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

[redacted]

DATE: JUN 2 4 2013 OFFICE: MOSCOW, RUSSIA [redacted]

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under sections 212(g) and (h) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(g) and (h)

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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 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 with the field office or service center that originally decided your case by filing a 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 Shumway

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Moscow, Russia and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native of the former Soviet Union and a citizen of Ukraine who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having committed a crime involving moral turpitude and section 212(a)(2)(B) of the Act, 8 U.S.C. § 1182(a)(2)(B), for having been convicted of two or more crimes for which the aggregate sentence exceeded five years. The applicant is the spouse and parent of U.S. citizens. He seeks a waiver of inadmissibility pursuant to section (h) of the Act, 8 U.S.C. §§ 1182(h), in order to reside in the United States.

The Field Office Director found that the applicant had not established extreme hardship to a qualifying relative under section 212(h) of the Act and, therefore, had also failed to demonstrate exceptional and extremely unusual hardship, the heighted standard of hardship imposed on him by the regulation at 8 C.F.R. § 212.7(d). She denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Decision of the Field Office Director,* dated June 14, 2010.

On appeal, the applicant's spouse asserts that United States Citizenship and Immigration Services (USCIS) failed to weigh the evidence of extreme hardship in the record. She further maintains that the applicant should be treated as a youthful offender as he was under 18 years of age at the time he committed the crimes that bar his admission to the United States. *Form I-290B, Notice of Appeal or Motion*, dated July 5, 2010. [1]

The record of evidence includes, but is not limited to: prior counsel's brief; statements from the applicant, his spouse, other family members, the applicant's spouse's pastor and members of her church; statements of support from the applicant's pastor in the Ukraine and his spouse's pastor in the United States; tax returns for the applicant's spouse; a statement from the applicant's spouse's former employer; earning statements for the applicant's spouse; medical documentation relating to the applicant's spouse; copies of wire transfers and Ukrainian customs declarations; and materials relating to the applicant's convictions, including an expert analysis of the applicant's court records. The entire record was reviewed and all relevant evidence considered in reaching a decision on the appeal.

Section 212(a)(2)(A)(i)(I) of the Act states, 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 –

[1] The AAO notes that the applicant was previously represented by counsel. However, on appeal, no new Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, has been submitted. Pursuant to the regulation at 8 C.F.R. § 292.4(a) as well as the instructions to the Form I-290B, a "new [Form G-28] must be filed with an appeal filed with the Administrative Appeals Office." This regulation applies to all appeals filed on or after March 4, 2010. *See* 75 Fed. Reg. 5225 (Feb. 2, 2010). Accordingly, the applicant is considered to be self-represented.

> (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 record reflects that on August 23, 1988, the found the applicant, who was then 16 years old, guilty of the secret theft of state property, by preliminary arrangement of group of persons with the penetration of a building or other repository under the Criminal Code of Ukraine (CCU) Art. 81 § 3. The applicant was sentenced to two years of imprisonment and the confiscation of his property, with the imposition of the sentence suspended for two years.

On February 28, 1989, the region found the applicant guilty of preparation of a crime and an attempted crime under CCU Art. 17, of the secret theft of state property committed repeatedly by preliminary arrangement of group of persons with the penetration of a building or other repository under CCU Art. 81 § 3, and rape using physical violence by a group of persons under CCU Art. 117 § 3. For these crimes, the applicant was sentenced to six years imprisonment in an educational-labor colony and the confiscation of all property belonging to him, to which the court added an additional year from his previously suspended sentence.

On appeal, the applicant's spouse contends that the applicant is eligible for the exception found in section 212(a)(2)(ii)(I) of the Act, 8 U.S.C. § 1182(a)(2)(ii)(I), which states:

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

She further asserts that as a youthful offender whose case was handled in juvenile delinquency proceedings, the applicant does not require this exception since such proceedings do not result in convictions. The AAO also notes that in the brief submitted at the time the Form I-601 was filed, prior counsel asserts that the applicant's offenses should be considered juvenile delinquencies rather than qualifying criminal offenses pursuant to the instructions found in the Department of State's Foreign Affairs Manual (FAM) at 9 FAM 40.21(a) N1.2(1) and 9 FAM 40.21(a) N9.4-2.

