**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

Date: MAY 09 2013 Office: TEGUCIGALPA FILE:

IN RE: Applicant:

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:

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, Tegucigalpa, Honduras, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of New Zealand 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 a crime involving moral turpitude. On January 5, 2011, the applicant filed an Application for Waiver of Grounds of Inadmissibility (Form I-601). 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 wife.

In a decision dated April 2, 2012, the field office director denied the Form I-601 application for a waiver, finding the applicant statutorily ineligible for a Form I-601 waiver as an aggravated felon. The field office director further noted the negative factors in the applicant's case and stated that "[it] is extremely doubtful that given the callous nature of the crimes committed, his attempt to influence a witness, and a past attempt to flee from justice, that a further inquiry would merit different results."

On appeal, counsel for the applicant contends that the field office director erred in denying the applicant's Form I-601 waiver, and that the director's decision contains erroneous conclusions of facts and law "as changes in the immigration law since the applicant's conviction were erroneously applied to reach the decision." Counsel indicated in Part 3 of the Notice of Appeal (Form I-290B) that she would file a legal brief and other essential supporting documentation with the AAO on or before October 15, 2012. However, as of the date of this decision, the AAO has not received any additional documents regarding the denial of the applicant's Form I-601.

The record contains, but is not limited to: counsel's basis for appeal; the applicant's statement; support statements from the applicant's family members, including the applicant's wife and stepdaughters; medical documentation; a letter describing the applicant's wife's psychological state; a marriage certificate; documentation regarding the applicant's administrative removal proceeding; 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 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.

In the present case, the record reflects that on September 24, 1996, the applicant was convicted in the United States District Court for the Southern District of Florida, of attempted tax evasion in violation of 26 USC § 7201. The applicant was sentenced to 12 months of imprisonment, suspended, and was placed on probation for two years. The field office director found the applicant was inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude.

26 USC § 7201 provides that:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

At the outset, the AAO notes that it is well established that for immigration purposes, with respect to moral turpitude there is no distinction between the commission of the substantive crime and the attempt to commit it. *Matter of Vo*, 25 I&N Dec. 426, 428 (BIA 2011); *Matter of Katsanis,* 14 I&N Dec. 266, 269 (BIA 1973); *Matter of Awaijane,* 14 I&N Dec. 117, 118-19 (BIA 1972); *see also Matter of Davis,* 20 I&N Dec. 536, 545 (BIA 1992), *modified on other grounds, Matter of Yanez,* 23 I&N Dec. 390, 396 (BIA 2002). An attempt involves the specific intent to commit the substantive crime, and if commission of the substantive crime involves moral turpitude, then so does the attempt, because moral turpitude inheres in the intent. *Matter of Katsanis*, 14 I&N Dec. at 269.

The Board has held that tax evasion crimes in violation of the United States Internal Revenue Code are crimes involving moral turpitude. *Matter of W-*, 5 I&N Dec. 754, 763-64 (BIA 1954) (holding that since moral turpitude inheres in the intent, and the term "willful" in tax evasion crimes means actual knowledge of the existence of the obligation and specific wrongful intent, the crime of tax evasion is one in which there is an intent to deprive the United States government of tax money and therefore involves moral turpitude); *see Matter of M-*, 8 I&N Dec. 535 (BIA 1960) (noting that tax evasion crimes in which the objective is to defraud the United States Government involve moral turpitude even though "intent to defraud" is not an element of the offense). Based on these precedential decisions, the AAO finds that the applicant's conviction for attempted tax evasion constitutes a conviction of a crime involving moral turpitude. Accordingly, the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The applicant does not dispute his inadmissibility on appeal. As the applicant's attempted tax evasion crime renders him inadmissible under section 212(a)(2)(A)(i)(I), the AAO need not consider whether his convictions for importation and conspiracy to import a Class I Controlled Substance in violation of the Clean Air Act involve moral turpitude.

A discretionary waiver of this criminal ground of inadmissibility is available under section 212(h) of the Act, 8 U.S.C. § 1182(h) if:

> (1)(A) in the case of any immigrant it is established to the satisfaction of the Attorney General 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
>
> (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 . . . .
>
> . . . .
>
> No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.

