



**U.S. Citizenship  
and Immigration  
Services**

(b)(6)



DATE: **JUN 18 2015**

FILE #: [REDACTED]  
APPLICATION RECEIPT #: [REDACTED]

IN RE: Applicant: [REDACTED]

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:



Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg  
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. The appeal will be dismissed as the application is not necessary.

The applicant is a native and citizen of China. The field office director found that the applicant was 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 committing crimes involving moral turpitude. The director indicated that the applicant requires a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h). However, the director concluded that the applicant failed to establish that her qualifying spouse would experience extreme hardship, and therefore she was ineligible for a waiver under section 212(h) of the Act, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On appeal, counsel asserts that the applicant's waiver application should have been granted because the evidence established that the qualifying spouse would experience extreme hardship. Counsel further indicates that the qualifying spouse is dependent upon the applicant due to his visual impairments, and that he will experience emotional, psychological, physical, medical and financial hardships if the applicant's waiver application is denied.

The record contains, but is not limited to: an appeal brief and letter written on behalf of the applicant; a statement from the qualifying spouse; a psychological evaluation; identification documents for the applicant and qualifying spouse; a declaration from the applicant; medical documentation including a letter from an optometrist, a handwritten note on prescription paper, and a referral authorization request; criminal records for the applicant; a death certificate for the qualifying spouse's first wife; financial documentation; a computer printout from the qualifying spouse's son's school indicating that he and the applicant are legally responsible for him; and photographs. The entire record was reviewed and considered in rendering this decision.

The AAO will first address the finding of inadmissibility. Section 212(a)(2)(A)(i)(I) 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.

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

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or

(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.)

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 (9<sup>th</sup> 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).

On [REDACTED] 2000, the applicant was convicted of Unauthorized Use of Personal Identifying Information of Another Person in violation of Section 530.5(a) of the California Penal Code. The judge sentenced the applicant to 45 days in jail and placed her on probation for 3 years. On [REDACTED], 2012, she was convicted for Theft in violation of Section 484(A) of the California Penal Code, and sentenced to 1 day in jail, placed on summary probation for 3 years and fined.

Section 484(a) of the California Penal Code states in part:

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 her, 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 or her 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)(stating, "It is well settled that theft or larceny, whether grand or petty, has always been held to involve moral turpitude . . ."); *Morasch v. INS*, 363 F.2d 30, 31 (9th Cir. 1966)(stating, "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 in *Castillo-Cruz v. Holder* determined that petty theft under Cal. Penal Code § 484(a) requires the specific intent to deprive the victim of his or her property

permanently, and is therefore a crime categorically involving moral turpitude. 581 F.3d 1154, 1160 (9th Cir. 2009).

However, although the applicant was convicted for his violation of section 484 of the California Penal Code and such crime involves a crime involving moral turpitude, the maximum penalty possible for this crime did not exceed imprisonment for one year and he was only sentenced to one day in jail. As such, we find that the applicant's conviction qualifies for the petty-offense exception, as the maximum penalty possible for his conviction did not exceed one year in prison and he was sentenced to less than six months in prison. Thus, the applicant is not inadmissible under section 212(a)(2)(A)(i) of the Act.

Section 530.5(a) of the California Penal Code states in part:

Every person who willfully obtains personal identifying information, as defined in subdivision (b) of Section 530.55, of another person, and uses that information for any unlawful purpose, including to obtain, or attempt to obtain, credit, goods, services, real property, or medical information without the consent of that person, is guilty of a public offense, and upon conviction therefore, shall be punished by a fine, by imprisonment in a county jail not to exceed one year, or by both a fine and imprisonment, or by imprisonment pursuant to subdivision (h) of Section 1170.

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).

In *Blanco v. Mukasey*, the Ninth Circuit Court of Appeals held that false identification to a peace officer under section 148.9(a) of the California Penal Code does not require fraudulent intent and is not categorically a crime involving moral turpitude. 518 F.3d 714 (9th Cir. 2008). The Ninth Circuit explained that the crime "requires a showing that the individual knowingly misrepresented his or her identity to a peace officer, but does not require that the individual thereby knowingly attempted to obtain anything of value." *Id.* at 719. The Ninth Circuit found significance in this distinction, stating that "intent to defraud is implicit in the nature of the crime when the individual makes false statements in order to procure something of value, either monetary or non-monetary." *Id.* The Ninth Circuit further noted that fraud "does not equate with mere dishonesty, because fraud requires an attempt to induce another to act to his or her detriment." *Id.* Therefore, "[w]hen the only 'benefit' the individual obtains is to impede the enforcement of the law, the crime does not involve moral turpitude." *Id.* Accordingly, the Ninth Circuit held that giving a false name or date of birth to a police officer does not make a crime one involving moral turpitude. *Id.* at 720.

Identity theft under section 530.5(a) of the California Penal Code similar to *Blanco v. Mukasey* does not categorically involve moral turpitude as it does not require the specific intent to defraud the victim. 518 F.3d 714 (9th Cir. 2008). Moreover, the statutory language finds a person who willfully obtains personal identifying information and uses that information for any unlawful purpose is guilty of violating this statute. Also like *Blanco v. Mukasey*, the criminal acts punishable by this statute could include acts not involving moral turpitude. As a violation of 530.5(a) of the California Penal Code is not categorically a crime involving moral turpitude, and the applicant may have committed acts not involving moral turpitude, he is not inadmissible for a crime involving moral turpitude with respect to this statute.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, because the applicant qualifies for the petty offense exception for his conviction under section 484(A) of the California Penal Code and he has not otherwise been convicted of a crime involving moral turpitude, he is not inadmissible and not required to file a waiver application. Because the waiver application is unnecessary, the appeal is dismissed.

**ORDER:** The appeal is dismissed as unnecessary.