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

(b)(6)

U.S. Citizenship and Immigration Services

Date: OCT 0 2 2013 NEBRASKA SERVICE CENTER FILE:

IN RE: Applicant:

APPLICATION: Application for Temporary Resident Status under Section 245A of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office 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.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

cc: Gibbs, Houston, Pauw
1000 Second Avenue, Suite 1600
Seattle, WA 98104

DISCUSSION: The Nebraska Service Center Director (director) denied the Application for Temporary Resident Status (Form I-687) and certified its decision to the Administrative Appeals Office (AAO) for review. The director's decision will be affirmed. The application will be denied.

The applicant filed an Application for Temporary Resident Status pursuant to Section 245A of the Immigration and Nationality Act (Act), 8 U.S.C. § 1225a. The director denied the application, finding the applicant's December 27, 1983 departure from the United States pursuant to an order of deportation meant the applicant failed to maintain the required continuous residence. *See* Section 245A(g)(2)(b)(i) of the Act, 8 U.S.C. § 1255a(g)(2)(b)(i).[1]

On March 22, 2013, the director granted the applicant's motion and reopened the Form I-690, Application for Waiver of Grounds of Inadmissibility, and the Form I-687 application.

This matter has a complex procedural history. In *Proyecto San Pablo v. INS*, No. CIV 89-456-TUC-WDB (D. Ariz. Feb. 2, 2001), the U.S. District Court for the District of Arizona held that the legacy Immigration and Nationalization Service (legacy INS) violated the due process rights of a class of applicants for legalization under the Immigration Reform and Control Act of 1986 (IRCA) when it denied those applicants access to their complete deportation or exclusion files and prevented them from seeking waivers to "cure" prior deportations or exclusions. On March 27, 2001, the court ordered the Department of Homeland Security (DHS) and U.S. Citizenship and Immigration Services (USCIS) to reopen legalization applications filed by class members and (1) accept waiver applications submitted by class members and adjudicate them in the same manner as waiver applications filed by other legalization applicants were adjudicated; and (2) prior to making a decision on a reopened legalization application, provide the applicant with complete copies of prior deportation files, including copies of tapes and/or transcripts of the hearings before the immigration court, to enable the applicant to bring a collateral challenge to the deportation order, if appropriate. Subsequently, in *Proyecto San Pablo v. Dept of Homeland Security*, No. CV 89-456-TUC-RCC (D. Ariz. May 4, 2007), the court reiterated its March 27, 2001 holding and ruled that, if the entire record cannot be located by the defendants, the following burden of proof will apply:

> A legalization applicant who may be denied on the basis of 8 U.S.C. § 1225a(g)(2)(B)(i), or because of a prior deportation or exclusion order, must make a *prima facie* showing that the prior deportation or exclusion order was not in compliance with the governing statute or regulations, or occurred in violation of due process, or was otherwise unlawful or involved a gross miscarriage of justice. If the applicant makes such a showing, then CIS has the burden of coming forward with a copy of the tape and/or transcript of the prior deportation or exclusion hearing . . . . If CIS does not produce such evidence from the prior deportation or exclusion file, then the prior deportation or exclusion cannot be used as evidence to support a denial of legalization benefits.

Therefore, to invoke a shift in the burden of proof from the applicant to USCIS, the applicant must make a *prima facie* showing that his deportation order was either: the result of proceedings not in compliance with the governing law or regulations; or occurred in violation of due process; or was otherwise unlawful or involved a gross miscarriage of justice.

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[1] The section provides that "an alien shall not be considered to have resided continuously in the United States, if, during any period for which continuous residence is required, the alien was outside the United States as a result of a departure under an order of deportation."

