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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: LOS ANGELES, CA Date: MAR 28 2007

IN RE: [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:

[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.

Ellen C. Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Los Angeles, California 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). Thus, the relevant waiver application is moot.

The applicant is a native and citizen of Mexico 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's father is a U.S. citizen, his mother is a lawful permanent resident, and his two children are U.S. citizens. 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 parents, children, and spouse.

The District 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 March 18, 2005.

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

In support of these assertions, counsel submits a statement. The record also includes, but is not limited to, court and criminal records for the applicant; a statement from the applicant's family; employment letters for the applicant; and tax statements for the applicant. The entire record was reviewed and considered in rendering this decision.

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

> (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.
>
> (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).

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) . . . 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 . . .

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 shows that on June 11, 1997 the applicant was convicted of felony Burglary under Section 459 of the California Penal Code. *Court records, Superior Court of Northeast Judicial District, County of Los Angeles, State of California,* dated September 30, 2003. The applicant was sentenced to serve 120 days in the county jail, placed on probation for three years, and had to pay a fine. *Id.* On December 16, 2003, the court reduced the Burglary charge under which the applicant was convicted to a misdemeanor. *Minute Order, Superior Court of California, County of Los Angeles*, dated December 16, 2003.

Counsel states that the applicant is not inadmissible because his crime is not one of moral turpitude. *Form I-290B and attached statement.* Counsel asserts that the applicant's charge under Section 459 of the California Penal Code did not specify whether the burglary included the intent to commit an offense involving moral turpitude. *Id.*

In *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), the Board of Immigration Appeals (Board) held 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.) 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 of moral turpitude, the statute in question by its terms, must necessarily involve moral turpitude. *Matter of Esfandiary*, 16 I&N Dec. 659 (BIA 1979); *Matter of L-V-C*, 22 I&N Dec. 594, 603 (BIA 1999).

Section 459 of the California Penal Code states in relevant part that every person who enters any house, room ... vehicle as defined by the Vehicle Code, when the doors are loaded ... with intent to commit grand or petit larceny or any felony is guilty of burglary. *See Section 459, California Penal Code*. The plain language of Section 459 of the California Penal Code involves intent, regardless of whether the crime committed was grand or petit larceny or any felony. As such, the AAO finds that the applicant has been convicted of a crime involving moral turpitude.

Counsel also asserts that the applicant's conviction falls under the petty offense exception, as the maximum penalty he could have received was one year incarceration and he received a sentence of 120 days in the county jail. *Form I-290B and attached statement.* Section 461 of the California Penal Code states in pertinent part:

> 461. 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.

The applicant was sentenced to serve 120 days in the county jail. *Court records, Superior Court of Northeast Judicial District, County of Los Angeles, State of California,* dated September 30, 2003. Based on the length of his sentence and the fact that the court ordered him to serve his sentence in a county jail and not a state prison, it is clear that the applicant was punished for a Burglary in the second degree. As the maximum penalty for the single crime of which the applicant was convicted does not exceed imprisonment for one year and the applicant was not sentenced to a term of imprisonment in excess of six months, the AAO finds the applicant is eligible for the exception to inadmissibility offered by Section 212(a)(2)(A)(ii)(II) of the Act. The applicant is therefore not inadmissible under Section 212(a)(2)(A) of the Act. The waiver filed pursuant to section 212(h) of the Act is 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 inadmissible and is not required to file the waiver. Accordingly, the appeal will be dismissed as moot.

ORDER: The appeal is dismissed as the underlying application is moot.