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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

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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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Honduras. In her decision, dated January 11, 2012, the field office director found that the applicant was 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 committing a crime involving moral turpitude. The field officer director indicated that the applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), so that she could continue to reside in the United States with her U.S. citizen daughter and lawful permanent resident spouse. The field office director found that the applicant had failed to establish that her 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 asserts that the field office director failed to give the psychological evaluation in the record the appropriate evidentiary weight and failed to fully consider country conditions in Honduras. Counsel states that the applicant's qualifying relatives would suffer extreme hardship as a result of the applicant's inadmissibility and that the applicant warrants the favorable exercise of discretion.

Section 212(a)(2) of the Act states that:

> (A)(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 new methodology for determining whether a conviction is a crime involving moral turpitude. 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).

The record indicates that on June 16, 1998 the applicant was convicted of larceny in Arlington, Virginia for events that occurred on February 21, 1998. The applicant was sentenced to 365 days in jail. The criminal complaint included in the record indicates that the applicant stole items valued at $200 or more from a [redacted]

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." *See In re Jurado-Delgado*, 24 I&N Dec. 29, 33 (BIA 2006). In *Matter of Jurado*, 24 I&N Dec. 29, 33-34 (BIA 2006), the BIA found that violation of a Pennsylvania retail theft statute involved 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. The reasoning in *Jurado* is applicable to the present case as the criminal complaint indicates that the applicant committed retail theft. Furthermore, in *Foster v. Commonwealth*, 44 Va.App. 574, 606 S.E.2d 518, Va.App. (2004), the Court of Appeals of Virginia stated that larceny in Virginia is defined by case law as "the wrongful or fraudulent taking of personal goods of some intrinsic value, belonging to another, without his assent, and with the intention to deprive the owner thereof permanently." (citations omitted). *Id.* at 577-81. Because the applicant's conviction for larceny requires proving an intention to permanently deprive the owner of his or her property, the AAO finds that the offense of which the applicant was convicted involves moral turpitude.

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

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 --
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> > (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 . . .

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 events which led to the applicant's criminal conviction for which the applicant was found inadmissible occurred more than 15 years ago, this conviction is waivable 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 she has been rehabilitated.

The record indicates that the applicant entered the United States in 1995 and has no other criminal record besides her one conviction in 1998. In her statement, the applicant expresses regret for the mistake she made in 1998, when she was 26 years old. Since her conviction, the applicant married and had a U.S. citizen daughter. The record also indicates that she has another son or stepson with her spouse, who lives with her and her spouse, and who has three children of his own. Moreover, the applicant's spouse states that the applicant is very close to her children and is caring and supportive towards him.

The AAO finds that the record indicates 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 she has been rehabilitated, as required by section 212(h)(1)(A) of the Act. The supporting statements in the record attest to the applicant's rehabilitation and close relationship with her family members who reside in the United States. The applicant has not been convicted of a violent or dangerous crime. Her conviction involved retail theft and it occurred over 15 years ago. Consequently, she has established that she merits a waiver under section 212(h)(1)(A) of the Act.

Furthermore, the applicant has established that the favorable factors in her application outweigh the unfavorable factors. The favorable factors include the applicant's rehabilitation, the applicant's family ties in the United States, the passage of 15 years since her conviction, and the hardships her family members would experience as a result of her inadmissibility. The negative factors in her case are her conviction for theft and period of unauthorized presence in the United States.

While the AAO cannot condone the applicant's criminal conviction and immigration violation, the AAO finds that the positive factors outweigh the negative and a positive exercise of discretion is appropriate in this case.

In proceedings for 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 now met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained and the application is approved.