



**U.S. Citizenship
and Immigration
Services**

(b)(6)



Date: **APR 27 2015** Office: NEBRASKA SERVICE CENTER FILE: 

IN RE: 

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:



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,

A handwritten signature in black ink that reads "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The application for waiver of inadmissibility was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant, a native and citizen of Fiji, was admitted to the United States as a lawful permanent resident on April 28, 1994. As a result of a criminal conviction the applicant was placed in removal proceedings and ordered removed to Fiji on June 9, 2009. In applying for an immigrant visa based on an Alien Relative Petition filed by his mother, the applicant 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 been convicted of crimes involving moral turpitude. In a decision, dated August 18, 2014, the director found the applicant ineligible for a waiver under section 212(h) of the Act because he had been convicted of an aggravated felony and he committed this crime subsequent to his admission to the United States as a lawful permanent resident. The director found that the applicant had been convicted of burglary under California Penal Code section 459(a) and that this crime constituted an aggravated felony under section 101(a)(43)(G) of the Act. The director explained that *Bracamontes v. Holder*, 675 F.3d 289 (4th Cir. 2012), *Lanier v. US Attorney General*, 631 F.3d 1363 (11th Cir. 2011), and *Martinez v. Mukasey*, 519 F.3d 532 (5th Cir. 2008), only apply in their respective circuits and do not apply to someone residing outside the United States. The application was denied accordingly. The applicant is applying for a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States.

On appeal, counsel asserts that the applicant's conviction is not for an aggravated felony because California Penal Code section 459 is a divisible statute. He asserts, citing to Ninth Circuit case law, that a charging document on its own cannot be used to establish which part of a divisible statute an applicant is convicted of committing. Thus, he states, the record in the applicant's case is not clear as to what part of California Penal Code section 459 the applicant was convicted of committing. Counsel also states that ineligibility of a section 212(h) waiver, as a result of an aggravated felony conviction, only applies in immigration proceedings and would not apply to the applicant's current application. The entire record was reviewed and considered in rendering a decision on the appeal.

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.

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 judgment in the applicant's criminal case states that on May 1, 2003, the applicant was convicted of felony, first degree burglary in violation of California Penal Code section 459/460(a) and was sentenced to two years imprisonment.

At the time of the applicant's conviction, Cal. Penal Code § 459 provided:

Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, as defined in Section 21 of the Harbors and Navigation Code, floating home, as defined in subdivision (d) of Section 18075.55 of the Health and Safety Code, railroad car, locked or sealed cargo container, whether or not mounted on a vehicle, trailer coach, as defined in Section 635 of the Vehicle Code, any house car, as defined in Section 362 of the Vehicle Code, inhabited camper, as defined in Section 243 of the Vehicle Code, vehicle as defined by the Vehicle Code, when the doors are locked, aircraft as defined by Section 21012 of the Public Utilities Code, or mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary. As used in this chapter, "inhabited" means currently being used for dwelling purposes, whether occupied or not. A house, trailer, vessel designed for habitation, or portion of a building is currently being used for dwelling purposes if, at the time of the burglary, it was not occupied solely because a natural or other disaster caused the occupants to leave the premises.

At the time of the applicant's conviction, Cal. Penal Code § 460 provided, in pertinent part:

- (a) Every burglary of an inhabited dwelling house, vessel, as defined in the Harbors and Navigation Code, which is inhabited and designed for habitation, floating home, as defined in subdivision (d) of Section 18075.55 of the Health and Safety Code, or trailer coach, as defined by the Vehicle Code, or the inhabited portion of any other building, is burglary of the first degree.
- (b) All other kinds of burglary are of the second degree.

Burglary is a crime involving moral turpitude where the crime the individual intends to commit after breaking into a dwelling, structure, or conveyance involves moral turpitude. *Matter of M-*, 2 I&N Dec. 721, 723 (BIA, A.G. 1946). In *Matter of M-*, the Board of Immigration Appeals held that third degree burglary in violation of section 404 of the New York Penal Law was not categorically a crime involving moral turpitude because a person could be convicted under the statute for simply “pushing ajar the unlocked door of an unused structure and putting one’s foot across the threshold” 2 I&N Dec. at 723. However, burglary of an *occupied dwelling* with the intent to commit *any crime* therein is a categorically a crime involving moral turpitude. *Matter of Louissaint*, 24 I&N Dec. 754, 758-59 (BIA 2009). The Ninth Circuit Court of Appeals has held that a residential burglary with the intent to commit larceny or theft, in violation of Washington Revised Code §9A.52.025(1), is a crime involving moral turpitude. See *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1020 (9th Cir. 2005) (“Because the underlying crime of theft or larceny is a crime of moral turpitude, unlawfully entering a residence with intent to commit theft or larceny therein is likewise a crime involving moral turpitude.”), *abrogated on other grounds by Holder v. Martinez Gutierrez*, 132 S.Ct. 2011 (2012).

