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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
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FILE:

Office: LOS ANGELES, CA

Date:

JUN 30 2009

IN RE:

PETITION: 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.

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, Los Angeles, California and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the applicant is not 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). Thus, the relevant waiver application is moot. The matter will be returned to the District Director for continued processing.

The applicant is a native and citizen of Nicaragua who was found to be inadmissible to the United States 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's spouse is a naturalized U.S. citizen, his father is a naturalized U.S. citizen, and he has a U.S. citizen daughter. He now seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), **so that he may reside in the United States with his spouse, father and child.**

The District Director concluded that the applicant had failed to establish that extreme hardship would be imposed upon a qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the District Director*, dated February 7, 2007.

On appeal, counsel contends that United States Citizenship and Immigration Services (USCIS) erred as a matter of fact and law in finding the applicant to be inadmissible under 212(h) of the Act. *Form I-290B*.

In support of these assertions, counsel submits a brief. The record also includes, but is not limited to, court and criminal records for the applicant; statements from the applicant's spouse; a statement from the applicant; statements from a family member and a friend; tax statements for the applicant and his spouse; and W-2 Forms for the applicant and his spouse. The entire record was reviewed and considered in rendering this decision.

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 . . .

Section 212(h) of the Act provides that a waiver of inadmissibility is dependent first upon a showing that the bar to admission imposes an extreme hardship on a qualifying family member. If extreme hardship is established, the Secretary then assesses whether an exercise of discretion is warranted.

The record shows that on May 1, 1997, the applicant pled nolo contendere under California Penal Code § 459 to the offense of misdemeanor burglary. *Court records, in the Municipal Court of Glendale Courthouse Judicial District, County of Los Angeles, State of California.* The applicant was ordered to serve 20 days in jail, was placed on summary probation for three years, and was ordered to pay fines. *Id.* The record shows that on January 7, 1998, the applicant pled nolo contendere under California Penal Code § 415(1) to the offense of disturbing the peace by fighting. *Court records, in the Municipal Court of Glendale Courthouse Judicial District, County of Los Angeles, State of California.* The applicant was placed on summary probation for two years and was ordered to pay fines. *Id.*

In *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), the Board of Immigration Appeals (Board) held 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.) 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). Before one can be convicted of a crime of moral turpitude, the statute in question by its terms, must necessarily involve moral turpitude. *Matter of Esfandiary*, 16 I&N Dec. 659 (BIA 1979); *Matter of L-V-C*, 22 I&N Dec. 594, 603 (BIA 1999).

California Penal Code § 415 states:

415. Any of the following persons shall be punished by imprisonment in the county jail for a period of not more than 90 days, a fine of not more than four hundred dollars (\$400), or both such imprisonment and fine:

- (1) Any person who unlawfully fights in a public place or challenges another person in a public place to fight.
- (2) Any person who maliciously and willfully disturbs another person by loud and unreasonable noise.
- (3) Any person who uses offensive words in a public place which are inherently likely to provoke an immediate violent reaction.

The applicant was convicted under § 415(1) of the California Penal Code. The AAO notes that while § 415(2) of the California Penal Code involves willful conduct, § 415(1) of the California Penal Code does not have a willful or intent element. As such, the AAO finds that the applicant's conviction of disturbing the peace by fighting is not a crime involving moral turpitude.

California Penal Code § 459 states:

459. Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, as defined in Section 21 of the Harbors and Navigation Code, floating home, as defined in subdivision (d) of Section 18075.55 of the Health and Safety Code, railroad car, locked or sealed cargo container, whether or not mounted on a vehicle, trailer coach, as defined in Section 635 of the Vehicle Code, any house car, as defined in Section 362 of the Vehicle Code, inhabited camper, as defined in Section 243 of the Vehicle Code, vehicle as defined by the Vehicle Code, when the doors are locked, aircraft as defined by Section 21012 of the Public Utilities Code, or mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary. As used in this chapter, "inhabited" means currently being used for dwelling purposes, whether occupied or not. A house, trailer, vessel designed for habitation, or portion of a building is currently being used for dwelling purposes if, at the time of the burglary, it was not occupied solely because a natural or other disaster caused the occupants to leave the premises.

Counsel asserts that the record is unclear as to whether the applicant's conviction for burglary is a crime involving moral turpitude and that, even if the applicant's conviction was for a crime involving moral turpitude, the applicant would be eligible for the petty offense exception. *Attorney's brief.* The AAO agrees. The applicant was convicted under California Penal Code § 459 for the offense of misdemeanor burglary. Under California Penal Code § 19, except in cases where a different punishment is prescribed by any law of the state of California, every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding one thousand dollars (\$1,000), or by both. The applicant was sentenced to 20 days imprisonment. As the maximum penalty for the single crime of which the applicant was convicted does not exceed imprisonment for one year and the applicant was not sentenced to a term of imprisonment in excess of six months, the AAO finds that the applicant, even if convicted of a crime involving moral turpitude, is eligible for the exception to inadmissibility offered by Section 212(a)(2)(A)(ii)(II) of the Act. The applicant is therefore not inadmissible under Section 212(a)(2)(A) of the Act. The waiver filed pursuant to section 212(h) of the Act is moot.

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. *See* Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant is not inadmissible and is not required to file the waiver. Accordingly, the appeal will be dismissed as moot.

ORDER: The appeal is dismissed as the underlying application is moot. The matter will be returned to the District Director for continued processing.