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

U.S. Citizenship and Immigration Services

H2

[redacted]

DATE: JAN 2 0 2012 Office: CALIFORNIA SERVICE CENTER FILE: [redacted]

IN RE: [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 Shumway

for 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 is a native and citizen of Cuba and is inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (INA or the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude.[1] The applicant is seeking adjustment of status pursuant to the Cuban Refugee Adjustment Act of 1966 (Cuban Adjustment Act) and is applying for a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), to reside in the United States with his U.S. citizen and lawful permanent resident qualifying relatives.

In a decision dated March 6, 2009, the Director concluded that the applicant did not establish that a qualifying relative would suffer extreme hardship and his application for a waiver of inadmissibility was denied accordingly.

On appeal, counsel for the applicant contests the applicant's inadmissibility and states that the Director erred in not finding extreme hardship to the applicant's qualifying relatives.

The record contains, among other documentation, a legal brief by counsel for the applicant, country reports regarding conditions in Cuba, the applicant's marriage certificate, the applicant's spouse's birth certificate, the applicant's children's birth certificates, a divorce decree for the applicant's prior marriage, evidence of the applicant's payment of child support, the applicant's father's birth certificate and evidence of his lawful permanent residence in the United States, an affidavit from the applicant's father, medical records pertaining to the applicant's father, evidence of the applicant's employment, local police clearances for the applicant, record of the applicant's arrest record and criminal conviction, evidence of the applicant's payment of U.S. income taxes, and documentation of the applicant's Immigration Court proceedings.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record was reviewed and considered in rendering a decision on the appeal.

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[1] The record makes clear that the applicant filed his initial application for adjustment of status to lawful permanent residence on September 12, 1996, after his arrest for grand larceny in Florida on August 31, 1996. The record also makes clear that his application for adjustment of status was approved on September 18, 1997 after his conviction for grand larceny on June 9, 1997. The applicant indicated on his application for adjustment of status that he had an arrest record, but he did not submit the records for his August 31, 1996 arrest. Although the applicant did not submit a complete arrest record at the time of his application for adjustment of status, he indicated that he had been arrested and we find insufficient evidence in the record to support a finding that the applicant committed fraud or willfully misrepresented a material fact. As such, we do not find the applicant to be inadmissible under INA § 212(a)(6)(C), 8 U.S.C. § 1182. The applicant was subsequently ordered removed by the Immigration Judge and at no point has a finding of inadmissibility under INA § 212(a)(6)(C) been made.

The applicant is an arriving alien and subject to an unexecuted order of removal that was entered by the Immigration Judge on April 7, 2004. The applicant is inadmissible under INA § 212(a)(9)(A)(ii), as he was ordered removed and the applicant has not remained outside of the United States for ten years. As such, the applicant also requires permission to reapply for admission. A Form I-212 has not been filed in this case and is not under consideration on appeal.

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

> (A)(i) Except as provided in clause (ii), any 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, or…
>
> is inadmissible.

The term "crime involving moral turpitude" (CIMT) is not defined in the Act or the regulations, but has been part of the immigration laws since 1891. *Jordan v. De George*, 341 U.S. 223, 229 (1951) (noting that the term first appeared in the Act of March 3, 1891, 26 Stat. 1084). 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....

The BIA has also explained that "[t]he test to determine if a crime involves moral turpitude is whether the act is accompanied by a vicious motive or a corrupt mind. An evil or malicious intent is said to be the essence of moral turpitude." *Matter of Flores*, 17 I&N Dec. 225, 227 (BIA 1980) (internal citations omitted).

When determining whether a crime involves moral turpitude, the statute under which the conviction occurred controls. *Matter of Short*, 20 I&N Dec. 136, 137 (BIA 1989). If the statute defines a crime "in which turpitude necessarily inheres," then a conviction under that statute constitutes a crime involving moral turpitude. *Id.*

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, a methodology that allows for review of documents beyond the record of conviction, if necessary. However, the Eleventh Circuit recently rejected the [redacted]

approach, holding that Congress unambiguously intended adjudicators to use the traditional categorical and modified categorical approach to determine whether a person was convicted of a crime involving moral turpitude. *Sanchez Fajardo v. U.S. Att'y Gen.*, 659 F.3d 1303 (11th Cir. 2011).

