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



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

[REDACTED]

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FILE: [REDACTED] Office: LOS ANGELES, CA Date: **SEP 02 2010**

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h), 8 U.S.C. § 1182(h) of the Immigration and Nationality Act.

ON BEHALF OF APPLICANT:

[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Los Angeles, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Mexico. The director stated that the applicant was inadmissible under section 212(a)(2)(B) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(B), for having been convicted of committing crimes involving moral turpitude. The director indicated that the applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h). The director concluded that the applicant had failed to establish that her bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On appeal, counsel concedes that the applicant is inadmissible for having been convicted of committing crimes involving moral turpitude. Counsel claims that although the applicant has two drug convictions, they do not impact her eligibility for adjustment of status. Counsel contends that the director failed to consider the hardship factors and the extreme hardship to the applicant's husband if the waiver application is denied, and even appeared to be reviewing someone else's case in the decision. Counsel asserts that the applicant is rehabilitated, overcoming substance abuse and the trauma of sexual and psychological abuse. Counsel avers that the submitted documentation established that the applicant is a vital part of her community and family.

Section 212(a) of the Act states in pertinent part:

(2) Criminal and related grounds. —

(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, or
 - (II) a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

....

Section 212(h) of the Act provides, in pertinent part, that:

The Attorney General may, in his discretion, waive the application of . . . subparagraph (A)(i)(II) . . . insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if – . . . in the case of an immigrant who is 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 that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully permanent resident spouse, parent, son, or daughter of such alien.

The record reflects that the applicant was convicted of the following offenses in California.

<u>Conviction date</u>	<u>Crime/Sentence</u>
• 11/21/1979	Cal. Penal Code § 602(j) (trespass: injure property) 15 days jail
• 06/05/1981	Cal. Penal Code § 459 (second-degree burglary) 180 days confinement and 36 months probation
• 06/18/1981	Cal. Penal Code § 602(j) (trespass) 30 days confinement and 24 months probation
• 05/16/1985	Cal. Health & Safety Code § 11550(a) (under influence controlled substance) (disposition unknown; however, the Court granted the applicant's order on motion to vacate pursuant to Cal. Penal Code § 1016.5 on April 23, 2007, and set aside the applicant's guilty plea and vacated the judgment because the trial court did not deliver the mandatory immigration warnings at the time the plea was taken)
• 09/19/1985	Cal. Penal Code § 647(b) (disorderly conduct prostitution) 10 days jail and 6 months probation
• 11/07/1985	Cal. Penal Code § 470 (forgery) 8 months prison Cal. Penal Code § 496 (receiving stolen property) 2 years prison (two-thirds of sentence is stayed and one-third (8 months) was consecutive with the forgery conviction)
• 10/28/1986	Cal. Health & Safety Code § 11550(a) (under influence controlled substance) 24 months probation and on January 10, 2003, the conviction was dismissed pursuant to Cal. Penal Code § 1203.4.
• 03/18/1994	Cal. Penal Code § 666 (petty theft with prior)

30 days jail, 2 years probation

Cal. Penal Code § 459 (second-degree burglary)
2 years prison

Cal. Penal Code § 148.9(a) (falsely represent self to officer)
Sentence unknown

Although not addressed by the director, we need to first address whether the applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act for having been convicted of a crime involving a controlled substance. The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).”

The abstract from the Municipal Court of East Los Angeles Judicial District, County of Los Angeles, reflects that on August 30, 1984, the applicant was charged with violation of Cal. Health & Safety Code § 11550(a), case number [REDACTED]. The disposition of the case is unknown. However, on April 23, 2007, the Superior Court of California granted the applicant’s order on motion pursuant to Cal. Penal Code § 1016.5, and set aside her guilty plea and vacated the judgment on finding that the trial court did not deliver the mandatory immigration warnings at the time the plea was taken.

Cal. Penal Code § 1016.5 provides:

(a) Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall administer the following advisement on the record to the defendant:

If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

(b) Upon request, the court shall allow the defendant additional time to consider the appropriateness of the plea in light of the advisement as described in this section. If, after January 1, 1978, the court fails to advise the defendant as required by this section and the defendant shows that conviction of the offense to which defendant pleaded guilty or nolo contendere may have the consequences for the defendant of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States, the court, on defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty. Absent a record that the court provided the advisement required by this section, the defendant shall be presumed not to have received the required advisement.