In this case, the director granted the applicant's Motion to Reopen and the director found the applicant failed to satisfy the continuous residence requirement of section 245A(a)(2)(A) of the Act. The director therefore denied the Form I-687 application and certified the matter to the AAO for a ruling. In rendering a decision, the director did not address whether the applicant was provided with a complete copy of his deportation file nor did the director discuss whether the applicant submitted *prima facie* evidence that his deportation order was not in compliance with the governing statute or regulations, or occurred in violation of due process, or resulted in a gross miscarriage of justice, as required by the amended *Proyecto* order. In addition, the director denied the applicant's Form I-690, Application for Waiver of Grounds of Inadmissibility.

The standard for establishing a *prima facie* case means the evidence reveals a reasonable likelihood that requirements have been satisfied. *See Fernandez v. Gonzales*, 439 F.3d 592, n.6 (9th Cir. 2006) (*citing Ordonez v. INS*, 345 F.3d 777, 785 (9th Cir. 2003) (citations omitted)). A reasonable likelihood means showing a realistic chance that the petitioner can establish the issue in question at a later time. *Guo v. Ashcroft*, 386 F.3d 556, 564 (3rd Cir. 2004) (discussing the *prima facie* standard in the context of motions to reopen).

In applying these standards, the Board of Immigration Appeals (Board) and most Circuits employ a balancing test and weigh all evidence for and against in determining whether a *prima facie* case has been made. *See Zheng v. Mukasey*, 546 F.3d 70, 72 (1st Cir. 2008) (discussing the issue in the context of a motion to reopen); *Wang v. BIA*, 437 F.3d 270, 276 (2d Cir. 2006) (same); *Matter of J-W-S-*, 24 I&N Dec. 185, 191-92; *Matter of C-C*, 23 I&N Dec. 899, 902-03 (BIA 2006) (same); *Guo v. Ashcroft*, 386 F.3d 556, 564-66 (3rd Cir. 2004) (same).

Neither counsel nor the applicant responded to the 2013 certified denial. In a letter brief dated October 3, 2003, filed in support of the applicant's motion to reopen, counsel for the applicant states:

> [T]here is a good faith dispute regarding whether the voluntary departure granted [the applicant] on July 19, 1983 by the Immigration Judge became an order of deportation. Unfortunately, there has been no response to the recent FOIA request for copies of my client's immigration and court files and which may assist to clarify this issue.

In the applicant's motion to reopen, counsel further asserts:

> On July 19, 1983, the IJ granted [the applicant] voluntary departure and [the applicant] had until August 19, 1983, or thirty days, in which to depart the United States. Arguably, the time frame in which [the applicant] had to voluntary (sic) depart was stayed by the INS filing the Notice of Appeal soon after July 29, 1983, since respondent was given until September 12, 1983 in which to file a brief in opposition to the INS appeal . . . . On December 12, 1983, the INS mailed its withdrawal of appeal . . . [The applicant] was escorted out of the country on December 27, 1983, within thirty days of December 12, 1983. It is submitted that [the applicant] had until January 12, 1984 in which to depart voluntarily.
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> * * *
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> Based on the limited documentation available, it appears that [the applicant] left the country within the time frame provided to him by the Immigration Judge for voluntary departure, except for the intervening actions by the INS in filing and then withdrawing their appeal from the IJ's decision to grant respondent voluntary departure.

The motion to reopen was supported by documents including the following: the July 19, 1983 decision of the Immigration Judge granting the applicant until August 19, 1983 to depart the United States with an alternate order of deportation to Mexico should he fail to do so; and the Notice of Order of Deportation (Form I-166) dated December 13, 1983, instructing the applicant that he has been ordered deported to Mexico and instructing him to report to a United States Immigration Officer on December 27, 1983 at 3:30 pm completely ready for deportation. The applicant was deported on December 27, 1983 through the port of San Ysidro, California.

Although counsel challenges the fact of the applicant's deportation, he does not assert that the applicant's deportation proceedings were otherwise in violation of his due process rights and the regulations as they existed in 1983. A review of the record reflects that the applicant was advised of his rights upon apprehension by immigration officers; that an interpreter was present during the deportation hearing; that the applicant was provided with an opportunity to secure counsel; and that the applicant was given an opportunity to apply for relief from deportation. The record reflects that the applicant failed to depart the United States voluntarily by August 19, 1983, and never requested nor was he ever granted an extension of his voluntary departure time.

