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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: JUL 17 2013 Office: NEW YORK CITY 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:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

**DISCUSSION**: The waiver application was denied by the District Director, New York City, New York. An appeal of the denial was sustained by the Administrative Appeals Office (AAO). Upon receipt of new evidence regarding the applicant's criminal history, the AAO reopens the matter on its own motion pursuant to 8 C.F.R. § 103.5(a)(5)(ii) for purposes of entering a new decision. The AAO withdraws its decision dated January 20, 2012. The applicant's appeal will be dismissed and the underlying application denied.

The applicant is a native and citizen of Panama who 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 applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with her U.S. citizen child and U.S. lawful permanent resident (LPR) mother.

In a decision dated June 19, 2009, the district director concluded that the applicant failed to demonstrate that her U.S. citizen son and LPR mother would suffer extreme hardship as a result of her inadmissibility to the United States and denied the waiver application accordingly. In a decision dated January 20, 2012, the AAO found that the applicant's son would experience extreme hardship upon relocation to Panama and in remaining in the United States separated from the applicant. The AAO further found that the application warranted approval in the exercise of discretion. The AAO sustained the applicant's appeal accordingly.

The AAO received information demonstrating that the applicant did not warrant a favorable exercise of discretion, as the documentation in the record shows that the applicant was convicted on July 18, 2011 of criminal possession of stolen property. This conviction was not considered as part of the Form I-601 adjudication, and the AAO was unaware of the criminal proceeding at the time we issued our decision on the applicant's appeal.

On April 14, 2013, the AAO issued a Notice of Intent to Dismiss (NOID) in the applicant's case giving her an opportunity to respond and submit evidence regarding her criminal record and the exercise of discretion. The AAO noted that the applicant's criminal conviction for criminal possession of stolen property in violation of New York Penal Law § 165.40 is a crime involving moral turpitude that renders her inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The AAO further noted that the applicant's six convictions for theft-related crime render her undeserving of a favorable exercise of the Secretary of Homeland Security's discretion.

In response to the NOID, the applicant submitted a statement and other documents, filed on May 13, 2013, explaining that the conviction does not reflect what actually happened and that she innocently used a stolen gift card to purchase some items. She further explains that she pled guilty on the advice of counsel and that she "agreed to plead guilty to a crime [she] did not commit."

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 has been reviewed and considered in rendering a decision on the appeal.

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....
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> 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 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 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.

The record reflects that the applicant was convicted of larceny under New York Penal Law § 155.25 on and attempted petty larceny under New York Penal Law § 110-155.25 on In its decision dated the AAO found that precedent case law of the New York State Courts, the Second Circuit Court of Appeals and the Board showed that the applicant's convictions for attempted petit larceny under New York Penal Law § 110-155.25 and petit larceny under New York Penal Law § 155.25 required the intent to permanently take another person's property and are thus convictions for crimes involving moral turpitude. The applicant is therefore inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act.

As indicated in our April 14, 2013 NOID, the record reflects that the applicant was convicted on of violating New York Penal Law § 165.40, Criminal Possession of Stolen Property, which provides that:

> A person is guilty of criminal possession of stolen property in the fifth degree when he knowingly possesses stolen property, with intent to benefit himself or a person other than an owner thereof or to impede the recovery by an owner thereof.
>
> Criminal possession of stolen property in the fifth degree is a class A misdemeanor.

To be convicted under New York Penal Law § 165.40, a defendant must "knowingly possess[] stolen property, with intent to benefit himself or a person other than an owner thereof or to impede the recovery by an owner thereof ...." The Second Circuit Court of Appeals has held that this crime qualifies as a type of larceny or theft, an offense that has long been recognized as involving moral turpitude. *Michel* v. *INS,* 206 F.3d 253,263-64 (2d Cir. 2000) (affirming this Board's determination that fifth-degree criminal possession of stolen property in violation of New York Penal Law § 165.40 is a crime involving moral turpitude). Additionally, the Board has held that any conviction for possession of stolen goods is a conviction for a crime involving moral turpitude if knowledge of the stolen nature of the goods is an element of the offense. *See Matter of Salvail*, 17 I&N Dec. 19 (BIA 1979).