. . .

On September 26, 1984, the applicant was charged with violation of Cal. Health & Safety Code § 11550(a), case number [REDACTED]. On October 28, 1986, she pled guilty and was convicted of the charge, and was sentenced to 24 months probation. The abstract from the Municipal Court of East

Los Angeles Judicial District, County of Los Angeles, reflects that on January 10, 2003, the conviction was dismissed pursuant to Cal. Penal Code § 1203.4.

Section 1203.4 of the California Penal Code provides:

a) In any case in which a defendant has fulfilled the conditions of probation for the entire period of probation, or has been discharged prior to the termination of the period of probation, or in any other case in which a court, in its discretion and the interests of justice, determines that a defendant should be granted the relief available under this section, the defendant shall, at any time after the termination of the period of probation, if he or she is not then serving a sentence for any offense, on probation for any offense, or charged with the commission of any offense, be permitted by the court to withdraw his or her plea of guilty or plea of nolo contendere and enter a plea of not guilty; or, if he or she has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and, in either case, the court shall thereupon dismiss the accusations or information against the defendant and except as noted below, he or she shall thereafter be released from all penalties and disabilities resulting from the offense of which he or she has been convicted, except as provided in Section 13555 of the Vehicle Code. . . .

On appeal, counsel states that although the applicant has two drug convictions, they do not impact her eligibility for adjustment of status. Counsel declares that the controlled substance offense of which the applicant was convicted on August 30, 1984 was vacated on May 3, 2007, and in view of *Matter of Song*, 23 I&N Dec. 173 (BIA 2001), and *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), is no longer a “conviction” for immigration purposes. Counsel also contends that the applicant’s conviction on October 28, 1986 for violation of Cal. Health & Safety Code § 11550(a), case number M253614, was dismissed pursuant to Cal. Penal Code § 1203.4, and in view of *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), her conviction is eliminated under the Federal First Offender Act (FFOA) for immigration purposes because it is her only drug-related conviction. We agree with counsel’s arguments for the reasons set forth in this decision.

The FFOA provides in part:

(a) If a person found guilty of an offense described in section 404 of the Controlled Substances Act (21 U.S.C. 844)-

(1) has not, prior to the commission of such offense, been convicted of violating a Federal or State law relating to controlled substances; and

(2) has not previously been the subject of a disposition under this subsection;

the court may ... place him on probation for a term of not more than one year without entering a judgment of conviction. At any time before the expiration of the term of probation, if the person has not violated a condition of his probation, the court may, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation....

18 U.S.C. § 3607 (1988).

We note that the Court of Appeals for the Ninth Circuit in *Flores-Arellano v. INS*, 5 F.3d 360 (9th Cir. 1993), held that inadmissibility under section 241(a)(2)(B)(i) of the Act reaches laws proscribing use or being under the influence of a controlled substance.¹ *Id.* at 361-363. The Ninth Circuit Court of Appeals has also held that an alien whose offense would have qualified for treatment under the FFOA, but who was convicted and had his conviction expunged under state or foreign law, may not be removed on account of that offense. *See Ramirez-Altamirano v. Holder*, 563 F.3d 800, 812 (9th Cir. 2009); *Dillingham v. INS*, 267 F.3d 996 (9th Cir. 2001); *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000). Moreover, the Ninth Circuit Court of Appeals held in *Rice v. Holder*, 597 F.3d 952, 957 (9th Cir.2010), that an individual convicted for the first time in state court of using or being under the influence of a controlled substance was eligible for the same immigration treatment as individuals convicted of drug possession under the FFOA.

