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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

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: HARLINGEN Date: SEP 2 1 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:

[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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Michael Shumway

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The District Director, Harlingen, Texas, denied the waiver application, and it is now before the Administrative Appeals Office (AAO) on appeal. The decision of the district director will be withdrawn and the matter remanded to the district director for further action and consideration.

The record reflects that the applicant, a native and citizen of Mexico, filed an Application to Adjust Status (Form I-485) on February 6, 2003 and an Application for Waiver of Ground of Excludability (Form I-601) on June 30, 2005. The applicant listed on his waiver application his arrests for *public intoxication*, *theft of a motor vehicle*, *failure to appear* and *injury to a child* as the basis of his inadmissibility.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative, the applicant's U.S. lawful permanent resident parents, and denied the waiver application accordingly. In denying the waiver application, the director found the applicant to be inadmissible to the United States, but failed to specify the section of the Immigration and Nationality Act (Act) under which he deemed the applicant to be inadmissible. The director conducted his extreme hardship analysis under section 212(i) of the Act, relating to aliens who seek to procure or have procured admission to the United States or another benefit under the Act by fraud or willful misrepresentation of a material fact. However, the record does not reflect that the applicant is subject to this ground of inadmissibility. The AAO, under its plenary power to review the appeal on a *de novo* basis, will determine whether the applicant is inadmissible under any ground for which a waiver is available.[1]

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-

[1] The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

> (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 –
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> > (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 . . .

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).

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)).

The record reflects that the applicant was arrested on February 1, 1997 and charged with *unauthorized use of a motor vehicle* in violation of section 31.07 of the Texas Penal Code. This charge was dismissed in the District Court of Cameron County, Texas on April 8, 1997 (. The record further reflects that the applicant had a prior arrest for *unauthorized use of a motor vehicle* on November 12, 1994 (Cameron County Sheriff's Department). The record does not contain the final disposition of this charge.

The U.S. District Court for the Southern District of Texas addressed whether unauthorized use of a motor vehicle is a crime involving moral turpitude in *Ramirez v. Ashcroft*. The Court determined that a review of a body of case law reveals that the offenses found to involve moral turpitude are of different quality and magnitude than unauthorized use of a motor vehicle. 361 F.Supp.2d 650, 658 (S.D. Tex. 2005). The Court held that the unauthorized use of a motor vehicle does not fit into the types of offenses that courts have found to involve moral turpitude. 361 F.Supp.2d 650, 659 (finding that a conviction for unauthorized use of motor vehicle qualifies as "crime of violence" and thus is an "aggravated felony" warranting deportation). Pursuant to the holding in *Ramirez v. Ashcroft*, the AAO does not find a conviction under Tex. Penal Code § 31.07 to be a crime involving moral turpitude.

The record reflects that on April 4, 1997, the applicant was convicted of *theft over 50 and under 500*, a Class B misdemeanor in violation of section 31.03 of the Texas Penal Code (Tex. Penal Code § 31.03) and sentenced to four months imprisonment (County Court at Law No. 1 of Cameron County, Texas,

Tex. Penal Code § 31.03 provides in pertinent part:

> (a) A person commits an offense if he unlawfully appropriates property with intent to deprive the owner of property.
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> (b) Appropriation of property is unlawful if:
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> (1) it is without the owner's effective consent;
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> (2) the property is stolen and the actor appropriates the property knowing it was stolen by another; or
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> (3) property in the custody of any law enforcement agency was explicitly represented by any law enforcement agent to the actor as being stolen and the actor appropriates the property believing it was stolen by another.

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). Tex. Penal Code § 31.03 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 Tex. Penal Code § 31.03 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 charging document in the applicant's case reflects that the applicant unlawfully, intentionally and knowingly acquired and otherwise exercised control over another individual's clothing without the effective consent of the owner and with the intent to deprive the owner of the property. Therefore, the AAO must find the applicant's conviction under Tex. Penal Code § 31.03 to be a crime involving moral turpitude.

