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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: DEC 27 2007

IN RE: [redacted]

APPLICATION: Application for Permission to Reapply for Admission into the United States after Deportation or Removal under section 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

ON BEHALF OF APPLICANT: Self-represented

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and it is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of El Salvador who, on December 11, 1988, filed a Request for Asylum in the United States (Form I-589). On August 12, 1997, the applicant was convicted of petty theft in violation of sections 484 and 488of the California Penal Code (CPC) and second-degree burglary in violation of section 460B of the CPC. The applicant was sentenced to three years of probation and ten days in jail. On January 9, 1998, the applicant's Form I-589 was referred to the immigration judge and he was placed into immigration proceedings. On March 19, 1998, the immigration judge ordered the applicant removed *in absentia*. The applicant failed to comply with the order of removal. On May 18, 2001, the applicant pled guilty to and was convicted of petty theft with a prior conviction in violation of sections 666, 484(a) and 488 of the CPC. The applicant was sentenced to three years of probation and thirty days in jail. On October 3, 2005, the applicant's 2001 conviction for petty theft was set aside and the charges were dismissed pursuant to section 1203.4 of the CPC because he had fulfilled the conditions of his probation. On February 13, 2006, the applicant filed the Form I-212. The applicant is inadmissible under section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii). He seeks permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii) in order to remain in the United States and seek special treatment for diabetes.

The director determined that the applicant was inadmissible pursuant to sections 212(a)(2)(A)(i)(I), 212(a)(6)(A), and 212(a)(9)(A)(ii) of the Act, 8 U.S.C. §§ 1182(a)(2)(A)(i)(I), 1182(a)(6)(A) and 1182(a)(9)(A)(i), for having been convicted of a crime involving moral turpitude, being present in the United States without inspection, and seeking admission after having been ordered removed from the United States. The director determined that the applicant did not warrant a favorable exercise of discretion and denied the Form I-212 accordingly. *See Director's Decision* dated September 27, 2006.

On appeal, the applicant contends that his conviction is only a misdemeanor that has been expunged and is not enough to render him inadmissible. The applicant contends that he has rehabilitated himself since 1996, has never been arrested for a felony, and that his employer and three other individuals are willing to attest to his good moral character. *See Form I-290B,* dated November 1, 2006. In support of his contentions, the applicant submits the referenced Form I-290B, criminal conviction records, an employment verification letter and affidavits from friends. The entire record was reviewed in rendering a decision in this case.

Section 212(a)(9) of the Act states in pertinent part:

> (A) Certain aliens previously removed.-
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> (i) Arriving aliens.- Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within five years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.
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> (ii) Other aliens.-Any alien not described in clause (i) who-

(I) has been ordered removed under section 240 or any other provision of law, or

(II) departed the United States while an order of removal was outstanding, and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case on a alien convicted of an aggravated felony) is inadmissible.

(iii) Exception.- Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Secretary has consented to the alien's reapplying for admission.

Before the AAO can weigh the discretionary factors in this case, it must first determine whether the applicant is eligible to apply for the relief requested. The applicant is inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act based on his convictions for petty theft and second-degree burglary in 1997 and 2001.

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 . . . or an attempt or conspiracy to commit such a crime . . . is inadmissible.

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) . . . of subsection (a)(2) . . . if –

. . . .

(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 . . .

On appeal, the applicant contends that his 2001 conviction has been set-aside under California law. A "conviction" for immigration purposes is defined in section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), as:

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.

Section 1203.4 of the CPC provides a limited expungement even under state law, and a conviction expunged under that provision remains a conviction for immigration purposes. As such, the applicant's conviction for petty theft in 2001 is a conviction for immigration purposes. The AAO notes that there is no evidence in the record to establish that the applicant's 1997 conviction for petty theft and second-degree burglary was set-aside. Even if the 1997 conviction has been set-aside, as discussed above, the conviction would still be a conviction for immigration purposes.

On appeal, the applicant contends that he has never been arrested for a felony and that his conviction, because it is a misdemeanor, is insufficient grounds to deny his Form I-212. Whether the applicant was convicted of a felony or a misdemeanor has no bearing on whether he has been convicted of a crime involving moral turpitude. Neither the seriousness of the criminal offense nor the severity of the sentence imposed is determinative of whether a crime involves moral turpitude. *Matter of Serna*, 20 I&N Dec. 579, 581 (BIA 1992). The AAO finds, therefore, that the applicant's convictions for petty theft and second-degree burglary render him inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act.

An applicant who is inadmissible under section 212(a)(2)(A)(i)(I) of the Act may, as previously noted, be eligible for a waiver under section 212(h) of the Act, if he or she can establish extreme hardship to a qualifying relative. Hardship the alien himself is not a permissible consideration under the statute. Instead, a section 212(h) waiver is dependent upon a showing that the bar to admission imposes an extreme hardship on the U.S. citizen or lawfully resident spouse, parent or child of the applicant. As the applicant stated on the Form I-212 that he does not have a U.S. citizen or lawful permanent resident spouse, parent or child, he has no qualifying family members on which to base a claim of extreme hardship. The AAO therefore finds that the applicant is inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act and is statutorily ineligible for relief pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h).

Matter of Martinez-Torres, 10 I&N Dec. 776 (reg. Comm. 1964) held that an application for permission to reapply for admission is denied, in the exercise of discretion, to an alien who is mandatorily inadmissible to the United States under another section of the Act, and no purpose would be served in granting the application.

The applicant is subject to the provisions of section 212(a)(2)(A)(i)(I) of the Act, which are very specific and applicable. The applicant is statutorily ineligible for a waiver of this ground of inadmissibility. Therefore, no purpose would be served in the favorable exercise of discretion in adjudicating the application to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act. As the applicant is statutorily inadmissible to the United States, the appeal will be dismissed.

ORDER: The appeal is dismissed.