In the instant case, the applicant has two under the influence of a controlled substance convictions, which occurred on August 30, 1984 (case number [REDACTED]) and October 28, 1986. The record shows that she filed a motion to vacate her August 30, 1984 conviction under Cal. Penal Code § 1016.6 on the basis that the trial court failed to provide the statutory immigration warning when her plea was taken. The criminal record shows that Superior Court of California granted the applicant's motion to vacate the August 30, 1984 conviction under Cal. Penal Code § 1016.6, set aside her guilty plea, and vacated the judgment. Regarding her October 28, 1986 conviction, the record reflects that on January 10, 2003, the conviction was dismissed pursuant to Cal. Penal Code § 1203.4. In *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999), the Board held that any subsequent, rehabilitative action that overturns a state conviction, other than on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings, is ineffective to expunge a conviction for immigration purposes. *Id.* at 523, 528. In *Matter of Pickering*, the Board reiterated that if a court vacates a conviction for reasons unrelated to a procedural or substantive defect in the underlying criminal proceedings, the alien remains "convicted" for immigration purposes. *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003). With regard to the first conviction, which occurred on August 30, 1984, because the court overturned the state conviction under Cal. Penal Code § 1016.6, based on a violation of the applicant's statutory rights in the underlying criminal proceedings, we find that the court's vacation of the August 30, 1984 conviction under Cal. Penal Code § 1016.5 eliminated the conviction for immigration purposes.

Counsel claims that because the applicant's first conviction was eliminated for immigration purposes she is similarly situated to a first-time offender, so her second conviction qualifies for FFOA treatment. In *De Jesus Melendez v. Gonzales*, 503 F.3d 1019, 1025-26 (9th Cir. 2007), the Ninth Circuit Court of Appeals addressed whether the Board erred in finding that a petitioner remained "convicted" for immigration purposes despite the expungement of his 1999 possession conviction under section 1203.4 of the California Penal. In *De Jesus Melendez*, the petitioner was charged with simple drug possession in 1996, and was convicted of simple possession in 1999. His 1996 charge was dismissed following his participation in a pretrial diversion program, whereby the charge is dropped after the completion of a drug education, treatment or rehabilitation program without a plea

¹ Section 241(a)(2)(B)(i) of the Act has been amended by Subtitle M, Anti drug Abuse Act of 1986, Oct. 27, 1986, Pub. L. No. 99-570, 100 Stat. 3207; Sec. 806(c), Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, Pub. L. No. 100-204, 101 Stat. 1331; and Sec. 601 of the Immigration Act of 1990, Act of Nov. 29, 1990, Pub. L. No. 101-649, 104 Stat. 4978.

or finding of guilt. *Id.* at 1026. The Ninth Circuit addressed whether equal protection principles required the Board to treat his 1999 expungement as an FFOA disposition. *Id.* at 1025-1026. The Ninth Circuit determined that even without a guilty plea to the 1996 charge, the petitioner was not similarly situated to a first-time offender because there was a sufficient factual basis to find that he had, in fact, committed a drug offense in 1996: he had submitted to a diversion program, he never contended that the drug possession charge was baseless, and he was arrested for drug possession, charged, and sent to a diversion program in lieu of prosecution. *Id.* at 1026. The Ninth Circuit, therefore, concluded that equal protection principles did not require the Board to ignore the 1996 diversion program. *Id.* Finding that the petitioner avoided criminal consequences for his 1996 charge and 1999 conviction, the Ninth Circuit determined that his 1999 conviction did not qualify for FFOA treatment because he “had received two bites at the ameliorative apple, instead of the one bite allowed by the FFOA.” *Id.*

In essence, the Ninth Circuit in *De Jesus Melendez* determined that it would not treat the petitioner’s 1999 expungement as a FFOA disposition because the petitioner had avoided the criminal consequences of his first controlled substance charge through a state rehabilitative statute and, accordingly, did not qualify as a first-time offender for his 1999 expungement. In the instant case, however, the applicant is unlike the petitioner in *De Jesus Melendez*. She has not avoided the criminal consequences of her first conviction pursuant to a state rehabilitative statute. Her first conviction was vacated on account of a violation of statutory rights in the underlying criminal proceedings, and under Cal. Penal Code § 1016.5 the court vacated the judgment and permitted her to withdraw the plea of guilty, and enter a plea of not guilty. Since we have already concluded that, in view of *Roldan* and *Pickering*, the applicant no longer stands “convicted” of her first controlled substance offense for immigration purposes, we find that the applicant is similarly situated to a first-time offender and her second controlled substance conviction, therefore, qualifies for FFOA treatment.

The AAO will now address the finding of inadmissibility under section 212(a)(2)(A) of the Act, for having been convicted of committing crimes involving moral turpitude.

