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

U.S. Citizenship and Immigration Services

(b)(6)

Date: MAR 1 2 2013 Office: MIAMI, FL FILE:

IN RE: Applicant:

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 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 in accordance with the instructions on 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Jamaica who was found to be inadmissible 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 a crime involving moral turpitude. The director stated that the applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h). The director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On appeal, counsel argues that the offense of which the applicant was convicted, burglary of an unoccupied structure in violation of Florida Statutes § 810.02, is not a crime involving moral turpitude (CIMT). Counsel contends that Florida Statutes § 810.02 is a divisible statute, and not all of the subsections have the requisite intent for a finding of moral turpitude. Counsel cited *Matter of Louissaint*, 24 I&N Dec. 754 (BIA 2009), and contended that the Board of Immigration Appeals (Board) stated in its decision that the crime of burglary does not involve moral turpitude unless the underlying crime involves moral turpitude. Counsel asserts that in *Matter of Short*, 20 I&N Dec. 136 (BIA 1989), the Board found that the offense of assault with intent to commit a felony upon a minor child could not be found to involve moral turpitude because the record of conviction did not identify the felony intended. 20 I&N Dec. 136 at 140-141. Counsel applied this reasoning to the crime of burglary, arguing that burglary could not involve moral turpitude if the underlying felony is not identified in the record and the intended crime is thus inconclusive. Counsel claims that in the applicant's record of conviction the underlying felony is not identified, and that the applicant is consequently not inadmissible under section 212(a)(2)(A)(i)(I) of the Act. Counsel asserts that the crime of possession of tools for which the applicant was convicted is also not a CIMT. Counsel contends that the immigration officer did not properly consider the applicant's criminal record because the applicant has only two arrests for which the judge withheld adjudication.

In regard to hardship, counsel contends that as of March 2010 the applicant and his wife have reunited after a few months of separation. Counsel asserts that the applicant is the stepfather to four children, with whom he has a close bond, and is the breadwinner of the family, repairing automobiles, while the applicant's wife works at odd jobs. Counsel declares that the applicant cooks, cleans, helps the children with homework, and drives them to places; and while separated from his wife continued with these activities. Counsel states that two of the applicant's stepchildren have severe asthma and the applicant's wife cannot manage both the household and the children. Counsel contends that the applicant's wife and stepchildren will not relocate to Jamaica and risk subjecting the children to an outdated medical care system, a foreign culture, and a high level of poverty and violent crime. Counsel argues that unemployment in Jamaica is high and that it is unlikely the applicant and his wife will be able to obtain a job in which to support their family. Counsel further states that the applicant is adopted and that his elderly parents do not have the means to assist him, and if the applicant's wife and children remained in the United States while the applicant lived in Jamaica, it would be impossible for the applicant to support them. Counsel argues that the immigration officer failed to give proper weight to the hardship factors and consider them collectively.

We will first address the finding of inadmissibility.

The applicant was found to be inadmissible for having been convicted of a CIMT.

Section 212(a)(2)(A)(i)(I) 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 . . . or an attempt or conspiracy to commit such a crime . . . is inadmissible.

The Board 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 applicant was arrested for burglary of an unoccupied structure and possession of burglary tools. On March 15, 2002, the judge withheld adjudication of guilt and placed the applicant on probation.

The applicant's case arises within the jurisdiction of the Eleventh Circuit Court of Appeals, which has recently reaffirmed the traditional categorical approach for determining whether a crime involves moral turpitude. *See Fajardo v. Attorney General,* 659 F.3d 1301, 1310 (11th Cir. 2011) (finding that the Congress intended the traditional categorical or modified categorical approach to be used to determine whether convictions were convictions for crimes involving moral turpitude and declining to follow the "realistic probability approach" put forth by the Attorney General in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)). In its decision, the Eleventh Circuit defined 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)). The court indicated, however, that 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)).
The applicant was convicted under Florida Statutes § 810.06 for possession of burglary tools. That section states:

> Whoever has in his or her possession any tool, machine, or implement with intent to use the same, or allow the same to be used, to commit any burglary or trespass shall be guilty of a felony of the third degree . . .

