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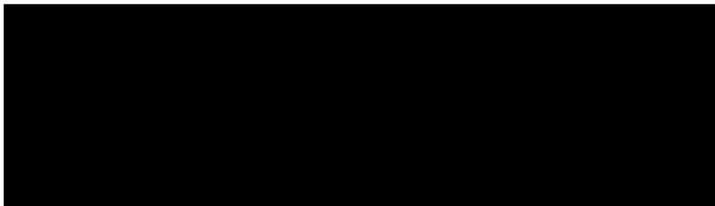
Office: CHICAGO, IL

Date: JUL 02 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:



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.

John F. Grissom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The District Director, Chicago, Illinois, denied the waiver application, and it is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed, the previous decision of the district director will be withdrawn, and the application declared moot.

The applicant is a native and citizen of Poland 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's parents are U.S. lawful permanent residents. He 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 his father and mother.

The district director concluded that the applicant had 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.

The record reflects that on November 27, 2002, the applicant was convicted of *aggravated assault* in violation of section 12-2(a)(1) of the Illinois Criminal Code (720 ILCS 5/12-2(a)(1)). The applicant was sentenced to five days of community service and one year of supervision (Circuit Court of Cook County, Illinois, [REDACTED]). On January 25, 2006, the applicant was convicted of *theft* in violation of section 16-1(a)(1) of the Illinois Criminal Code (720 ILCS 5/16-1(a)(1)). The applicant was sentenced to six months of court supervision, three days in the Sheriff's Work Alternative Program (SWAP), and ordered to pay restitution (Circuit Court of Cook County, Illinois, [REDACTED]). On April 9, 2009, the applicant's conviction for theft was vacated by the Circuit Court of Cook County [REDACTED].

On appeal, counsel asserts that the applicant was convicted of aggravated assault under a divisible statute. Counsel contends that under the divisible statute analysis, an alien is not inadmissible for a crime involving moral turpitude unless the record of conviction demonstrates that the crime itself involved moral turpitude. Counsel notes that *Matter of Medina*, 15 I&N Dec. 611 (BIA 1976), is inapplicable in the applicant's case because at the time of the *Medina* decision, the divisible statute analysis had not been articulated by the Board of Immigration Appeals. Counsel contends that because there is no information contained in the record related to the facts and circumstances of the underlying offense, there is no evidence that the applicant's conviction involved anything more serious than a simple assault. Counsel asserts that under this analysis, the applicant's theft conviction is his only crime involving moral turpitude, and he qualifies for the petty offense exception to this ground of inadmissibility. Counsel notes that alternatively, the applicant has demonstrated that he is eligible for a 212(h) waiver.

The record reflects that on April 30, 2009, counsel filed a brief and additional evidence with the AAO. Counsel now asserts that on April 9, 2009, the applicant's plea of guilt for theft was vacated and the charges were dismissed. Counsel notes that the only remaining offense is aggravated assault. Counsel contends that even if aggravated assault is a crime involving moral turpitude, the applicant qualifies for the petty offense exception to this ground of inadmissibility. Counsel furnished as corroborating evidence, his petition to the Circuit Court of Cook County, Illinois, for

relief from judgment of conviction and an amended court disposition reflecting the court's vacatur of the applicant's guilty plea. The entire record was reviewed and considered in rendering a decision in this case.

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.

- (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:

- (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 . . .

In the recently decided *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. Finally, in all such inquiries, the burden is on the alien to establish “clearly and beyond doubt” that he is “not inadmissible.” *Id.* at 709 (citing *Kirong v. Mukasey*, 529 F.3d 800 (8th Cir. 2008))

As stated, on January 25, 2006, the applicant was convicted of theft in violation of 720 ILCS 5/16-1(a)(1). That statute provides in pertinent part:

(a) A person commits theft when he knowingly:

(1) Obtains or exerts unauthorized control over property of the owner . . . .

U.S. Courts have held that the crime of theft or larceny, whether grand or petty, involves moral turpitude. See *Matter of Scarpulla*, 15 I&N Dec. 139, 140 (BIA 1974)(stating, “It is well settled that theft or larceny, whether grand or petty, has always been held to involve moral turpitude . . .”); *Morasch v. INS*, 363 F.2d 30, 31 (9<sup>th</sup> Cir. 1966)(stating, “Obviously, either petty or grand larceny, i.e., stealing another’s property, qualifies [as a crime involving moral turpitude].”) A conviction for theft is considered to involve moral turpitude only when a permanent taking is intended. *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973). 720 ILCS 5/16-1(a)(1) makes no distinction between temporary and permanent takings. In this situation, the adjudicator must 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. *See Matter of Silva-Trevino*, 24 I&N Dec. 687, 698.

