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

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U.S. Citizenship  
and Immigration  
Services

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[REDACTED]

FILE:

[REDACTED]

Office: CHICAGO, IL

Date:

JUN 30 2009

IN RE:

[REDACTED]

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 PETITIONER:

[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.

John F. Gassom

Acting Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the District Director, Chicago, Illinois 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 Mexico 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 U.S. citizen, and she asserts that she also has a lawful permanent resident child and a U.S. citizen child. She now seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), so that she may reside in the United States with her spouse and their children.

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 October 19, 2005.

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 and to have failed to meet the burden of establishing extreme hardship to his qualifying relative, as required for a waiver 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; an employment letter for the applicant's spouse; tax statements for the applicant and her spouse; a Form W-2 for the applicant's spouse; a statement from the applicant's child's school; and baptismal certificates for the applicant's child. 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 April 30, 1991 the applicant pled no contest under California Penal Code § 487 to the offense of grand theft. *Clerk's docket and minutes, County of Santa Barbara Municipal Court District, State of California*, dated April 30, 1991. The applicant was sentenced to 23 days in jail and ordered to pay fines. *Id.* On December 21, 1999 the applicant was found guilty in Illinois under 720 ILCS 5.0/12-3 of battery. *Certified statement of conviction/disposition, Circuit Court of Cook County*, dated February 6, 2001. The record is unclear as to the applicant's sentence.

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).

Simple battery is not a crime involving moral turpitude. *Matter of Garcia-Hernandez*, 23 I&N Dec. 590 (BIA 2003). Grand theft under California Penal Code is a crime involving moral turpitude. *Matter of Kochlani*, 24 I&N Dec. 128 (BIA 2007) that states “there is no dispute that the California offense of grand theft is a crime involving moral turpitude.” As such, the AAO finds that the applicant has been convicted of a crime involving moral turpitude.

California Penal Code § 489 states as follows:

489. Grand theft is punishable as follows:

- (a) When the grand theft involves the theft of a firearm, by imprisonment in the state prison for 16 months, 2, or 3 years.
- (b) In all other cases, by imprisonment in a county jail not exceeding one year or in the state prison.

The applicant was sentenced to serve 23 days in the Santa Barbary County Jail. *Clerk’s docket and minutes, County of Santa Barbara Municipal Court District, State of California*, dated April 30, 1991. Based on the length of her sentence and the fact that the court ordered her to serve her sentence in a county jail and not a state prison, it is clear that the applicant was punished under California Penal Code § 489. 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 the applicant 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.