U.S. Department of Homeland Security
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U.S. Citizenship
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Services

PUBLIC COPY

[redacted]

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FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: DEC 11 2006

IN RE: Applicant: [redacted]

APPLICATION: Application for Permanent Residence Pursuant to Section 1 of the Cuban Adjustment Act of November 2, 1966 (P.L. 89-732)

ON BEHALF OF APPLICANT:

[redacted]

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.

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, California Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the applicant is not 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), and the relevant waiver application is, thus, moot. The matter will be returned to the Director for continued processing.

The applicant is a native and citizen of Cuba who was found to be inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. The applicant states he is the spouse of a U.S. citizen and the father of a U.S. citizen child. He now seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), so that he may reside in the United States with his spouse and child.

The Director concluded that the applicant had failed to establish that extreme hardship would be imposed upon a qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the District Director,* dated July 21, 2006.

On appeal, counsel contends that Citizenship and Immigration Services (CIS) erred as a matter of law in finding that the applicant failed to meet the burden of establishing extreme hardship to his qualifying relative, as necessary for a waiver under 212(h) of the Act. *Form I-290B.*

In support of his assertions, counsel submits a brief. The record also includes, but is not limited to, bills; tax statements; and criminal records for the applicant. The entire record was considered in rendering a decision on the appeal.

The applicant has the following criminal history. On May 16, 1997 the applicant pled guilty to the felony of grand theft in the third degree under Florida Statute 812.014(2)(c)(1). *Criminal records, Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida*, dated May 28, 1997.

The applicant was convicted under Florida Statute § 812.014(2)(c) which in 1997 read in pertinent part:

> (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.
>
> (2) 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...

(c) It is grand theft of the third degree and a felony of the third degree, punishable as provided in s. 775.082; s. 775.083; or s. 775.084, if the property stolen is:

1. Valued at $300 or more, but less than $5,000.

In *Matter of Grazley*, the Board of Immigration Appeals found that ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended. 14 I. & N. Dec. 330 (BIA 1973). In that the Florida statute under which the applicant was convicted encompasses thefts involving both the permanent and temporary taking of property, it is treated as a "divisible" statute. *Id.* Therefore it is permissible to look beyond the statute to consider such facts as may appear from the record of conviction to determine whether the applicant was convicted of theft that involved the permanent taking of property. *Id.* The court in *Matter of Short* included the indictment, plea, verdict, and sentence in its definition of the record of conviction. *Matter of Short,* 20 I&N Dec. 136 (BIA 1989). The record of conviction does not include the arrest report. *See In re Teixeira,* 21 I&N Dec. 316, 319-20 (BIA 1996).

In the present matter, the record of conviction includes the indictment or information charging the applicant with grand theft in the third degree; the finding of guilt and order withholding adjudication, which also indicates that the applicant pled guilty to grand theft in the third degree; and the order of probation. None of these documents, however, addresses the applicant's intent in the commission of the crime. As the applicant's record of conviction is complete and fails to specify whether the applicant intended to temporarily or permanently deprive the owner of property, the AAO does not find the record to establish that the applicant has been convicted of a crime involving moral turpitude. Based on the record, the AAO finds that the applicant is not inadmissible under section 212(a)(2)(A) of the Act. The waiver filed pursuant to section 212(h) of the Act is, therefore, moot.

An applicant must demonstrate by a preponderance of the evidence that he is eligible for the benefit sought. Section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361, places the burden of proof upon the applicant to establish that eligibility. The applicant has met his burden of proof in this matter.

ORDER: The appeal is dismissed as the applicant is not inadmissible and the underlying waiver application is moot. The Director shall reopen the denial of the Form I-485 application on motion and continue to process the adjustment application.