be a crime involving moral turpitude because the applicant's entire record of conviction is not available. However, the AAO's prior decision was based on documents from the applicant's record of conviction, which is contained in the record of proceeding. The record before the AAO contains the felony complaint filed on June 30, 1992, which states:

> Count 1
>
> On and between May 21, 1992 and June 27, 1992, in the above named Judicial District, the crime of FALSE IMPRISONMENT, in violation of PENAL CODE SECTION 236/237, a Felony, was committed by

who did unlawfully violate the personal liberty of , said violation being effected by violence, menace, fraud, and deceit.

The Felony Minutes, Commitment, Certification Form, also contained in the record, reflects that on August 13, 1992, the applicant entered a plea of nolo contendere to "(a) Felony violation(s) of Ct. 1 PC 236/237" and the judge found a factual basis for the plea.

Counsel's arguments on motion are not new, and they fail to demonstrate that the AAO's decision was erroneous because the documents counsel states are lacking are in the record. As to reopening, counsel provides no new evidence that would establish exceptional and extremely unusual hardship to a qualifying relative. Therefore, the motion will be dismissed.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility rests with the applicant. *See* section 291 of the Act. Here, the applicant has not met that burden. Accordingly, the motion will be dismissed and the waiver application will remain denied.

ORDER: The motion is dismissed.