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U. S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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FILE: [redacted] Office: MEXICO CITY Date: MAY 25 2011

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h) of the Act, 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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Michael Rhumway

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting District Director ("District Director"), Mexico City, Mexico. The matter came before the Administrative Appeals Office (AAO) on appeal, and the AAO issued a notice of intent to dismiss (NOID) to the applicant. The applicant failed to respond to the NOID. The appeal will now be dismissed.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to: section 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude; section 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having violated a law relating to a controlled substance; section 212(a)(2)(B), 8 U.S.C. § 1182(a)(2)(B), for multiple criminal convictions; and section 212(a)(9)(B)(i)(II), 8 U.S.C. § 1182(a)(9)(B)(i)(II), as an alien unlawfully present in the United States for more than one year. The applicant seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen spouse and child.

The District Director determined that the applicant failed to demonstrate extreme hardship to a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Acting District Director*, dated June 23, 2008.

On appeal, counsel asserts that the applicant's spouse and child will suffer extreme hardship if the applicant's admission is denied. Counsel further asserts that the applicant has rehabilitated. *Appeal Brief,* undated.

On March 16, 2011, the AAO sent a notice of intent to dismiss (NOID) to the applicant. The NOID afforded the applicant 30 days to respond to the basis of the intended dismissal. However, as of the date of this decision, the applicant has not responded to the NOID. Therefore, we will issue a decision based on the record before us, and dismiss the appeal for the reasons stated herein.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

> (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-
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> . . . .
>
> (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.
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> . . . .
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> (v) Waiver. – The Attorney General [now the Secretary of Homeland Security (Secretary)] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to

> the satisfaction of the [Secretary] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

In the present application, the record reflects that the applicant entered the United States from Mexico without inspection in 1992. The applicant resided in the United States until he departed to Mexico in April 2007. The applicant accrued unlawful presence from April 1, 1997, the date of enactment of unlawful presence provisions under the Act, until his departure in April 2007. Consequently, the applicant accrued unlawful presence for a period of ten years prior to his departure from the United States. The applicant is seeking admission within ten years of his April 2007 departure. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

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

(A) Conviction of certain crimes. –

> (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –
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> > (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or
> >
> > (II) a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible. . . .
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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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> > (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).

(B) Multiple criminal convictions.-

Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single

scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

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

> The Attorney General may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), (D), and (E) or subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana . . . .
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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 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 on December 25, 1999, the applicant was arrested and charged with possession of a controlled substance in violation of Cal. Health & Safety Code § 11377 and possession of less than one ounce of marijuana in violation of Cal. Health & Safety Code § 11357(b). On July 10, 2000, the applicant was convicted in the Superior Court of California, County of Santa Clara, of a felony violation of Cal. Health & Safety Code § 11377(a) for possession of a controlled substance. The applicant was sentenced to 120 days imprisonment, payment of fines, completion of a substance abuse program, and three years probation (case number illegible). The record further reflects that on July 26, 2002, the applicant was charged with buying, receiving, concealing, or withholding stolen property, in violation of Cal. Penal Code § 496(a), a felony. On September 24, 2002, the applicant was convicted of this offense in the Superior Court of California, County of Santa Clara. The applicant was sentenced to four months imprisonment, three years probation, completion of a substance abuse program, and payment of restitution (Case No. 00252896).

The AAO notes that a finding of inadmissibility under section 212(a)(2)(B) of the Act requires two or more convictions for which the aggregate sentences to confinement were 5 years or more. The record reflects that the aggregates sentences for the applicant's two convictions constituted eight months. Therefore, the applicant is not inadmissible under section 212(a)(2)(B) of the Act, and this part of the District Director's decision will be withdrawn from the record.

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). This case arises in the Ninth Circuit, and the Ninth Circuit Court of Appeals has adopted the realistic probability standard. *See Nicanor-Romero v. Mukasey*, 523 F.3d 992, 1004-1007 (9th Cir. 2008).

At the time of the applicant's conviction, Cal. Penal Code § 496(a) provided:

> Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in a state prison, or in a county jail for not more than one year. However, if the district attorney or the grand jury determines that this action would be in the interests of justice, the district attorney or the grand jury, as the case may be, may, if the value of the property does not exceed four hundred dollars ($400), specify in the accusatory pleading that the offense shall be a misdemeanor, punishable only by imprisonment in a county jail not exceeding one year.

The BIA has determined that to constitute a crime involving moral turpitude, a theft offense must require the intent to permanently take another person's property. *See Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973) ("Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended."). In *Castillo-Cruz v. Holder*, 581 F.3d 1154 (9th Cir. 2009), 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.*

In accordance with the language of *Silva-Trevino*, the AAO will review the record as part of its categorical inquiry to determine if the statute was applied to conduct not involving moral turpitude in the applicant's own criminal case. The documents comprising the record of conviction include the felony complaint, which provides:

> On or about May 31, 2002, in the County of Santa Clara, State of California, the crime of Buying, Receiving, Concealing, or Withholding Stolen Property, in violation of Penal Code Section 496(a), a Felony, was committed by [redacted] who did buy and receive, and conceal and withhold and aid in concealing and withholding from

> the owner, property, computer laptop and car stereo, that had been stolen, knowing the property to have been stolen.

Second Amended Felony Complaint, dated July 26, 2002.

