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U.S. Citizenship
and Immigration

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FILE: [REDACTED] Office: DENVER, CO (SALT LAKE CITY, UT) Date: JAN 24 2008

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:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Denver, Colorado (Salt Lake City, Utah, Sub-office). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed, and the application will be denied.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to 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 applicant seeks a waiver of her ground of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h).

The district director determined that the applicant had been convicted of three crimes involving moral turpitude (retail theft/shoplifting, perjury and petty theft), and that she was inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The district director concluded that the applicant had failed to establish that a qualifying family member would suffer extreme hardship if the applicant were denied admission into the United States. The applicant's Form I-601, Application for Waiver of Ground of Inadmissibility (I-601 Application) was denied accordingly.

On appeal the applicant indicates, through counsel, that she obtained ineffective assistance when she applied for the waiver of her ground of inadmissibility. The applicant asserts further that legal evidence submitted on appeal establishes she was improperly found to be inadmissible for having been convicted of a crime involving moral turpitude. Through counsel, the applicant indicates that she was not convicted, for immigration purposes, of two of the offenses referred to in the district director's decision (retail theft/shoplifting and perjury.) The applicant asserts further that she qualifies for a petty offense exception under section 212(a)(2)(A)(ii) of the Act, 8 U.S.C. § 1182 (a)(2)(A)(ii), because she has only one petty theft conviction. The applicant does not address the district director's finding that she failed to establish a qualifying family member would suffer extreme hardship if she were denied admission into the United States.

Section 212(a)(2)(A)(i) of the Act provides in pertinent part that:

[A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-

- (1) a crime involving moral turpitude . . . or an attempt or conspiracy to commit such a crime . . . is inadmissible.

Evidence contained in the record reflects that the applicant was arrested in 2003, for Retail Theft/Shoplifting in violation of Utah Code (UC) Section 76-6-602. The applicant plead nolo contendere to the offense on September 16, 2003. Her plea was held in abeyance on the condition that she not commit any repeat offenses for six months, and that she pay \$100.00 in court costs. The record reflects that upon completion of these terms, the applicant's plea was withdrawn and the retail theft/shoplifting charge was dismissed.

Section 101(a)(48) of the Act, 8 U.S.C. § 1101(a)(48), defines the term, "conviction" as:

A formal judgment of guilt of the alien entered by a court *or, if adjudication of guilt has been*

withheld, where –

- (i) a judge or jury has found the alien guilty *or the alien has entered a plea of guilty or nolo contendere* or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) *the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.*

(Emphasis added.) The applicant asserts through counsel, that she was not convicted, for immigration purposes, of retail theft/shoplifting, in violation of Utah Code Section 76-6-602, because no punishment or penalty was imposed against her. In support of this assertion, the applicant submits an April 19, 2005, unnamed and unpublished Board of Immigration Appeals decision which held that the assessment of court costs against a respondent, without more, was not punitive, and thus did not qualify as a conviction for immigration purposes.

The AAO finds, upon review of the evidence, that the applicant was convicted, for immigration purposes, of retail theft/shoplifting, in violation of Utah code Section 76-6-602. The AAO notes that the applicant plead nolo contendere to the offense of retail theft/shoplifting, as described in section 101(a)(48)(i) of the Act. The applicant's plea was held in abeyance for 6 months and ultimately dismissed. However, the record reflects that the applicant was ordered to refrain from committing any repeat offenses for six months. The AAO finds that the applicant was thus subjected to a restraint on her liberty. Because a restraint on the applicant's liberty was ordered, in addition to the payment of court costs, the AAO finds that the conditions contained in section 101(a)(48)(ii) of the Act have been met. The applicant was thus convicted of the offense of retail theft/shoplifting, for immigration purposes.

The Board of Immigration Appeals (Board) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992) that:

[I]n 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. . . .

Utah Code Section 76-6-602 provides in pertinent part that:

A person commits the offense of retail theft when he knowingly:

- (1) Takes possession of, conceals, carries away, transfers or causes to be carried away or transferred, any merchandise displayed, held, stored or offered for sale in a retail mercantile establishment with the intention of retaining such merchandise or with the intention of depriving the merchant permanently of the possession, use or benefit of such merchandise without paying the retail value of such merchandise. . . .

The AAO finds that the elements contained in Utah code Section 79-6-602 constitute a crime involving moral turpitude. Furthermore, “[i]t is well-settled that theft or larceny, whether grand or petty, has always been held to involve moral turpitude.” See *Matter of Scarpulla*, 15 I&N Dec. 139, 140-141 (BIA 1974.) The applicant’s conviction for retail theft/shoplifting thus constitutes a conviction for a crime involving moral turpitude.

The evidence in the record reflects that on March 24, 1994, the applicant was convicted of Perjury, in violation of California Penal Code (PC) section 118. The applicant was sentenced to 36 months probation, 90 days in jail, and payment of restitution.

California PC section 118 provides in pertinent part that:

(a) Every person who, having taken an oath that he or she will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which the oath may by law of the State of California be administered, willfully and contrary to the oath, states as true any material matter which he or she knows to be false, and every person who testifies, declares, deposes, or certifies under penalty of perjury in any of the cases in which the testimony, declarations, depositions, or certification is permitted by law of the State of California under penalty of perjury and willfully states as true any material matter which he or she knows to be false, is guilty of perjury.

