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



U.S. Citizenship  
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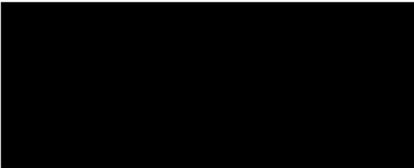
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FILE: [REDACTED] Office: BUFFALO, NY Date: **MAR 14 2011**

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:



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.

Thank you,

*Michael Shumway*  
for Perry Rhew  
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Guyana 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 her U.S. citizen spouse.

In a decision, dated January 26, 2008, the field office director found the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of two crimes involving moral turpitude. The field office director also found that the applicant failed to demonstrate that her U.S. citizen spouse would suffer extreme hardship as a result of her inadmissibility to the United States. The application was denied accordingly.

In a Notice of Appeal to the AAO (Form I-290B), dated February 14, 2008, counsel states that the decision of the field office director is arbitrary, capricious, and an abuse of discretion. Counsel submits a brief for further discussion.

In support of her waiver application, the applicant has submitted a brief from counsel and a statement from her spouse.

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.

(ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or

(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).

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.

The record shows that the applicant was arrested in Broward County, Florida, on December 7, 1993 for grand theft in violation of § 812.014 of the Florida Statutes. On February 25, 1994 the applicant was convicted of grand theft in the third degree under § 812.014 of the Florida Statutes. Under Florida law a conviction for grand theft in the third degree is a felony punishable by a maximum of five years imprisonment. The applicant was placed on probation for a period of six months. The applicant, born on October 25, 1959, was 34 years old at the time she committed the crime.

In addition to her Florida arrest and conviction, the record shows that the applicant was arrested and convicted three times in the state of New York. The applicant was arrested in Nassau County, New York on January 21, 1996 and charged with petit larceny under New York Penal Law § 155.25. On June 27, 1996 the applicant was convicted of attempted petit larceny under New York Penal Law § 110-155.25 and sentenced to one year probation.

The record shows that the applicant was arrested in Queens County, New York on November 2, 1997 and on March 3, 1998 was convicted of disorderly conduct under New York Penal Law § 240.20 and sentenced to one year probation.

The record shows that the applicant was also arrested in Kings County, New York on September 26, 1999 and on October 27, 1999 was convicted of disorderly conduct under New York Penal Law § 240.20 and sentenced to one year probation.

At the time of the applicant’s conviction New York Penal Law § 110.00 stated that, “a person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime.” New York Penal Law § 155.25, stated, “[a] person is guilty of petit larceny when he steals property. Petit larceny is a class A misdemeanor.” The AAO notes that at the time of the applicant’s conviction New York Penal Law § 70.15 stated that a sentence for a class A misdemeanor shall not exceed one year.

NYPL § 155.05 states, in pertinent part:

- (1) A person steals property and commits larceny when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof.

Under NYPL § 155.00, the term “deprive” means “(a) to withhold [property] or cause it to be withheld from [another] permanently or for so extended a period or under such circumstances that

the major portion of its economic value or benefit is lost to him, or (b) to dispose of the property in such manner or under such circumstances as to render it unlikely that an owner will recover such property.”

The BIA has determined that to constitute a crime involving moral turpitude, a theft offense must require the intent to permanently take another person’s property. *See Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973) (“Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended.”). The AAO notes that although NYPL § 155.40 does not make a clear distinction as to whether a conviction under this section of the statute constitutes a permanent or temporary taking, New York courts have found that to establish larcenous intent, a permanent taking must be intended.

New York courts have also indicated that larcenous intent is shown when the defendant intends to exercise control over another’s property for so an extended period or under such circumstances as to acquire the major portion of its economic value or benefit. *See People v. Jennings*, 69 N.Y.2d 103, 118-122, 504 N.E.2d 1079, 1086-89 (N.Y. 1986). In *People v. Hoyt*, 92 A.D.2d 1079, 461 N.Y.S.2d 569, 570 (N.Y. App. Div. 3<sup>rd</sup> Dept. 1983) the court found that to warrant a larceny conviction, intent to permanently deprive the owner of his property must be established and that a temporary withholding of property, by itself, would not constitute larcenous intent.

