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

U.S. Citizenship and Immigration Services

[redacted]

H2

DATE: FEB 15 2012 OFFICE: NEW DELHI, INDIA FILE: [redacted]

IN RE: [redacted]

APPLICATION: Application for Waiver 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.

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 Hurwitz

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Form I-601, Application for Waiver of Grounds of Inadmissibility, was denied by the Field Office Director, New Delhi, India, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of India 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 committed a crime involving moral turpitude. The applicant is married to a U.S. citizen, and he is the beneficiary of an approved Form I-130, Petition for Alien Relative. He seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h) in order to reside in the U.S. with his wife and son.

In a decision dated April 28, 2009, the Director determined the applicant had been ordered removed from the U.S. for an aggravated felony conviction after he was lawfully admitted for permanent residence in the U.S., for an offense involving theft for which the term of imprisonment was more than one year. On this basis, the director determined that the applicant was statutorily barred from section 212(h) of the Act relief. The applicant's Form I-601 was denied accordingly.[1]

On appeal, counsel does not dispute that the applicant's felony theft conviction would make him inadmissible under section 212(a)(2)(A)(i)(I) of the Act, and that it would bar the applicant from section 212(h) of the Act waiver relief. Counsel asserts, however, that the applicant's conviction has been vacated on substantive and procedural grounds, due to his criminal attorney's failure to inform him of the potential immigration consequences of a guilty plea. Counsel asserts that the applicant is therefore no longer "convicted" for immigration purposes and is admissible. In support of these assertions, counsel submits copies of a Motion for, *Motion for Discharge and Dismissal of Prosecution Pursuant to LA. C. Cr. P. Article 893* and an *ORDER* from the Criminal District Court Parish of Orleans dated July 26, 2006. Counsel also refers to U.S. Supreme Court, federal court, and Board of Immigration Appeals (BIA) decisions on the issue.

Section 101(a)(48) of the Act, 8 U.S.C. § 1101(a)(48) provides:

> (A) The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—
>
> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
>
> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

[1] It is noted that the record also contains criminal history information reflecting the applicant was arrested on November 11, 2001 in Gretna, Louisiana for: Driving While Intoxicated; Reckless Operation of a Vehicle; Hit and Run Driving; Driving on Wrong Side of Road; and Aggravated Flight from an Officer. The record contains no court dispositions for these charges, and it is unclear whether the applicant was convicted of the offenses, and if so, whether any of themy constitute crimes involving moral turpitude.

The record in this case reflects that on April 26, 2001, in the Orleans Parish Criminal District Court in Louisiana, the applicant plead guilty to the offense of Theft over $500.00, in violation of section 14:67(A) of the Louisiana Revised Statutes (LRS). The applicant was fined, and he received a two year suspended sentence and two years active probation. The applicant was therefore "convicted" of the offense of Theft, as set forth in section 101(a)(48)(A) of the Act.

Counsel asserts on appeal that the applicant's Theft conviction no longer exists for immigration purposes because it because of the applicant's criminal attorney's failure to inform him of potential immigration consequences of a guilty plea.

Under the current statutory definition of "conviction" provided at section 101(a)(48)(A) of the Act, no effect is to be given in immigration proceedings to a state action that purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. *Matter of Roldan* 22 I&N Dec. 512 (BIA 1999). Any subsequent, rehabilitative action that overturns a state conviction, other than on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings, is ineffective to expunge a conviction for immigration purposes. *Id.* at 523, 528. *See also, Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003) (holding that in light of the language and legislative purpose of the definition of a "conviction" at section 101(a)(48) of the Act, "there is a significant distinction between convictions vacated on the basis of a procedural or substantive defect in the underlying proceedings and those vacated because of post-conviction events, such as rehabilitation or immigration hardships); and *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378, 1379 (BIA 2000) (a conviction vacated under a state criminal procedural statute, rather than a rehabilitative provision, remains vacated for immigration purposes.) The BIA held further in, *Matter of Adamiak*, 23 I&N Dec. 878, 879 (BIA 2006), that a conviction vacated for the failure of the trial court to advise the alien defendant of the possible immigration consequences of a guilty plea was no longer a valid conviction for immigration purposes because the guilty plea has been vacated as a result of a defect in the underlying criminal proceedings, and not for a rehabilitative or immigration hardship purpose. A vacated conviction based on ineffective assistance of counsel would therefore qualify as a conviction vacated on substantive grounds, and no longer serve as a "conviction" for immigration purposes.

In order to determine whether a vacatur is tied to a defect in the underlying conviction, rather than rehabilitative or immigration-related purposes, the adjudicative body starts by examining the order itself. Often, the statutory basis for the order will resolve whether the underlying conviction remains valid for immigration purposes. *See Matter of Pickering,* 23 I. & N. Dec. at 624. Where the order does not specify its statutory basis, the BIA will consider the grounds presented to the court by the petitioner in his or her motion to vacate the conviction. *Id.* ("The resolution of this case ... turns on whether the conviction was quashed on the basis of a defect in the underlying criminal proceedings. In making this determination, we look to the law under which the [ ] court issued its order and the terms of the order itself, as well as the reasons presented by the respondent in requesting that the court vacate the conviction." (Footnote omitted)).