The record of conviction in this case establishes that the applicant was convicted of Grand Theft, in the third degree, under Florida Statute § 812.014 on June 9, 1997. The applicant was initially sentenced to two years of probation, but that probation was revoked on April 8, 1998 and he was sentenced to three and a half months in the [redacted] Grand theft of the third degree is a third degree felony punishable by a maximum of five years imprisonment. Fl. Stat. § 775.082(3)(d).

Florida Statutes § 812.014, states in relevant part that:

> (1) A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:
>
> (a) Deprive the other person of a right to the property or a benefit from the property.
>
> (b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.

In the instant case, the statute under which the applicant was convicted, Fl. Stat. § 812.014, involves both temporary and permanent takings. A plain reading of Fl. Stat. § 812.014 shows that it can be violated by knowingly obtaining or using the property of another with intent to, either temporarily or permanently, deprive an individual of his or her property or appropriate the property to his or her own use. 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."). Therefore, the AAO cannot find that a violation of Fl. Stat. § 812.014 is categorically a crime involving moral turpitude. The appropriate approach therefore would be the modified categorical approach, where we would look to the record of conviction to determine whether the applicant was convicted under a subpart of the statute that encompasses only acts involving moral turpitude. [redacted] 659 F.3d at 1305. The applicant states that the record of conviction does not establish that he was convicted of a crime involving moral turpitude. The AAO acknowledges that the statute under which the applicant's conviction occurred is a divisible statute and thus the modified categorical approach is the appropriate approach in this case. In the applicant's removal proceedings, however, the Immigration Judge found that the applicant, an arriving alien, was removable for having been convicted of a crime involving moral turpitude under INA § 212(a)(2)(A)(i)(I). The applicant did not appeal the Immigration Judge's order. In view of Immigration Judge's decision and because no new evidence has been submitted by the applicant to illustrate that his conviction did not involve moral turpitude, we will not disturb the Immigration

Judge's holding that the applicant's 1997 conviction under Florida Statute § 812.014 is a crime involving moral turpitude.

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

> 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
> (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; or
> ...

Section 212(h)(1)(A) of the Act provides that the Secretary may, in her 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 to the United States 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. *Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992).

Since the activities that are the basis for the applicant's criminal conviction occurred more than 15 years ago, on August 31, 1996, he is eligible for a waiver under section 212(h)(1)(A) of the Act. Section 212(h)(1)(A) 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 he has been rehabilitated. Evidence in the record to establish the applicant's eligibility under section 212(h)(1)(A)(ii) and (iii) of the Act consists of local police records from Broward County, Florida and Miami Dade County Florida, evidence of the applicant's child support payments to his ex-wife, a letter from the applicant's lawful permanent resident father stating the applicant's role in helping to care for him on a daily basis, and evidence of the applicant's employment and payment of U.S. federal income taxes.

The record indicates that the applicant's last arrest was on April 2, 1998 for a probation violation. The record does not indicate any arrests or convictions for the applicant since that date. In a sworn letter dated December 26, 2008, the applicant's elderly father, who has various medical

conditions documented in the record, states that the applicant goes to his home every day to assist him with bathing, shaving, eating, and other necessities. He also states that the applicant drives him to medical appointments and provides financial assistance to him when needed. There is also documentation in the record that the applicant was employed and filed his federal income taxes in the years preceding his application for a waiver of inadmissibility.

In view of the record, which shows that the applicant has not been convicted of any crimes since 1997 and has been gainfully employed and supporting his family both financially and physically, the AAO finds that the applicant has provided sufficient evidence to demonstrate that his 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 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 factors in the present case are the applicant's conviction for Grand Theft in 1997 and his 2004 removal order based on his 1997 conviction. He has no other known criminal or immigration violations. The favorable factors in the present case are the applicant's family ties to the United States, including the applicant's support of his elderly father and his support of his wife and children, hardship to his wife and children if the application is denied, and the lack of a criminal record or offense since 1998. The AAO finds that the applicant has established that the favorable factors in his application outweigh the unfavorable factors.

In these proceedings, the burden of establishing eligibility for the waiver rests entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met his burden and the appeal will be sustained. The applicant also requires permission to reapply for admission due to his April 7, 2004 removal order. A Form I-212 has not been filed in this case.

ORDER: The appeal is sustained.