In *Ponnapula v. Spitzer*, the Second Circuit Court of Appeals found that the acts covered by NYPL § 155.00 are permanent takings that manifest larcenous intent. 297 F.3d 172, 183-84 (2<sup>nd</sup> Cir. 2002). The court observed that while the intent to temporarily deprive an owner of property does not constitute larcenous intent, such a temporary deprivation occurs only where a person borrows property without permission with the intent to return the property in full to the owner after a short and discrete period of time. *Id.* at 184. Thus, the AAO finds that the applicant’s conviction for attempted petit larceny under New York Penal Law § 110-155.25 required the intent to permanently take another person’s property and is thus a conviction for a crime involving moral turpitude.

At the time of the applicant’s conviction, Florida Statutes § 812.014 provided, in pertinent parts:

(1) A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:

(a) Deprive the other person of a right to the property or a benefit from the property.

(b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.

(2) . . .

(c) It is grand theft of the third degree and a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if the property stolen is:

- (1) Valued at \$300 or more, but less than \$5,000. . . .

As stated above, the BIA has determined that to constitute a crime involving moral turpitude, a theft offense must require the intent to permanently take another person's property. *See Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973) ("Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended."). The AAO notes that the Florida statute for which the applicant was convicted is divisible because it may be violated by either permanently or temporarily depriving another person of the right or benefit of that person's property.

The applicant has not presented, and the AAO is unaware of any prior case in which a conviction has been obtained under Florida Statutes § 812.014 for conduct not involving moral turpitude. Nevertheless, in accordance with the language of *Silva-Trevino*, the AAO reviews the record to determine if the statute was applied to conduct not involving moral turpitude in the applicant's own criminal case.

In a Request for Evidence (RFE), dated August 3, 2010, the AAO noted that except for the judgment of conviction, the record did not contain the full record of conviction or any additional relevant evidence that resolved the moral turpitude question for the applicant's Florida conviction. The record did contain a letter from the Florida Department of Corrections dated January 27, 2005 and stating that per Florida statute, records are destroyed after three years of inactivity. The letter indicates that the applicant's probation in Florida was terminated in 1994 and thus they were unable to provide the applicant with information regarding her records. The letter states that the applicant may need to contact the Broward County Clerk's Office. At that time the record did not show that the applicant contacted the clerk's office in an effort to obtain the documents which would constitute the full record of conviction.

In response to the RFE counsel provided an affidavit and a letter. In his letter dated October 29, 2010, counsel states that he has confirmed that the certified transcripts of the sentencing minutes and plea agreement from Broward County are unavailable. Counsel does submit the applicant's indictment and certificate of disposition from Broward County. Counsel also states that the applicant was not convicted of Grand Theft in Broward County. In support of this statement, counsel submits: 1). a criminal complaint for the felony of Grand Theft; 2). A document from the Circuit Court of Broward County indicating that adjudication in the applicant's case was withheld after she changed her plea and the criminal charges against her were dismissed after she completed 100 hours of community service; and 3). A document from the Department of Corrections in Tallahassee, Florida stating that the applicant was placed on six months probation under the name [REDACTED] for the offense of Grand Theft, that her adjudication was withheld, and that she did not receive a felony conviction. The AAO notes that these documents indicate that the applicant pled nolo contendere to Grand Theft in the 3<sup>rd</sup> Degree, adjudication was withheld, and the applicant was sentenced to 100 hours of community service and six months probation. The criminal complaint also indicates that the applicant was convicted of retail theft. The complaint states that the applicant had selected merchandise from the J.C. Penney Department Store, concealed the items in her purse, and then exited the store making no attempt to pay for the items.

The AAO notes that in *Matter of Jurado*, 24 I&N Dec. 29, 33-34 (BIA 2006), the Board of Immigration Appeals found that violation of a Pennsylvania retail theft statute involved moral turpitude because the nature of retail theft is such that it is reasonable to assume such an offense would be committed with the intention of retaining merchandise permanently. The reasoning in *Jurado* is applicable to the present case. Based on the criminal complaint, the AAO finds that the applicant's crime was retail theft. She was thus convicted of knowingly taking goods of another with the intent to permanently deprive that person of such goods, a crime involving moral turpitude, and is inadmissible under section 212(a)(2)(A)(i)(I) of the Act. Thus, the AAO finds that the applicant's conviction for grand theft under Florida Statutes § 812.014 constitutes a crime involving moral turpitude.

The AAO notes that the RFE issued to the applicant and counsel stated that the "petty offense" exception found in section 212(a)(2)(A)(ii)(II) of the Act would apply to the applicant's conviction for attempted petit larceny if her conviction for grand theft was found not to be a crime involving moral turpitude. As it has now been found that the applicant has been convicted of two crimes involving moral turpitude, the petty offense exception does not apply.

