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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: FEB 19 2014 Office: SANTA ANA [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:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Santa Ana, California, denied the waiver application and a subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on motion. The motion is granted and the prior decision of the AAO is affirmed.

The applicant is a native and citizen of the Republic of Korea who was found to be inadmissible to the United States under 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 committed crimes involving moral turpitude. The record reflects that in 1992 the applicant was convicted in California of sexual battery and that in 2010 the applicant was convicted in Arizona of criminal impersonation. 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 spouse and son.

The Field Office Director found that the applicant failed to establish that a qualifying relative would experience extreme hardship as a consequence of his inadmissibility. The Form I-601, Application for a Waiver of Grounds of Inadmissibility, was denied accordingly. *See Decision of the Field Office Director,* dated February 08, 2013.

A subsequent appeal was dismissed by the AAO based on a finding that the record did not contain sufficient evidence to show that the hardships faced by the qualifying relatives, considered in the aggregate, rose beyond the common results of removal or inadmissibility to the level of extreme hardship. The AAO further noted that the applicant would therefore fail to demonstrate exceptional and extremely unusual hardship to a qualifying relative, a standard more restrictive than the extreme hardship standard. *See Decision of the AAO,* dated October 1, 2013.

In support of the instant motion, counsel for the applicant submits a brief and criminal records pertaining to the applicant's 2010 conviction. The entire record was reviewed and all relevant evidence 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.

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

> (1) (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 . . .

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....

On motion, counsel asserts that the AAO misapplied the law by requiring a showing of extreme hardship for sexual battery, a crime that is more than fifteen years old. Counsel further contends that the AAO erred in determining that the crime of criminal impersonation was a crime of moral turpitude.

Regarding the applicant's conviction for sexual battery, counsel contends that as the crime occurred more than 15 years ago, establishing extreme hardship is not required. A waiver under section 212(h) is discretionary and the crime involving moral turpitude for which the applicant was convicted, sexual battery, is additionally a "violent or dangerous crime" as contemplated by 8 C.F.R. § 212.7(d). Accordingly, as outlined in detail in the AAO's decision to dismiss the appeal and contrary to counsel's statements on motion, the applicant must establish exceptional and extremely unusual hardship, irrespective of the passage of time since the crime occurred. On motion, counsel has not addressed any of the deficiencies with respect to establishing exceptional and extremely unusual hardship referenced by the AAO in its decision to dismiss the appeal. Accordingly, the applicant has not established exceptional and extremely unusual hardship and thus, he is not eligible for a waiver under section 212(h) in regard to his conviction for sexual battery.

As for counsel's assertion that the AAO erred in determining that the crime of criminal impersonation was a crime of moral turpitude, the record reflects that the applicant was convicted on July 9, 2010, in Arizona under A.R.S. § 13-2006 on three counts of criminal impersonation. A.R.S. § 13-2006 provides that:

> A. A person commits criminal impersonation by:
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> 1. Assuming a false identity with the intent to defraud another; or

2. Pretending to be a representative of some person or organization with the intent to defraud; or

3. Pretending to be, or assuming a false identity of, an employee or a representative of some person or organization with the intent to induce another person to provide or allow access to property. This paragraph does not apply to peace officers in the performance of their duties.

B. Criminal impersonation is a class 6 felony.

The record of conviction submitted by the applicant does not indicate under which section of A.R.S. § 13-2006 the applicant was convicted.

To determine if a crime involves moral turpitude, the Ninth Circuit Court of Appeals employs the categorical approach set forth in *Taylor v. United States*, 110 S.Ct. 2143 (1990). *See Nicanor-Romero v. Mukasey*, 523 F.3d 999, 1004 (9th Cir. 2008), overruled on other grounds by *Marmolejo-Campos v. Holder*, 58 F.3d 903, 911 (9th Cir. 2009). The purpose of the categorical approach is to determine whether the full range of conduct encompassed by the statute constitutes a crime of moral turpitude. *Cuevas–Gaspar v. Gonzalez*, 430 F.3d 1013, 1017 (9th Cir. 2005), abrogation on other grounds recognized by *Holder v. Martinez-Gutierrez*, 132 S.Ct. 2011, 2020-21 (2012). If the statute "criminalizes both conduct that does involve moral turpitude and other conduct that does not, the modified categorical approach is applied." *Marmolejo-Campos*, 558 F.3d at 912 (citing *Fernando-Ruiz v. Gonzalez*, 466 F.3d 1121, 1163 (9th Cir. 2006)); see also *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1161 (9th Cir. 2009). However, there must be "a realistic probability, not a theoretical possibility, that the statute would be applied to reach conduct that did not involve moral turpitude." *Nicanor-Romero*, 523 F.3d at 1004 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). To demonstrate a "realistic probability," the applicant must point to his or her own case or other cases in which the state courts in fact did apply the statute to conduct not involving moral turpitude. 523 F.3d at 1004-05. A realistic probably also exists where the statute expressly punishes conduct not involving moral turpitude. *See U.S. v. Vidal*, 504 F.3d 1072, 1082 (9th Cir. 2007).

Once a realistic probability is established, the modified categorical approach is applied, which requires looking to the "limited, specified set of documents" that comprise what is known as the record of conviction – the charging document, a signed plea agreement, jury instructions, guilty pleas, transcripts of a plea proceeding and the judgment – to determine if the conviction entailed admission to, or proof of, the elements of a crime involving moral turpitude. *Castillo-Cruz*, 581 F.3d at 1161 (citing *Fernando-Ruiz*, 466 F.3d at 1132-33); *see also Marmolejo-Campos*, 558 F.3d at 912 (citing *Cuevas–Gaspar*, 430 F.3d at 1020). The Ninth Circuit has reaffirmed that courts may not examine evidence outside the record of conviction in determining whether a conviction was for a crime involving moral turpitude. *See Olivas-Motta v. Holder*, --- F.3d ---, 2013 WL 2128318 (9th Cir. May 17, 2013) (rejecting *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)).

Fraud has, as a general rule, been held to involve moral turpitude. The U.S. Supreme Court in *Jordan v. De George* concluded that "Whatever else the phrase 'crime involving moral turpitude' may mean in peripheral cases, the decided cases make it plain that crimes in which fraud was an

ingredient have always been regarded as involving moral turpitude. . . . Fraud is the touchstone by which this case should be judged. The phrase 'crime involving moral turpitude' has without exception been construed to embrace fraudulent conduct." 341 U.S. 223, 232 (1951). In *Matter of Serna*, 20 I&N Dec. 579, 583-84 (BIA 1992), the Board stated that intent to defraud involves moral turpitude. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966).

The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). As noted above, the conviction records submitted by the applicant do not specify under which section of A.R.S. § 13-2006 he was convicted, and he has therefore not established whether he was convicted of conduct involving an intent to defraud. Where the burden of proof is on the applicant, as in the present case, the applicant cannot sustain that burden where the record of conviction is inconclusive. *Young v. Holder*, 697 F.3d 976, 989 (9th Cir. 2012). On motion, the applicant has not established, based on the record of conviction, that his conviction for criminal impersonation was not for conduct involving moral turpitude.

On motion, counsel has not addressed any of the deficiencies with respect to establishing exceptional and extremely unusual hardship to a qualifying relative, a standard more restrictive than the extreme hardship standard, with respect to his conviction for sexual battery. *Cortes-Castillo v. INS*, 997 F.2d 1199, 1204 (7th Cir. 1993). Accordingly, the applicant is not eligible for a waiver under section 212(h) of the Act.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The motion is granted and the prior decision of the AAO is affirmed.