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



U.S. Citizenship
and Immigration
Services

DATE: JUN 12 2013

Office: CALIFORNIA SERVICE CENTER

FILE: [REDACTED]

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to 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,

A handwritten signature in black ink that reads "Michael Shumway".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of the Philippines who was found to be inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (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), so as to adjust status in the United States. The director denied the waiver application, finding that the applicant failed to establish that he had been rehabilitated because although one of the applicant's theft convictions occurred over 15 years ago, his second theft conviction occurred 14 years ago. *Decision of the Director*, dated May 23, 2012. The director also found that the applicant had failed to show that a denial of his waiver would impose extreme hardship on a qualifying relative.

On appeal, counsel contends that the director erred in finding that the applicant was not rehabilitated. Counsel states that one of the applicant's theft convictions occurred in 1995, more than 15 years ago, and that he has submitted evidence demonstrating his rehabilitation. Counsel alleges that the director incorrectly found that the applicant's second theft conviction, which occurred 14 years prior to the director's decision, prevented him from establishing his rehabilitation. Additionally, counsel contends that the applicant's sons and elderly mother would suffer extreme hardship if the waiver application were denied.

The record includes, but is not limited to conviction records, medical records relating to the applicant's mother, statements from the applicant, copies of the applicant's income tax returns, letters from the applicant's pastor and other members of his church, and a petition from members of the applicant's church attesting to his good moral character. The entire record was reviewed and considered in rendering a decision on the appeal.

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.

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.)

To determine if a crime involves moral turpitude, the Ninth Circuit Court of Appeals employs the categorical approach set forth in *Taylor v. United States*, 110 S.Ct. 2143 (1990). See *Nicanor-Romero v. Mukasey*, 523 F.3d 999, 1004 (9th Cir. 2008), *overruled on other grounds by Marmolejo-Campos v. Holder*, 58 F.3d 903, 911 (9th Cir. 2009). The purpose of the categorical approach is to determine whether the full range of conduct encompassed by the statute constitutes a crime of moral turpitude. *Cuevas-Gaspar v. Gonzalez*, 430 F.3d 1013, 1017 (9th Cir. 2005), *abrogation on other grounds recognized by Holder v. Martinez-Gutierrez*, 132 S.Ct. 2011, 2020-21 (2012). If the statute “criminalizes both conduct that does involve moral turpitude and other conduct that does not, the modified categorical approach is applied.” *Marmolejo-Campos*, 558 F.3d at 912 (citing *Fernando-Ruiz v. Gonzalez*, 466 F.3d 1121, 1163 (9th Cir. 2006)); see also *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1161 (9th Cir. 2009). However, 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.” *Nicanor-Romero*, 523 F.3d at 1004 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). To demonstrate a “realistic probability,” the applicant must point to his or her own case or other cases in which the state courts in fact did apply the statute to conduct not involving moral turpitude. 523 F.3d at 1004-05. A realistic probability also exists where the statute expressly punishes conduct not involving moral turpitude. See *U.S. v. Vidal*, 504 F.3d 1072, 1082 (9th Cir. 2007).

Once a realistic probability is established, the modified categorical approach is applied, which requires looking to the “limited, specified set of documents” that comprise what is known as the record of conviction – the charging document, a signed plea agreement, jury instructions, guilty pleas, transcripts of a plea proceeding and the judgment – to determine if the conviction entailed admission to, or proof of, the elements of a crime involving moral turpitude. *Castillo-Cruz*, 581 F.3d at 1161 (citing *Fernando-Ruiz*, 466 F.3d at 1132-33); see also *Marmolejo-Campos*, 558 F.3d at 912 (citing *Cuevas-Gaspar*, 430 F.3d at 1020). The Ninth Circuit has reaffirmed that courts may not examine evidence outside the record of conviction in determining whether a

conviction was for a crime involving moral turpitude. See *Olivas-Motta v. Holder*, --- F.3d ---, 2013 WL 2128318 (9th Cir. May 17, 2013) (rejecting *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)). Where the burden of proof is on the applicant, as in the present case, the applicant cannot sustain that burden where the record of conviction is inconclusive. *Young v. Holder*, 697 F.3d 976, 989 (9th Cir. 2012).