Pursuant to the *Proyecto* 2007 amended order, USCIS is required to provide class members with a copy of the tape recording and/or transcript of the prior deportation hearing, to enable the applicants to bring a collateral challenge to the deportation order, if appropriate. The applicant's physical file (currently in the possession of the AAO) contains the tape recording and transcript of the applicant's December 27, 1983 deportation hearing. The record reflects that the applicant's Freedom of Information Act (FOIA) request, number was processed on June 16, 1995, and that 158 pages of record material were released to the applicant. In addition, the record reflects that the applicant's Freedom of Information Act (FOIA) request, number was processed on September 16, 2003, and that 41 pages of record material were released to the applicant. Finally, on July 23, 2013, the AAO notified substituted counsel that if he had not received a copy of the tape of the deportation hearing, to inform the agency. No response was received. Therefore, USCIS has complied with the District Court's order in that the applicant has been provided with complete copies of prior deportation files, including copies of the recording of the hearings before the immigration court.

As the applicant has been provided with a copy of the tape recording and hearing transcript, the AAO does not have the authority to determine whether the applicant has made a *prima facie* showing that the prior deportation order was not in compliance with the governing statute or regulations, or occurred in violation of due process, or was otherwise unlawful or involved a gross miscarriage of justice. Under the terms of the 2007 *Proyecto* amended order the AAO's consideration of whether an applicant has made a *prima facie* showing that proceedings were not conducted in accordance with the law applies only in cases where the entire deportation record cannot be located. Consequently, we will not consider prior arguments regarding the reasons for the applicant's failure to depart pursuant to the voluntary departure the granted the applicant on July 19, 1983 by the Immigration Judge, as it is not within the authority of the AAO to pass judgment on prior proceedings falling outside of its jurisdiction. The applicant may request the Board of Immigration Appeals to take *sua sponte*, affirmative action under 8 C.F.R. § 1003.2(a). The relevant portion of 8 C.F.R. § 1003.2(a) provides that "[t]he Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision." In addition, with the USCIS and EOIR having provided the applicant with a copy of the tape recording and hearing transcript, the applicant may request judicial review and challenge the underlying deportation order pursuant to section 245A(f)(4) of the Immigration Reform and Control Act of 1986.

In this case, the director granted the applicant's Motion to Reopen and denied the applicant's Form I-690, Application for Waiver of Grounds of Inadmissibility. In addition, the director found the applicant failed to satisfy the continuous residence requirement of section 245A(a)(2)(A) of the Act.

An applicant for temporary residence must establish entry into the United States before January 1, 1982, and continuous residence in the United States in an unlawful status since such date and through the date the application is filed. Section 245A(a)(2) of the Act, 8 U.S.C. § 1255a(a)(2). An alien shall not be considered to have resided continuously in the United States, if, during any period for which continuous residence is required, the alien was outside of the United States under an order of deportation. Section 245A(g)(2)(B)(i) of the Act, 8 U.S.C. § 1255a(g)(2)(B)(i).

As stated previously, documentation in the record shows that the applicant was deported from the United States to Mexico on December 27, 1983. As the applicant failed to depart from the United States voluntarily within the period granted by the Immigration Judge, the voluntary departure privilege was withdrawn and the applicant was ordered deported from the United States to Mexico. In support, as previously stated, the record contains the Notice of Order of Deportation (Form I-166) dated December 13, 1983, which instructs the applicant that he has been ordered deported to Mexico. The Notice instructs the applicant to report to a United States Immigration Officer on December 27, 1983 at 3:30 pm completely ready for deportation. The record also contains the Warrant of Deportation, Form I-205, which is dated December 27, 1983 and states the applicant is subject to deportation under section 241(a)(2) of the Immigration and Nationality Act. It indicates that the applicant was deported to Mexico at San Ysidro, California on December 27, 1983 and that he traveled by foot. Therefore, the record evidence establishes that the applicant did not reside continuously in the United States for the requisite period. On that basis, the applicant is statutorily ineligible for temporary residence status.

