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

U.S. Citizenship
and Immigration
Services

[redacted]

H2

Date: AUG 0 1 2012 Office: LOS ANGELES, CA FILE: [redacted]

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:

[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.

Thank you,

Michael Shumway

for 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. As we find that the applicant is not inadmissible, the decision of the Field Office Director will be withdrawn and the waiver applicant declared unnecessary. The appeal will be dismissed and the matter returned to the Field Office Director for continued processing.

The applicant is a native and citizen of Bolivia who was found to be inadmissible under 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 been convicted of crimes involving moral turpitude. The director stated 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 his 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 argues that the director erred in applying the section 212(i) waiver for misrepresentation in the instant case, and in finding that the applicant was inadmissible for having been convicted of burglary and theft in 2008 because the applicant was convicted only of burglary. Counsel cites *Cuevas-Gaspar v. Gonzalez*, 430 F.3d 1013 (9th Cir. 2005), and contends that the applicant's burglary conviction under Cal. Penal Code § 459 is not categorically a crime involving moral turpitude because the statute encompasses the perpetrator's intent to commit *any* felony, instead of a felony that involves moral turpitude. Counsel asserts that since the applicant was convicted of only one crime involving moral turpitude (the burglary offense) the petty offense exception applies.

Counsel contends that U.S. Citizenship and Immigration Services (USCIS) gave no consideration to the extreme hardship of the applicant's three-year-old child, who has a speech delay and language difficulties. Counsel asserts that, in removing the applicant to Bolivia, the applicant's children, who are 22, 19, 10, and 3 years old, will face economic hardship as the applicant is his family's primary economic contributor, and the applicant will not be able to take care of his son or pay for his son's treatment and therapy. Counsel contends that the applicant's skills are marketable in the United States, but not in Bolivia. Counsel states that the applicant has worked the better part of his life in the United States, and lacks the skills and acumen to seek employment in Bolivia that would enable him to provide for himself, his girlfriend, and his children. Counsel asserts that it is common knowledge in Bolivia that older workers face discrimination, and as a 48-year-old man who has only been employed in the United States, the applicant lacks the skills to survive in Bolivia. Counsel argues that the applicant's four children have spent their entire lives in the United States and have no family ties to Bolivia, and would not be able to make a life there. Counsel states that the applicant and the applicant's girlfriend attend therapy sessions in order to assist in their three-year-old child's treatment. Counsel contends that in Bolivia the applicant's son will not be entitled to receive medical benefits or specialized care because the applicant's son is not a citizen of Bolivia. Counsel asserts that the applicant has a close relationship with his family members and that the family members are dependent on each other. Counsel argues that USCIS failed to consider the applicant's son's hardship in the aggregate, and the hardship of the applicant's second youngest child, [redacted] if the waiver is denied. Counsel contends that the decision of USCIS was vague, lacked analysis, and failed to analyze hardship to the applicant's three-year-old son.

Section 212(a)(2) of the Act states in pertinent part:

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

The submitted record of conviction reflects that on January 17, 2008 the applicant was charged with theft and burglary. The applicant pled nolo contendere to and was found guilty of misdemeanor burglary in violation of Cal. Penal Code § 459. The judge suspended imposition of sentence and

ordered that the applicant serve three years of probation and three days in jail. The judge dismissed the theft charge pursuant to plea negotiation.

At the time of the applicant's conviction for burglary, Cal. Penal Code § 459 provided, 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.

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).

In *Matter of Silva-Trevino*, which the Ninth Circuit has not declined to follow, 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. The Attorney General adopted the "realistic probability" test, consistent with the Ninth Circuit. 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 Board has maintained 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. *Matter of M-*, 2 I&N Dec. 721, 723 (BIA 1946). For example, the Board has held that burglary with intent to commit theft is a crime involving moral turpitude. *See Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982). The Ninth Circuit Court of Appeals has similarly 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.").

Thus, we will review the applicant's record of conviction from which we may determine whether the applicant's intent in entering a structure was with the intent to commit a crime involving moral turpitude. Although we agree with counsel that the applicant's conviction is not a categorical crime involving moral turpitude based on the language of the statute, the applicant has not provided his entire record of conviction, which might describe the basis for the conviction. Additionally, the applicant has not established in accordance with the requirements of 8 C.F.R. § 103.2(b)(2) that the documents comprising the record of conviction are unavailable. In proceedings for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act. In these proceedings, where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not, the applicant has the burden of demonstrating by means of the record of conviction, and, if necessary, other relevant documentation, that his conviction is not a crime involving moral turpitude. Accordingly, based on the record, we cannot find that the burglary conviction is not for a crime involving moral turpitude rendering the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

However, we agree with counsel that the petty offense applies to the applicant's conviction. Section 212(a)(2)(A)(ii)(II) of the Act provides an exception to inadmissibility where an alien has committed only one crime (involving moral turpitude), the maximum penalty possible for that crime did not exceed

imprisonment for one year, and the alien was not sentenced to imprisonment in excess of six months. The applicant has only one criminal conviction for a crime involving moral turpitude, which is for burglary in violation of section 459 of the California Penal Code, and this crime qualifies for the petty offense exception under Section 212(a)(2)(A)(ii)(I) of the Act. The statute under which the applicant was convicted is a "wobbler," or an offense that can be punished either as a felony or as a misdemeanor. In cases where a wobbler is involved, California law classifies an offense as a misdemeanor when the defendant is not sentenced to state prison. See C.A. P.C. § 17(b)(1).[1] In the present case, the applicant was sentenced to serve three days in jail. Section 19 of the California Penal Code states, in pertinent part: "every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding one thousand dollars ($1,000), or by both." Therefore, because the applicant's offense is a misdemeanor and the applicant was sentenced to serve only three days in jail his offense falls within the petty offense exception, and he is thereby not inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

Thus, the waiver application is unnecessary and the issue of whether the applicant established extreme hardship to a qualifying relative pursuant to the Act is necessary and will not be addressed. Accordingly, the decision of the Field Office Director is withdrawn, the waiver application declared unnecessary, and the appeal dismissed.

ORDER: As the applicant is not inadmissible, the waiver application is unnecessary. The appeal is dismissed, and the matter is returned to the Field Office Director for further processing.

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[1] Section 17(b)(1) of the California Penal Code states, in pertinent part:

> When a crime is punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances:
>
> (1) After a judgment imposing a punishment other than imprisonment in the state prison.