While the AAO is not bound by the instructions provided consular officers in the FAM, we note that the Board of Immigration Appeals (BIA) has applied the standards of the Federal Juvenile Delinquency Act to crimes committed abroad by aliens who, like the applicant, were under 18 years of age when they committed the offenses that potentially bar their admission to the United States. In *Matter of De La Nues*, 18 I&N Dec. 140 (BIA 1981), the BIA held that "[c]onduct underlying a foreign conviction which constitutes an act of juvenile delinquency under United States standards, however treated by the foreign court, is not a crime for purposes of the Immigration and Nationality

Act." The BIA further stated that "an act which would be a crime if committed by an adult is an act of juvenile delinquency where perpetrated by a youth under the age of 16 years or by a youth between 16 and 18 years of age unless, in the latter case, the act complained of, if committed by an adult, would be a felony punishable by a maximum penalty of 10 years imprisonment or more, life imprisonment, or death." *De La Nues* at 142 (citing *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981).

To determine whether an offense committed outside the United States by an individual between 16 and 18 years old is a conviction for immigration purposes, the BIA, using the definition of felony in 18 U.S.C. § 1(1)(2), instructed that an offense be examined "in light of the maximum punishment imposable for an equivalent crime described in the United States Code or, if an equivalent crime is not found there, in the District of Columbia Code." *De La Nues* at 143. If the punishment was imprisonment for more than ten years, "it may not be said that one charged with the commission of [the] offense is entitled, as a matter of law, to treatment as a juvenile delinquent under United States standards." *Id.* at 144.

In the present case, the applicant was between 16 and 18 years old when he was twice convicted of secret theft of state property with the penetration of a building or other repository under CCU Art. 81 § 3, which the AAO finds to closely resemble the crime of second degree Burglary, District of Columbia (DC) Code §22-801, which states:

> (b) [W]hoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building or any apartment or room, whether at the time occupied or not, . . . with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be guilty of burglary in the second degree. Burglary in the second degree shall be punished by imprisonment for not less than 2 years nor more than 15 years.

The applicant was also convicted of rape using physical violence by a group of persons under CCU Art. 117 § 3, which the AAO finds analogous to the offense of first degree sexual abuse, DC Code § 22-3002(a)(1), which provides:

> (a) A person shall be imprisoned for any term of years or for life, and in addition, may be fined in an amount not to exceed $250,000, if that person engages in or causes another person to engage in or submit to a sexual act in the following manner:
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> (1) By using force against that other person;

The applicant has, therefore, been convicted of at least three offenses that appear similar to U.S. crimes that carry maximum penalties in excess of ten years. Therefore, pursuant to the reasoning in *De La Nues*, these convictions may not be presumed to be juvenile delinquencies and the burden is on the applicant to establish that he was prosecuted as a youthful offender for his 1988 and 1989 offenses.

The record contains an April 10, 2010 statement from , a foreign law consultant, who reviewed the applicant's records of conviction. In his statement, indicates that

the applicant's sentence for his first offense was suspended for two years because he was under 18. He does not, however, state that, in 1988, the applicant was convicted in the Ukrainian equivalent of juvenile delinquency proceedings. As no other documentation has been submitted to establish that the applicant was treated as a youthful offender in 1988 and none of the materials relating to his 1989 trial indicate that he was prosecuted as a juvenile, he has not established his convictions as juvenile delinquencies. Therefore, the AAO finds the applicant's 1988 and 1989 convictions to be convictions for immigration purposes.

In the present case, the applicant has been convicted of rape using physical violence by a group of persons under CCU Art. 117 § 3. The AAO finds that it is well established that the crime of rape involves moral turpitude. *Matter of B-*, 5 I&N Dec. 538 (BIA 1953), *Ng Sui Wing v. United States*, 46 F.2d 755 (C.C.A. 7, 1931). Therefore, the applicant's conviction under CCU Art. 117 § 3 is for a crime that categorically involves moral turpitude.

With regard to the applicant's convictions for theft under CCU Art. 81 § 3, which the AAO has found to closely resemble the crime of burglary, we note that the BIA has generally held that the crime of burglary is a crime involving moral turpitude only when the crime intended to be committed at the time of entry or prior to the breaking out involves moral turpitude. *Matter of M-*, 2 I&N Dec. 721, 723 (BIA 1946). However, in *Matter of Louissaint*, 24 I&N Dec. 721 (BIA 2009), the BIA expanded the circumstances under which the crime of burglary constitutes a crime involving moral turpitude, holding that entering or remaining in an occupied dwelling, without permission to do so, and with the intent to commit any crime therein, is a crime involving moral turpitude. The BIA has also found that burglary with intent to commit theft is a crime involving moral turpitude, if the theft is of a permanent nature. *See Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982); s*ee also Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973).