Though relief is provided in the Act for absences based on factors related to emergencies and absences approved under the advance parole provisions, it was not congressional intent to provide relief for absences during an order of deportation. In addition, general grounds of inadmissibility, set forth in section 212(a) of the Act, apply to any alien seeking a visa or admission into the United States, or adjustment of status. There is a waiver available for applicant's inadmissibility under section 212(a)(9)(A)(ii) for having been deported and having returned to the United States without authorization. However, an alien's inadmissibility under section 212(a) of the Act is a separate issue from the continuous residence requirement issue discussed above. Although the applicant's failure to maintain continuous residence and his inadmissibility for having been deported and having returned without authorization are both based on the deportation, a waiver is possible only for the inadmissibility.

There is no authority in the Act given to the Attorney General, now the Director, USCIS, to waive the statutory requirement of continuous residence in the United States. The Congress may have intended applicable waivers to be granted liberally in support of the legalization program. However, the clear intent of Congress was to deny legalization benefits to applicants who did not maintain their continuous residence in the United States because they were deported outside the United States.

As previously determined by the director, due to the applicant's departure pursuant to an order of deportation on December 27, 1983, he lacks the necessary continuous residence. The applicant is therefore ineligible for legalization and the AAO will not disturb the director's denial of the application.

Additionally, a review of the record reveals that the applicant has failed to meet his burden to furnish sufficient credible evidence that he has no disqualifying criminal convictions.

An alien who has been convicted of a felony or of three or more misdemeanors committed in the United States is ineligible for adjustment to temporary resident status. 8 C.F.R. § 245a.2(c)(1); section 245A(a)(4)(B) of the Act.

In addition, an applicant is inadmissible, and therefore ineligible for temporary resident status, if he has been convicted of a crime involving moral turpitude (other than a purely political offense), or if he admits having committed such crime, or if he admits committing an act which constitutes the essential elements of such crime. Section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (Act), as amended, 8 U.S.C. § 1182(a)(2)(A)(i)(I). No waiver of such ineligibility is available.

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 –
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> (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.
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> . . .
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> (ii) Exception.-Clause (i)(I) shall not apply to an alien who committed only one crime if-
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> . . . .
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> (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 . . . .
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> 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.)

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 992, 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. Gonzales*, 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 probability 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*, 716 F.3d 1199 (9th Cir. 2013) (rejecting *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)). 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).

The record reflects that the applicant was convicted under section 647.6(a) of the 2000 California Penal Code for annoying or molesting a child less than 18 years of age. At the time of his conviction, section 647.6(a) provided, "Every person who annoys or molests any child under the age of 18 shall be punished by a fine . . . , by imprisonment in a county jail not exceeding one year, or by both the fine and imprisonment." A violation of section 647.6(a) is a misdemeanor. Under California law, a conviction for having annoyed or molested a child requires motivation of unnatural or abnormal sexual interest in children. *In re Gladys R.*, 1 Cal.3d 855, 867, 83 Cal.Rptr. 671, 464 P.2d 127 (1970) (confirming interpretation of *People v. Pallares,* 112 Cal.App.2d Supp. 895, 901, 246 P.2d 173 (1952)). Sexual offenses committed against children have long been held to be crimes involving moral turpitude. *Matter of Garcia*, 11 I&N Dec. 521, 524 (BIA 1966). However, the AAO also notes that a broad range of conduct has been found to constitute annoying or molesting a child under section 647.6 of the California Penal Code. In *People v. Thompson*, 206 Cal.App.3d 459, 465; 253 Cal.Rptr. 564 (1988), the court found that a misdemeanor conviction for annoying or molesting a child did not require the specific act of annoying to be lewd or obscene, only that there be proof of acts by which a normal person would be "unhesitatingly irritated," provided those acts were motivated by an abnormal or unnatural sexual interest in the child victim. It further concluded that hand and facial gestures that were calculated to disturb or irritate, although not lewd, were sufficient for a conviction under the statute. *Id.* at 467. In *People v. La Fontaine*, 79 Cal.App.3d 176, 185; 144 Cal.Rptr. 729 (1978), words alone were determined to constitute annoyance or molestation of a child under 18 years of age. More recently in *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 1004 (9th Cir. 2008), *overruled on other grounds by Marmolejo-Campos v. Holder*, 558 F.3d 903, 911 (9th Cir. 2009), the court determined that a misdemeanor conviction under Cal. Penal Code §647.6(a), for annoying or molesting a child under the age of eighteen is not categorically a crime involving moral turpitude, as the court identified at least one