The applicant has not presented and the AAO is unaware of any prior case in which a conviction has been obtained under 720 ILCS 5/16-1(a)(1) for conduct not involving moral turpitude. Further, the record does not establish that this statute was applied to conduct not involving moral turpitude in the applicant's own criminal case. The AAO notes that the record contains a certified statement of conviction/disposition, but does not contain other documents comprising the record of conviction, such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. Therefore, the AAO must find a conviction under 720 ILCS 5/16-1(a)(1) to be a crime involving moral turpitude, and the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act if he was convicted under that statute.

The AAO notes, however, that the applicant's conviction for theft has since been vacated under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401). That statute provides:

(a) Relief from final orders and judgments, after 30 days from the entry thereof, may be had upon petition as provided in this Section. Writs of error coram nobis and coram vobis, bills of review and bills in the nature of bills of review are abolished. All relief heretofore obtainable and the grounds for such relief heretofore available, whether by any of the foregoing remedies or otherwise, shall be available in every case, by proceedings hereunder, regardless of the nature of the order or judgment from which relief is sought or of the proceedings in which it was entered. Except as provided in Section 6 of the Illinois Parentage Act of 1984, there shall be no distinction between actions and other proceedings, statutory or otherwise, as to availability of relief, grounds for relief or the relief obtainable.

The purpose of section 735 ILCS 5/2-1401 is to provide a comprehensive statutory procedure by which final orders, judgments, and decrees may be vacated after 30 days from the entry thereof. *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21, 499 N.E.2d 1381, 1386 (1986); *see also, People v. Vincent*, 226 Ill.2d 1, 7-8, 871 N.E.2d 17, 22 (2007)(stating, "Relief under section 2-1401 is predicated upon proof, by a preponderance of evidence, of a defense or claim that would have precluded entry of the judgment in the original action and diligence in both discovering the defense or claim and presenting the petition."). To be entitled to relief under section 2-1401, the petitioner must affirmatively set forth specific factual allegations supporting each of the following elements: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim to the circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition for relief. *Id.* The record contains a copy of the applicant's petition for relief from judgment of conviction, filed pursuant to 735 ILCS 5/2-1401. The petition alleges that neither the applicant nor his defense attorney was aware of the immigration consequences of his guilty plea.<sup>1</sup> The record also contains an amended court

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<sup>1</sup> Section 113-8 of the Illinois Code of Criminal Procedure provides:

Before the acceptance of a plea of guilty, guilty but mentally ill, or nolo contendere to a misdemeanor

disposition, which reflects that on April 9, 2009, the Circuit Court of Cook County vacated the applicant's plea of guilt for theft and entered *nunc pro tunc* a plea of not guilty. The AAO finds that the court's vacation of the applicant's theft conviction renders the conviction no longer valid for immigration purposes. *See Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006)(A conviction vacated pursuant to section 2943.031 of the Ohio Revised Code for failure of the trial court to advise the alien defendant of the possible immigration consequences of a guilty plea is no longer a valid conviction for immigration purposes.)

The next issue to be addressed is the applicant's November 27, 2002 conviction for aggravated assault in violation of 720 ILCS 5/12-2(a)(1). That statute provides:

(a) A person commits an aggravated assault, when, in committing an assault, he:

(1) Uses a deadly weapon or any device manufactured and designed to be substantially similar in appearance to a firearm, other than by discharging a firearm in the direction of another person, a peace officer, a person summoned or directed by a peace officer, a correctional officer or a fireman or in the direction of a vehicle occupied by another person, a peace officer, a person summoned or directed by a peace officer, a correctional officer or a fireman while the officer or fireman is engaged in the execution of any of his official duties, or to prevent the officer or fireman from performing his official duties, or in retaliation for the officer or fireman performing his official duties.

Counsel asserts that the applicant was convicted of aggravated assault under a divisible statute. Counsel maintains that the statute is divisible because the applicant could have committed an act which involves simple assault coupled with a device that only looks like a weapon, such as a toy or prop. Counsel contends that under the divisible statute analysis, an alien is not inadmissible for a crime involving moral turpitude unless the record of conviction demonstrates that the crime itself involved moral turpitude. Counsel notes that *Matter of Medina*, 15 I&N Dec. 611 (BIA 1976), is inapplicable in the applicant's case because at the time of the *Medina* decision, the divisible statute analysis had not been articulated by the Board of Immigration Appeals. Counsel contends that because there is no information contained in the record related to the facts and circumstances of the underlying offense, there is no evidence that the applicant's conviction involved anything more serious than a simple assault.