Cal. Penal Code §461 states:

Burglary is punishable as follows: 1. Burglary in the first degree: by imprisonment in the state prison for two, four, or six years. 2. Burglary in the second degree: by imprisonment in the county jail not exceeding one year or in the state prison.

Cal. Penal Code §459 is a “wobbler” offense, meaning a person can be charged with burglary as either a misdemeanor or a felony depending on the circumstances of the case and the defendant’s criminal history. In the applicant’s case, the judgment clearly indicates that the applicant was convicted of felony, first degree burglary. A clear reading of the statute indicates that felony, first degree burglary, under Cal. Penal Code §459 is burglary committed on an occupied dwelling. Therefore, the applicant was convicted of a crime involving moral turpitude and is inadmissible under 212(a)(2)(A) of the Act. The applicant does not contest this determination on appeal.

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 –

....

(1) (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 and

(2) the Attorney General [Secretary], in his discretion, and pursuant to such terms, conditions

and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status. . . .

No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than seven years immediately preceding the date of initiation of proceedings to remove the alien from the United States. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.

Counsel's assertions regarding the statutory construction of section 212(h) and the aggravated felony bar only applying in immigration proceeding is not persuasive. Counsel fails to include supporting case law, regulations, or legislative history to support his assertions regarding the statutory interpretation of section 212(h) of the Act. Thus, the aggravated felony bar of section 212(h) will continue to be applied to those applicants seeking immigrant status or adjustment of status in the United States.

In considering whether the applicant's conviction is an aggravated felony, we first apply the "formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." *Taylor v. United States*, 495 U.S. 575, 600 (1990). First, we will look to the statute under which the alien was convicted and compare its elements to the relevant definition of aggravated felony set out in section 101(a)(43) of the Act, 8 U.S.C. § 1101(a)(43). Under this categorical approach, an offense qualifies as an aggravated felony if and only if the full range of conduct covered by the criminal statute falls within the meaning of that term. *Id.*

However, if the criminal statute of conviction could be applied to conduct that would constitute an aggravated felony and conduct that would not, we then determine whether there is "a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime." *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). In applying this approach, the alien "may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues." *Id.*

If the alien demonstrates a "realistic probability" that the statute would be applied to conduct that falls outside the generic definition of the crime, we then apply a modified categorical approach. Under the modified categorical approach, we conduct a limited examination of documents in the record of conviction to determine if there is sufficient evidence to conclude that the alien was convicted of the elements of the generically defined crime. *Shepard v. United States*, 544 U.S. 13, 26 (2005). These documents include the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the transcript of plea proceedings. *Id.*

Section 101(a)(43)(G) of the Act, 8 U.S.C. § 1101(a)(43)(G), includes as an aggravated felony, theft or burglary offenses for which the term of imprisonment is at least one year. Cal. Penal Code §459 could be applied to conduct that was not an aggravated felony because a person could be convicted under the statute for a misdemeanor and be sentenced to less than one year in jail. However, in the applicant's case, the judgment of conviction clearly indicates that the applicant was convicted of burglary as a felony and was sentenced to two years imprisonment. Thus, the applicant's conviction is an aggravated felony under section 101(a)(43)(G) of the Act. The applicant is ineligible for a waiver under section 212(h) of the Act because he committed this crime subsequent to his admission to the United States as a lawful permanent resident.

Counsel asserts that in the Ninth Circuit, when making a determination regarding whether an applicant's criminal conviction, in the context of a plea agreement, constitutes an aggravated felony, one cannot rely solely on the charging document, but must consider the charging documents together with other documentation. Counsel cites to *United States v. Sweeten*, 933 F.2d. 765, 772 (9th Cir. 1991), *United States v. Bonat*, 106 F3d. 1472, 1476-1477 (9th Cir. 1997), and *Cisneros-Perez v. Gonzales*, 465 F3d. 386, 401 (9th Cir. 2006). In each of these cases, the court had to use the modified categorical approach to make a determination as to whether a crime fit into a certain category of more serious crimes. The lower courts in these cases had incorrectly relied on charging documents only in making their determination, in one case ignoring the actual statute of conviction. In this case, we used the modified categorical approach to look at the judgment of conviction to show whether the applicant was convicted of felony burglary or misdemeanor burglary, which then, by statutory construction, indicated which part of the statute the applicant was convicted of committing. The judgment also established what sentencing was imposed for the crime. We did not look to any underlying facts or charging documents to determine what acts the applicant was convicted of committing. Therefore, counsel's asserts are unpersuasive, the applicant's conviction is an aggravated felony under section 101(a)(43)(G) of the Act, and he is ineligible for a waiver under section 212(h) of the Act because he committed this crime subsequent to his admission to the United States as a lawful permanent resident.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility 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.