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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**



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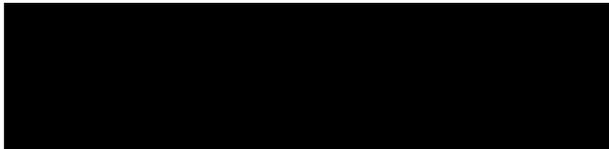


IN RE: Applicant:



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 District Director, Tampa, Florida, and is now before the Administrative Appeals Office (AAO) on appeal. The application will be declared moot, the decision of the director withdrawn and the appeal dismissed.

The applicant is a native and citizen of Columbia 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 two 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 contends that the applicant does not require a waiver as she was convicted of only one crime involving moral turpitude (a petty theft offense), and that the crime qualifies for the petty offense exception. Counsel indicates that the applicant demonstrated that the applicant's U.S. citizen husband and U.S. citizen son would experience extreme hardship if the waiver is denied. Counsel conveys that the applicant worked illegally in the United States because the applicant no longer received financial support from her husband and needed to provide for her child.

We will first address the finding of inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of crimes involving moral turpitude.

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 (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 applicant's case arises within the jurisdiction of the Eleventh Circuit Court of Appeals, which has recently reaffirmed the traditional categorical approach for determining whether a crime involves moral turpitude. See *Fajardo v. Attorney General*, 659 F.3d 1301, 1310 (11th Cir. 2011) (finding that the Congress intended the traditional categorical or modified categorical approach to be used to determine whether convictions were convictions for crimes involving moral turpitude and declining to follow the "realistic probability approach" put forth by the Attorney General in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)). In its decision, the Eleventh Circuit defined the categorical approach as "looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." 659 F.3d at 1305 (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990)). The court indicated, however, that where the statutory definition of a crime includes "conduct that would categorically be grounds for removal as well as conduct that would not, then the record of conviction – i.e., the charging document, plea, verdict, and sentence – may also be considered." 659 F.3d at 1305 (citing *Jaggernaut v. U.S. Att'y Gen.*, 432 F.3d 1346, 1354-55 (11th Cir. 2005)).

The record indicates that on August 1, 2003 the applicant was convicted of possession of a counterfeit immigration document in violation of 18 U.S.C. § 1546. The judge placed the applicant on probation for three years.

18 U.S.C. § 1546 provides, in pertinent part, the following:

(a) Whoever knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, or utters, uses, attempts to use, possesses, obtains, accepts, or receives any such visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained; or

. . . .

Shall be fined under this title or imprisoned not more than 25 years . . .

Counsel cites *Matter of Serna*, 20 I&N Dec. 579, 586 (BIA 1992), and contends that the Board held that violation of 18 U.S.C. § 1546(a) did not categorically constitute a crime involving moral turpitude because the possession portion of the statute did not expressly include the element of fraud. Counsel states that the Board concluded that violation of section 1546(a) is morally turpitudinous only "when accompanied by the intent to commit another crime involving moral turpitude." We find that the Board in *Matter of Serna* indicates that use of a counterfeit immigration document for any unlawful purpose, including unlawful employment, is a crime involving moral turpitude. 20 I&N Dec. at 580-586. Essentially, the immigration judge determined that Serna was convicted of the use and possession of an altered immigrant visa with the knowledge that it had been altered, and concluded that this offense involved moral turpitude. *Id.* at 583. The Board determined that the judgment of conviction established that [REDACTED] conviction was for possession of an altered

immigration document. *Id.* The Board stated that had the “conviction included the use of an altered visa, we would agree that it was for a crime involving moral turpitude.” *Id.* Thus, the Board held that “possession of an altered immigration document with the knowledge that it was altered, but without its use or proof of any intent to use it unlawfully, is not a crime involving moral turpitude.” *Id.* at 586. The Board reasoned that there may be circumstances under which the respondent might not have had the intent to use the altered immigration document in his possession unlawfully. *Id.*

Counsel also cites an unpublished decision, *In re Maria de la Luz Castillo-Gutierrez A.K.A. Maria de la Luz Castillo*, 2006 WL 1558782 (BIA 2006), in support of her contention. In this decision, the Board found that conviction under section 529.5(c) of the California Penal Code for possession of an altered document with the knowledge that the document was not government-issued was not a crime involving moral turpitude. The Board stated that the statute does not include an element of fraud and there was no evidence indicating that the respondent intended to use the altered document in her possession to commit a crime involving moral turpitude. The Board indicated that the respondent suggested that she acquired the card in order to work and pay taxes, and not because she had any intent to use it unlawfully. Counsel declares that the applicant did not intend to commit an unlawful act with the counterfeit immigration document, but sought to use it to obtain a job so the applicant’s conviction under section 1546(a) is not a crime involving moral turpitude.