As previously stated, under the precedent decision, *Matter of Silva-Trevino*, an adjudicator must review the criminal statute at issue to determine if there is a "realistic probability, not a theoretical

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or felony offense, the court shall give the following advisement to the defendant in open court:

"If you are not a citizen of the United States, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization under the laws of the United States."

possibility,” that the statute would be applied to reach conduct that does not involve moral turpitude. 24 I&N Dec. 687, 698. In reaching this determination, the applicant must show that the statute has been applied to conduct not involving moral turpitude in a prior case, including applicant’s own case. *Id.* at 697, 708. Counsel’s assertion that the applicant could have committed an act which involves simple assault coupled with a device that only looks like a weapon, such as a toy or prop, is only a theoretical possibility, not a realistic probability, and therefore does not satisfy the analysis set forth in *Matter of Silva-Trevino*. The applicant has not presented and the AAO is unaware of any prior case in which a conviction has been obtained under 720 ILCS 5/12-2(a)(1) for conduct not involving moral turpitude. Further, the record does not establish that this statute was applied to conduct not involving moral turpitude in the applicant’s own criminal case. The AAO notes that other than a certified statement of conviction/disposition, the record does not contain any documents comprising the record of conviction, such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript, or other relevant documents from which the precise nature of the applicant’s criminal acts can be ascertained. Therefore, the AAO will find the applicant’s conviction for aggravated assault to be a crime involving moral turpitude, and the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The AAO notes that the applicant’s conviction for aggravated assault would have been considered a crime involving moral turpitude even prior to the Attorney General’s precedent decision in *Matter of Silva-Trevino, supra*. Crimes involving moral turpitude are generally defined as an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man. See *Jordan v. De George*, 341 U.S. 223, 71 S.Ct. 703 (1951); *Matter of Serna* 20 I&N Dec. 579, 581 (BIA 1992). 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). Section 12-1 of the Illinois Criminal Code (720 ILCS 5/12-1) provides that a person commits an assault when, without lawful authority, he engages in conduct which places another in reasonable apprehension of receiving a battery. It is well established that this crime - placing another person in reasonable apprehension of receiving a battery - is a crime involving moral turpitude when it is committed using a deadly weapon. See *Matter of Medina*, 15 I&N Dec. 611, 614 (BIA 1976)(stating, “Under Illinois law, the respondent had to have committed his aggravated assault with one of the three specified mental elements. Each of these mental states will support a finding of moral turpitude. Thus, a conviction for aggravated assault under section 12-2(a)(1) inherently involves moral turpitude.”). The AAO finds that substituting the term “deadly weapon” for “a device manufactured and designed to be substantially similar in appearance to a deadly weapon,” does not alter the BIA’s analysis in *Matter of Medina*.

Although the applicant has been convicted of aggravated assault, a crime involving moral turpitude, the record reflects that he qualifies for a petty offense exception to this ground of inadmissibility under Section 212(a)(2)(A)(ii)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(ii)(II). The applicant was convicted under 720 ILCS 5/12-2(a)(1). 720 ILCS 5/12 provides that a violation of subsection (a)(1) is a Class A misdemeanor. A Class A misdemeanor under the Illinois Criminal Code is punishable by any term of imprisonment less than one year. 730 ILCS 5/5-8-3 (West 2009). The court disposition in the record reflects that the applicant was sentenced to five days of community service and one year of supervision

(Circuit Court of Cook County, Illinois, [REDACTED] Because the maximum penalty possible for the applicant's conviction did not exceed imprisonment for one year and he was not sentenced to a term of imprisonment in excess of six months, he qualifies for the petty offense exception. Therefore, he is not inadmissible for having been convicted of a crime involving moral turpitude.

In conclusion, the record reflects that the applicant was convicted of only one crime involving moral turpitude, the crime qualifies under the petty offense exception to inadmissibility, and the applicant is not otherwise inadmissible. Accordingly, the AAO finds that the applicant is not inadmissible. He therefore does not require a waiver of inadmissibility. The appeal will be dismissed, the decision of the District Director will be withdrawn, and the waiver application will be declared moot.

**ORDER:** The appeal is dismissed, the prior decision of the district director is withdrawn, and the application for waiver of inadmissibility is declared moot.