

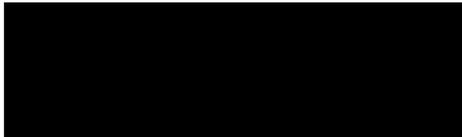
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



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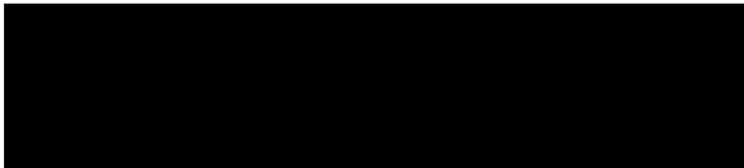
Date: **JAN 23 2012** Office: TAMPA, FLORIDA

FILE: 

IN RE: 

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

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,

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 The decision of the district director will be withdrawn, the waiver application will be declared moot, and the appeal will be dismissed. The matter will be returned to the district director for continued processing of the applicant's adjustment application.

The applicant is a native and citizen of Colombia 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 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 his U.S. citizen spouse, three U.S. citizen children, and lawful permanent resident mother.

In a decision, dated June 26, 2009, the district director found that the record did not contain sufficient evidence to show that any of the applicant's qualifying relatives would suffer extreme hardship as a result of his inadmissibility. The Application for Waiver of Grounds of Inadmissibility (Form I-601), was denied accordingly.

In a Notice of Appeal to the AAO (Form I-290B), dated July 15, 2009, counsel states that the denial of the applicant's waiver application was an abuse of discretion, that the analysis of country conditions in Colombia was erroneous, and that the waiver should have been granted as a matter of law and discretion.

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.)

The record indicates that on May 13, 1998 the applicant was arrested for Burglary of an Occupied Dwelling and Grand Theft. On August 19, 1998 the applicant was convicted of Grand Theft in the 3rd degree under Florida Statutes § 812.014. Grand theft in the third degree is a third degree felony punishable by a maximum of five years imprisonment. The applicant was sentenced to six months of probation for the crime. The applicant, born on February 15, 1980, was eighteen years old at the time of the incident. No action was taken on the charge of Burglary of an Occupied Dwelling.

The record also indicates that on March 9, 2004, the applicant was arrested and charged with: possession of more than 20 grams of marijuana under Fl. Stat. § 893.13(6A), possession of marijuana with the intent to sell within 1,000 feet of a school under Fl. Stat. § 893.13(1C2), possession of a controlled substance under Fl. Stat. § 893.13(6A), and possession of narcotics equipment under Fl. Stat. § 893.147(1). The possession of marijuana charge was nolle prossed and the other three charges were dropped.

The AAO notes that the applicant's case arises under the jurisdiction of the Eleventh Circuit Court of Appeals, which has recently affirmed 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)).

Section 812.014 of the Florida Statutes states, in pertinent part:

(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. . . .

In the instant case, the statute under which the applicant was convicted, Fl. Stat. § 812.014, 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 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."). Therefore, the AAO cannot find that a violation of Fl. Stat. § 812.014 is categorically a crime involving moral turpitude.

Since the full range of conduct proscribed by the statute at hand does not constitute a crime involving moral turpitude, we will apply the modified categorical approach and review the record of conviction to determine under which part of the statute the applicant was convicted. The submitted record of conviction includes the complaint and disposition.

The complaint, dated May 13, 1998, indicates that the applicant violated Fl. Stat. § 812.014 by knowingly obtaining the property of another with the intent to temporarily deprive the owner of that property. The complaint states that the applicant took a radio from an acquaintance and intended to keep the radio until this acquaintance returned his beeper, but the applicant ultimately returned the radio to the acquaintance's possession after having it in his possession for less than 24 hours. Thus, the applicant was convicted of knowingly taking the property of another with intent to temporarily deprive that person of the property, which does not constitute a crime involving moral turpitude. Thus, the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

In proceedings regarding a waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act. Here, the applicant has met that burden. Accordingly, the decision of the district director will be withdrawn, the waiver application will be declared moot, and the appeal will be dismissed. The matter will be returned to the district director for continued processing of the applicant's adjustment application.

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