Florida Statutes § 812.014, which provides the definition for theft, reads in pertinent parts:

> (1) A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:
>
> (a) Deprive the other person of a right to the property or a benefit from the property.
>
> (b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.
>
> . . .

The applicant was convicted of burglary of an unoccupied structure, which is defined under Florida Statutes § 810.02 and reads in pertinent parts:

> (1)(a) For offenses committed on or before July 1, 2001, "burglary" means . . .
>
> (b) For offenses committed after July 1, 2001, "burglary" means:
>
> 1. Entering a dwelling, a structure, or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter; or
>
> 2. Notwithstanding a licensed or invited entry, remaining in a dwelling, structure, or conveyance:
>
> a. Surreptitiously, with the intent to commit an offense therein;
> b. After permission to remain therein has been withdrawn, with the intent to commit an offense therein; or
> c. To commit or attempt to commit a forcible felony, as defined in s. 776.08.
>
> . . .
>
> (4) Burglary is a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if, in the course of committing the offense, the offender does not make an assault or battery and is not and does not become armed with a dangerous weapon or explosive, and the offender enters or remains in a:
>
> (a) Structure, and there is not another person in the structure at the time the offender enters or remains; or
>
> . . .

Counsel argues that Florida Statues § 810.02 is a divisible statute, and not all of the subsections have the requisite intent for a finding of moral turpitude. Counsel cited *Matter of Louissaint* wherein the Board discussed *Matter of M-*, 2 I&N Dec. 721 (BIA, AG 1946), which held that the crime of burglary involves moral turpitude where the underlying crime involves moral turpitude. 24 I&N Dec. at 756. We agree with counsel that the Board (and Attorney General) has ruled that burglary is not a CIMT, except in cases involving an occupied structure, where the crime the perpetrator intended to commit after breaking into a building does not involve moral turpitude. *Id.*

The applicant was convicted of burglary of an unoccupied structure. The term "burglary" at section 810.02(1)(b) of the Florida Statutes has been interpreted by the Florida courts to require three elements: (1) knowing entry into a dwelling, (2) knowledge that such entry is without permission, and (3) criminal intent to commit an offense within the dwelling. 24 I&N Dec. at 758. Our analysis of the statutory definition of burglary of an unoccupied structure with intent to commit any offense within reveals that a person could conceivably be convicted under the burglary statute and not act with moral turpitude. For example, juveniles could enter an unoccupied structure without permission with the intent to drink beer in violation of an alcohol law. Accordingly, the language of the criminal statute encompasses both conduct that involves moral turpitude, and conduct that does not. We will therefore review the applicant's conviction record under the modified categorical approach to determine whether the conduct for which he was convicted involved moral turpitude.

The applicant provided the information for the burglary of an unoccupied structure charge, which read:

> [The applicant], on or about March 15, 2002 . . . did unlawfully enter or remain in a structure, to wit: a building or the curtilage thereof, located at [redacted] Dade County, Florida, the property of [redacted] without the consent of said victim as owner or custodian, the defendant having an intent to commit an offense therein, to wit: theft in violation of s. 810.02(4)A, Fla. Stat.

The information is clear that the applicant's burglary offense was committed with the intent to commit a theft. The Board has determined that to constitute a crime involving moral turpitude, a theft offense must require the intent to permanently take another person's property. *See Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973) ("Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended."). Florida's theft statute, Florida Statutes § 812.014, is divisible, and can be violated by either permanently or temporarily depriving another person of the right or benefit of that person's property. Not all of the prohibited acts under the statute involve moral turpitude; the offense is not one that categorically involves moral turpitude. As the statutory definition of the applicant's crime includes conduct that would categorically be grounds for removal as well as conduct that would not, then the record of conviction (the charging document, plea, verdict, and sentence) are to be considered in moral turpitude inquiry. 659 F.3d at 1305.