In the present matter, counsel submits the aforementioned copies of the *Motion* and *Order* to establish that the applicant's conviction was vacated based on a procedural or substantive defect in

its proceedings (ineffective assistance of counsel) rather than on rehabilitative grounds. The *Order*, purportedly signed by a judge on July 26, 2002, reflects that the court ordered discharge and dismissal of prosecution of the applicant's theft conviction, pursuant to LA. C. Cr. P. Art. 893. The *Motion* states that the applicant "entered a plea *[sic]* of guilty, pursuant to Article 893, of the code of Criminal Procedure, to a violation of L.R.S. 14:67, relative to Theft." The *Motion* states further that the applicant was placed on probation and received a suspended sentence, that he was required to pay restitution to the victim, and that the court terminated his probation in the matter. The *Motion* then moves, pursuant to LA. C. Cr. P. Art. 893, to discharge and dismiss prosecution in the applicant's theft case. The *Motion* is undated and contains no evidence that it was filed with the Court or with the Deputy Clerk. It appears, however, to relate directly to the above July 26, 2002 *Order*. The *Order* also lacks indicia of authenticity, such as court stamps or the printed name of the judge or other official signing the order. Nevertheless, as we find that these documents do not support counsel's arguments on their face, we will accept, for purposes of this appeal, that these documents reflect that the court did in fact discharge and dismiss prosecution in the applicant's favor pursuant to LA. C. Cr. P. Art. 893.[2]

La. C. Cr. P. Art. 893 provides in pertinent part:

> Art. 893. Suspension and deferral of sentence and probation in felony cases
>
> > A. When it appears that the best interest of the public and of the defendant will be served, the court, after a first or second conviction of a noncapital felony, may suspend, in whole or in part, the imposition or execution of either or both sentences, where suspension is allowed under the law, and in either or both cases place the defendant on probation under the supervision of the division of probation and parole. The court shall not suspend the sentence of a conviction for a crime of violence as defined in R.S. 14:2(B)(1), (2), (3), (4), (5), (9), (10), (11), (12), (13), (14), (15), (16), (18), (20), (21), (22), (26), (27), or (28). . . .
> >
> > . . . .
> >
> > E.(1)(a) When it appears that the best interest of the public and of the defendant will be served, the court may defer, in whole or in part, the imposition of a sentence after conviction of a first offense noncapital felony under the conditions set forth in this Paragraph. When a conviction is

[2] An undated and unsigned copy of a *Uniform Application for Post-Conviction Relief, Petition* is also contained in the record, reflecting a claim for post-conviction relief on the basis that the applicant's attorney failed to advise him that he could be deported from the U.S. if he plead guilty to felony theft. The *Petition* does not reference relief under LA. C. Cr. P. Art. 893, and counsel does not make reference to this *Petition* on appeal. It is further noted that there is no indication that the *Petition* was filed with the court or with the Deputy Clerk. Rather, the *Petition* contains a hand-written notation across the front stating, "Draft #3." The *Petition* is not signed by the applicant's attorney, and the name and address blocks below all signature lines are crossed out. Based on the above factors and discrepancies, the *Petition* will not be considered as evidence pertaining to the applicant's vacated conviction.

> entered under this Paragraph, the court may defer the imposition of sentence and place the defendant on probation under the supervision of the division of probation and parole. . . .
>
> *(2) Upon motion of the defendant, if the court finds at the conclusion of the probationary period that the probation of the defendant has been satisfactory, the court may set the conviction aside and dismiss the prosecution. The dismissal of the prosecution shall have the same effect as acquittal, except that the conviction may be considered as a first offense and provide the basis for subsequent prosecution of the party as a multiple offender, and further shall be considered as a first offense for purposes of any other law or laws relating to cumulation of offenses. Dismissal under this Paragraph shall occur only once with respect to any person. . . .*

(Emphasis added.)

Upon review of the totality of the evidence, the AAO finds that counsel has failed to establish that the applicant's felony theft conviction was vacated based on substantive or procedural grounds rather than on the basis of a rehabilitative statute. The BIA held in *Matter of Cruzado,* that LA. C. CR. P. Art. 893 is a rehabilitative statute. 14 I&N Dec. 513 (BIA 1973) (holding that the setting aside of a respondent's conviction under Article 893 did not vacate the conviction for immigration purposes because it was pursuant to a rehabilitative statute which provided an award for good behavior.) Moreover, an independent review of LA. C. CR. P. Art. 893 reflects that, on the basis of the language of the article itself, it is rehabilitative rather than substantive.

