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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

H2.

[redacted]

FILE: [redacted] Office: PHOENIX, AZ Date: AUG 16 2010

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:

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.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Phoenix, Arizona. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the underlying application is moot. The matter will be returned to the field office director for continued processing.

The applicant, a native and citizen of Mexico, 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 record indicates that the applicant has a lawful permanent resident mother. The applicant seeks a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States.

In her decision dated September 5, 2007, the Field Office Director found the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act for a Theft conviction. She also found that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative as a result of his inadmissibility and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

In a Notice of Appeal to the AAO dated September 17, 2007, counsel states that the Field Office Director failed to fully balance the negative and positive factors in the applicant's case.

Section 212(a)(2)(A) 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 (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

The Board of Immigration Appeals (BIA) 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 AAO notes that the Ninth Circuit has adopted the "realistic probability" approach, as articulated by the U.S. Supreme Court in *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183 (2007), to determine whether or not the elements of a statute categorically render the offense a crime involving moral turpitude. *See Nicanor-Romero v. Mukasey*, 523 F.3d 992, 1004-1007 (9th Cir. 2008). In defining this approach, the U.S. Supreme Court explained:

> [T]o find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime. To show that realistic possibility, an offender, of course, may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.

Duenas-Alvarez, 549 U.S. at 193.

Duenas-Alvarez did not involve the determination of whether the alien was convicted of a crime involving moral turpitude, but rather, whether he was convicted of an aggravated felony under section 101(a)(43)(G) of the Act, 8 U.S.C. § 1101(a)(43)(G). As stated above, the Ninth Circuit has applied the "realistic probability" test as part of the categorical analysis for determining if a conviction is a crime of moral turpitude. *See Nicanor-Romero,* 523 F.3d at 1004-1007. Likewise, the Attorney General in *Matter of Silva-Trevino* found that the question presented in *Duenas-Alvarez* is similar to the question of whether a crime constitutes moral turpitude, and adopted the "realistic probability" standard articulated in *Duenas-Alvarez* as an approach for determining inadmissibility under section 212(a)(2)(A)(i)(I) of the Act. *See* 24 I&N Dec. 687, 698 (A.G. 2008).

The methodology adopted by the Attorney General consists of a three-pronged approach. First, in evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a "realistic probability, not a theoretical possibility," that the statute would be applied to reach conduct that does not involve moral turpitude. 24 I&N Dec. at 698 (citing *Duenas-Alvarez*, 549 U.S. at 193). If a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, "the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude." 24 I&N Dec. at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage or "modified categorical" inquiry in which the adjudicator reviews the "record of conviction" to determine if the conviction was based on conduct involving moral turpitude. 24 I&N Dec. at 698-699, 703-704, 708. The record of conviction consists of documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.* at 698, 704, 708. Finally, if review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary

or appropriate to resolve accurately the moral turpitude question. 24 I&N Dec. at 699-704, 708-709.

The Ninth Circuit Court of Appeals had previously reserved judgment as to whether it would follow the ruling of the Attorney General in *Silva-Trevino* that adjudicators may look beyond the record of conviction as part of the modified categorical inquiry. *See Marmolejo-Campos v. Holder*, 558 F.3d 903, 915 (9th Cir. 2009). However, this question was implicitly addressed in the recent case *Castillo-Cruz v. Holder*, 581 F.3d 1154 (9th Cir. 2009). In *Castillo-Cruz,* the Ninth Circuit addressed whether receipt of stolen property under Cal. Penal Code § 496(a) constitutes a categorical crime involving moral turpitude by applying the "realistic probability" test. 581 F.3d at 1161. The Ninth Circuit concluded that California courts have upheld convictions under Cal. Penal Code § 496(a) in cases where there was no intent to permanently deprive owners of their property, and as such, a conviction under the statute is not categorically a crime of moral turpitude. *Id.* The Court then held that the respondent's conviction was not a crime involving moral turpitude under the modified categorical analysis because the government conceded that there was no evidence in the record establishing that his offense involved an intent to deprive the owner of possession permanently. *Id.* The court cited to its prior precedent that only the record of conviction may be reviewed as part of the modified categorical inquiry, and apparently reviewed only the record of conviction in making this determination. *Id.* (citing *Fernando-Ruiz v. Gonzalez*, 466 F.3d 1121, 1132-33 (9th Cir. 2006). The AAO interprets the holding in *Castillo-Cruz* as a refusal by the Ninth Circuit to accept the more expansive review allowed by the Attorney General, and will thus restrict its review in this case to only the record of conviction.

