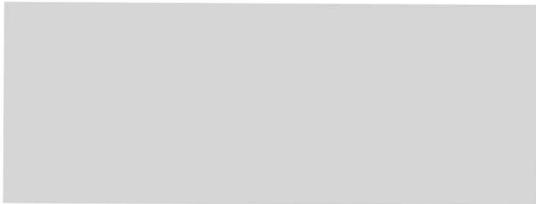




**U.S. Citizenship
and Immigration
Services**

(b)(6)



DATE: JUN 25 2015

FILE #: [REDACTED]

APPLICATION RECEIPT #: [REDACTED]

IN RE: [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]

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

Thank you,

A handwritten signature in black ink that reads "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director of the Houston, Texas Field Office (the director) denied the Application for Waiver of Grounds of Inadmissibility (Form I-601), and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Mexico 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 been convicted of crimes involving moral turpitude. The applicant is the beneficiary of an approved Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360) under the Violence Against Women Act (VAWA), and she has applied to adjust her status pursuant to section 245 of the Act, 8 U.S.C. § 1255. She presently seeks a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h).

The director determined, in a decision dated June 25, 2014, that because the applicant failed to submit certified arrest and court disposition evidence, U.S. Citizenship and Immigration Services (USCIS) was unable to assess whether her criminal history was connected to abuse she suffered from her former spouse and whether discretion should be exercised favorably in her case. He denied the applicant's Form I-601 accordingly.

Through counsel, the applicant indicates on appeal that USCIS erred by not determining her eligibility for a waiver of inadmissibility under section 212(h) of the Act, and she submits certified arrest and court disposition evidence and an affidavit.

The record also includes, but is not limited to, affidavits from friends and statements submitted in support of the applicant's Form I-360; a protective order against the applicant's former husband, police reports and divorce evidence; documents establishing relationships and identity; financial evidence; and country-conditions information about Mexico. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(2)(A) of the Act provides, in pertinent part:

(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.

Section 212(h) of the Act provides, in pertinent part, that the Attorney General [now Secretary of the Department of Homeland Security (Secretary)] may, in his discretion, waive inadmissibility under section 212(a)(2)(A)(i)(I) of the Act:

(1) (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 [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; or

(C) the alien is a VAWA self-petitioner; and

(2) the [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa for admission to the United States, or adjustment of status.

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. (Internal citations omitted.)

When determining whether a crime involves moral turpitude, the statute under which the conviction occurred controls. See *Matter of Short*, 20 I&N Dec. 136, 137 (BIA 1989). In addition, for cases that arise in the jurisdiction of the U.S. Fifth Circuit Court of Appeals, such as the applicant's, the determination of whether a conviction is a crime involving moral turpitude requires a categorical inquiry into the "the inherent nature of the crime, as defined in the statute concerned, rather than the circumstances surrounding the particular transgression." *Okabe v. I.N.S.*, 671 F.2d 863, 865 (5th Cir. 1982). The categorical inquiry takes into account only "the minimum criminal conduct necessary to sustain a conviction under the statute." *Hamdan v. U.S.*, 98 F.3d 183, 189 (5th Cir. 1996). A conviction is "a crime involving moral turpitude if the minimum reading of the statute necessarily reaches only offenses involving moral turpitude." *Amouzadeh v. Winfrey*, 467 F.3d 451, 455 (5th Cir. 2006) (citing *Pichardo v. I.N.S.*, 104 F.3d 756, 759 (5th Cir. 1997)).

If, however, the statute is divisible into separate subsections of criminal acts, some of which are categorically crimes involving moral turpitude and some of which are not, we may make a modified categorical inquiry into the record of conviction to discern whether the applicant has been convicted of a subsection that qualifies as a crime involving moral turpitude. See *Hamdan, supra*, at 187; see also *Amouzadeh, supra*, at 455 (citing *Smalley v. Ashcroft*, 354 F.3d 332, 336 (5th Cir. 2003)). The record of conviction is a narrow, specific set of documents which includes the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. See *Matter of Louissaint*, 24 I&N Dec. 754, 757 (BIA 2009); see also *Shepard v. U.S.*, 544 U.S. 13, 16 (2005) (finding that the record of conviction is limited to the "charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented").

In the present matter, the record reflects the following criminal history for the applicant:¹

On [REDACTED] 1996, the applicant was arrested for Theft, a Class B misdemeanor, in violation of Texas Penal Code (Tex. Pen. Code) § 31.03. She was found guilty and sentenced to 30 days' imprisonment on [REDACTED] 1999;

On [REDACTED] 1999, the applicant was arrested for Theft, a Class B misdemeanor, in violation of Tex. Pen. Code § 31.03. She was found guilty and sentenced to a concurrent imprisonment term of 30 days on [REDACTED] 1999;

On [REDACTED] 2003, the applicant was arrested for Possession, Manufacture, or Distribution of Certain Instruments Used to Commit Retail Theft, a Class A misdemeanor, in violation of Tex. Pen. Code § 31.15. She was found guilty and sentenced to 60 days' imprisonment on [REDACTED], 2004;

On [REDACTED] 2004, the applicant was found guilty of Failure to Stop and Give Information, a Class B misdemeanor. The conviction record for this offense, which occurred on [REDACTED] 2003, does not include a statutory provision; however, Texas Transportation Code (Tex. Transp. Code) section 550.023 represents the terms of the offense. The applicant was sentenced to 60 days' imprisonment.

