(b)(6)

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

U.S. Citizenship and Immigration Services

[redacted]

Date: MAY 28 2013 Office: OAKLAND PARK FILE: [redacted]

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under sections 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, Oakland Park, Florida, and is now before the Administrative Appeals Office (AAO) on appeal. As the applicant is not inadmissible, the appeal will be dismissed as the waiver application is unnecessary.

The applicant is a native and citizen of Jamaica 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. The applicant is married to a U.S. citizen. On July 2, 2012, he filed an Application for Waiver of Ground 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 remain in the United States with his U.S. citizen wife and mother.

In a decision dated August 27, 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 wife would experience extreme hardship as a consequence of his inadmissibility.

On appeal, counsel asserts that the field office director erred in finding that the applicant has not established extreme hardship to his qualifying relatives, as the evidence outlining emotional, medical, psychological, and financial difficulties demonstrates extreme hardship to the applicant's spouse and mother.

The record includes, but is not limited to: counsel's brief; the applicant's affidavit; the applicant's wife's affidavit; an affidavit by the applicant's mother; a reference letter by pastor , medical reports; copies of birth certificates; a marriage certificate; copy of a fetal death certificate; psychological reports; copies of naturalization certificates; school transcripts; country conditions documentation; 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, that:

> (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 Eleventh Circuit has found that, when evaluating whether an offense constitutes a crime involving moral turpitude, immigration adjudicators must employ the categorical and modified categorical approach. *Fajardo v. U.S. Att'y Gen.*, 659 F.3d 1303, 1305-06 (11th Cir. 2011). "To determine whether a conviction for a particular crime constitutes a conviction of a crime involving moral turpitude, both [the Eleventh Circuit] and the BIA have historically looked to 'the inherent nature of the offense, as defined in the relevant statute....'" *Id.* at 1305. "If the statutory definition of a crime encompasses some conduct that categorically would be grounds for removal as well as other conduct that would not, then the record of conviction-i.e., the charging document, plea, verdict, and sentence—may also be considered." *Id.* (citing *Jaggernauth v. U.S. Att'y Gen.*, 432 F.3d 1346, 1354-55 (11th Cir. 2005)).

The record shows that on June 8, 2005, the applicant was convicted in the Circuit Court of the 17th Judicial Circuit in and for Broward County, Florida, of "possession of a weapon (knife) on school property" in violation of section 790.115(2) of the Florida Statutes. The applicant was placed on probation for a period of one year and was ordered to pay court costs and fees. The field office director found the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude.

Florida Statutes § 790.115(2) provides, in pertinent part, that:

> (2)(a) A person shall not possess any firearm, electric weapon or device, destructive device, or other weapon as defined in s. 790.001(13), including a razor blade or box cutter, except as authorized in support of school-sanctioned activities, ...
>
> For the purposes of this section, "school" means any preschool, elementary school, middle school, junior high school, secondary school, career center, or postsecondary school, whether public or nonpublic.
>
> (b) A person who willfully and knowingly possesses any electric weapon or device, destructive device, or other weapon as defined in s. 790.001(13), including a razor blade or box cutter, except as authorized in support of school-sanctioned activities, in violation of this subsection commits a felony of the third degree [].

Florida Statutes § 790.001(13) defines "weapon" as "any dirk, knife, metallic knuckles, slung shot, billie, tear gas gun, chemical weapon or device, or other deadly weapon except a firearm or a common pocketknife, plastic knife, or blunt-bladed table knife."

The AAO is unaware of any published federal cases addressing whether the crime of third degree possession of a weapon on school grounds under Florida law is a crime involving moral turpitude. Generally, however, the crime of possession of a concealed weapon, without intent to use it, is not a crime involving moral turpitude. *See U.S. ex rel. Andreacchi v. Curran*, 38 F.2d 498 (S.D.N.Y. 1926); *Ex Parte Saraceno*, 182 F. 955 (C.C.N.Y. 1910) (finding that carrying a concealed weapon without a written license is not a crime involving moral turpitude). In *Matter of Granados*, the Board held that a conviction for possession of a concealed and unregistered sawed-off shotgun, in violation of 26 USC 5861(d), an offense that does not include as an additional element the intent to use the weapon for an unlawful purpose, is not a crime involving moral turpitude. 16 I&N Dec. 726, 728 (BIA 1979).

Conversely, in *Matter of S-,* the Board held that carrying a concealed and deadly weapon with intent to use it against the person of another is a crime involving moral turpitude because "the use of a dangerous weapon against the person of another is motivated by an evil, base, and vicious intent." 8 I&N Dec. 344, 346 (BIA 1959). The Board reasoned that "[t]he essence of the offense is the carrying of the dangerous weapon with a base, evil and vicious intent to injure another." *Id.* Thus, it is not only the possession of a dangerous weapon, but the intent to use the weapon to injure another that renders it a morally turpitudinous offense.

In Florida, the crime of unlawful possession of a weapon in the fourth degree does not include, as an element, an intent to use the weapon unlawfully. In *F.D. v. State*, 927 So. 2d 936 (Fla. App. 2006), the Florida District Court of Appeal upheld the conviction of the appellant, who had been convicted of possessing a knife on school property after finding it in the parking lot of the school and being approached by a school teacher before he could turn it in at the main office. The Florida Appeals Court noted that possession of a weapon on school property is a general intent crime, the essential elements being: (1) that an individual knowingly possessed a weapon on school property; (2) without authorization to do so. 927 So. 2d 936, 938 (Fla. App. 2006). Thus, Florida Statutes § 790.115(2) pertains only to the possession of a weapon, and as such, it lacks the evil, base, and vicious intent to injure another as described in *Matter of S-*. It is also noted that the Florida Legislature made the possession of a given weapon a more serious crime if that possession was accompanied by an intent to use it unlawfully against another. *See* Florida Statutes § 775.087 (possession of a weapon or firearm with intent to use is a first or second degree felony) *with* Florida Statutes § 790.01(1) (carrying a concealed weapon is a first degree misdemeanor) *and* § 790.01(2) (carrying a concealed firearm is a third degree felony).

Additional aggravating factors, such as the endangerment of another person, a resulting injury to another person, and the intent to use a weapon unlawfully, are covered by other section of the Florida Statutes. For instance, section 784.045 of the Florida Statutes punishes an aggravated battery using a deadly weapon. Section 784.021(1)(a) of the Florida Statutes punishes an aggravated assault with a deadly weapon without the intent to kill. In addition, section 777.087 of the Florida Statutes punishes the possession of a weapon with the intent to use the weapon against another

person during the commission of a felony. Similarly, section 790.15 of the Florida Statutes punishes discharging a firearm in public, and section 790.161 punishes the possession, discharge or use of a destructive device.

Therefore, under the categorical approach followed in the Eleventh Circuit, the AAO finds that the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act.[1] The waiver filed pursuant to section 212(h) of the Act is therefore unnecessary. As the applicant is not required to file a waiver application, the appeal of the denial of the waiver will be dismissed.

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

[1] A review of the record indicates that, following his conviction for possession of a weapon, the applicant was arrested for the offense of battery. However, the record reflects that the applicant was acquitted of this charge after trial by jury. The record further indicates that the applicant was arrested on November 29, 2009, for aggravated assault and battery. However, the record reflects that on April 7, 2010, both charges were "*nolle prosequi*," and therefore, will not be considered.