To determine if a crime involves moral turpitude, the Ninth Circuit Court of Appeals first applies the categorical approach. *Nunez v. Holder*, 594 F.3d 1124, 1129 (9th Cir. 2010) (citing *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 999 (9th Cir.2008)). This approach requires analyzing the elements of the crime to determine whether all of the proscribed conduct involves moral turpitude. *Nicanor-Romero*, *supra* at 999. In *Nicanor-Romero*, the Ninth Circuit states that in making this determination there must be “a realistic probability, not a theoretical possibility, that the statute would be applied to reach conduct that did not involve moral turpitude. *Id.* at 1004 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability can be established by showing that, in at least one other case, which includes the alien’s own case, the state courts applied the statute to conduct that did not involve moral turpitude. *Id.* at 1004-05. *See also Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008) (whether an offense categorically involves moral turpitude requires reviewing the criminal statute to determine if there is a “realistic probability, not a theoretical possibility,” that the statute would be applied to conduct that is not morally turpitudinous).

If the crime does not categorically involve moral turpitude, then the modified categorical approach is applied. *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1161 (9th Cir. 2009). This approach requires looking to the “limited, specified set of documents” that comprise what has become known as the record of conviction—the charging document, a signed plea agreement, jury instructions, guilty pleas, transcripts of a plea proceeding and the judgment—to determine if the conviction entailed admission to, or proof of, the necessary elements of a crime involving moral turpitude. *Id.* at 1161 (citing *Fernando-Ruiz v. Gonzalez*, 466 F.3d 1121, 1132-33 (9th Cir. 2006)).

The applicant was convicted under Cal. Penal Code § 602(j), “trespass: injure property” in 1979. The provision of Cal. Penal Code § 602 under which the applicant was convicted provided that “every person who willfully commits a trespass by . . . building fires upon any lands owned by another . . . is guilty of a misdemeanor.” The crime of “trespass: injury property” does not involve moral turpitude in view of *In re M*, 2 I&N Dec. 686 (BIA 1946). In that case, the Board held that willfully breaking insulators belonging to the Canadian National Railways Telegraph System was not morally turpitudinous because the convicting statute did not require the prohibited conduct to be accompanied by a vicious or corrupt intent, and the Board noted that the proscribed conduct did not endanger others. *Id.* at 690-691. With the present case, a person is convicted under Cal. Penal Code § 602(j) for acting “willfully”; the statute does not require that the prohibited act be accompanied by a vicious motive or corrupt mind. In addition, building a fire on land would not necessarily endanger the life of others. Thus, we find that violation of Cal. Penal Code § 602(j) does not involve moral turpitude.

The applicant was convicted of second-degree burglary under Cal. Penal Code § 459 in 1981 and 1994. The section provides, in pertinent part:

Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, 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 of such vehicle are locked, aircraft as defined by the Harbors and Navigation Code, 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.

Cal. Penal Code § 460 provides that “[e]very burglary of an inhabited dwelling house or trailer coach . . . or the inhabited portion of any other building, is burglary of the first degree. All other kinds of burglary are of the second degree.” We note that in *Matter of Louissaint*, 24 I&N Dec. 754, 759 (BIA 2009), the Board held that “moral turpitude is inherent in the act of burglary of an occupied dwelling itself and the respondent’s unlawful entry into the dwelling of another with the intent to commit *any crime* therein is a crime involving moral turpitude.” In the instant case, the applicant was convicted of second-degree burglary; thus, under Cal. Penal Code § 460 her offense did not involve an inhabited or occupied house, trailer coach, or building.

In determining whether second-degree burglary under Cal. Penal Code § 459 involves moral

turpitude, the Ninth Circuit Court of Appeals, the jurisdiction under which this case arises, has held that burglary with the intent to commit theft is a crime involving moral turpitude. *See Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1020 (9th Cir. 2005) (“Because the underlying crime of theft or larceny is a crime of moral turpitude, unlawfully entering a residence with intent to commit theft or larceny therein is likewise a crime involving moral turpitude.”). Similar to *Cuevas-Gaspar*, in *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982), the Board determined that burglary with intent to commit theft is a crime involving moral turpitude. Lastly, in *Matter of M-*, 2 I&N Dec. 721 (BIA 1946), the Board stated that the determinative factor in assessing whether burglary involves moral turpitude is whether the crime intended to be committed at the time of entry or prior to the breaking out involves moral turpitude. *Id.* at 723. Based solely on the statutory language, Cal. Penal Code § 459 encompasses (hypothetically) conduct that involves moral turpitude, because the statute convicts for burglary with the “intent to commit grand or petit larceny,” and conduct that does not involve moral turpitude, since the statute convicts for burglary with intent to commit “any felony,” which offense may or may not involve moral turpitude.