The information document related to the Failure to Stop and Give Information misdemeanor charge against the applicant states that:

[T]he vehicle driven and operated by [the applicant] collided with the vehicle attended by [other party's name omitted] and the [applicant] did intentionally and knowingly fail to stop [her] vehicle at the scene of said accident and give [her] name, [her] address, the vehicle registration number [she] was driving and exhibit upon request [her] operators [sic] license and the name of the [applicant's] Motor vehicle liability insurer to [name omitted], and the damages to the vehicles involved in said accident resulted in a pecuniary loss of the value of over two hundred dollars.

Tex. Transp. Code § 550.023, "Duty to Give Information and Render Aid," as in effect at the time of the applicant's conviction in 2004, provided that:

The operator of a vehicle involved in an accident resulting in the injury or death of a person or damage to a vehicle that is driven or attended by a person shall:

- (1) give the operator's name and address, the registration number of the vehicle the operator was driving, and the name of the operator's motor vehicle liability

¹ As the director noted in his decision denying Form I-601, the applicant was arrested and charged with several other crimes between 1999 and 2003; however, the applicant provided evidence that these charges were dismissed. The charges therefore do not affect the applicant's admissibility.

insurer to any person injured or the operator or occupant of or person attending a vehicle involved in the collision;

(2) if requested and available, show the operator's driver's license to a person described by Subdivision (1); and

(3) provide any person injured in the accident reasonable assistance, including transporting or making arrangements for transporting the person to a physician or hospital for medical treatment if it is apparent that treatment is necessary, or if the injured person requests the transportation.

The statutory provisions contained in Tex. Transp. Code § 550.023 include accidents resulting in injury or death of a person, as well as accidents resulting in damage to a vehicle. The statute is therefore divisible into subsections of different criminal acts, and we must conduct a modified categorical inquiry into the record of conviction to discern whether the applicant has been convicted of a subsection that qualifies as a crime involving moral turpitude. *See Hamdan, supra*, at 187.

The Fifth Circuit Court of Appeals held in *Garcia-Maldonado v. Gonzales*, 491 F.3d 284, 290 (5th Cir. 2007), that failure to stop and render aid following a fatal auto accident in violation of Tex. Transp. Code § 550.023 was a crime involving moral turpitude. In the present case, however, the record reflects that the applicant's conviction was for an offense which resulted only in property damage. This conduct does not mirror the "inherently base, vile, or depraved," behavior found in moral turpitude offenses. *See Matter of Perez-Contreras*, 20 I&N Dec. at 617-18. Further, the Board has held that even malicious destruction of property is not a crime involving moral turpitude where "the statute does not require that the proscribed act be accompanied by a vicious or corrupt intent." *See Matter of M-*, 2 I&N Dec. 686, 691 (BIA 1946). A violation of the property-damage subsection of 550.223 of the Tex. Transp. Code, therefore, does not require evil intent and does not implicate moral turpitude. Accordingly, we see no basis to find that moral turpitude inheres in this conviction.

The applicant's theft convictions, however, do constitute crimes involving moral turpitude.

Section 31.03 of the Tex. Pen. Code, as in effect at the time of the applicant's convictions in 1999, provided, in pertinent part:

(a) A person commits an offense [of Theft] if he unlawfully appropriates property with intent to deprive the owner of property.

(b) Appropriation of property is unlawful if:

(1) it is without the owner's effective consent;

(2) the property is stolen and the actor appropriates the property knowing it was stolen by another; or

(3) property in the custody of any law enforcement agency was explicitly represented by any law enforcement agent to the actor as being stolen and the actor appropriates the property believing it was stolen by another.

....

(e) Except as provided by Subsection (f), an offense under this section is . . .
(2) a Class B misdemeanor if:

(A) the value of the property stolen is:(i) \$50 or more but less than \$500.

Generally, the crime of theft or larceny, whether grand or petty, involves moral turpitude. *See Matter of Scarpulla*, 15 I&N Dec. 139, 140-41 (BIA 1974). However, 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, 333 (BIA 1973). The BIA determined in the decision, *In re Jurado-Delgado*, that violation of a retail theft statute involves 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. *See In re Jurado-Delgado*, 24 I&N Dec. 29, 33-34 (BIA 2006).

The evidence in the applicant's conviction record reflects that her theft convictions were related to retail theft.² The offenses therefore constitute crimes involving moral turpitude. The applicant does not contest that her theft convictions are for crimes involving moral turpitude.

