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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: JUN 2 4 2013 OFFICE: WEST PALM BEACH FILE:

IN RE:

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) and section 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v)

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.

Thank you,

Ron Rosenberg, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, West Palm Beach, Florida. 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 granted and the underlying application appeal will be dismissed as the applicant is not inadmissible and the underlying 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. He was further found inadmissible under section 212(a)(9)(B)(i)(I) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I), for having been unlawfully present in the United States for more than 180 days, but less than one year, and seeking readmission within three years of his last departure.[1] He seeks waivers of inadmissibility in order to reside in the United States with his U.S. citizen spouse.

On July 1, 2008, the District Director denied the Form I-601 application for a waiver, finding that the applicant failed to establish extreme hardship to his U.S. citizen wife and to show that he warrants a favorable exercise of discretion. The applicant appealed that decision and on August 30, 2011, the AAO dismissed that appeal.

On motion, counsel for the applicant asserts that the AAO failed to conduct a proper analysis of the applicant's criminal history or the facts of the present matter, and that the wrong legal standard was applied.

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 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 record contains briefs from counsel, copies of medical records for the applicant's wife, documentation relating to some of the applicant's and his wife's expenses, letters from friends of

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[1] Although not at issue on motion, we note that since our initial decision in this case, the Board of Immigration Appeals in *Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012) held that an applicant for adjustment of status who left the United States temporarily pursuant to advance parole under section 212(d)(5)(A) of the Act did not make a departure from the United States within the meaning of section 212(a)(9)(B)(i)(II) of the Act. Here, the applicant obtained advance parole under section 212(d)(5)(A) of the Act, temporarily left the United States pursuant to that grant of advance parole, and was paroled into the United States. Therefore, the applicant did not make a departure from the United States for the purposes of section 212(a)(9)(B)(i) of the Act. Accordingly, the applicant is not inadmissible under section 212(a)(9)(B)(i) of the Act.

the applicant, letters from the applicant's employers, a copy of the applicant's marriage certificate, and records relating to the applicant's criminal convictions and immigration history. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(2)(A) of the Act states, in pertinent parts:

> (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.
> (ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-
> (I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or
> (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).

The Board of Immigration Appeals (BIA) 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 shows that, on December 5, 1996, the applicant pled guilty to Preparation to Commit Burglary under North Carolina General Statutes § 14-56. On December 5, 2000, the applicant pled guilty to Theft by Check Class B under Texas Penal Code § 31.06. As a result, the AAO found the applicant to be inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act for having

been convicted of crimes involving moral turpitude. In regards to the Theft by Check conviction, the record indicates that the applicant was sentenced to 30 days incarceration and the maximum possible sentence for Theft by Check class B in Country Court of Texas was a jail sentence not to exceed 180 days. As such, the applicant's conviction under Texas Penal Code § 31.06 would meet the requirements of the "petty offense" exception found in section 212(a)(2)(A)(ii)(II) of the Act, if had only been convicted of one crime involving moral turpitude.

On motion, counsel asserts that AAO failed to conduct a proper analysis of whether the applicant's conviction for Preparation to Commit Burglary involved moral turpitude. Counsel contends that the record does not indicate that the crime involved moral turpitude and the applicant is therefore not inadmissible under 212(a)(2)(A)(i)(I) of the Act.

The applicant's case arises within the jurisdiction of the Eleventh Circuit Court of Appeals, which has recently reaffirmed the traditional categorical and modified categorical approach for determining whether a crime involves moral turpitude, declining to follow the framework set forth by the Attorney General in *Matter of Silva-Trevino,* 24 I&N Dec. 24 I&N Dec. 687 (A.G. 2008). *See Fajardo v. Attorney General*, 659 F.3d 1301, 1310 (11th Cir. 2011). The Eleventh Circuit defines the categorical approach as "looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." 659 F.3d at 1305 (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990)). However, where the statutory definition of a crime includes "conduct that would categorically be grounds for removal as well as conduct that would not, then the record of conviction – i.e., the charging document, plea, verdict, and sentence – may also be considered." 659 F.3d at 1305 (citing *Jaggernauth v. U.S. Att'y Gen.*, 432 F.3d 1346, 1354-55 (11th Cir. 2005)). An application for admission is a "continuing" application, and admissibility is adjudicated on the basis of the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992).