prior case in which a conviction had been obtained under section 647.6 of the California Penal Code for conduct that was found not to involve moral turpitude.[2] The court found that based on this conviction, there is "a realistic probability, not a theoretical possibility, that the State would apply § 647.6(a) to conduct that falls outside the generic definition of a crime involving moral turpitude." Thus the court found that in such case a modified categorical approach is required. *Id.* at 1007-1008.

Therefore, because Cal. Penal Code § 647.6(a) prohibits conduct that may not necessarily involve moral turpitude, we will apply the modified categorical approach to determine if the applicant's actual offense involved moral turpitude. The AAO will review the record as part of its categorical inquiry to determine if the statute was applied to conduct that was found not to involve moral turpitude in the applicant's own criminal case. We look beyond the language of the statute to a narrow, specified set of documents that are part of the record of conviction, including the indictment, the judgment of conviction, jury instructions, a signed guilty plea, or the transcript from the plea proceedings. *See Tokatly v. Ashcroft*, 371 F.3d 613, 620 (9th Cir. 2004). We do not look beyond such documents, however, to determine what particular underlying facts might have supported the applicant's conviction. Id

The limited number of documents comprising the record of conviction in the applicant's file fails to offer any indication of what the applicant actually did. Instead, they repeat the statutory language of section 647.6, i.e., that the applicant was charged with and convicted of annoying or molesting a child less than 18 years of age. In addition, on the signed guilty plea dated January 26, 2000, the applicant stated, "On October 3, 1999, I willfully and unlawfully annoyed a minor." Therefore, the AAO is unable to determine the nature of the crime committed by the applicant. As stated previously, 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). Accordingly, it finds that the applicant has failed to establish that his conviction under section 647.6 of the 2000 California Penal Code was for a crime that did not involve moral turpitude.

The record reflects that on September 29, 2003, the Superior Court of California, County of San Diego, ordered that the applicant's plea of guilty be withdrawn, that probation and all terms and conditions of sentencing be vacated, and that the case be dismissed pursuant to section 1203.4 of the California Penal Code. This particular section of the California Penal Code is a rehabilitative type of statute, which serves to dismiss, cancel, or vacate a prior conviction as a result of the successful completion of a term of probation, restitution, or other condition of sentencing. However, under the current statutory definition of conviction provided at section 101(a)(48)(A) of the Act, no effect is to be given in immigration proceedings to a state action that purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). The Ninth Circuit Court of Appeals, the jurisdiction in which this case arises, has deferred to the Board's determination regarding the effect of post-conviction expungements pursuant to a state rehabilitative statute. *Murillo-Espinoza v. INS*, 261 F.3d 771, 774 (9th Cir. 2001). In general, a criminal conviction remains valid for immigration purposes regardless of the effect of a post-conviction type of rehabilitative statute, unless the conviction was expunged or vacated because of a procedural or constitutional defect in the underlying trial court proceedings. *See Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003). Thus, the court's order of September 29, 2003, that expunged the applicant's misdemeanor conviction under section 1203.4 of the California Penal Code is ineffective to remove the immigration

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[2] The court in *Nicanor-Romero* identified an unpublished opinion, *People v. Villareal*, 2003 WL 21153430, in which the court found that the factual circumstances that supported an actual conviction under §647.6(a) involved conduct that, while criminal, was not morally turpitudinous.

effect of the underlying conviction. Therefore, the applicant remains convicted of a crime involving moral turpitude.

