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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services

H2

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: AUG 30 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,

Michael Rhew

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant, a native and citizen of Colombia, 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 crimes involving moral turpitude. The record indicates that the applicant has a lawful permanent resident husband and three U.S. citizen children. She 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 March 25, 2008, the Director found that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative as a result of her inadmissibility and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

In a brief to the AAO dated April 21, 2008, counsel states that the applicant was arrested and convicted three times, with the last arrest occurring in 1995. She states that the applicant has turned her life around, she owns a home and a business, and she has three U.S. citizen children, the youngest of whom is thirteen years old. Counsel also notes that the petitioner in the applicant's case, her U.S. citizen son, recently returned home from serving in the U.S. Armed Forces in Iraq. Finally, counsel states that the applicant's spouse and children will suffer emotionally and financially if their mother is found inadmissible, and counsel also indicates that Colombia, where the applicant has not been for 12 years, is not safe.

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.)

In the recently decided *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. 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. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). A realistic probability exists where, at the time of the proceeding, an "actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien's own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude." *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

However, 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 inquiry in which the adjudicator reviews the "record of conviction" to determine if the conviction was based on conduct involving moral turpitude. *Id.* 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.

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 [redacted] However, this "does not mean that the parties would be free to present any and all evidence bearing on an alien's conduct leading to the conviction. (citation omitted). The sole purpose of the inquiry is to ascertain the nature of the prior conviction; it is not an invitation to relitigate the conviction itself." *Id.* at 703.

The record shows that on August 12, 1991 the applicant was convicted of Theft under California Penal Code Section 484(a) for events that occurred on June 19, 1991. The applicant, born on January 21, 1959, was thirty-two years old at the time the crime was committed. The imposition of the applicant's sentence for this conviction was suspended and she was placed on summary probation for two years and made to pay a $100 fine.

The record shows that on July 29, 1992 the applicant was convicted of Theft under Cal. Penal Code § 484(a) for events that occurred on July 3, 1992. The imposition of the applicant's sentence for

this conviction was suspended and she was placed on summary probation for two years and made to pay a $250 fine. The applicant was also ordered to stay away from Sportmart.

The record shows that on August 11, 1995 the applicant was convicted of Burglary under Cal. Penal Code § 459 for events that occurred on August 9, 1995. The imposition of the applicant's sentence was suspended for this conviction and she was placed on summary probation for three years and was ordered to stay away from the Price Club in Burbank, California.

At the time of the applicant's conviction, Cal. Penal Code § 484 provided, in pertinent part:

> (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 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 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 Ninth Circuit Court of Appeals in [redacted] determined that petty theft under Cal. Penal Code § 484(a) requires the specific intent to deprive the victim of his or her property permanently, and is therefore a crime categorically involving moral turpitude. 581 F.3d 1154, 1160 (9th Cir. 2009).

At the time of the applicant's conviction, Cal. Penal Code § 459 provided, in pertinent part:

> Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, railroad car, locked or sealed cargo container, whether or not mounted on a vehicle, trailer coach, as defined in Section 635 of the Vehicle Code, any house car, as defined in Section 362 of the Vehicle Code, inhabited camper, as defined in Section 243 of the Vehicle Code, vehicle as defined by the Vehicle Code when the doors of such vehicle are locked, aircraft as defined by the Harbors and Navigation Code, mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary. As used in this chapter, "inhabited" means currently being used for dwelling purposes, whether occupied or not.

At the time of the applicant's conviction, Cal. Penal Code § 460 provided, in pertinent part:

> 1. Every burglary of an inhabited dwelling house or trailer coach as defined by the Vehicle Code, or the inhabited portion of any other building, is burglary of the first degree.
>
> 2. All other kinds of burglary are of the second degree.