This subdivision is applicable whether the statement, or the testimony, declaration, deposition, or certification is made or subscribed within or without the State of California.

(b) No person shall be convicted of perjury where proof of falsity rests solely upon contradiction by testimony of a single person other than the defendant. Proof of falsity may be established by direct or indirect evidence.

Through counsel, the applicant asserts that she did not commit the elements contained in the definition of Perjury, as set forth in California PC 118. The applicant indicates that her Perjury conviction was in error, and that she should instead have been convicted for the crime of Falsely Representing Self as Another Person to Peace Officer, in violation of California PC section 148.9, which, she asserts, is not a crime involving moral turpitude.

The AAO notes that it is without authority to go behind the judicial record to determine the guilt or innocence of an alien. *Matter of Madrigal-Calvo*, 21 I&N Dec. 323, 327 (BIA 1996.) Moreover, collateral attacks upon a conviction do not operate to negate the finality of the conviction unless and until the conviction is overturned. *Id.* The applicant has presented no evidence to demonstrate that her conviction for perjury has been overturned. Upon review of the elements contained in the statutory definition of Perjury, as set forth in California PC 118, the AAO finds that the applicant’s conviction for perjury was correctly found to be a crime involving moral turpitude. See generally, *In Matter of P*, 4 I&N Dec. 373 (BIA 1951.)

In addition to the above criminal convictions, the evidence in the record reflects that the applicant was convicted of the crime of Theft, in violation of California PC section 484, on May 15, 1992. The applicant was sentenced to 12 months probation, fined and placed in a work program.

California Penal Code Section 484 provides in pertinent part that:

(a) Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him or her, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his or her wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft. . . .

The AAO finds that the elements contained in California PC 484(a) constitute a crime involving moral turpitude. As discussed above, “[i]t is well-settled that theft or larceny, whether grand or petty, has always been held to involve moral turpitude.” *Matter of Scarpulla, supra*. Furthermore, the U.S. Ninth Circuit Court of Appeals held in *United States v. Esparada-Ponce*, 193 F.3d 1133 (9th Cir. 1999) that the crime of petty theft in California is a crime involving moral turpitude.

The applicant asserts, through counsel, that she qualifies for a petty theft exception to the crime involving moral turpitude ground of inadmissibility, because the California theft conviction is her only conviction for immigration purposes.

Section 212(a)(2)(A)(2)(ii) of the Act, 8 U.S.C. § 1182(a)(2)(A)(2)(ii) provides in pertinent part:

(ii) Exception.-Clause (i)(I) shall not apply *to an alien who committed only one crime if-*

(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).

(Emphasis added.) The AAO has found that the applicant was convicted of more than one crime involving moral turpitude. The applicant has thus failed to establish that she qualifies for the petty theft exception contained in section 212(a)(2)(A)(ii)(II) of the Act. Accordingly, the applicant is inadmissible under section 212(a)(2)(A)(i)(1) of the Act.

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

The Attorney General [now, Secretary, Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2)

. . . .
(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

Section 212(h) of the Act provides that a waiver of inadmissibility is dependent first upon a showing that the bar to admission imposes an extreme hardship on a qualifying family member. If extreme hardship is established, the Secretary then assesses whether an exercise of discretion is warranted.

The record reflects that the applicant is married to a U.S. citizen, and that she has a U.S. citizen son. The applicant's husband and son are qualifying family members for section 212(h) of the Act, extreme hardship purposes.

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999), the Board provided a list of factors deemed relevant in determining whether an alien has established extreme hardship. 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. The Board held in *Matter of Ige*, 20 I&N Dec. 880, 882, (BIA 1994), that, "relevant [hardship] factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists."

U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. See *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). In *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), the U.S. Ninth Circuit Court of Appeals defined "extreme hardship" as hardship that was unusual or beyond that which would normally be expected upon deportation. The U.S. Ninth Circuit Court of Appeals emphasized that the common results of deportation are insufficient to prove extreme hardship.

In support of her extreme hardship claim, the applicant wrote and submitted a letter indicating that she is the primary caretaker for her, now ten-year-old, son and that her son would suffer extreme hardship if he were separated from the applicant. The applicant indicates that her husband's business occupies most of his time, and that her husband would be unable to properly care for their son alone. The applicant also indicates that she and her family have cars and a house. The applicant makes no other extreme hardship assertions.

The AAO finds, upon review of the evidence, that the applicant has failed to establish that her husband and son would suffer extreme hardship if her waiver of inadmissibility were denied and they remained in the United States. The AAO notes that, "[t]he mere showing of economic detriment to qualifying family members is

insufficient to warrant a finding of extreme hardship.” *INS v. Jong Ha Wang*, 450 U.S. 139 (1981). The applicant’s letter and school transcript evidence contained in the record additionally fail to establish that the applicant’s husband and son would suffer hardship beyond that which is normally expected upon the removal of a family member, if the applicant were denied admission into the United States. Furthermore, the record contains no evidence to indicate or demonstrate that the applicant’s husband and son would suffer extreme hardship if they moved with the applicant to Mexico.

Having found the applicant ineligible for relief, the AAO notes no purpose in discussing whether the applicant merits a waiver as a matter of discretion.

Section 291 of the Act provides that the burden of proof is on the applicant to establish eligibility for the benefit sought. The applicant has failed to meet her burden of proof in the present matter. The appeal will therefore be dismissed, and the application will be denied.

ORDER: The appeal is dismissed. The application is denied.