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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE: [REDACTED] Office: MIAMI, FLORIDA

Date: JAN 29 2009

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:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

A handwritten signature in black ink, appearing to read "John F. Grissom".

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Miami, Florida, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Colombia 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 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 remain in the United States and reside with her U.S. citizen husband.

The district director concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated September 28, 2006.

On appeal, counsel for the applicant contends that the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act, as the record does not show that her conviction constitutes a crime involving moral turpitude. *Brief from Counsel*, undated. Thus, counsel asserts that the applicant does not require a waiver of inadmissibility. *Id.* at 3. In the alternative, counsel asserts that the applicant has shown that her husband will experience extreme hardship if the present waiver application is denied. *Id.* at 3-5.

The record contains a brief and letters from counsel; statements from the applicant's husband; records of the applicant's arrests and criminal conviction; copies of medical documents for the applicant's husband and mother-in-law; a copy of a birth record for the applicant; a copy of the applicant's marriage certificate; a copy of the applicant's husband's naturalization certificate; copies of employment and tax records for the applicant and her husband, and; documentation on conditions in Colombia. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(2)(A) of the Act states in pertinent part, that:

- (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.
- (ii) Exception.-Clause (i)(I) shall not apply to an alien who committed only one crime if-
 -
 - (II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or

of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

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

- (h) The Attorney General [now Secretary, Homeland Security, “Secretary”] may, in his discretion, waive the application of subparagraphs (A)(i)(I) [or] (B) . . . 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
- (1) (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 [now the Secretary of Homeland Security (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 . . .

The record reflects that the applicant pled guilty to Larceny - Grand Theft in the Third Degree under Florida Statute § 810.14(2)(c). The applicant was sentenced to two years probation. The conduct for which the applicant was convicted occurred on February 6, 1993. Where a theft statute provides for culpability whether a taking was temporary or permanent, a conviction under such provision does not immediately give rise to inadmissibility. *Matter of Grazley*, 14 I&N Dec. 330, 333 (BIA 1973). Florida Statute § 812.014 criminalizes the taking of property with the intent to “either temporarily or permanently” deprive the owner of the property. **Florida Statute § 812.014**. The Board of Immigration Appeals has found that, where a conviction is based on such a divisible theft statute, “it is permissible to look beyond the statute to consider such facts as may appear from the record of

conviction to determine whether the conviction was rendered under the portion of the statute dealing with crimes that do involve moral turpitude.” *Matter of Grazley* at 333. In the present matter, the record of the applicant’s conviction contains an arrest record that reflects that she concealed retail property in a shopping bag and exited a store. *Broward County Arrest Record*, dated February 6, 1993. Nothing in the record of the applicant’s conviction records suggests that she intended to temporarily take the property. Accordingly, the record supports that the applicant intended to permanently take the retail property and her conviction for Larceny - Grand Theft is a crime involving moral turpitude. See *Matter of M-*, 2 I&N Dec. 686 (BIA 1946); *Matter of Grazley* at 333.

As the applicant has only been convicted of one crime, the AAO considers whether her conviction meets the “petty offense” exception in Section 212(a)(2)(a)(ii) of the Act. The applicant did not receive a sentence of incarceration. However, the maximum sentence possible for a third degree felony in the State of Florida is five years of imprisonment. Florida Statute § 775.082(3)(d). Thus, conviction for a third degree felony under Florida Statute § 810.14(2)(c) does not constitute a petty offense as contemplated by Section 212(a)(2)(a)(ii) of the Act.

Based on the foregoing, the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

In examining whether the applicant is eligible for a waiver, the AAO will assess whether she meets the requirements of section 212(h)(1)(A) of the Act. The applicant’s conviction for which she is inadmissible involved her conduct on February 6, 1993. As this conduct took place over 15 years ago, she meets the requirement of section 212(h)(1)(A)(i) of the Act.

The record does not reflect that admitting the applicant would be contrary to the national welfare, safety, or security of the United States. Section 212(h)(1)(A)(ii) of the Act. While the applicant was convicted of grand theft, she performed the culpable conduct on February 6, 1993, over 15 years ago. The record does not show that the applicant has engaged in criminal activity since her conviction in 1993. There is nothing in the record that suggests that the applicant has exhibited violent behavior at any time. The applicant has not been a public charge since her arrival in 1986. Accordingly, the applicant has shown that she meets the requirement of section 212(h)(1)(A)(ii) of the Act.

The applicant has shown by a preponderance of the evidence that she has been rehabilitated. Section 212(h)(1)(A)(iii) of the Act. As discussed above, there is no evidence that she has engaged in criminal activity since her conviction in 1993. The record shows that she has conducted herself well during the last 15 years, including paying taxes and assisting her U.S. citizen husband and mother-in-law with their health problems and day-to-day needs. The record does not reflect that the applicant has a propensity to engage in further criminal activity. Accordingly, the applicant has shown that she meets the requirement of section 212(h)(1)(A)(iii) of the Act.

Based on the foregoing, the applicant has shown that she is eligible for consideration for a waiver under section 212(h)(1)(A) of the Act.

In determining whether the applicant warrants a favorable exercise of discretion under section 212(h) of the Act, the Secretary must weigh positive and negative factors in the present case.

The negative factors in this case consist of the following:

The applicant has been convicted of grand theft in the third degree for stealing merchandise from a retail store. Additional negative factors include her initial entry without inspection and periods of unauthorized presence.

The positive factors in this case include:

The applicant has family ties to the United States, including her husband and mother-in-law; the applicant's husband would experience significant hardship should the applicant be prohibited from remaining in the United States; the applicant has not been convicted of a crime since 1993, in over 15 years, and; the applicant assists her husband and mother-in-law with their health conditions and day-to-day needs.

While the AAO cannot condone the applicant's criminal conviction and immigration violations, the positive factors in this case outweigh the negative factors.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met her burden that she merits approval of her application.

ORDER: The appeal is sustained.