The applicant submitted a document from the court listing his crimes and their disposition, the finding of guilt and order of withholding adjudication/special conditions, the complaint/arrest affidavit, probation warrant, and the information, but he has not provided the plea agreement and/or transcript. To meet his burden to establish his crime does not involve moral turpitude, the applicant must

submit the requisite available documents that comprise the record of conviction and show that they fail to establish that his conviction was based on conduct involving moral turpitude. To the extent such documents are unavailable, this fact must be established pursuant to the requirements in 8 C.F.R. § 103.2(b)(2). The submitted document listing the applicant's convictions provide basic information about the convictions but no additional details. The applicant has not established, in accordance with the requirements in 8 C.F.R. § 103.2(b)(2), that the documents comprising his record of conviction are unavailable. The submitted court record does not demonstrate that the applicant's burglary offense is not for a crime involving moral turpitude. Accordingly, we will not disturb the finding that the applicant's burglary conviction is a crime involving moral turpitude rendering

The applicant was convicted under Florida Statutes § 810.06 for possession of burglary tools, which conviction is related to the burglary conviction. In *Matter of S-*, 6 I&N Dec. 769 (BIA 1955), possession of burglary tools in violation of § 464(b) of the Canadian Criminal Code was held not be a CIMT unless possession was accompanied by an intent to use the tools to commit a crime defined as one involving moral turpitude. The information for the possession of burglary tools charge stated that the applicant possessed "hand tools with intent to use same or allow the same to be used to commit a burglary or trespass." As the applicant has not provided the plea agreement and/or transcript, or established that these documents are unavailable, he cannot demonstrate that his possession of burglary tools offense is not a crime involving moral turpitude. Accordingly, we will not disturb the finding that the applicant's possession of burglary tools conviction is for a crime involving moral turpitude rendering the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The waiver for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act is found under section 212(h) of the Act. That section provides in pertinent part:

> (h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if -
>
> . . .
>
> (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 . . .

A section 212(h) waiver of the bar to admission resulting from violation of section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant is not a consideration under the statute and will be considered only to the extent that it results in hardship to a qualifying relative. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296 (BIA 1996).

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez,* the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. *Id.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. *See generally Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator "must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation." *Id.*

The actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. *See, e.g.*, *Matter of Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. *See Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS,* 712 F.2d 401, 403 (9th Cir. 1983)); *but see Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for

28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

In rendering this decision, the AAO will consider all of the evidence in the record.

The applicant's U.S. citizen wife contended in the letter dated June 10, 2012 that her separation from her husband was in name only because he was with her and her U.S. citizen children for most of the day. She asserted that in March 2010 they made a complete reconciliation, realizing their close bond and the applicant's strong relationship with his four stepchildren. The applicant's wife contended that her earnings are not enough to support her and her children and they rely on the applicant's income. She declared that her husband will not be able to obtain a job in Jamaica due to its high unemployment and his parents will not be able to assist him financially, and she will lose valuable financial support from him. The applicant's wife declared that if she and her children accompanied the applicant to live in Jamaica, they would not have jobs that will enable them to support themselves, and her two children with asthma would lose the medical care they have in the United States. She contended that her children know nothing about Jamaica, do not speak Patios, and would experience extreme culture shock there. She asserted that in Jamaica there is a high level of violent crime, crime is often perpetrated against women, and gangs control the country; and that she could not expose her children to these conditions. The applicant's wife declared that the applicant will be in grave danger in Jamaica.

