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

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[redacted]

FILE: Office: LOS ANGELES, CALIFORNIA Date: NOV 2 4 2009

IN RE: Applicant: [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.

Michael Shumway

Perry Rhew
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 sustained.

The record reflects that 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 been convicted of crimes involving moral turpitude. The record indicates that the applicant is married to a United States citizen. The applicant 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 her United States citizen spouse, lawful permanent resident children, United States citizen father, and lawful permanent resident mother.

The District Director found 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 Excludability (Form I-601) accordingly. *Decision of the District Director*, dated April 10, 2007.

On appeal, the applicant, through counsel, "submits that the previously submitted evidence warrants a favorable exercise of discretion granting [the applicant] a Waiver." *Appeal Brief*, page 2, dated May 2, 2007. Additionally, counsel asserts that the Service misapplied "the legal standards used for determining extreme hardship under 212(h) of the INA;" the Service used "an assumption unsupported by the evidence in the record to determine the nonexistence of hardship to [the applicant's] qualifying relatives;" and the Service failed "to consider the relevant determinative factors in the aggregate as required by section 212(h) of the INA." *Id.* at 3.

The record includes, but is not limited to, counsel's brief; declarations and letters from the applicant's husband, parents, and children; numerous letters of recommendations from the applicant's family; and court dispositions for the applicant's convictions. The entire record was reviewed and considered in arriving at a decision on the appeal.

The record reflects that on April 12, 1991, the applicant was convicted of theft of property and was sentenced to twelve (12) months probation. On October 29, 1991, the applicant was convicted of theft of property, and was sentenced to two (2) years probation. On May 20, 1992, based on the applicant's violation of the probation order of October 29, 1991, the applicant was sentenced to serve ninety (90) days in jail. On the same day, the applicant was convicted of petty theft with prior jail term and was sentenced to two (2) years probation. On January 11, 1993, the applicant violated the May 20, 1992 probation order and was ordered to serve six (6) months in jail.

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 *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." *Silva-Trevino*, 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. *Id.* 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.

The Ninth Circuit has adopted the "realistic probability" approach, as articulated by the U.S. Supreme Court in *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183 (2007), to determine whether or not the elements of a statute categorically render the offense a crime involving moral turpitude. *See Nicanor-Romero v. Mukasey*, 523 F.3d 992, 1004-1007 (9th Cir. 2008). However, it has not embraced the Attorney

General's ruling that evidence beyond the record of conviction may be considered as part of the modified categorical inquiry. *See Marmolejo-Campos v. Holder*, 558 F.3d 903, 915 (9th Cir. 2009); *see also Castillo-Cruz v. Holder*, 581 F.3d 1154, 1161 (9th Cir. 2009) (citing *Fernando-Ruiz v. Gonzalez*, 466 F.3d 1121, 1132-33 (9th Cir. 2006).

The AAO will consider whether a theft conviction under section 484(a) California Penal Code is a categorical crime involving moral turpitude. For a theft conviction to be a crime involving moral turpitude, there must be a specific intent to deprive the victim of his or her property permanently. *See Castillo-Cruz*, 581 F.3d at 1160; *see also Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973). However, in *Castillo-Cruz*, the Ninth Circuit reviewed lower court case law on convictions under Cal. Penal Code § 484(a), and determined that a conviction for theft (grand or petty) under the California Penal Code requires the specific intent to deprive the victim of his or her property permanently. 581 F.3d at 1160 (citations omitted). The Ninth Circuit cited to the opinion of the California Second District Court of Appeals in *People v. Albert*, which held that the act of robbery, defined by the court as "larceny aggravated by use of force or fear," requires an intended permanent taking. *Id.* (citing 47 Cal.App.4th 1004, 1007 (1996)). The Second District Court of Appeal emphasized that absent this specific intent, the taking of the property of another is not theft. 47 Cal.App.4th at 1008. Though it may be theoretically possible for the applicant to have been convicted of theft under Cal. Penal Code § 484(a) without having the intent to permanently deprive the owner of the property, the AAO notes that the applicant has not submitted evidence of a prior case in which this statute was applied to conduct not involving moral turpitude, and the record does not reflect that the applicant's acts themselves did not involve moral turpitude. Therefore, the AAO must find that the applicant's convictions are categorically crimes involving moral turpitude.

Counsel claims that the applicant's court "appearances were in connection with petty theft offenses for which she completed all probationary terms and paid related court costs." *Memorandum in support of I-601*, page 8, dated March 15, 2007. The AAO notes that only one of the applicant's convictions was for petty theft while the other two convictions were for theft, and since she was convicted of three separate crimes involving moral turpitude, she is not eligible for the petty offense exception. Additionally, the AAO notes that even though the applicant completed her probationary terms and paid the court costs, she was still convicted of crimes involving moral turpitude and is now inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act. Furthermore, the AAO notes that counsel has not disputed that the applicant's convictions are for crimes involving moral turpitude or that the applicant is inadmissible under section 212(a)(2)(A) of the Act.