The record reflects that the applicant was convicted on February 21, 1995 of theft in violation of Ca. Penal Code § 484(a). He was sentenced to five days in jail, 24 months of probation, and to pay a fine. The record also reflects that the applicant was again convicted of theft in violation of Ca. Penal Code § 484(a) on May 27, 1998. He was sentenced to two days in jail, 36 months of probation, community service, and a fine.

At the time of the applicant's convictions in 1995 and 1998, Ca. Penal Code § 484 provided:

- (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 of 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. In determining the value of the property obtained, for the purposes of this section, the reasonable and fair market value shall be the test, and in determining the value of services received the contract price shall be the test. If there be no contract price, the reasonable and going wage for the service rendered shall govern. For the purposes of this section, any false or fraudulent representation or pretense made shall be treated as continuing, so as to cover any money, property or service received as a result thereof, and the complaint, information or indictment may charge that the crime was committed on any date during the particular period in question. The hiring of any additional employee or employees without advising each of them of every labor claim due and unpaid and every judgment that the employer has been unable to meet shall be prima facie evidence of intent to defraud.

U.S. Courts have held that the crime of theft or larceny, whether grand or petty, involves moral turpitude. See *Matter of Scarpulla*, 15 I&N Dec. 139, 140 (BIA 1974); *Morasch v. INS*, 363 F.2d 30, 31 (9th Cir. 1966) (“Obviously, either petty or grand larceny, i.e., stealing another’s property, qualifies [as a crime involving moral turpitude].”) However, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended. *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973).

The Ninth Circuit Court of Appeals addressed the issue of whether Ca. Penal Code § 484(a) constitutes a crime involving moral turpitude in *Castillo-Cruz*. 581 F.3d at 1157. The Ninth Circuit reviewed lower court case law on convictions under Ca. Penal Code § 484(a), and determined that a conviction for theft (grand or petty) under the California Penal Code requires the specific intent to deprive the victim of his or her property permanently. *Id.* at 1160 (citations omitted). The Ninth Circuit cited to the Second District Court of Appeal's opinion in *People v. Albert*, which held that the act of robbery, defined by the court as "larceny aggravated by use of force or fear," requires an intended permanent taking. *Id.* (citing 47 Cal.App.4th 1004, 1007 (1996)). The Second District Court of Appeal emphasized that absent this specific intent, the taking of the property of another is not theft. 47 Cal.App.4th at 1008. Therefore, the AAO finds that a conviction for theft under Ca. Penal Code § 484(a) is categorically a crime involving moral turpitude because it requires the permanent intent to deprive the victim of his or her property. Accordingly, the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of crimes involving moral turpitude. The applicant does not contest his inadmissibility on appeal.

Section 212(h) of the Act provides, in pertinent part:

The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if -

(1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that -

(i) . . . the 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

Section 212(h)(1)(A) of the Act provides that the Secretary may, in her discretion, waive the application of subparagraph (A)(i)(I) of subsection (a)(2) if the 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.

On appeal, counsel asserts that the field office director erred in finding that the applicant did not qualify for a waiver under section 212(h)(1)(A) of the Act due to the fact that while one of his convictions had occurred over 15 years ago, the other conviction had not. Counsel alleges that the applicant's lack of a criminal record for 14 years should have been taken into account in determining whether the applicant was rehabilitated. However, the field office director correctly found that to be eligible for a rehabilitation waiver under section 212(h)(1)(A) of the Act, the conduct which rendered the applicant inadmissible must have occurred more than 15 years ago. Because both of the applicant's convictions are crimes involving moral turpitude which render him inadmissible, both offenses must have occurred more than 15 years ago for him to be eligible for a waiver based on rehabilitation. The conviction records indicate that the applicant's second theft offense occurred on March 28, 1998, approximately 14 years and two months prior to the field office director's decision on May 23, 2012. Therefore, at the time of the field office director's decision, the applicant was statutorily ineligible for a waiver based on rehabilitation because he failed to meet the 15-year requirement in section 212(h)(1)(A)(i) of the Act. However, the AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Furthermore, an application for admission is a "continuing" application, and admissibility is adjudicated on the basis of the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992). As more than 15 years have now passed since both of the applicant's theft offenses, we may consider the applicant for a waiver under section 212(h)(1)(A) of the Act, as well as section 212(h)(1)(B).