In the present matter, the record reflects that the applicant was previously admitted to the United States as an alien lawfully admitted for permanent residence on May 7, 1961. On September 24, 1996, the applicant was convicted of attempted tax evasion. On May 15, 2003, the applicant was served with a Notice to Appear (Form I-862) charging him with removability under section 212(a)(2)(A)(i)(I) of the Act as an alien who has been convicted of a crime involving moral turpitude. On May 31, 2005, an immigration judge in Miami, Florida entered an order sustaining the moral turpitude ground of inadmissibility and ordered the applicant removed from the United States. On November 14, 2006, the Board dismissed the applicant's appeal of the immigration judge's May 31, 2005 decision. On February 8, 2007, the applicant self-deported when he departed the United States to Costa Rica.

In considering whether the respondent's conviction is an aggravated felony, we first apply the "formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." *Taylor v. United States*, 495 U.S. 575, 601 (1990). First, we will look to the statute under which the alien was convicted and compare its elements to the relevant definition of aggravated felony set out in section 101(a)(43) of the Act, 8 U.S.C. § 1101(a)(43). Under this categorical approach, an offense qualifies as an aggravated felony if and only if the full range of conduct covered by the criminal statute falls within the meaning of that term. *Id.*

However, if the criminal statute of conviction could be applied to conduct that would constitute an aggravated felony and conduct that would not, we then see if there is "a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime." *Gonzalez v. Duenas-Alvarez*, 549 U.S. at 193. In applying this approach, the alien "may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues." *Id.*

If the alien demonstrates a "realistic probability" that the statute would be applied to conduct that falls outside the generic definition of the crime, we then apply a modified categorical approach. Under the modified categorical approach, we conduct a limited examination of documents in the record of conviction to determine if there is sufficient evidence to conclude that the alien was convicted of the elements of the generically defined crime. *Shepard v. U.S.*, 544 U.S. 13 (2005). These documents include the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the transcript of plea proceedings. 544 U.S. at 26.

Section 101(a)(43)(M)(ii) of the Act, 8 U.S.C. § 1101(a)(43)(U), includes as an aggravated felony, "an offense that is described in section 7201 of the Internal Revenue Code of 1986 (relating to tax evasion) in which the revenue loss to the government exceeds $10,000." Section 101(a)(43)(U) of the Act, 8 U.S.C. § 1101(a)(43)(U) adds that that an attempt or conspiracy to commit any of the listed offenses, including a tax evasion offense, also qualifies as an aggravated felony. Here, the record of conviction clearly reflects that the applicant pled guilty to the charge described in section 7201 of the Internal Revenue Code of 1986. Consequently, the applicant was convicted of a crime relating to attempted tax evasion within the meaning of sections 101(a)(43)(M)(ii) and 101(a)(43)(U) of the Act.

Having established that the underlying crime categorically involves tax evasion, the AAO next looks at the facts of the case to assess whether the loss to the victim exceeded $10,000. For the purpose of determining whether an amount of loss in a conviction exceeds $10,000 as required under sections 101(a)(43)(M) and 101(a)(43)(U) of the Act, the AAO considers the specific circumstances surrounding the commission of the crime, rather than taking a categorical or modified categorical approach. *See Nijhawan v. Holder,* 129 S.Ct. 2294, 2302 (2009). Here, the Judgment of Conviction establishes that the applicant pled guilty to attempted tax evasion as charged in count 68 of the Indictment, which indicates that the applicant "did knowingly, willfully, and unlawfully attempt to evade and defeat substantial federal excise taxes of approximately $106,530, due and owing from [the applicant] to the United States of America...." Thus, when looking at the record of conviction and the circumstances surrounding the commission of the applicant's crime, the record shows that the applicant pled guilty to attempted tax evasion with a revenue loss to the United States government well beyond $10,000.

The applicant's 1996 conviction for attempted tax evasion thus falls within the definition of an "aggravated felony" as set forth in sections 101(a)(43)(M)(ii) and 101(a)(43)(U) of the Act. Consequently, the applicant's conviction under 26 USC § 7201 after being admitted as a lawful permanent resident statutorily bars him from section 212(h) relief. Since the applicant is statutorily ineligible for a waiver of inadmissibility, no purpose would be served in addressing claims of

hardship, rehabilitation, or determining whether the applicant merits a waiver as a matter of discretion.

In proceedings for an 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, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.