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

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**U.S. Citizenship  
and Immigration  
Services**

#2

FILE:

Office:

Date: **MAY 02 2011**

IN RE:

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,

A handwritten signature in cursive script, appearing to read "Michael Hummitz".

for Perry Rhew

Chief, Administrative Appeals Office

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

The applicant is a native and citizen of [REDACTED] 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 a crime involving moral turpitude. The applicant is the mother of a U.S. citizen. She 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.

The Director concluded that the applicant had failed to establish that the bar to her admission would result in extreme hardship for a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Director's Decision*, dated July 30, 2008.

On appeal, counsel asserts that the applicant's inadmissibility would result in medical, economic and emotional hardship for her daughter *Form I-290B, Notice of Appeal or Motion*, dated August 28, 2008.

In support of the waiver application, the record contains, but is not limited to, counsel's briefs; statements from the applicant's daughter and son-in-law; medical records and statements for the applicant's daughter; published articles on diabetes and a range of medications; letters of support for the applicant from friends and several of her grandchildren; country conditions materials on [REDACTED] tax returns and W-2s for the applicant's daughter and son-in-law; an employment letter and earnings statement; an article on childcare costs in [REDACTED] a bank statement for the applicant's daughter; documentation relating to the mortgages held by the applicant's daughter and son-in-law; school records for one of the applicant's grandchildren; car insurance, car loan, credit card, telephone, Direct TV and medical bills; and documentation relating to the applicant's criminal history. The entire record has been reviewed and all relevant evidence considered in rendering a decision on the appeal.

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

(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

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

[M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general...

In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

In the present case, the record reflects that on April 7, 1987 the applicant pled guilty to petty theft under California Penal Code (Cal. PC) § 484(a). The applicant was placed on probation for one year.

At the time of the applicant's conviction, Cal. PC § 484(a) provided, 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 on 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 record also indicates that the applicant was convicted of Larceny of Merchandise from Retailer under [REDACTED] Statutes (Okl. St.) § 1731 on April 5, 1996, for which she again received probation.

At the time of the applicant's conviction, Okl. St. § 1731 stated:

Larceny of merchandise held for sale in retail or wholesale establishments shall be punishable as follows:

1. For the first conviction, in the event the value of the goods, edible meat or other corporeal property which has been taken does not exceed Fifty Dollars (\$50.00), punishment shall be by imprisonment in the county jail not exceeding thirty (30) days, and by a fine not less than Ten Dollars (\$10.00) nor more than One Hundred Dollars (\$100.00); provided for the first conviction, in the event more than one item of goods, edible meat or other corporeal property has been taken, punishment shall be by imprisonment in the county jail not to exceed thirty (30) days, and by a fine not less than Fifty Dollars (\$50.00) nor more than One Hundred Dollars (\$100.00).

In *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining inadmissibility under section 212(a)(2)(i)(I) of the Act, adopting the “realistic probability” standard used by the Supreme Court in *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183 (2007). The methodology requires an adjudicator to review the criminal statute at issue to determine if there is a “realistic probability, not a theoretical possibility,” that the statute could be applied to reach conduct that does not involve moral turpitude. 24 I&N Dec. 687, 698 (A.G. 2008)(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 has been 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 Board of Immigration Appeals (BIA) has determined that for a theft offense to constitute a crime involving moral turpitude, it 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.”). In the present case, however, the AAO does not find it necessary to engage in a *Silva-Trevino* analysis in relation to either of the applicant’s theft convictions.

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). The AAO also notes that in *In re Jurado-Delgado*, 24 I&N Dec. 29, 33-34 (BIA 2006), the Board of Immigration Appeals (BIA) found that violation of a [REDACTED] 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-Delgado* may be applied to the present case as the record establishes that the applicant’s crime was retail theft.

Therefore, based on the record, the AAO finds the applicant to have been convicted of two crimes involving moral turpitude and to be inadmissible under section 212(a)(2)(A)(i)(I) of the Act.<sup>1</sup>

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), (B), . . . of subsection (a)(2) . . . if –

(1)(A) [I]t is established to the satisfaction of the Attorney General that-

(i) [T]he 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 [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 . . . .