In the present matter, we find the statutory language of CCU Art. 81 § 3, which punished the theft of state property by penetrating a building or repository, to establish that the applicant twice committed burglary with the intent to commit theft. The statute, however, is silent as to whether the theft committed is a temporary or permanent taking, or the building or repository entered is or is not occupied.

The AAO has conducted a modified categorical review of the applicant's records of convictions, which in the present case are limited to translations of two "Extract[s] from the Soviet Socialist Republic," from his 1988 and 1989 proceedings. While the 1989 verdict extract offers no additional information regarding the nature of the applicant's 1989 theft offense, the AAO finds the August 23, 1988 verdict extract to indicate that the offense for which the applicant was punished included the theft of cigars and matches.

In *Matter of Jurado*, 24 I&N Dec. 29, 33-34 (BIA 2006), the BIA found that a violation of a Pennsylvania retail theft statute involved moral turpitude because the nature of retail theft is such that it is reasonable to assume such an offense would be committed with the intention of retaining merchandise permanently. The AAO finds the applicant's theft of cigars and matches to equate with retail theft in nature. The applicant has not demonstrated that this crime is not of the nature of theft crimes that have been found not to be crimes of moral turpitude. Accordingly, the record establishes that, in 1988, the applicant committed a burglary with the intent to commit a theft of a permanent nature and that his 1988 conviction under CCU Art. 81 § 3 is a conviction for a crime involving

moral turpitude. Accordingly, the applicant is found to have been convicted of three crimes involving moral turpitude and to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act.

Section 212(a)(2)(B) provides:

> Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude for which the aggregate sentences to confinement were 5 years or more is inadmissible.

The record reflects that, as just discussed, the applicant has been convicted of multiple offenses for which he was ultimately sentenced to serve five years and six months in a Ukrainian correctional labor colony. Accordingly, he is also inadmissible to the United States pursuant to section 212(a)(2)(B) of the Act, 8 U.S.C. § 1182(a)(2)(B).

Section 212(h) of the Act provides, in pertinent part:

> (h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), . . . of subsection (a)(2) . . . if –
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> > (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that –
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> > > (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; or
> >
> > (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 . . . .

Although the record in the present case indicates that the applicant is seeking a waiver under section 212(h)(1)(B) of the Act on the basis of extreme hardship, he is also eligible for wavier consideration under section 212(h)(1)(A) of the Act as the offenses that bar his admission to the United States took

place more than 15 years ago.[2] The AAO finds, however, that no purpose would be served by our consideration of the applicant's statutory eligibility under section 212(h)(1)(A) or (B) of the Act. Even if the applicant were able to satisfy the statutory requirements for a waiver, we would not, pursuant to the regulation at 8 C.F.R. § 212.7(d), favorably exercise the Secretary's discretion in his case based on his 1989 conviction for rape.

The regulation at 8 C.F.R. § 212.7(d) provides:

> The Attorney General [Secretary, Department of Homeland Security], in general, will not favorably exercise discretion under section 212(h)(2) of the Act (8 U.S.C. 1182(h)(2)) to consent to an application or reapplication for a visa, or admission to the United States, or adjustment of status, with respect to immigrant aliens who are inadmissible under section 212(a)(2) of the Act in cases involving violent or dangerous crimes, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of the application for adjustment of status or an immigrant visa or admission as an immigrant would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the alien's underlying criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act.

The AAO notes that the words "violent" and "dangerous" and the phrase "violent or dangerous crimes" are not further defined in the regulation, and the AAO is aware of no precedent decision or other authority containing a definition of these terms as used in 8 C.F.R. § 212.7(d). A similar phrase, "crime of violence," is found in section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F). Under that section, a crime of violence is an aggravated felony if the term of imprisonment is at least one year. As defined by 18 U.S.C. § 16, a crime of violence is an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, *or* any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. We note that the Attorney General did not reference section 101(a)(43)(F) of the Act or 18 U.S.C. § 16, or the specific language thereof, in 8 C.F.R. § 212.7(d). Thus, we find that the statutory terms "violent or dangerous crimes" and "crime of violence" are not synonymous and the determination that a crime is a violent or dangerous crime under 8 C.F.R. § 212.7(d) is not dependent on it having been found to be a crime of violence under 18 U.S.C. § 16 or an aggravated felony under section 101(a)(43)(F) of the Act. *See* 67 Fed. Reg. 78675, 78677-78 (December 26, 2002).

