identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

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

U.S. Citizenship and Immigration Services

[redacted]

H2

Date: OCT 03 2011 Office: CHICAGO FILE: [redacted]

IN RE: Applicant: [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:

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 Hancock

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Chicago, Illinois, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Mexico who was found to be 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), for having been convicted of a crime involving moral turpitude. The director indicated that the applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h). The director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On appeal, counsel contends that the applicant demonstrated extreme hardship to his U.S. citizen wife and children. Counsel avers that the applicant's wife and children will experience extreme hardship in Mexico because the applicant is 37 years old and no longer has a support network in Mexico after having lived in the United States for 18 years. Counsel also states that the adjudications officer did not properly consider the fact that the applicant's spouse and children have no ties to Mexico. Counsel asserts that the applicant and his family will most likely relocate to San Pedro de los Naranjos, Salvatierra, Guanajuato, Mexico, which is where the applicant was born. Counsel submits data from the National Institute of Geographical Statistics (INEGI) and avers that INEGI information shows that the locality of San Pedro de los Naranjos has a population of 4,365, of which 66.9 percent have no rightful claim to health care services. Counsel contends that there is also limited access to education in San Pedro de los Naranjos. Counsel avers that the applicant's five-year-old daughter has asthma and his three-year-old son has seizures for which they currently receive treatment. Counsel asserts that it is likely that they will not have access to education and healthcare in Mexico. Counsel contends that the applicant and his wife will not be able to obtain jobs in Mexico for which they are qualified and which will provide a sufficient income to support their family.

Additionally, counsel avers that the applicant's wife has stated that her parents and siblings will not be able to financially assist her if she remains in the United States without her husband. Counsel states that the applicant's mother-in-law recently died and that his father-in-law now lives with the applicant and his wife. Counsel declares that the applicant's wife earns $5.75 working part time and her household expenses exceed her income. Counsel states that the immediate family members of the applicant's wife, with whom the applicant's wife has a close relationship, live in the United States and are U.S. citizens.

We will first address the finding of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude.

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 (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....
>
> 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 April 1994, the applicant pled guilty to and was convicted of theft, a class 3 felony, in violation of section 16-1(a)(1)(A) of Chapter 38 of the Illinois Revised Statutes. The applicant was sentenced to a term of 24 months of probation.

In *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).

At the time of the applicant's conviction in 1994, the statute under which he was convicted, 720 ILCS 5/16(a)(1)(A), provided that "a person commits theft when he knowingly . . . [o]btains or exerts unauthorized control over property of the owner . . . and [i]ntends to deprive the owner permanently of the use or benefit of the property."

The Board 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.").

Accordingly, the AAO finds that conviction for theft under 720 ILCS 5/16(a)(1)(A) requires the intent to permanently take another person's property and thus involves moral turpitude, rendering the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The waiver for inadmissibility under section 212(a)(2)(A) of the Act is found under section 212(h) of the Act. That section 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
>
> (ii) the alien has been rehabilitated; or
>
> (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)(1)(A) of the Act provides that the Attorney General may, in his discretion, waive the application of subparagraph (A)(i)(I) of subsection (a)(2) if 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. An application for admission (and corresponding waiver application) is a "continuing" application, and inadmissibility and waiver eligibility is adjudicated on the basis of the law and facts in effect on the date of the decision. *See Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). Since the conviction rendering the applicant inadmissible occurred in 1994, which is more than 15 years ago, it is waivable under section 212(h)(1)(A)(i) of the Act.

Section 212(h)(1)(A)(ii) and (iii) of the Act requires that the applicant's admission to the United States not be contrary to the national welfare, safety, or security of the United States; and that the applicant establish his rehabilitation.

Evidence in the record to establish the applicant's eligibility under section 212(h)(1)(A)(ii) and (iii) of the Act consists of the statement by the applicant's wife dated June 6, 2007 in which she described the applicant as a responsible husband and father and a homeowner, and as sincerely

regretting the mistake he made in 1994. Furthermore, the applicant expressed remorse for his actions in the statement dated May 5, 2005 and stated that when he committed theft in 1994 he was a juvenile and did not consider the consequences of his actions. The applicant averred that he has matured since then, and has a close relationship with his wife and children and is the head of his household. The record contains evidence showing that the applicant is a homeowner, that his U.S. citizen daughter receives treatment for asthma and his son takes medication for seizures, and that the applicant has been married since June 2000.

In view of the aforementioned record and the fact that the applicant has not committed any crimes since 1994, the AAO finds that there is sufficient evidence to demonstrate that the applicant's admission to the United States is not contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated, as required by section 212(h)(1)(A)(ii) and (iii) of the Act.

In *Matter of Mendez-Moralez,* 21 I&N Dec. 296, 301 (BIA 1996), the Board stated that once eligibility for a waiver is established, it is one of the favorable factors to be considered in determining whether the Secretary should exercise discretion in favor of the waiver. Furthermore, the Board stated that:

> 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).

Id. at 301.

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 factors in the present case are the criminal conviction of theft, entry into the United States without inspection, unlawful presence, and any unauthorized employment. The favorable factors in the present case include the hardship to the applicant's spouse and children if the waiver is denied, the applicant's remorse for his actions, the applicant's property ownership, and the passage of 17 years since the applicant's criminal conviction. Though the AAO finds that the crimes and

immigration violations committed by the applicant are serious in nature, when taken together, we find the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility rests with the applicant. *See* section 291 of the Act. Here, the applicant has now met that burden. Accordingly, the appeal will be sustained and the waiver application will be approved.

ORDER: The appeal is sustained.