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U.S. Department of Homeland Security  
U.S. Immigration and Citizenship Services  
*Office of Administrative Appeals*  
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**U.S. Citizenship  
and Immigration  
Services**



**PUBLIC COPY**

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FILE: [REDACTED] Office: LIMA Date: **SEP 02 2011**

IN RE: Applicant: [REDACTED]

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

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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 that reads "Michael Shumway".

for Perry Rhew  
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Brazil who was found to be inadmissible under 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of crimes involving moral turpitude. The applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h). The field office director concluded that the applicant had established that her bar to admission would impose extreme hardship on a qualifying relative. However, the field officer director determined that the applicant had not established that the waiver should be granted as a matter of discretion. The field office director stated that applicant did not submit any statement or indicate any regret for the crimes of which she was convicted, and had not provided any documentation indicative of having sought help “for what appears to be a chronic tendency to engage in stealing and shoplifting.”

On appeal, the applicant’s husband states that he is submitting new evidence of extreme hardship which is to be considered in the hardship determination. We note that the new evidence consists of letters and medical records.

With regard to inadmissibility under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of crimes involving moral turpitude, that section 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 . . . or an attempt or conspiracy to commit such a crime . . . is inadmissible.

We find that the record reflects that the applicant pled guilty to and was convicted in Massachusetts for larceny on August 29, 2000 and June 19, 2003; and for shoplifting by asportation, and providing a false name and social security number on August 25, 2001.

With regard to larceny, Gen. Laws Mass. ch. 266, § 30 states that “[w]hoever steals . . . shall be guilty of larceny.” Stealing is defined as “the criminal taking, obtaining or converting of personal property, with intent to defraud or deprive the owner permanently of the use of it.” Gen. Laws Mass. ch. 277, § 39.

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

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

In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional

conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

In *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. First, in evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a “realistic probability, not a theoretical possibility,” that the statute would be applied to reach conduct that does not involve moral turpitude. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability exists where, at the time of the proceeding, an “actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien’s own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude.” *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

However, if a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, “the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude.” 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.

A plain reading of Massachusetts’ larceny statute shows that the act of “taking, obtaining or converting of personal property” is done “with intent to defraud” or with intent to “deprive the owner permanently” of the use of the property.

We note that the Board has determined that to constitute a crime involving moral turpitude, a theft offense must require “an intention to permanently deprive the owner of his property.” *See In re Jurado-Delgado*, 24 I&N Dec. 29, 33 (BIA 2006). That violation of Gen. Laws Mass. ch. 266, § 30 has as a necessary element the intention to permanently deprive the owner of his property is clear. Furthermore, with regard to crimes involving fraud, the U.S. Supreme Court held in *Jordan v. DeGeorge*, 341 U.S. 223 (1951), that:

Whatever else the phrase ‘crime involving moral turpitude’ may mean in peripheral cases, the decided cases make it plain that crimes in which fraud was an ingredient have always been regarded as involving moral turpitude. . . . The phrase ‘crime involving moral turpitude’ has without exception been construed to embrace fraudulent conduct.

A person can be convicted under Massachusetts’ larceny statute if the State proves that the act of “taking, obtaining or converting of personal property” was done “with intent to defraud.” Thus, we find the applicant’s convictions for the crime of larceny in Massachusetts to be crimes involving moral turpitude, which render the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude.

Since the applicant’s larceny offense involves moral turpitude, we need not determine whether her other crimes, shoplifting by asportation and providing a false name and social security number, are morally turpitudinous.

We note that the director determined that the applicant demonstrated extreme hardship to a qualifying relative, her husband and children, as required under section 212(h) of the Act. In *Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996), the Board 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 Board 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).

We find that the adverse factors in the instant case are the applicant’s criminal convictions for larceny on August 29, 2000 and June 19, 2003; and for shoplifting by asportation, and providing a false name and social security number on August 25, 2001.

The favorable factors are the extreme hardship to the applicant's husband and children and in-laws if the waiver is denied, the passage of eight years since her most recent criminal conviction, the applicant's and her family's community ties to the United States. Furthermore, we note that in the letter dated February 28, 2010 the applicant has professed remorse for her crimes. The applicant indicated in the letter that she lived in the United States for seven years in a relationship with the father of her children which gradually became abusive. The applicant's wife stated that while in that relationship she was not allowed to leave the house without permission, and was given barely enough money to buy food and clothing so she stole items from stores. The applicant's wife admitted to committing theft five times and realizing the full impact of her actions while in court before the judge. The applicant's wife stated that she served three days in jail, and worried about the effect her wrongdoing would have on her children. The applicant declared that after spending two days in jail she knew she would never steal again, so she moved away from the children's father and the environment of violence and mental torment. The applicant stated that she deeply regretted breaking the law, and the damage which her actions caused to her children. Lastly, we observe that the applicant's husband stated in the letter dated October 28, 2010 that his wife committed criminal offenses while in an abusive relationship, and since that relationship ended she has never committed another criminal act. The applicant's husband stated that his wife felt she was rehabilitated after facing a judge and serving two days in jail. Further, he contended that his wife does not want her children to grow up without respecting the law.

Thus, we find that statements of the applicant and her husband, coupled with no subsequent criminal record, demonstrate that the applicant does not currently have a propensity to engage in criminal behavior, and that the circumstances of the applicant's past abusive relationship were likely the contributing factor which motivated the applicant to commit crimes. Consequently, when we consider and balance the aforementioned favorable factors against the adverse factors, we find that the adverse factors are outweighed by the favorable factors. Therefore, we find that the grant of relief in the exercise of discretion is not warranted in this case.

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

**ORDER:** The appeal is sustained.