Nevertheless, we will use the definition of a crime of violence found in 18 U.S.C. § 16 as guidance in determining whether a crime is a violent crime under 8 C.F.R. § 212.7(d), considering also other common meanings of the terms "violent" and "dangerous". The term "dangerous" is not defined specifically by 18 U.S.C. § 16 or any other relevant statutory provision. Thus, in general, we interpret the terms "violent" and "dangerous" in accordance with their plain or common meanings,

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[2] The AAO notes that an application for admission or adjustment of status is considered a "continuing" application and "admissibility is determined on the basis of the facts and the law at the time the application is finally considered." *Matter of Alarcon*, 20 I.&N. Dec. 557, 562 (BIA 1992) (citations omitted).

and consistent with any rulings found in published precedent decisions addressing discretionary denials under the standard described in 8 C.F.R. § 212.7(d). Decisions to deny waiver applications on the basis of discretion under 8 C.F.R. § 212.7(d) are made on a factual "case-by-case basis." 67 Fed. Reg. at 78677-78.

In the present case, the applicant was convicted under CCU Art. 117 § 3 of rape using physical violence by a group of persons, statutory language that we find not only to meet the definition of crime of violence set forth in 18 U.S.C. § 16, but to identify an offense commonly held to be violent or dangerous. Accordingly, the applicant's rape offense is a violent or dangerous crime, and he is subject to the regulation at 8 C.F.R. § 212.7(d).

The statute under which the applicant was convicted states only that he was a member of a group of people who committed a rape using physical violence. No documentary evidence in the record offers specifics as to the victim's age, the circumstances under which she was raped, the type or level of physical violence used in the rape, or the extent of the harm inflicted on the victim. Neither does it offer any documentary evidence that would serve to lessen the applicant's culpability in what from the language of CCU Art. 117 § 3 appears to have been a "gang rape."

The record contains a December 21, 2009 statement in which the applicant asserts that he was charged for his involvement in the rape of a young girl by a group of young men. He reports that at that time in the former Soviet Union, young girls discovered by their parents to be involved with boys claimed to have been raped or, in the case of actual rape, perpetrators would accuse others to avoid lengthy prison sentences. While the applicant indicates that he believes the girl in his case "was actually taken advantage of," he contends that one of his group's members, the prosecutor's nephew, blamed others in the group, including the applicant, for the rape. He contends that although neither the girl nor anyone from the group testified against him in court, the legal system found him guilty as he came from a lower socio-economic and disadvantaged class, but allowed the prosecutor's nephew to go free. The applicant maintains that the fact that his original sentence of six years for theft and rape was reduced to four years and six months (or five years and six months when the year from his 1988 suspended sentence is added) is proof that the case against him was weak. He also indicates that he was released early for good behavior and that, as of October 30, 1992, his conviction was vacated.

While the AAO notes the applicant's explanation of the circumstances surrounding his conviction for rape, his assertions, by themselves, are insufficient to establish that he was wrongly convicted, and they do not indicate remorse or an attitude reflective of genuine rehabilitation. Generally, we cannot go behind the judicial record to determine the guilt or innocence of an alien for a criminal offense. *See Matter of Khalik*, 17 I&N Dec. 518 (BIA 1980); *In Re Max Alejandro Madrigal-Calvo,* 21 I&N Dec. 323, 327 (BIA 1996) (citations omitted). Going on record without supporting documentation is not sufficient to meet the applicant's burden of proof in this proceeding. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). In the absence of any documentary evidence that would support the applicant's claim of wrongful conviction or that, in some manner, establishes he was not a participant in the gang rape of a young woman, the AAO finds that the applicant has been convicted of a particularly reprehensible act and that it is sufficiently grave that, when considered along with the applicant's other criminal convictions, preclude a favorable exercise of discretion, notwithstanding the hardships that may result from his inadmissibility.

In proceedings for application for waiver of grounds of inadmissibility under sections 212(g) and (h) of the Act, the burden of establishing that the application merits approval remains entirely 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.