In the instant case, the record of conviction contains only the applicant’s docket, which shows that she was convicted of second-degree burglary with intent to commit grand or petit larceny, or any felony. Because the record contains only the docket, we are unable to determine whether the applicant acted with intent to commit theft, which involves moral turpitude, or with intent to commit any felony, which may or may not involve moral turpitude. The burden of proof in these proceedings is on the applicant to demonstrate his admissibility for admission to the United States to the satisfaction of the Secretary of Homeland Security. *See* Section 291 of the Act, 8 U.S.C. § 1361. Since the criminal record does not demonstrate the applicant’s intent and as counsel never argued that her conduct did not involve moral turpitude, we cannot find that the applicant’s violation under Cal. Penal Code § 459 does not involve moral turpitude.

The applicant was convicted of forgery, Cal. Penal Code § 470, in 1985. That section provides:

- (a) Every person who, with the intent to defraud, knowing that he or she has no authority to do so, signs the name of another person or of a fictitious person to any of the items listed in subdivision (d) is guilty of forgery.
- (b) Every person who, with the intent to defraud, counterfeits or forges the seal or handwriting of another is guilty of forgery.
- (c) Every person who, with the intent to defraud, alters, corrupts, or falsifies any record of any will, codicil, conveyance, or other instrument, the record of which is by law evidence, or any record of any judgment of a court or the return of any officer to any process of any court, is guilty of forgery.
- (d) Every person who, with the intent to defraud, falsely makes, alters, forges, or counterfeits, utters, publishes, passes or attempts or offers to pass, as true and genuine, any of the following items, knowing the same to be false, altered, forged, or counterfeited, is guilty of forgery . . .

Forgery is a crime involving moral turpitude. *See Matter of Seda*, 17 I&N Dec. 550, 552 (BIA 1980).

In 1985, the applicant was convicted of receiving stolen property under Cal. Penal Code § 496(a).

That section 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.

The Ninth Circuit Court of Appeals addressed the issue of whether Cal. Penal Code § 496(a) constitutes a crime involving moral turpitude in *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1160 (9th Cir. 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. *Id.* at 1160-1161. The Court applied the methodology articulated in *Gonzales v. Duenas-Alvarez*, *supra*, for a determination of whether there is a “realistic probability” that Cal. Penal Code § 496(a) would be applied to conduct that does not involve moral turpitude. *Id.* at 1161. 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. *Id.* The Court held that the alien’s conviction was 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).

To prove her conviction under Cal. Penal Code § 496(a) did not involve moral turpitude, the applicant must establish that she did not intend to deprive the owner of his or her property permanently. To meet her burden, the applicant must, at a minimum, submit the available documents that comprise the record of conviction and show that these fail to establish that her conviction was based on conduct involving moral turpitude. To the extent such documents are unavailable, this fact must be established pursuant to the requirements in 8 C.F.R. § 103.2(b)(2). The AAO notes the letter by the Deputy Clerk of the Superior Court of California, County of Stanislaus, dated May 10, 2002, reflects that the court records contained a disposition regarding the receiving stolen property conviction, which records are the abstract of judgment, the document “Further Proceedings re. CRC Commitment and Imposition of Sentence,” and the disposition of

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.

arrest and court action. The submitted documents do not demonstrate that the applicant's offense of receiving stolen property included an intent to deprive the owner of his or her property permanently. The AAO notes that the specific intent required to characterize this offense as a crime involving moral turpitude is not an element of the crime, and it is thus unlikely that documentation would exist demonstrating any procedural finding of intent. Accordingly, the AAO will not conclude, based on the record before it that under the modified categorical approach as applied in the Ninth Circuit the applicant's conviction is a crime involving moral turpitude. *See, e.g., Tijani v. Holder*, 598 F.3d 647 (9th Cir. 2010), *Nunez v. Holder*, 594 F.3d 1124 (9th Cir. 2010).

