U.S. Department of Homeland Security
20 Mass. Avenue, N.W., Rm. A3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

H2

[redacted]

FILE: [redacted] Office: BUFFALO, NY Date: APR 04 2007

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(h) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1182(h)

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Buffalo, New York, 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 therefore moot.

The record reflects that the applicant is a native and citizen of Canada who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude (theft of mail). The record reflects that the applicant has a U.S. citizen spouse. The applicant seeks a waiver of inadmissibility in order to reside with his spouse in the United States.

The district director found that based on the evidence in the record, the applicant had failed to establish extreme hardship to a qualifying relative and the application was denied accordingly. *Decision of the District Director*, dated March 2, 2004.

On appeal, counsel states that the district director did not discuss whether the applicant's conviction constituted a crime involving moral turpitude and that the district director did not adequately discuss the factors which would constitute extreme hardship. *Form I-290B*, received March 26, 2004.

The record includes, but is not limited to, counsel's brief, medical records for the applicant's spouse and the applicant's conviction record. The entire record was reviewed and considered in arriving at a decision on the appeal.

Section 212(a)(2)(A) of the Act states in pertinent part, that:

> (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.

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

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

The record reflects that the applicant pled guilty to theft of mail on June 21, 1995.

The Board of Immigration Appeals ("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.

Neither the seriousness of the criminal offense nor the severity of the sentence imposed is determinative of whether a crime involves moral turpitude. *Matter of Serna*, 20 I&N Dec. 579, 581 (BIA 1992). Before one can be convicted of a crime involving moral turpitude, the statute in question must involve moral turpitude. *Matter of Esfandiary*, 16 I&N Dec. 659 (BIA 1979). The Board has held that the courts and immigration authorities may look to the record of conviction if the statute under which an alien is convicted includes some offenses which involve moral turpitude and others which do not (i.e. a divisible statute), in order to determine the offense for which the alien was convicted. *See Matter of Short,* 20 I&N Dec. 136 (BIA 1989). The court in *Matter of Short* included the indictment, plea, verdict, and sentence in its definition of the record of conviction. *Matter of Short*, at 137-38. It is important to note that the record of conviction does not include the arrest report. *See In re Teixeira,* 21 I&N Dec. 316, 319-20 (BIA 1996).

The applicant's conviction was in violation of § 356(1)(a)(i) of the Canadian Criminal Code (CCC), which states in pertinent part:

> (1) Everyone who
>
> (a) steals
>
> (i) any thing sent by post, after it is deposited at a post office and before it is delivered...is guilty of an indictable offense...

Section 2 of the CCC states that "steal" means to commit theft.

Section 356(1)(a) of the CCC states:

> (1) Every one commits theft who fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his use or to the use of another person, anything whether animate or inanimate, with intent:
>
> (a) to deprive, temporary or absolutely, the owner of it, or a person who has a special property or interest in it, of the thing or of his property or interest in it...

In *Matter of Grazley*, the BIA reviewed this statute, formerly listed at section 283 of the CCC, and held that theft is a crime involving moral turpitude only when a permanent taking is intended. *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973). In *Matter of Grazley*, the respondent was convicted under this theft statute, which requires the intent to deprive the owner, either temporarily or absolutely. *Id.* at 332. The BIA looked to the record of conviction to conclude that the respondent had intended a permanent taking, thus finding

moral turpitude. *Id.* at 332-333. The applicant's denunciation for his 1995 conviction states, in pertinent part:

> Between January 1995 and January 12, 1995, in Montreal, district of Montreal, a theft by sent mail, after its deposit in a mailbox, and before its delivery, committed thus the planned criminal act of article 356(1)(a)(i) of the Canadian Criminal Code.

In the present case, the applicant's record of conviction does not specify whether he intended a temporary or permanent taking. As such, the AAO cannot make a finding of commission of a crime of moral turpitude.

The AAO can only base its decision on prior case law and the record of conviction as defined by the Board. Based on the record, the AAO finds that the applicant did not commit a crime involving moral turpitude and 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.

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 is not required to file the waiver. Accordingly, the appeal will be dismissed as moot.

ORDER: The appeal is dismissed.