On motion, counsel does not challenge the use of the modified categorical approach in this case, but argues rather that the record of conviction does not show whether the respondent's conviction is a crime involving moral turpitude.

On the applicant pled guilty to Preparation to Commit Burglary in North Carolina. The record of his conviction notes that his charge was described in North Carolina General Statutes § 14-56, but states that the charge was Preparation to Commit Burglarly. At the time of the applicant's conviction, however, Preparation to Commit Burglary was defined at North Carolina General Statutes § 14-55 as follows:

> If any person shall be found armed with any dangerous or offensive weapon, with the intent to break or enter a dwelling, or other building whatsoever, and to commit any felony or larceny therein; or shall be found having in his possession, without lawful excuse, any picklock, key, bit, or other implement of housebreaking; or shall be found in any such building, with intent to commit any felony or larceny therein, such person shall be punished as a Class I felon.

The text of North Carolina General Statutes § 14-55 is more congruent with the applicant's actual conviction, discussed below, and it appears that his conviction records contain an error in the section of law under which he pled. The indicated section, North Carolina General Statutes § 14-56, stated as follows:

> If any person, with intent to commit any felony or larceny therein, breaks or enters any railroad car, motor vehicle, trailer, aircraft, boat, or other watercraft of any kind, containing any goods, wares, freight, or other thing of value, or, after having committed any felony or larceny therein, breaks out of any railroad car, motor vehicle, trailer, aircraft, boat, or other watercraft of any kind containing any goods, wares, freight, or other thing of value, that person is guilty of a Class I felony. It is prima facie evidence that a person entered in violation of this section if he is found unlawfully in such a railroad car, motor vehicle, trailer, aircraft, boat, or other watercraft.

North Carolina General Statutes § 14-55 has a broad reach, including various types of conduct and intents, not all of which would be crimes involving moral turpitude. Burglary without the intent to commit a crime involving moral turpitude has been found to not be a crime involving moral turpitude, unless it is of an occupied dwelling. *Matter of M*, 2 I&N Dec. 721 (BIA 1946); *Matter of Louissant*, 24 I&N Dec. 754 (BIA 2009). The statute also appears to contain elements of what is often referred to as possession of burglary tools. Similarly, that crime would not be a crime involving moral turpitude unless accompanied by an intent to use the tools to commit a crime defined as one involving moral turpitude. *Matter of S-*, 6 I&N Dec. 769 (BIA 1955). Thus, it appears that North Carolina General Statutes § 14-55 can be applied to conduct that involves moral turpitude and conduct that does not.

North Carolina General Statutes § 14-56, too, has a broad reach, including breaking and entering certain conveyances that contain things of value with "intent to commit any felony." We cannot determine that any felony necessarily would be a crime involving moral turpitude. Thus, it appears that North Carolina General Statutes § 14-56 can also be applied to conduct that involves moral turpitude and conduct that does not.

As the full range of conduct proscribed by the statutes in question does not constitute a crime involving moral turpitude, we will apply the modified categorical approach by reviewing the record of conviction to determine the which elements of the statutory offenses pertain to the applicant's conviction. The Transcript of Plea makes clear that in exchange for the applicant's plea of no contest to the Preparation to Commit Burglary Charge, the additional charge of Burglary would be dismissed. The "Information" in this case refers to the charge of burglary, which was dismissed, and is not properly considered under the modified categorical approach. *See Matter of Ahortalejo-Guzman*, 25 I&N Dec. 465, 468-69 (BIA 2011). No additional information in the record of conviction identifies whether the applicant was convicted for the intent to commit a crime involving moral turpitude. Consequently, under the controlling authority of the Eleventh Circuit, and taking into account the applicant's other conviction falls under the petty offense exception found in section 212(a)(2)(A)(ii)(II) of the Act, we conclude that the record does not

support inadmissibility under section 212(a)(2)(A)(i)(I) of the Act. The applicant does not require a waiver of inadmissibility under section 212(h) of the Act.

In proceedings regarding a waiver of grounds of inadmissibility under sections 212(h) and 212(a)(9)(B)(v) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. After a careful review of the record, the AAO finds that in the present motion, the applicant has met this burden. Accordingly, the motion is granted and the underlying appeal is dismissed as unnecessary because the record does not support inadmissibility.

ORDER: The motion is granted. As the applicant is not inadmissible, the waiver application is unnecessary. The appeal will remain dismissed.