The record further reflects that the applicant was arrested on August 22, 1999 and charged with *injury to a child* in violation of section 22.04(a)(3) of the Texas Penal Code.[2] The record contains a City of Brownsville Municipal Court Affidavit Certificate of Dismissal, which provides that the charge was dismissed on September 27, 1999 [redacted][3] The AAO notes that the City of Brownsville Municipal Court would not have jurisdiction over this matter today. The Municipal Court has jurisdiction over environmental violations, traffic violations, Class C misdemeanors, and violations of City ordinance. Here, the applicant was charged with a third degree felony offense. On remand, should the district director question the authenticity of the record of dismissal, the district director may request an explanation from the applicant and/or a disposition of the charge related to his August 22, 1999 arrest for injury to a child from the court that had jurisdiction over that matter.

The record before the AAO demonstrates that the applicant has been convicted of only one crime involving moral turpitude, theft. Because the maximum penalty possible for the applicant's theft conviction did not exceed imprisonment for one year and he was not sentenced to a term of imprisonment in excess of six months, he would qualify for the 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).

In addition, the record reveals that the applicant may be inadmissible under sections 212(a)(9)(B)(i)(I), 212(a)(9)(B)(i)(II) and 212(a)(9)(C)(i)(I) of the Act, 8 U.S.C. §§ 1182(a)(9)(B)(i)(I), 1182(a)(9)(B)(i)(II) and 1182(a)(9)(C)(i)(I). Section 212(a)(9)(B)(i)(I) of the Act renders inadmissible those aliens who were unlawfully present in the United States for more than 180 days but less than one year, who voluntary departed the United States prior to the initiation of removal proceedings and who seek admission within three years of the date of such departure or removal from the United States. Section 212(a)(9)(B)(i)(II) of the Act renders inadmissible those aliens unlawfully present for one year or more, and who seek admission within ten years of the alien's departure or removal from the United States. Section 212(a)(9)(C)(i)(I) of the Act renders inadmissible any alien who has been unlawfully present in the United States for an aggregate period of more than one year, and who enters or attempts to reenter the United States without being admitted. Time in unlawful presence begins to accrue on April 1, 1997, the date of enactment of unlawful presence provisions under the Act.

The record reflects that on June 24, 2000, the applicant was apprehended by a border patrol agent at Brownsville, Texas. During his detention, the applicant informed the border patrol agent that he last entered the United States from Mexico without inspection on December 1, 1999. He stated that he has used his mother's address in Brownsville, Texas since 1990. He admitted that he has visited

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[2] Child and spousal abuse has been found to be a crime involving moral turpitude where the perpetrator willfully commits an act of baseness or depravity contrary to accepted moral standards. *See Grageda v. INS*, 12 F.3d 919, 922 (9th Cir. 1993); *see also Guerrero de Nodahl v. INS*, 407 F.2d 1405, 1406-07 (9th Cir. 1969) (stating, "we rule that inflicting 'cruel or inhuman corporal punishment or injury' upon a child is so offensive to American ethics that the fact that it was done purposely or willingly ends debate on whether moral turpitude was involved. When the crime is this heinous, willful conduct and moral turpitude are synonymous terms.").

[3] http://www.cob.us/municipalcourt/cases.asp

Mexico and re-entered the United States illegally on numerous occasions. The AAO notes that according to the applicant's Biographic Information Form (Form G-325), he has resided in Brownsville, Texas since 1991. The applicant's accrual of unlawful presence, subsequent departures from the United States, and entries without inspection into the United States, may render him inadmissible to the United States under any of the aforementioned provisions of the Act. On remand, the district director should request evidence concerning the specific or approximate dates of the applicant's residence in the United States, departures from the United States, and entries into the United States without inspection.

ORDER: The decision of the district director is withdrawn and the matter is remanded to the district director for further action and consideration consistent with this decision. If the subsequent decision of the district director is adverse to the applicant, the district director shall certify the decision to the AAO for review.