In 1985, the applicant was convicted of disorderly conduct prostitution in violation of Cal. Penal Code § 647(b). That section provides, in part:

Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:

. . .

(b) Who solicits or who agrees to engage in or who engages in any act of prostitution. A person agrees to engage in an act of prostitution when, with specific intent to so engage, he or she manifests an acceptance of an offer or solicitation to so engage, regardless of whether the offer or solicitation was made by a person who also possessed the specific intent to engage in prostitution. No agreement to engage in an act of prostitution shall constitute a violation of this subdivision unless some act, in addition to the agreement, is done within this state in furtherance of the commission of an act of prostitution by the person agreeing to engage in that act. As used in this subdivision, "prostitution" includes any lewd act between persons for money or other consideration.

The AAO is unaware of any published federal cases addressing whether the crime of prostitution under California law is a crime of moral turpitude. However, in *Matter of Turcotte*, 12 I&N Dec. 206 (BIA 1967), the respondent was charged with prostitution and the Board held that the charge of "offer to commit or to engage in prostitution, lewdness, or assignation," a misdemeanor under Florida law, was a crime involving moral turpitude. *Id.* at 207. Furthermore, in *Matter of W*, 4 I&N Dec. 401, the Board held that the respondent's conviction for violation of an ordinance of the City of Seattle, Washington, which ordinance stated that "[i]t shall be unlawful to commit or offer or agree to commit any act of prostitution, assignation, or any other lewd or indecent act," involved moral turpitude. The Board stated that "[i]t is well established that the crime of practicing prostitution involves moral turpitude." *Id.* 401-404.

Under California law, a conviction for "soliciting prostitution" is distinguishable from a conviction for "prostitution." In the instant case, the applicant's conviction was not for "soliciting prostitution," but was for engaging in prostitution in violation of Cal. Penal Code § 647(b), and in view of the holdings in *Turcotte* and *Matter of W*, in so far as they relate to "prostitution," we find that the applicant's conviction for prostitution under Cal. Penal Code § 647(b) is morally turpitudinous.

In 1994, the applicant was convicted of petty theft with a prior conviction. Cal. Penal Code § 484 provides, in pertinent part:

(a) Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft. . . .

The Ninth Circuit Court of Appeals in *Castillo-Cruz v. Holder* determined that petty theft under Cal. Penal Code § 484(a) requires the specific intent to deprive the victim of his or her property permanently, and is therefore a crime categorically involving moral turpitude. 581 F.3d 1154, 1160 (9th Cir. 2009).

Lastly, in 1994 the applicant was convicted of falsely represent self to officer, Cal. Penal Code § 148.9(a). That section provides:

Any person who falsely represents or identifies himself or herself as another person or as a fictitious person to any peace officer ... upon a lawful detention or arrest of the person, either to evade the process of the court, or to evade the proper identification of the person by the investigating officer is guilty of a misdemeanor.

In *Latu v. Mukasey*, 547 F.3d 1070 (9th Cir. 2008), the Ninth Circuit Court of Appeals stated that it held in *Blanco v. Mukasey*, 518 F.3d 714, 720 (9th Cir.2008), that “the statute [Cal. Penal Code § 148.9(a)] did not require fraudulent intent and therefore was not a crime involving moral turpitude”. Thus, violation of Cal. Penal Code § 148.9(a) does not involve moral turpitude.

The record establishes that the applicant has been convicted of crimes involving moral turpitude, which render her inadmissible under section 212(a)(2)(B) of the Act. The waiver for inadmissibility under section 212(a)(2)(B) of the Act is found under section 212(h) of the Act. That section 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 -

(1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [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 . . .

Section 212(h)(1)(A) of the Act provides that the Attorney General may, in his discretion, waive the application of subparagraph (A)(i)(I) of subsection (a)(2) if 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. Since the convictions rendering the applicant inadmissible occurred in 1994, which is more than 15 years ago, they are waivable under section 212(h)(1)(A)(i) of the Act.