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

> (A) *Conviction of certain crimes.*—
>
> > (i) In general.—Except as provided in clause (ii), any 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…

(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 for 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:

> Waiver of subsection (a)(2)(A)(i)(I), (II), (B), (D), and (E).—The Attorney General [now the Secretary of Homeland Security, "Secretary"] may, in [her] discretion, waive the application of subparagraphs (A)(i)(I)…of subsection (a)(2) if—
>
> (1) (A) in the case of any immigrant it is established to the satisfaction of the [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
>
> (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 established to the satisfaction of the [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…

> (2) the [Secretary], in [her] discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

The applicant's last petty theft conviction occurred on May 20, 1992. The applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) on November 3, 2003. The AAO notes that the applicant's conviction did not occur in excess of 15 years prior to her filing for adjustment of status; however, an application for admission or adjustment is a "continuing" application, adjudicated on the basis of the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). The AAO notes that there has been no final decision made on the applicant's I-485 application filed on November 3, 2003, so the AAO finds that the applicant, as of today, is still seeking admission by virtue of her application for adjustment of status. Therefore, the crimes involving moral turpitude for which the applicant was found inadmissible occurred more than 15 years prior to the applicant's application for adjustment of status.

The AAO finds that the District Director erred in basing her decision on section 212(h)(1)(B) of the Act and failing to consider the eligibility of the applicant for a waiver under section 212(h)(1)(A). The record reflects that the applicant has not been convicted of any additional criminal charges since her last conviction in 1992. Counsel claims that "[d]uring one difficult period in life, almost over 15 years ago, [the applicant] made some poor decisions that have shaped and reformed her character.... [The applicant] abundantly realizes her error and she has paid her debt to society. She has not had any arrests or incidents during the nearly 15 years that have since passed." *Appeal Brief, supra* at 10. In a declaration dated March 5, 2007, the applicant asks for "forgiveness and a pardon from Immigration for [her] past mistakes." The AAO notes that there are no additional convictions on the applicant's record, further attesting to her rehabilitation, and the record of proceedings does not establish that the admission of the applicant to the United States would be "contrary to the national welfare, safety, or security of the United States."

The record reflects that the applicant meets the requirements for waiver of her grounds of inadmissibility under section 212(h)(1)(A) of the Act. Further, the AAO notes that the applicant's United States citizen husband, United States citizen father, lawful permanent resident mother, and lawful permanent resident children would suffer hardship as a result of their separation from the applicant. In a declaration dated April 16, 2007, the applicant's husband states he is "currently experiencing much stress and pressure and depression due to the experience [the applicant] is going through with her immigration case.... [He does not] know how [he] can live facing a future without [the applicant]." In a psychological evaluation dated May 3, 2007, states the applicant's husband "presents with a depressive and an anxiety disorder. His ability to respond to changes is markedly impaired. If [the applicant] were to be deported to Mexico he would be left without his wife's support and his symptoms would only worsen." In a declaration dated March 2, 2007, the applicant's father states that he relies on the applicant to take him to the doctor and she monitors his diabetes. The applicant's father further states he does not "know how [he] would cope with [his] medical problems without [the applicant's] help.... [He] need[s] [the applicant] to be by

[his] side here in the United States." In a letter dated January 30, 2007, the applicant's mother states the applicant "worries and takes care of [her] husband and [her], and since neither of [them] drive [the applicant] is [their] transportation to the doctors or any appointment that [they] have. [Her] husband and [her] are ill and [they] appreciate all of the support from [the applicant]." In a letter dated February 3, 2007, the applicant's daughter, [redacted] states it would be emotionally devastating if the applicant is removed from the United States, since the applicant "has always thrived to keep [their] family together."

The favorable factors presented by the applicant are the hardship to her United States citizen husband, United States citizen father, lawful permanent resident mother, and lawful permanent resident children, who depend on her for emotional support; the applicant's history of paying her federal income taxes; and the lack of any other criminal convictions since her last conviction in 1992.

The unfavorable factors presented in the application is the applicant's convictions for theft of property on April 12, 1991 and October 29, 1991, and the applicant's conviction for petty theft with prior jail term on May 20, 1992. The AAO notes that the applicant has not been convicted of any criminal violations since her last conviction and the applicant's crime occurred more than 15 years ago.

While the AAO does not condone her actions, the applicant has established that the favorable factors in her application outweigh the unfavorable factors. The District Director's denial of the I-601 application is withdrawn.

In discretionary matters, the applicant bears the full burden of proving her eligibility for discretionary relief. *See Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976). Here, the applicant has now met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained and the application is approved.