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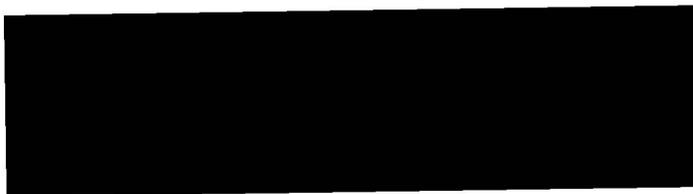
Applicant:



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.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Santa Ana, California, and is now before the Administrative Appeals Office (AAO) on appeal. The previous decision of the director will be withdrawn, the waiver application will be declared moot, and the appeal will be dismissed. The matter will be returned to the director for continued processing of the applicant's adjustment application.

The applicant is a native and citizen of Mexico 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 committed crimes 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 with his U.S. citizen spouse, two U.S. citizen daughters, and U.S. lawful permanent resident parents.

The District Director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative and denied the Application for Waiver of Ground of Excludability (Form I-601) accordingly.

On appeal, counsel asserts that because the applicant's 1996 conviction for carrying a concealed weapon in violation of section 12025(a) of the California Penal Code is not a crime involving moral turpitude, a waiver is not needed. Counsel states that even if a waiver is needed, the applicant has demonstrated that his U.S. citizen wife and children would suffer extreme emotional, psychological and economical hardship. As corroborating evidence, the record contains, but is not limited to, attestations from the applicant, his spouse and older daughter; medical documentation; financial documentation; and letters from the applicant's spouse's siblings. The entire record was reviewed and considered in arriving at a decision on the appeal.

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

(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.

The Board of Immigration Appeals (BIA) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), 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.)

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). This case arises in the Ninth Circuit, and the Ninth Circuit Court of Appeals has adopted the realistic probability standard. *See Nicanor-Romero v. Mukasey*, 523 F.3d 992, 1004-1007 (9th Cir. 2008).

The record reflects that on June 20, 1996, the applicant was convicted in the Municipal Court of Rio Hondo Judicial District, County of Los Angeles, California, of carrying a concealed weapon within a vehicle in violation of section 12025(a) of the California Penal Code (Cal. Penal Code). The applicant was placed on summary probation for a period of two years on the condition that he serve 30 days in jail and pay a \$315.00 fine [REDACTED]

Cal. Penal Code § 12025(a) (West 1996) provides:

(a) A person is guilty of carrying a concealed firearm when he or she does any of the following:

(1) Carries concealed within any vehicle which is under his or her control or direction any pistol, revolver, or other firearm capable of being concealed upon the person .

(2) Carries concealed upon his or her person any pistol, revolver, or other firearm capable of being concealed upon the person.

On appeal, counsel contends that the applicant’s conviction for carrying a concealed weapon within a vehicle is not a crime involving moral turpitude. Counsel cited to the Board of Immigration Appeals (BIA) holding in *Matter of Granados*, which states that a conviction for possession of a concealed sawed-off shotgun is not a crime involving moral turpitude. 16 I&N Dec. 726, 728 (BIA 1979). The AAO agrees with counsel and notes that in *Matter of S-*, the BIA held that carrying a concealed and deadly weapon with intent to use against the person of another is a crime involving moral turpitude because “the use of a dangerous weapon against the person of another is motivated by an evil, base, and vicious intent. The essence of the offense is the carrying of the dangerous

weapon with a base, evil and vicious intent to injure another.” 8 I&N Dec. 344, 346 (BIA 1959)(citations omitted). Cal. Penal Code § 12025(a) pertains only to the carrying of a concealed firearm, and as such, it lacks the evil, base, and vicious intent to injure another as described in *Matter of S-*. Accordingly, the AAO finds that the applicant’s June 20, 1996 conviction under Cal. Penal Code § 12025(a) is not a crime involving moral turpitude.