Section 212(h)(1)(A)(ii) and (iii) of the Act requires that the applicant's admission to the United States not be contrary to the national welfare, safety, or security of the United States; and that the applicant establish his rehabilitation. Evidence in the record to establish the applicant's eligibility under section 212(h)(1)(A)(ii) and (iii) of the Act consists of letters commending her character and a psychological evaluation. [REDACTED] psychological evaluation conveys that the applicant has a close relationship with her U.S. citizen husband, with whom she helped overcome alcoholism, and her nephews and nieces, and that she has spent many hours volunteering at the Tarzana Treatment Center, [REDACTED] group, and is a speaker at self-help organizations. In view of the record, which shows that the applicant has not committed any crimes since 1994, and that she has been actively involved in the community and has been a positive influence in the lives of her family members and friends, the AAO finds that the applicant has provided sufficient evidence to demonstrate that her admission to the United States is not contrary to the national welfare, safety, or security of the United States, and that she has been rehabilitated, as required by section 212(h)(1)(A)(ii) and (iii) of the Act.

In *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996), the BIA stated that once eligibility for a waiver is established, it is one of the favorable factors to be considered in determining whether the Secretary should exercise discretion in favor of the waiver. Furthermore, the BIA stated that:

In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

Id. at 301.

The AAO must then, “[B]alance the adverse factors evidencing an alien’s undesirability as a permanent resident with the social and humane considerations presented on the alien’s behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country. “ *Id.* at 300. (Citations omitted).

The adverse factors in the present case are the criminal convictions of use of a controlled substance, prostitution, receiving stolen property, burglary, petty theft with a prior, and forgery; and her entry into the United States without inspection, subsequent period of unlawful presence, and any unauthorized employment.

The favorable factors are the extreme hardship to the applicant’s spouse; Dr. Gloria Morote’s psychological evaluation indicating that the applicant helped her husband overcome alcoholism and has a positive influence on her nephews and nieces, and letters by the applicant’s family members and friends commending her character.

The assistant manager of [REDACTED] stated in his letter dated July 8, 2009 that the applicant is in recovery and has been clean and sober for 12 years. He indicated that she volunteers at Midnight Mission and sponsors newcomers in the AA fellowship, has been employed for 13 years with the same employer, and is a responsible member of the recovery community. The applicant’s Alcoholics Anonymous (AA) sponsor, states in her July 14, 2009 letter that she has been the applicant’s sponsor for the last seven years. She praises the applicant’s character and conveys that the applicant works with alcoholics and drug addicts in the skid row area in downtown Los Angeles through Skid Row Drifters group of AA, and she volunteers at recovery homes. The head counselor with Tarzana Treatment Center, Inc, stated in his letter dated September 17, 1997, that the applicant attended East Los Angeles College full time and volunteered for El Centro De Ayuda. The applicant’s case manager with Tarzana Treatment Center, Inc. averred in her letter dated September 24, 1997 that the applicant has achieved a “significant foundation in the arena of chemical dependency recovery, and already exhibits a level of maturity in her sobriety that many never reach.” The executive director and program administrator with Match-Two Prisoner Outreach commend the applicant’s character, perseverance, and personal growth. The program coordinator with Match-Two Prisoner Outreach stated in her letter dated September 25, 1997, that the applicant volunteers at “El Centro de Ayuda” and juvenile halls throughout East Los Angeles and counsels youth and encourages them to change their lives. The substance abuse case manager with El Centro de Ayuda averred in his letter dated September 22, 1997 that the applicant started volunteering with his agency in 1995 by going to different juvenile halls to share her experience and hope to youth in the Los Angeles community. He stated that she is a model example to others who seem to have a drug problem. The letters by a fellow volunteer with Skid Row Drifters; an administrative assistant with El Centro De Ayuda; panel leaders with Skid Row Drifters group of AA; an active AA member; a club manager with Los Amigos Group; and a letter dated August 9, 2000 and signed by 19 members of Skid Row Drifters group of AA, all commend the applicant’s character and integrity.

Lastly, we note that it has been 15 years since the applicant’s most recent criminal conviction in 1994. The AAO finds that the crimes and immigration violations committed by the applicant are serious in nature; nevertheless, when taken together, we find the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility rests with the applicant. *See* section 291 of the Act. Here, the applicant has now met that burden. Accordingly, the appeal will be sustained and the waiver application will be approved.

ORDER: The appeal is sustained.