Having established the methodology followed by the Ninth Circuit Court of Appeals in determining whether a conviction is a crime involving moral turpitude, the AAO will now apply the "realistic probability" standard to the instant case.

The record shows that on July 19, 2006 the applicant was convicted of Theft under Arizona Revised Statutes § 13-1801, 1802, 610, 701, 702, 702.01, and 801 (a class 6 felony) for events that occurred on April 18, 2005. The applicant, born on [redacted], was [redacted] at the time the crime was committed. He served four months in prison, was sentenced to two years probation, and was made to pay fines in the amount of $2,528.00. The AAO notes that the maximum sentence for a class 6 felony under Arizona Revised Statutes § 13-702 is one and a half years.

Arizona Revised Statutes § 13-1802 states that:

> (A). A person commits theft if, without lawful authority, the person knowingly:
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> > 1. Controls property of another with the intent to deprive the other person of such property; or

> 2. Converts for an unauthorized term or use services or property of another entrusted to the defendant or placed in the defendant's possession for a limited, authorized term or use; or
>
> 3. Obtains services or property of another by means of any material misrepresentation with intent to deprive the other person of such property or services; or
>
> 4. Comes into control of lost, mislaid or misdelivered property of another under circumstances providing means of inquiry as to the true owner and appropriates such property to the person's own or another's use without reasonable efforts to notify the true owner; or
>
> 5. Controls property of another knowing or having reason to know that the property was stolen; or
>
> 6. Obtains services known to the defendant to be available only for compensation without paying or an agreement to pay the compensation or diverts another's services to the person's own or another's benefit without authority to do so.
>
> (B). A person commits theft if, without lawful authority, the person knowingly takes control, title, use or management of a vulnerable adult's property while acting in a position of trust and confidence and with the intent to deprive the vulnerable adult of the property. Proof that a person took control, title, use or management of a vulnerable adult's property without adequate consideration to the vulnerable adult may give rise to an inference that the person intended to deprive the vulnerable adult of the property.

Arizona Revised Statutes § 13-1801 states, in pertinent part:

> (4). "Deprive" means to withhold the property interest of another either permanently or for so long a time period that a substantial portion of its economic value or usefulness or enjoyment is lost, to withhold with the intent to restore it only on payment of any reward or other compensation or to transfer or dispose of it so that it is unlikely to be recovered.

U.S. Courts have held that the crime of theft or larceny, whether grand or petty, involves moral turpitude. See *Matter of Scarpulla*, 15 I&N Dec. 139, 140 (BIA 1974) ("It is well settled that theft or larceny, whether grand or petty, has always been held to involve moral turpitude . . ."); *see also Morasch v. INS*, 363 F.2d 30, 31 (9th Cir. 1966) ("Obviously, either petty or grand larceny, i.e., stealing another's property, qualifies [as a crime involving moral turpitude].") However, the BIA has indicated that a conviction for theft is considered to involve moral turpitude only when a

permanent taking is intended. *Matter of Grazley*, 14 I&N Dec. 330, 333 (BIA 1973). The BIA has not clearly defined the meaning of "permanent" in this context. In the subsequently decided *Matter of Jurado-Delgado*, the BIA questioned the premise that "if [an] offense required only an intent to temporarily deprive the owner of the use or benefit of the property taken, the crime would not be one of moral turpitude." 24 I&N Dec. 29, 33 (BIA 2006). The BIA did acknowledge that the intent to permanently deprive the owner of property was necessary to establish moral turpitude, but it also stated that it is "appropriate to consider the nature and circumstances surrounding a theft offense" in to determine if a permanent taking was intended. *Id.* The BIA then held that the respondent's conviction for retail theft, which required "proof that the person took merchandise offered for sale by a store without paying for it" was of such a nature that "it is reasonable to assume that the taking is with the intention of retaining the merchandise permanently." *Id.* at 33-34.