The asserted hardships to the applicant's wife and stepchildren in remaining in the United States while the applicant lives in Jamaica are financial and emotional in nature. The applicant's wife declares that her income is not enough to support her family and that she financially depends on the applicant. However, as of the date of the appeal, there is no evidence in the record, such as income tax records, consistent with the claim that the applicant financially supported his family and will do so in the future. The applicant's wife contends that she would be anxious about her husband's physical safety in Jamaica, particularly in Rockfort, Kingston, where he will most likely live. The submitted two newspaper articles about gang-related crimes in Jamaica, and the U.S. Department of State Country Reports on Human Rights Practices – 2006 for Jamaica are in agreement with her concern about gang violence in Jamaica. U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, *Country Reports on Human Rights Practices – 2006*: *Jamaica*, 1 (March 6, 2007). Emotional hardship to the applicant's wife and children is described by the applicant's wife in the letters dated December 14, 2009 and June 10, 2012. The applicant's wife asserted in the December letter that regardless of marital problems, she has a close relationship with her husband and would be devastated if separated from him. She indicated that during "the past three months, we have been talking more and more about getting back together under one roof." The applicant's wife declared that on October 28, 2009 she was arrested for fighting, and she and the applicant agreed to live apart due to her temper. We acknowledge the applicant's wife's assertion that she and her children are financially and emotionally dependent on the applicant, and she will be distressed about the applicant's safety in Jamaica. Nevertheless, when we consider the asserted hardship factors together, they fail to demonstrate the hardship to the applicant's wife and stepchildren is extreme and more than the common or typical results of inadmissibility.

The declared hardships in relocating to Jamaica with the applicant are not being able to obtain a job which will support them, not having specialist healthcare for her two children with asthma, culture

shock, and exposure to violent crime and sexual violence directed against women and girls. The applicant's wife contends that they will not be able to obtain jobs in Jamaica. The newspaper article from *The Gleaner* stated that Jamaica had 14 percent unemployment. Income tax records and the Biographic Information reflect that the applicant and his wife have held menial, low-paying jobs in the United States; the applicant worked as a handyman and his wife as a cashier. Medical records from Emergency Department are in agreement with the claim that the applicant's stepchildren, who were born on October 15, 1995 and October 5, 1999, have required emergency care for their asthma. In August 2006, the applicant's stepdaughter was seen for asthma with acute exacerbation, and in November 2007 she was seen for acute upper respiratory infection. Twice in April 2009 the applicant's ten-year-old stepson was seen for acute asthma and respiratory infection. As to the health system in Jamaica, the applicant provided a letter from dated December 10, 2009 in which she stated that she had taken her grandchild, who has asthma, to Jamaica for a vacation, and brought him to the for wheezing. She asserted that they waited hours before he was seen, and the prescribed medication was not effective, so she immediately returned to the United States and grandson went to an emergency room in the United States. declared that her grandson's doctor stated that the medication prescribed to her grandson in Jamaica did not exist in the United States. She contended that she submitted her letter on behalf of the applicant to express concern about the safety of the applicant's family in Jamaica. As previously stated, the submitted evidence of gang-related violence is consistent with the applicant's wife's distress about the lack of physical safety for herself and her children if they lived in Jamaica, particularly in Rockfort, East Kingston, where she asserted they will most likely live. When the asserted hardships of difficulty in obtaining a job which will financially support their family; the high likelihood of not having specialist healthcare for the two children with severe asthma, particularly for the applicant's young stepson; culture shock; and of exposure to violent crime in Rockfort, East Kingston, where the applicant's family will most likely live due to their limited financial means, are considered together, we believe they demonstrate extreme hardship to the applicant's wife and children if they join the applicant to live in Jamaica.

We can find extreme hardship warranting a waiver of inadmissibility only where an applicant has demonstrated extreme hardship to a qualifying relative in the scenario of separation *and* the scenario of relocation. A claim that a qualifying relative will relocate and thereby suffer extreme hardship can easily be made for purposes of the waiver even where there is no actual intention to relocate. *Cf. Matter of Ige*, 20 I&N Dec. 880, 886 (BIA 1994). Furthermore, to relocate and suffer extreme hardship, where remaining the United States and being separated from the applicant would not result in extreme hardship, is a matter of choice and not the result of inadmissibility. *Id.*, *also cf. Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996). As the applicant has not demonstrated extreme hardship from separation, we cannot find that refusal of admission would result in extreme hardship to the qualifying relatives in this case.

Based upon the record before the AAO, the applicant in this case fails to establish extreme hardship to a qualifying family member for purposes of relief under section 212(h) of the Act.

Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

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. The applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.