In her July 30, 2008 decision, the Director correctly considered the applicant's waiver application solely in relation to the requirements of section 212(h)(1)(B) of the Act. However, the AAO finds that the applicant is now eligible for waiver consideration under section 212(h)(1)(A) of the Act as the offenses on which her convictions are based occurred more than 15 years prior to the date of her application for adjustment of status.

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). The issue the Board addressed in *Matter of Alarcon* was whether the respondent,

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<sup>1</sup> The AAO notes that applicant may also be inadmissible under section 212(a)(9)(B)(i)(II) of the Act based on unlawful presence in the United States. A January 9, 2008 letter from one of the applicant's grandchildren states that she has lived in the United States for over 17 years and an order issued by the District Court of Sequoyah County, 15<sup>th</sup> Judicial District on September 23, 1999 reports the applicant's last known address as [REDACTED]. The statement provided by the applicant's daughter indicates that her mother has taken care of her children every day for many years. We also observe, however, that the applicant's Form I-601 indicates that her only visit to the United States after April 1, 1997, the effective date of the unlawful presence provisions under the Act, and prior to her most recent June 14, 2007 admission was as a B-2 nonimmigrant visitor in 2001. As no documentary evidence establishes the applicant's entries to the United States prior to June 14, 2007 or any of her departures, the AAO cannot conclude that the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

who had been found inadmissible for a crimes involving moral turpitude and had not disputed this finding on appeal, was eligible for a waiver as a consequence of amendments to the waiver provisions of section 212(h) of the Act enacted during the pendency of his appeal. *Id.* at 559-62. Based on the rationale that an application for adjustment of status is a continuing application and that “a final administrative decision does not exist until the Board renders its decision,” the Board held that the waiver provisions in effect at the time of the Board’s decision applied to the respondent. *Id.* at 562-63. As the issue disputed in *Matter of Alarcon* was the availability of a waiver, and not the respondent’s inadmissibility in the first instance, we conclude that the principles articulated by the Board are of equal application to adjustment and waiver applications, to the extent both address the issue of admissibility.

Thus, where the basis for denying an applicant’s adjustment application is inadmissibility that can be waived under section 212(h) of the Act, and an appeal of the denial of the applicant’s waiver application is pending before the AAO, we deem the adjustment and waiver applications to be continuing applications, and no final administrative decision regarding the applicant’s admissibility exists until we have rendered our decision. Therefore, as the events that led to the applicant’s convictions predate the AAO’s consideration of her appeal by more than 15 years, we will consider the applicant’s eligibility for a waiver under 212(h)(1)(A) of the Act.

In order to be eligible for a section 212(h)(1)(A) waiver, the applicant must demonstrate that her admission to the United States would not be contrary to its national welfare, safety, or security and that she is rehabilitated. The AAO finds no indication in the record that the applicant has ever been involved in conduct or activities that would be contrary to the safety or security of the United States or that she has engaged in any activity contrary to its welfare since she committed the crimes that resulted in her convictions. The record contains letters from friends of the applicant who attest to her moral character and sense of responsibility. It also includes statements from the applicant’s daughter and son-in-law who describe the daily support she provides to their family, cooking and caring for their children. Based on the evidence before it, the AAO finds that admitting the applicant would not be contrary to the national welfare, safety, or security of the United States and that she is rehabilitated. Accordingly, the applicant is eligible for a waiver 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-Morales*, 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).

In the present case, the mitigating factors that support the granting of the waiver application include the applicant’s age of 70 years; her U.S. citizen daughter and the general hardship that her family members would experience as a result of her removal, as evidenced by their individual statements; the applicant’s daughter’s Type 2 Diabetes and hyperlipidemia; the letters of support from the applicant’s friends; and the absence of a criminal record in the United States since 1996. The unfavorable factors are the applicant’s criminal convictions.

Although the AAO does not condone the crimes committed by the applicant, we nevertheless find that, taken together, the favorable factors in the present case outweigh the adverse factors such that a favorable exercise of discretion is warranted.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

**ORDER:** The appeal is sustained.