The record reflects that the applicant was convicted in the Superior Court of Northeast Judicial District, County of Los Angeles, California, on April 15, 1997 of receiving/concealing stolen property in violation of section 496(a) of the California Penal Code. The applicant was sentenced to a period of formal probation for a period of three years under the condition that he serve 180 days in jail and pay a restitution fine of \$200.00. On December 5, 2000, the Superior Court found that the applicant violated his probation. The applicant’s probation was revoked and then reinstated with the modification that he serve 365 days in jail ([REDACTED]).

Cal. Penal Code § 496(a) (West 1997) provides:

Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, is punishable by imprisonment in a state prison, or in a county jail for not more than one year . However, if the district attorney or the grand jury determines that this action would be in the interests of justice, the district attorney or the grand jury, as the case may be, may, if the value of the property does not exceed four hundred dollars (\$400), specify in the accusatory pleading that the offense shall be a misdemeanor, punishable only by imprisonment in a county jail not exceeding one year.

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 (9th 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).

The Ninth Circuit Court of Appeals addressed the issue of whether Cal. Penal Code § 496(a) constitutes a crime involving moral turpitude in the recent case, *Castillo-Cruz v. Holder*, No. 06-70896, slip op. (9th Cir. Sept. 17, 2009). The Court determined that Cal. Penal Code § 496(a) does not require a perpetrator to have the intent to permanently deprive the owner of his or her property, but rather permits conviction for an intent to deprive the owner of his or her property temporarily. *Castillo-Cruz v. Holder*, No. 06-70896, slip op. at 13481. The Court applied the methodology articulated in *Gonzales v. Duenas-Alvarez*, *supra*, for a determination of whether there is a “realistic

¹ The sentence imposed after revocation is imposed for the original conviction. See *Alabama v. Shelton*, 535 U.S. 654, 662 (2002) (stating, “A suspended sentence is a prison term imposed for the offense of conviction. Once the prison term is triggered, the defendant is incarcerated not for the probation violation, but for the underlying offense.”).

probability” that Cal. Penal Code § 496(a) would be applied to conduct that does not involve moral turpitude. *Id.* The Court concluded that lower courts have upheld convictions under Cal. Penal Code § 496(a) in cases where there was no permanent intent, and as such, a conviction under the statute is not categorically a crime of moral turpitude. *Castillo-Cruz*, No. 06-70896, slip op. at 13482. The Court held that the alien’s conviction is not a crime involving moral turpitude under the modified categorical analysis because the government conceded that there is no evidence in the record establishing that his offense involved an intent to deprive the owner of possession permanently. *Id.* It is noted that the court apparently reviewed only the record of conviction in making this determination.² *Id.* (citing *Fernando-Ruiz v. Gonzalez*, 466 F.3d 1121, 1132-33 (9th Cir. 2006)).

In the instant case, the record of conviction, which consists of a transcript of the applicant’s court proceedings, does not reflect that the applicant was convicted under Cal. Penal Code § 496(a) for intending to deprive the owner of his or her property permanently. Without evidence that a permanent taking was intended, the AAO cannot find that the applicant’s offense constitutes conduct involving moral turpitude, pursuant to the holding in *Castillo-Cruz*. Therefore, the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

In proceedings for application for waiver of grounds of inadmissibility, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. The decision of the director will be withdrawn and the appeal will be dismissed as the underlying waiver application is moot.

ORDER: The director’s decision is withdrawn and the appeal is dismissed as the underlying waiver application is moot. The director shall continue processing the Form I-485 accordingly.

² The Ninth Circuit Court of Appeals had previously reserved judgment as to whether it would follow the additional ruling of the Attorney General in *Silva-Trevino*, that adjudicators may look beyond the record of conviction as part of the modified categorical inquiry. *See Marmolejo-Campos v. Holder*, 558 F.3d 903, 915 (9th Cir. 2009). The AAO interprets the holding in *Castillo-Cruz* as a refusal by the Ninth Circuit to accept the more expansive review allowed by the Attorney General, and will thus restrict its review in this case to the record of conviction only.