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

(b)(6)

[redacted]

Date: JUN 14 2013 Office: ST. LOUIS [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 Rosenberg

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The applicant, a native and citizen of Suriname, was found 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 applicant 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 United States with her U.S. citizen son and U.S. lawful permanent resident sons.

In a decision dated June 13, 2012, the Field Office Director concluded that the applicant did not establish that a qualifying relative would suffer extreme hardship and the application for a waiver of inadmissibility was denied.

On appeal, counsel for the applicant states that the applicant established that a qualifying relative would suffer extreme hardship and that she merits a favorable exercise of discretion.

In support of the waiver application, the record includes, but is not limited to documentation of the applicant's employment, letters regarding the applicant's moral character; biographical information for the applicant, her deceased spouse, and her children; education records and awards concerning the applicant's children; limited financial information for the applicant; and documentation concerning the applicant's immigration and criminal history.

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.

The applicant is inadmissible under section 212(a)(2) of the Act, which provides, 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 –
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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 . . . is inadmissible.
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> . . .

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 indicates that on March 18, 1994 in the County Court of the State of New York, Nassau County, the applicant pled guilty to Attempted Grand Larceny in the third degree in violation of New York Penal Law section 110-155.35. The applicant was sentenced to five years of probation. For immigration purposes, there is no distinction with respect to crimes involving moral turpitude between the commission of the substantive crime and the attempt to commit it. *See Matter of Awaijane,* 14 I&N Dec. 117, 118-19 (BIA 1972) (citing *United States ex rel Meyer v. Day,* 54 F.2d 336, 337 (2d Cir. 1931)).

Section 155.35 of the New York Penal Law stated at the time of the applicant's conviction:

> Grand larceny in the third degree
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> A person is guilty of grand larceny in the third degree when he steals property and when the value of the property exceeds three thousand dollars.

> Grand larceny in the third degree is a class D felony.

On the same day and before the same court, the applicant also pled guilty to Petty Larceny in violation of New York Penal Law section 155.25. For this offense the applicant was sentenced to three years of probation to be served concurrently with the order of probation on her other offense.

Section 155.25 of the New York Penal Law stated at the time of the applicant's conviction:

> Petit larceny
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> A person is guilty of petit larceny when he steals property.
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> Petit larceny is a class A misdemeanor.

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 *Matter of Jurado*, 24 I&N Dec. 29, 33-34 (BIA 2006), the BIA held that retail theft is a crime involving moral turpitude because the nature of retail theft is such that it is reasonable to assume such an offense would be committed with the intention of retaining merchandise permanently. Furthermore, although New York Penal Law § 155.25 and § 155.25 do not make a distinction as to whether a conviction under these sections of the statute would constitute a permanent or temporary taking, New York courts have found that to establish larcenous intent, a permanent taking must be intended.

Larceny is defined in New York Penal Law section 155.05 as "when, with the intent to deprive another of property or to appropriate the same to himself or to a third person, [a person] wrongfully takes, obtains or withholds such property from an owner thereof." Deprive is defined in paragraph 3 of New York Penal Law section 155.00:

> To "deprive" another of property means (a) to withhold property or cause it to be withheld from another permanently or for so extended a period or under such circumstances that the major portion of its economic value or benefit is lost to the owner, or (b) to dispose of the property in such a manner or under such circumstances as to render it unlikely that an owner will recover such property.

New York courts have also indicated that larcenous intent is shown when the defendant intends to exercise control over another's property for an extended period or under such circumstances as to acquire the major portion of its economic value or benefit. *See People v. Jennings*, 69 N.Y.2d 103, 118-122, 504 N.E.2d 1079, 1086-89 (N.Y. 1986). In *People v. Hoyt*, 92 A.D.2d 1079, 461 N.Y.S.2d 569, 570 (N.Y. App. Div. 3rd Dept. 1983) the court found that to warrant a larceny conviction, intent to permanently deprive the owner of his property must be established and that a temporary withholding of property, by itself, would not constitute larcenous intent.

In *Ponnapula v. Spitzer*, the Second Circuit Court of Appeals found that the acts covered by New York Penal Law section 155.00 are permanent takings that manifest larcenous intent. 297 F.3d 172,

183-84 (2nd Cir. 2002). The court observed that while the intent to temporary deprive an owner of property does not constitute larcenous intent, such a temporary deprivation occurs only where a person borrows property without permission with the intent to return the property in full to the owner after a short and discrete period of time. *Id.* at 184. Thus, the AAO finds for the applicant to be convicted of any crime involving larceny under the New York Penal Law, it must have been established that he intended to permanently take another person's property. Therefore, the applicant's convictions for attempted grand larceny and petty larceny are both crimes involving moral turpitude, making the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The applicant has not contested her inadmissibility on appeal.

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
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> . . .

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, she is now 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: documentation of the applicant's employment; statements from community members, former patients, former employers; colleagues; the current employer of the applicant; documentation regarding the applicant's career as a nurse; and documentation regarding the applicant's sons' successful educational pursuits and the positive role that the applicant has played in her sons' lives. The record does not indicate any arrests or convictions for the applicant that are unrelated to crime that led to the applicant's inadmissibility.

In view of the record, which shows that the applicant's only convictions pertain to criminal activities performed by the applicant prior to March 18, 1994, that the applicant has not been arrested for or convicted of any other crimes, that the applicant has sought and obtained an education and employment, that the applicant is the caring mother of a U.S. citizen son and two U.S. lawful permanent resident sons, and that numerous individuals have attested to the moral character of the applicant, the AAO finds that the applicant has provided sufficient evidence to demonstrate that her admission to the United States is not contrary to the national welfare, safety, or security of the United States, and that she has been rehabilitated, as required by section 212(h)(1)(A)(ii) and (iii) of the Act.

Demonstrating that admission to the United States is not contrary to the national welfare, safety, or security of the United States, and that she has been rehabilitated, as required by section 212(h)(1)(A)(ii) and (iii) of the Act, is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Id.* 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 discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See* Matter of T-S-Y-, 7 I&N Dec. 582 (BIA 1957). The AAO must "balance 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." *See Matter of Mendez-Moralez*, 21 I&N Dec. 296, 300 (BIA 1996) (citations omitted).

The adverse factors in the present case are the applicant's convictions for attempted grand larceny and petit larceny in 1994. The applicant has no other known criminal convictions. The favorable factors in the present case are the applicant's family ties to the United States, especially the positive role that the record indicates that the applicant has played in the lives of her sons, the applicant's career as a licensed practical nurse (LPN), and the numerous letters of recommendations that she received from community members, including her employer, former employers, and the principal and other employees at her son's school. The AAO finds that the applicant has established that the favorable factors in her application outweigh the unfavorable factors.

The crimes committed by the applicant are serious in nature and cannot be condoned. Nonetheless, the AAO finds that the applicant has established that the favorable factors in her application outweigh the unfavorable factors. Therefore, a favorable exercise of the Secretary's discretion is warranted.

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. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.