Further, the applicant has not established that he is eligible for the "petty offense exception" as set forth in section 212(a)(2)(A)(ii)(II) of the Act because the record reflects that the applicant was arrested in two other incidents. The final disposition of these matters is not known. The AAO notes that convictions concerning these additional arrests may constitute CIMT's rendering the applicant ineligible for the exception.

The record reflects that on June 22, 1983, the applicant was arrested in National City and charged by the Sheriff's Office of San Diego with violations of the California penal code (PC) as follows: section 261(2)(PC), *rape by force;* section 261(5)(PC), *rape by deceit;* section 288A(C)(PC) *oral sex under 14*. The final disposition of this arrest is not known.

The record further reflects that on September 15, 1984, the applicant was arrested and charged by the Sheriff's Office of with a violation of section 459(PC), *burglary in the first degree.* The final disposition of this arrest is not known.

In response to an AAO Notice of Intent to Deny/Request for Evidence, the applicant submitted a letter dated July 2, 2013, from a clerk of the Sheriff's Department certifying the results of a search of the criminal records of the department under the name ' ," and stating "June 1983 & September 1984 incidents: No records found based on information given."

In addition, counsel submitted a form dated June 22, 2013, titled "Request for Live Scan Service (VISA/Immigration)," submitted to the California Department of Justice for records relating to Counsel states as follows:

> The California Department of Justice is still processing the Live Scan Request, which Applicant will mail to the AAO immediately upon its arrival. Unfortunately, the 30 days required for the response to the *Notice/Request* is not enough time to receive a response to a request for a Live Scan.

From the documents submitted by the applicant, the AAO cannot determine whether the charges for *rape by force, rape by deceit, oral sex under 14* and *burglary* were dismissed or whether the applicant was convicted of these offenses or a different offense involving these particular incidents. We note that it is not sufficient to meet the applicant's burden of proof to simply provide a form Request for Live Scan Service submitted to the California Department of Justice and a letter from the Sheriff's Department that states no records have been found relating to the charges outlined above. Federal regulations provide that, in all applications or petitions for immigration benefits (temporary resident status in this case) the applicant must show that the requested evidence is unavailable. Any letter that is submitted to show that a criminal record is unavailable must be: (1) an original, (2) on letterhead, and (3) from the relevant government authority that serves as the custodian of records. 8 C.F.R. § 103.2(b)(2)(ii). The government letter must indicate the reason the record does not exist and also indicate whether similar records for the time and place are available. The letter from the Sheriff's Department dated July 4, 2013 does not meet these requirements.

In the absence of primary evidence, the applicant must then submit relevant "secondary evidence." 8 C.F.R. § 103.2(b)(2)(ii). If the applicant does not submit secondary evidence, he or she must submit at least two affidavits from persons who are not party to the application and who have direct knowledge of the event and circumstances. *Id.* In criminal record cases, this would include affidavits from the prosecuting

attorney, the defense attorney, the judge, or some other individual (other than derivative family members) who has direct knowledge of the disposition of the arrest. The AAO notes that despite the Request for Evidence dated June 4, 2013, the applicant did not submit the relevant secondary evidence regarding the final dispositions of the June 22, 1983 and September 15, 1984 arrests.

Therefore the applicant has failed to furnish sufficient credible evidence that he has no disqualifying criminal convictions, is admissible and is otherwise eligible for temporary resident status.. As the applicant has failed to meet his burden of proof, he is therefore ineligible for legalization. This constitutes an additional basis to deny the application.

ORDER: The director's March 22, 2013 decision is affirmed. The Form I-687 application is denied.