The Board of Immigration Appeals (BIA) has maintained that the determinative factor in assessing whether burglary involves moral turpitude is whether the crime intended to be committed at the time of entry or prior to the breaking out involves moral turpitude. *Matter of M-*, 2 I&N Dec. 721, 723 (BIA 1946). For example, the BIA has held that burglary with intent to commit theft is a crime involving moral turpitude. *See Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982). The Ninth Circuit Court of Appeals has similarly held that burglary with the intent to commit theft is a crime involving moral turpitude. *See Cuevas-Gaspar v. Gonzales,* 430 F.3d 1013, 1020 (9th Cir. 2005)("Because the underlying crime of theft or larceny is a crime of moral turpitude, unlawfully entering a residence with intent to commit theft or larceny therein is likewise a crime involving moral turpitude."). Conversely, the Second Circuit Court of Appeals held in [redacted] that burglary with intent to commit larceny is not a crime involving moral turpitude where there was no intent to deprive the victim permanently of his property. 511 F.3d 102, 110 (2d Cir. 2007). Thus, based solely on the statutory language, it appears that Cal. Penal Code § 459 encompasses (hypothetically) conduct that involves moral turpitude and conduct that does not.

However, in accordance with *Silva-Trevino*, the AAO must determine if an actual case exists in which Cal. Penal Code § 459 was applied to conduct that did not involve moral turpitude. The applicant has not presented and the AAO is unaware of any prior case in which a conviction has been obtained under Cal. Penal Code § 459 for conduct not involving moral turpitude. Further, the record does not establish that this statute was applied to conduct not involving moral turpitude in the applicant's own criminal case. Therefore, the AAO must find the applicant's conviction for burglary under Cal. Penal Code § 459 to be crimes involving moral turpitude, and the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

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 -
>
> (1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that –
>
> (i) the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,
>
> (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
>
> (iii) the alien has been rehabilitated; or

The applicant's convictions were based on actions taken by the applicant on June 19, 1991, July 3, 1992 and August 9, 1995. The AAO notes that an application for admission or adjustment is considered a "continuing" application and the issue of admissibility is adjudicated based on the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992).

Thus, it has now been more than 15 years since the actions that made the applicant inadmissible occurred. The AAO finds that the applicant is now eligible for a waiver under section 212(h)(1)(A) of Act.

The AAO notes that the record reflects that the applicant has not been charged with any crimes since her last conviction in 1995. In her brief, dated April 21, 2008, counsel states that the applicant has become a law-abiding member of her community. She states that the applicant owns a home and a business and pays her income tax. Counsel also states that the applicant has three U.S. citizen children, two U.S. citizen grandchildren, and a lawful permanent resident spouse.

The record also includes an affidavit from the applicant's son dated January 22, 2008. In his affidavit the applicant's son states that he is very close to the applicant, that the applicant has a very close relationship with his daughter, and that the applicant's presence in their lives is very important. The AAO notes that the record includes documentation to show that the applicant owns property and a business in Miami-Dade County, Florida. In addition, the record includes a police clearance letter stating that the applicant has no local criminal record in Miami-Dade County.

The AAO finds that the record establishes that the applicant has been rehabilitated and the record does not establish that the admission of the applicant to the United States would be "contrary to the national welfare, safety, or security of the United States." Thus, the record reflects that the applicant meets the requirements for waiver of his grounds of inadmissibility under section 212(h)(1)(A) of the Act.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the applicant bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

> In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

See Matter of Mendez-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country. " *Id.* at 300. (Citations omitted).

The adverse factor in the present case is the applicant's criminal record. The favorable factors in the present case are the applicant's family ties to the United States, including a thirteen year old daughter and a son who served in the U.S. Armed Forces; the applicant's financial and business ties to the United States; and the applicant's lack of a criminal record or offense since 1995.

The AAO finds that the applicant has established that the favorable factors in her application outweigh the unfavorable factors. In discretionary matters, the applicant bears the full burden of proving his eligibility for discretionary relief. *See Matter of Ducret,* 15 I&N Dec. 620 (BIA 1976). Here, the applicant has now met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained and the application is approved.