As a general rule, unpublished decisions are not authority and are therefore not binding. *See Matter of Arthur*, 20 I&N Dec. 475, 479 (BIA 1992) and *Matter of Medrano*, 20 I&N Dec. 216, 220 (BIA 1990, 1991).

By its terms, section 1546(a) convicts a person for conduct that both does and does not involve moral turpitude. A person may be convicted for simple, knowing possession of illegal documents without having any intent to use those illegal documents, which *Serna* indicates does not involve moral turpitude. Conversely, a person may be convicted under section 1546(a) for possession of illegal documents with an intent to use them, which conduct involves moral turpitude. Therefore, the AAO cannot find that a violation of section 1546(a) is categorically a crime involving moral turpitude.

There is no indication in the record of conviction that the applicant was convicted of other than possession of a counterfeit immigration document in violation of 18 U.S.C. § 1546. As we may not look beyond the record of conviction, and mere possession of the documents listed in section 1546 is not a crime involving moral turpitude, we cannot find that the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act as a consequence of this conviction.

The applicant pled nolo contendere to petit theft (shoplifting) in violation of Florida Statutes § 812.014 on April 25, 2000. The judge withheld imposition of sentence and placed the applicant on six months of probation.

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.

. . .

(3)(a) Theft of any property not specified in subsection (2) is petit theft of the second degree and a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083, and as provided in subsection (5), as applicable.

(b) A person who commits petit theft and who has previously been convicted of any theft commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

Florida Statutes § 775.082 provides, in pertinent part:

(4) A person who has been convicted of a designated misdemeanor may be sentenced as follows:

....

(a) For a misdemeanor of the first degree, by a definite term of imprisonment not exceeding 1 year;

(b) For a misdemeanor of the second degree, by a definite term of imprisonment not exceeding 60 days.

In the instant case, the Florida statute under which the applicant was convicted involves both temporary and permanent takings. A plain reading of Fl. Stat. § 812.014 shows that it can be violated by knowingly obtaining or using the property of another with intent to, either temporarily or permanently, deprive an individual of his or her property or appropriate the property to his or her own use. The Board has determined that to constitute a crime involving moral turpitude, a theft offense must require “an intention to intention to permanently deprive the owner of his property.” *See Matter of Jurado-Delgado*, 24 I&N Dec. 29, 33 (BIA 2006). Therefore, the AAO cannot find that a violation of Fl. Stat. § 812.014 is categorically a crime involving moral turpitude.

In *Jurado-Delgado*, the Board found that violation of a 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. Although a “criminal report affidavit” shows that the applicant was charged with petit theft (shoplifting) for changing the tag price of a product and bringing the item to the cashier with the intention of paying the reduced price and thereby depriving the store owner of the full value of the product, we do not believe this document can be considered part of the limited documents comprising the record of conviction.

Regardless, even were we to find that the applicant’s theft conviction is a crime involving moral turpitude, we would also find that the petty offense exception under section 212(a)(2)(A)(ii)(II) of the Act applies. The exception applies where an alien has committed only one crime (involving

moral turpitude) and 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. Based on the record before us, the applicant has only one conviction for a crime involving moral turpitude, petit theft, a misdemeanor. The maximum penalty for this crime under Florida law is imprisonment for one year. The applicant was not sentenced to imprisonment. Therefore, this offense falls within the petty offense exception, and the applicant is thereby not inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

Accordingly, based on the record before the AAO, a waiver application is not necessary and the issue of extreme hardship to a qualifying relative will not be addressed. The decision of the director is withdrawn and the appeal is dismissed as moot.

ORDER: The decision of the director is withdrawn, the waiver application declared moot and the appeal dismissed.