The felony complaint reveals that the applicant received and purchased property knowing that it was stolen with the intent to conceal and withhold the property from the true owner. The applicant's actions indicate that he intended a permanent taking, and therefore his crime involved moral turpitude. However, the record reflects that the applicant has only been convicted of one crime involving moral turpitude, and therefore he qualifies for the "petty offense" exception. Section 212(a)(2)(A)(ii)(II) provides that the ground of inadmissibility at section 212(a)(2)(A)(i)(I) shall not apply to an alien who committed only one crime if the maximum penalty possible for the crime which the alien was convicted did not exceed imprisonment for one year and, the alien was not sentenced to a term of imprisonment in excess of 6 months. Here, the maximum penalty possible under Cal. Penal Code § 496(a) was one year, and he was sentenced to four months imprisonment. Accordingly, the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having committed a crime involving moral turpitude.

Finally, we will address the applicant's conviction for possession of a controlled substance in violation of Cal. Health & Safety Code § 11377.

At the time of the applicant's conviction, section 11377 of the California Health & Safety Code provided, in pertinent part:

> (a) [E]very person who possesses any controlled substance which is (1) classified in Schedule III, IV, or V, and which is not a narcotic drug, (2) specified in subdivision (d) of Section 11054, except paragraphs (13), (14), (15), and (20) of subdivision (d), (3) specified in paragraph (2) or (3) of subdivision (f) of Section 11054, or (4) specified in subdivision (d), (e), or (f) of Section 11055 . . . shall be punished by imprisonment in a county jail for a period of not more than one year or in the state prison.
>
> (b)(1) Any person who violates subdivision (a) by unlawfully possessing a controlled substance specified in subdivision (f) of Section 11056, and who has not previously been convicted of such a violation involving a controlled substance specified in subdivision (f) of Section 11056, is guilty of a misdemeanor.
>
> (2) Any person who violates subdivision (a) by unlawfully possessing a controlled substance specified in subdivision (g) of Section 11056 is guilty of a misdemeanor.

The applicant's conviction under Cal. Health & Safety Code § 11377 is a violation of a law relating to a controlled substance, and renders him inadmissible under section 212(a)(2)(A)(i)(II) of the Act. A section 212(h) the Act waiver of the bar to admission, resulting from the violation of section

212(a)(2)(A)(i)(II) of the Act, is only available for simple possession of 30 grams or less of marijuana.

The BIA stated that in determining whether an offense relates to a simple possession of 30 grams or less of marijuana, a categorically inquiry of the offense would obviously be insufficient. *Matter of Espinoza,* 25 I&N Dec. 118, 124 (BIA 2009)("it is hard to imagine any offense—apart from a few inchoate offenses—that could 'relate to' it categorically without actually *being* a simple marijuana possession offense."). The BIA determined that it was the intent of Congress to have "a factual inquiry into whether an alien's criminal conduct bore such a close relationship to the simple possession of a minimal quantity of marijuana that it should be treated with the same degree of forbearance under the immigration laws as the simple possession offense itself." *Id.* at 124-25.

Pursuant to *Espinoza, supra,* we must look at the factual circumstances behind the applicant's conviction to determine whether it relates to a simple possession of 30 grams or less of marijuana. The record contains a copy of the arrest report, dated December 25, 1999. The report provides, in pertinent part:

> When I took [redacted] shoe, I noticed possibly 2-3 small objects within the shoe. Upon closer inspection, I saw that the objects were a pinkish substance in a rock like form, individually wrapped pieces of plastic. Based on my training and experience, I recognized the substance to possibly methamphetamines. I also located a folded piece of paper which contained a small amount of marijuana within it. . . . Regarding the controlled substance that [redacted] had in his possession, he stated that he had found it near his home. [redacted] stated that he does not use narcotics, however, he has a friend who does use narcotics and stated he had intended to give the suspected methamphetamines to his friend. [redacted] stated he found them earlier in the day and placed them in his shoe to avoid carrying them in his pockets. [redacted] is a known . . . gang member and is currently on probation.

The arrest report further states that the applicant's blood samples were entered into evidence for analysis by the Santa Clara County crime laboratory. A document from the crime laboratory reflects that a blood sample was taken of the applicant on the date of his arrest. It lists "alcohol, meth, cocaine"; however it is not clear whether this information reflects the results of the blood tests. The applicant has failed to provide lab results, or any other information to reflect that his conviction was related to only simple marijuana possession of 30 grams or less. The AAO notes that the applicant was also charged with possession of less than one ounce of marijuana. However, his conviction was for possession of a controlled substance, indicating that it was for a substance other than marijuana. Therefore, the applicant has not met his burden of proof to establish that he is eligible for a section 212(h) waiver of inadmissibility arising under section 212(a)(2)(A)(i)(II) of the Act.

The applicant is eligible for a section 212(a)(9)(B)(v) waiver of his inadmissibility under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of more than one year. However, even if the AAO found extreme hardship to the applicant's qualifying relatives, as required for a section 212(a)(9)(B)(v) waiver, he would nevertheless be inadmissible under section 212(a)(2)(A)(i)(II) of the Act, for which he does not appear to qualify for a waiver.

No purpose is served in adjudicating a waiver application where, as in this case, an adjustment of status application cannot be approved because of a separate non-waivable ground of inadmissibility. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.