Though the applicant now asserts that she is innocent of the crime and that she pled guilty solely on the advice of counsel, we note that it is a well-established principle of immigration law that immigration adjudicators cannot entertain collateral attacks on a judgment of conviction unless that judgment is void on its face, and cannot go behind the judicial record of conviction to relitigate the facts that led to the applicant's convictions. *See Matter of Madrigal*, 21 I&N Dec. 323, 327 (BIA 1996); *Matter of Fortis*, 14 I&N Dec. 576, 577 (BIA 1974); *see also Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988) (observing that for purposes of deportability, immigration adjudicators cannot go behind the record of conviction to determine the alien's guilt or innocence).

Additionally, the AAO notes that the applicant was found guilty of the charged criminal possession of stolen property crime, and the record of proceedings indicates that her conviction constitutes a final conviction for immigration purposes. *Matter of Ozkok*, 19 I & N Dec. 546, 551 (BIA 1988); *see also Marino v. INS*, 537 F.2d 686 (2d Cir.1976). Though the applicant indicates in her declaration dated May 10, 2013 that she pled guilty to the crime after "persistent pressure and reassurance from

her [attorney]," the record does not contain any evidence indicating that the applicant's conviction has been vacated for a substantive or procedural defect in the underlying proceeding. *See Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003); *see also Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999). Consequently, the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act. As a person found to be inadmissible under section 212(a)(2)(A) of the Act, the applicant is eligible to apply for a waiver under section 212(h) of the Act.

The waiver for inadmissibility under section 212(a)(2)(A)(i)(I) 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 -
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> . . .
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> (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 . . .

In the AAO's January 20, 2012 decision, we found that the applicant had established extreme hardship to her son. However, though extreme hardship is a requirement for eligibility, it is but one favorable discretionary factor to be considered once established. *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Id.* at 299. The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on her behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the Board stated that:

> The factors adverse to the applicant 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, recency and seriousness, and the presence of other evidence indicative of an 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 the alien began his 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 and service to 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 primary adverse factor in the present case is the applicant's extensive criminal history. The record evidence shows that the applicant has been convicted on six separate occasions for theft-related crimes, the most recent being the applicant's conviction for criminal possession of stolen property. Other unfavorable factors include the applicant's 2008 disorderly conduct conviction; her period of unlawful presence in the United States; her period of unauthorized employment in the United States; and her history of violating the immigration and criminal laws of this country, as evidenced by her seven criminal convictions and her failure to comply with the terms of the nonimmigrant visa upon which she initially entered the United States in 2002. The favorable factors in this case are the extreme hardship to the applicant's son; the general hardship to the applicant's mother and infant son; and the character reference letters by the applicant's Pastor, clinical nurse, cousin, aunt, and friends, submitted in support of the Form I-601 waiver application.

In an affidavit dated July 16, 2009, the applicant stated: "I have been arrested several times for breaking the law. I have stolen and I have reacted to situations without good judgment. For that I am truly sorry." Significantly, the applicant asserts the following in the same declaration: "I am especially sorry that my actions will affect my mother and son in the worst possible way if I have to return to Panama." However, the record reflects that the applicant was convicted on July 18, 2011 of yet another theft-related offense after asserting remorse for her crimes.

In response to the NOID, the applicant indicates that on February 16, 2013 she gave birth to another United States citizen child, that she is taking care of her mother who suffers from diabetes and high blood pressure, and that she joined the Temple of Restoration church.

However, the applicant's [redacted] criminal possession of stolen property conviction, together with her criminal record for similar offenses involving the taking of personal property belonging to others, calls into question the sincerity of the applicant's assertions and denote a lack of good moral character. Thus, while the AAO regrets the difficulties that the applicant's children and mother will face as a result of a denial of the applicant's waiver request, it does not find the favorable factors in the present matter to outweigh the negative and will not favorably exercise the Secretary's discretion.

The AAO notes that a finding of extreme hardship carries considerable weight in the exercise of discretion and has carefully considered the extent to which the applicant's son's extreme hardship mitigates the numerous negative factors in this case. However, the AAO finds the applicant's extensive criminal history, particularly in light of the most recent conviction for another theft-related crime, denotes recidivism and a lack of genuine rehabilitation, which significantly augments the negative weight we assign to the applicant's criminal record. Therefore, the AAO finds that the applicant has failed to demonstrate that the favorable factors outweigh the negative factors in her case.

In discretionary matters, the applicant bears the full burden of proving his or her eligibility for discretionary relief. *See Matter of Ducret,* 15 I&N Dec. 620 (BIA 1976). Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

**ORDER**: The applicant's appeal is dismissed and the underlying application is denied.