As indicated above, a subsequent, rehabilitative action that overturns a state conviction, other than on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings, is ineffective to expunge a conviction for immigration purposes. Here, the *Motion* and the *Order* contained in the record document only Article 893 as a basis for the state court's dismissal and discharge of the applicant's conviction, and the record contains no credible documentation to establish that the applicant's conviction was vacated on the basis of ineffective assistance of counsel. The assertions of counsel do not constitute evidence. Without supporting documentation, the assertions of counsel are not sufficient to meet the burden of proof in these proceedings. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Accordingly, the applicant remains "convicted" within the meaning of section 101(a)(48)(A) of the Act based on his April 26, 2001, plea of guilty to Theft in violation of LRS § 14:67.

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 (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 *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a 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 699-704, 708-709. 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.

LRS § 14:67 defines the offense of Theft and provides in pertinent part:

> A. Theft is the misappropriation or taking of anything of value which belongs to another, either without the consent of the other to the misappropriation or taking, or by means of fraudulent conduct, practices, or representations. An intent to deprive the other permanently of whatever may be the subject of the misappropriation or taking is essential.
>
> B.(1) Whoever commits the crime of theft when the misappropriation or taking amounts to a value of one thousand five hundred dollars or more shall be imprisoned, with or without hard labor, for not more than ten years, or may be fined not more than three thousand dollars, or both.
>
> (2) When the misappropriation or taking amounts to a value of five hundred dollars or more, but less than a value of one thousand five hundred dollars, the offender shall be imprisoned, with or without hard labor, for not more than five years, or may be fined not more than two thousand dollars, or both.

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."). *See also Matter of Jurado*, 24 I&N Dec. 29, 33 (BIA 2006) (recognizing that in determining whether theft is a crime of moral turpitude, the BIA considers "whether there was an intention to permanently deprive the owner of his property.")

In the present case, the statutory requirements for a conviction of Theft under LRS § 14:67 specify that an intent to permanently deprive the owner of his or her property is required. The offense is therefore categorically a crime involving moral turpitude. A conviction under LRS § 14:67 thus renders the applicant inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act, for commission of a crime involving moral turpitude.

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), (B), . . . of subsection (a)(2) . . . if –
>
> . . . .
>
> (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 [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 . . . . and
>
> (2) the Attorney General [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status

. . . .

> *However, no waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony* or the alien has not lawfully resided continuously in the United States for a period of not less than seven years immediately preceding the date of initiation of proceedings to remove the alien from the United States. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection. (Emphasis added.)

In the present matter, the record reflects that the applicant was previously admitted to the United States as an alien lawfully admitted for permanent residence on March 27, 1997. His theft conviction occurred on April 26, 2001.

In considering whether the respondent's conviction is an aggravated felony, we first apply the "formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." *Taylor v. United States*, 495 U.S. 575, 601 (1990). First, we will look to the statute under which the alien was convicted and compare its elements to the relevant definition of aggravated felony set out in section 101(a)(43) of the Act, 8 U.S.C. § 1101(a)(43). Under this categorical approach, an offense qualifies as an aggravated felony if and only if the full range of conduct covered by the criminal statute falls within the meaning of that term. *Id.*

However, if the criminal statute of conviction could be applied to conduct that would constitute an aggravated felony and conduct that would not, we then see if there is "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." *Gonzales v. Duenas-Alvarez*, 549 U.S. at 193. In applying this approach, the alien "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." *Id.*

If the alien demonstrates a "realistic probability" that the statute would be applied to conduct that falls outside the generic definition of the crime, we then apply a modified categorical approach. Under the modified categorical approach, we conduct a limited examination of documents in the record of conviction to determine if there is sufficient evidence to conclude that the alien was convicted of the elements of the generically defined crime. *Shepard v. U.S.*, 544 U.S. 13 (2005). These documents include the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the transcript of plea proceedings. 544 U.S. at 26.

Section 101(a)(43)(G) of the Act, 8 U.S.C. § 1101(a)(43)(G), includes as an aggravated felony, "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment is at least one year."

Counsel does not dispute that a conviction for theft in violation of LRS § 14:67 constitutes an aggravated felony under section 101(a)(43)(G) of the Act. Furthermore, LRS § 14:67(B)(1) clearly provides that the term of imprisonment for a theft offense over $500.00 is up to five to ten years. The applicant's theft offense thus categorically falls within the definition of an "aggravated felony" as set forth in section 101(a)(43)(G) of the Act. The applicant's conviction under LRS § 14:67 after being admitted as a lawful permanent resident therefore statutorily bars the applicant from section 212(h) waiver relief. Since the applicant is ineligible for a waiver of inadmissibility, no purpose would be served in addressing claims of hardship or determining whether the applicant merits a waiver as a matter of discretion.

In proceedings for an 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 burden has not been met. Accordingly, the Form I-601 appeal will be dismissed.

ORDER: The appeal is dismissed.