Furthermore, the AAO finds that, for the purposes of immigration law, counsel's statements regarding the applicant having not been convicted of grand theft are unfounded.

Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines "conviction" for immigration purposes as:

A formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where –

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

As stated above, documents submitted by counsel in response to an RFE and regarding the applicant's conviction for grand theft show that adjudication on the charge was withheld, the applicant pled nolo contendere, and the judge ordered punishment for the applicant in the form of 100 hours of community service and six months probation. Thus, the applicant was convicted for grand theft and is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of both attempted petit larceny and grand theft.

The AAO also notes that the applicant's convictions for disorderly conduct under NYPL § 240.20 are not for crimes involving moral turpitude. Disorderly conduct generally is not a crime involving moral turpitude where evil intent is not necessarily involved. See *Matter of S-*, 5 I. & N. Dec. 576

(BIA 1953); *Matter of P-*, 2 I. & N. Dec. 117 (BIA 1944); and *Matter of Mueller*, 11 I. & N. Dec. 268 (BIA 1965).

NYPL § 240.20 states:

A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof:

1. He engages in fighting or in violent, tumultuous or threatening behavior; or
2. He makes unreasonable noise; or
3. In a public place, he uses abusive or obscene language, or makes an obscene gesture; or
4. Without lawful authority, he disturbs any lawful assembly or meeting of persons; or
5. He obstructs vehicular or pedestrian traffic; or
6. He congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse; or
7. He creates a hazardous or physically offensive condition by any act which serves no legitimate purpose.

Disorderly conduct is a violation.

The AAO notes that in *Matter of Mueller*, 11 I&N Dec. 268 (BIA 1965), the Board analyzed whether indecent exposure under Wisconsin law involved moral turpitude. Essentially, the Board stated that the term “moral turpitude” refers to “an act of baseness, vileness, or depravity” that is dependent upon a “depraved or vicious motive.” *Id.* at 269. In holding that a violation of the Wisconsin Statute did not involve moral turpitude, the Board found that the statute did not require a specific intent or that a violator has a vicious motive or corrupt mind. *Id.* It stated that all that is required for conviction under the statute is for the act to be done consciously, even though it may have been done carelessly. *Id.* The Board stated that the offense is not one which is inherently and essentially evil. *Id.*

The reasoning and holding in *Matter of Mueller* are relevant to the instant case. Although NYPL § 240.20 requires that an offender acts intentionally or recklessly, neither involves a vicious or depraved motive and thus a conviction under NYPL § 240.20 is not morally turpitudinous.

As a person found to be inadmissible under section 212(a)(2)(A) of the Act, the applicant is eligible to apply for a waiver under section 212(h) of the Act.

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

The Attorney General [now, Secretary, Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) . . . if –

(1) (A) . . . it is established to the satisfaction of the Attorney General 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 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 resident spouse, parent, son, or daughter of such alien . . .

The applicant's convictions were based on actions taken by the applicant on December 7, 1993 and January 21, 1996. The AAO notes that an application for admission or adjustment of status is considered a "continuing" application and "admissibility is determined on the basis of the facts and the law at the time the application is finally considered." *Matter of Alarcon*, 20 I.&N. Dec. 557, 562 (BIA 1992) (citations omitted). It has now been more than 15 years since the actions that made the applicant inadmissible occurred. The AAO finds that the applicant is eligible for a waiver under section 212(h)(1)(A) of Act.

The AAO notes that the record reflects that the applicant has not been charged with any crimes since her conviction in 1999. The record also establishes that the applicant and her spouse have been married since 2001. The record includes a letter from the applicant's employer, [REDACTED] stating that the applicant has been a fulltime employee there as a private duty specialist since November 12, 2003 and that her services are highly valued by clients.

The AAO finds that the record establishes that the applicant has been rehabilitated and the record 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." Thus, the record reflects that the applicant

meets the requirements for a waiver of his grounds of inadmissibility under section 212(h)(1)(A) of the Act.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the applicant bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

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).

*See Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). 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 factor in the present case is the applicant's criminal record. The favorable factors in the present case are the applicant's marriage to a U.S. citizen, the applicant's record of employment, and the applicant's lack of a criminal record or offense since 1999.

The AAO finds that the applicant has established that the favorable factors in her application outweigh the unfavorable factors. 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.