In the instant case, the police probation documents submitted by the applicant do not reflect which subsection of Arizona Revised Statutes § 13-1802 the applicant was convicted under or whether the applicant was convicted for intending to deprive the owner of his or her property permanently or temporarily. However, we are persuaded that, as stated by the Second Circuit Court of Appeals, a temporary deprivation lacking larcenous intent occurs only where a defendant borrows property without permission with the intent to return the property in full after a short and discrete period of time. *See Ponnapula v. Spitzer*, 297 F.3d 172, 184 (2nd Circuit 2002). We do not believe that the BIA's decisions stand for the principle that any taking of property, so long as the perpetrator has the intent to return the property at any time in the future, necessarily lacks the requisite mens rea to constitute a crime involving moral turpitude.

We find that the deprivations at issue here — to deprive an owner of property for so long a time period that a substantial portion of its economic value or usefulness or enjoyment is lost, to withhold property with the intent to restore it only on payment of any reward or other compensation, or to transfer or dispose of property so that it is unlikely to be recovered — do not entail mere borrowing of property with the intent to return it, but rather manifest the evil intent characteristic of permanent takings that have been found to involve moral turpitude. Thus, the AAO finds that the applicant's conviction for theft required the intent to permanently take another person's property and is a conviction for a crime involving moral turpitude.

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

> (A) Conviction of certain crimes.-
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> ...
>
> (ii) Exception.-Clause (i)(I) shall not apply to an alien who committed only one crime if-
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> (I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation

and the date of application for admission to the United States, or

(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).

We find that the applicant's conviction does not qualify for the petty offense exception, as the maximum penalty possible for a conviction of theft under Arizona Revised Statutes § 13-1802 is one and a half years. However, we find that the applicant does qualify for the juvenile exception. The applicant was a juvenile when the crime was committed on April 18, 2005 and it has been five years since the commission of the crime. Furthermore, the applicant, although sentenced to four months in prison, had the imposition of his sentence suspended and was instead placed on probation for two years. Thus, as of April 19, 2010, it has been five years since the crime was committed and the applicant was released from any confinement imposed for the crime.

The AAO makes note that section 212(a)(2)(A)(ii)(I) of the Act states that to qualify for the juvenile exception more than 5 years must have passed before the date of "application for a visa or other documentation and the date of application for admission to the United States." The BIA found in *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992), that "[a]n application for admission . . . is a continuing application, and *admissibility* is determined on the basis of the facts and the law at the time the application is finally considered." 20 I.&N. Dec. at 562 (citations omitted, emphasis added). The AAO finds, therefore, that when adjudicating issues of admissibility, the date of application is ongoing and admissibility is determined based on the facts and law at the time the application is considered as opposed to at the time the application is filed.

The AAO recognizes that, as a general matter, "[a]n applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition." 8 C.F.R § 103.2(b)(1). However, the AAO finds that the decision by the BIA in *Matter of Alarcon* creates an exception to 8 C.F.R § 103.2(b)(1) when adjudicating admissibility issues. As the BIA specifically addressed waivers of inadmissibility under section 212(h) of the Act in *Matter of Alarcon*, its holding does not necessarily apply to other adjustment eligibility criteria or to other adjudications. *See, e.g., Cuadra v. Gonzales*, 417 F.3d 947 (8th Cir. 2005); *Robledo v. Chertoff*, 658 F.Supp.2d 688 (D.Md. 2009).

Therefore, in accordance with *Matter of Alarcon,* the AAO finds that the applicant's application for admission is ongoing and his admissibility is determined based on the facts and law at the present time. The AAO finds that the applicant currently qualifies for an exception under section 212(a)(2)(A)(ii)(I) of the Act as it as been more than five years since the crime was committed and he was released from imprisonment.

Accordingly, the applicant is not inadmissible as a result of his conviction and the field office director's findings regarding this conviction are withdrawn. The applicant's waiver application is thus moot and the appeal will be dismissed.

ORDER: The applicant's waiver application is declared moot and the appeal is dismissed.