Section 212(h)(1)(A)(ii) and (iii) of the Act requires that the applicant's admission to the United States not be contrary to the national welfare, safety, or security of the United States; and that the applicant establish his rehabilitation. The record does not reflect that admitting the applicant would be contrary to the national welfare, safety, or security of the United States. The record does not show that the applicant has engaged in violent behavior at any time.

In his brief on appeal, counsel alleges that the applicant has not been engaged in any criminal activity since his convictions in 1995 and 1998. Counsel states that the applicant is a board member of his church, that he participates in weekly Bible studies, and that he contributes to his community. Also, counsel asserts that the applicant has taken responsibility for his criminal activity and has been a person of good moral character since his last conviction.

The applicant states that he served his probation and learned from his convictions. He states that he has been working continuously as a licensed general contractor since 2004. He has not received any complaints and has not violated the terms of his contractor's license. The applicant also asserts that he has four adult children, two of whom live with him. He also contends that he helps support his 91-year-old mother. Additionally, the applicant states that he has paid taxes. Finally, he contends that he is actively involved in his church and is a member of the church Board of Trustees.

The applicant also asserts that his family would suffer extreme hardship if his waiver application were denied. He states that two of his sons rely on him for housing and financial support

because they are unemployed. Also, the applicant contends that his children would be unable to find work in the Philippines because they have never worked in that country. He also notes that his youngest son was born in the United States and has never lived in the Philippines. Additionally, he states that his elderly mother, who suffers from dementia, hypertension, heart disease, hip dysplasia, and arthritis, relies on him for financial assistance, physical care, help with medications, and emotional support. Finally, he notes that his mother would be unable to relocate to the Philippines with him due to her age and health condition, so she would likely never see the applicant again if he were removed.

In a letter, the Senior Pastor of the applicant's church states that the applicant has been an active member since 2008. The Pastor asserts that the applicant regularly attends Sunday services, participates in a Bible study group, is on the Board of Trustees, and "has exemplified hospitality, generosity and cooperation" in his involvement with the church. *See Letter from [REDACTED] Senior Pastor*, dated April 18, 2012. A friend also writes that the applicant is an active member of his church and that he "is of good moral character, his integrity, generosity and kindness are exemplary." *See Letter from [REDACTED]*, dated April 20, 2012. Two other friends also confirm that the applicant is active with his church and that he is a person of good moral character. *See Letter from [REDACTED]*, dated April 18, 2012. Finally, the record contains a letter signed by numerous church members attesting that the applicant is "of good moral character and an active member of [REDACTED]." *See Certification*, dated April 15, 2012.

The applicant has shown by a preponderance of the evidence that he has been rehabilitated as required by section 212(h)(1)(A)(iii) of the Act. As discussed above, there is no evidence that he has engaged in criminal activity since 1998. The record shows that he has conducted himself well during the last 15 years, including working and paying taxes, supporting his family, and contributing to his church. The record does not reflect that the applicant has a propensity to engage in further criminal activity. Accordingly, the applicant has shown that he meets the requirements of section 212(h)(1)(A)(iii) of the Act.

In determining whether the applicant warrants a favorable exercise of discretion under section 212(h) of the Act, the Secretary must weigh positive and negative factors in the present case. The negative factors in this case are the applicant's two convictions for theft, both of which occurred more than 15 years ago. The positive factors include the applicant's rehabilitation and involvement in his community, the hardship the applicant's children and mother would experience if he were removed, and the fact that the applicant has resided in the United States since 1993. While the applicant's criminal activity cannot be condoned, the positive factors in this case outweigh the negative factors.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met his burden and the appeal will be sustained.

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ORDER: The appeal is sustained.