Similarly, the applicant's conviction on [REDACTED] 2004, for Possession, Manufacture, or Distribution of Certain Instruments Used to Commit Retail Theft, in violation of Tex. Pen. Code § 31.15, also constitutes a crime involving moral turpitude.

² The Complaint for the applicant's [REDACTED] 1996 arrest states that she was charged with unlawfully appropriating property:

[B]y exercising control over property, other than real property, to-wit: One (1) toothbrush; two (2) eye markers and ten (10) cans baby formula of the total value of \$50.00 or more but less than \$500.00, without the effective consent of [name omitted] the owner thereof, and with the intent to deprive [name omitted] of said property[.]

The Complaint for the applicant's [REDACTED] 1999 arrest states that she was charged with unlawfully appropriating property:

[B]y exercising control over property, other than real property, to-wit: Infant milk of the value/total value of \$50.00 or more but less than \$500.00, without the effective consent of [name omitted] the owner thereof, and with the intent to deprive [name omitted] of said property[.]

The Tex. Pen. Code, in effect at the time the applicant was convicted in 2004, provided, in pertinent part at section 31.15 that:

(b) A person commits an offense if, with the intent to use the instrument to commit theft, the person:

- (1) possesses a shielding or deactivation instrument; or
- (2) knowingly manufactures, sells, offers for sale, or otherwise distributes a shielding or deactivation instrument.

(c) An offense under this section is a Class A misdemeanor.

The nature of the Possession, Manufacture, or Distribution of Certain Instruments Used to Commit Retail Theft offense is such that it is reasonable to assume that the device was to be used with the intention of retaining merchandise permanently. *See In re Jurado-Delgado, supra.* The offense therefore also constitutes a crime involving moral turpitude.

The applicant has been convicted of three crimes involving moral turpitude.³ She is therefore inadmissible under Section 212(a)(2)(A)(i)(I) of the Act and requires a waiver of this ground of inadmissibility under section 212(h) of the Act.

The record reflects that on September 20, 2012, the applicant became the beneficiary of an approved Form I-360 VAWA petition pursuant to section 204(a)(1)(A)(iii) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii). As such, the applicant is eligible to apply for a waiver of inadmissibility under section 212(h)(1)(C) of the Act, which provides that a beneficiary of a VAWA self-petition is not required to demonstrate extreme hardship to a qualifying relative but may be granted a waiver of inadmissibility as an exercise of discretion.

In evaluating whether section 212(h)(1)(C) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his or her family if he or she is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the

³ The record reflects that on [REDACTED] 1998, the applicant was also arrested for the offense of Theft of Goods in [REDACTED] Louisiana. The applicant does not dispute that she was arrested for this offense; nevertheless, she provides no court disposition evidence to establish the judicial history and resolution of the matter. Although an offense under LRS § 14:67.10 would meet the definition of a crime involving moral turpitude and the applicant has not provided relevant evidence concerning this arrest, she has conceded her inadmissibility based on her convictions of other theft crimes that are crimes involving moral turpitude; therefore, these missing records do not affect the analysis of her case.

community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives). See *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). We must then “balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country.” *Id.* at 300 (citations omitted).

The adverse factors in the applicant's case are her multiple theft-related offenses that occurred between [REDACTED] 1996 and [REDACTED] 2003; and her conviction for Failure to Stop and Give Information, which occurred in [REDACTED] 2003.

The favorable factors in the applicant's case are her family ties in the United States; her sole support of five U.S. citizen children, ages 4 through 15;⁴ and evidence of financial and educational hardship the family would face if they were separated or moved together to Mexico. In addition, the applicant asserts in an [REDACTED] 2013 affidavit that her abusive ex-husband forced her to steal, that they fought when she resisted by telling him she did not want to steal, and that even when she tried running away from him, he caught her and beat her. She states further that her former husband “took [her] to the store and took [her] inside and he stood in front of [her] and handed [her] the cans of baby formula and he walked out of the store and waited for [her] in the car.” She also indicates that she did not want to continue stealing after she was arrested and went to jail, but that this caused another “big fight” and he “just beat [her] again.” The record contains evidence that the applicant filed police reports against her former husband and that she obtained a protective order against him in 2008. In addition, she was granted a divorce from her former husband in [REDACTED] 2009, based on cruelty. Evidence of the applicant's rehabilitation is also evident, in that she has had no arrests or documented criminal activity for over 10 years, since 2003. In addition, the record contains several letters from friends who describe the applicant's good moral character. The applicant, in her affidavit, also expresses remorse for her criminal history.

Upon review of all the factors in the applicant's case, the applicant has established that the favorable factors in her application outweigh the unfavorable factors. The applicant has therefore demonstrated that she merits a waiver as a matter of discretion under section 212(h)(1)(C) of the Act. Because the applicant has established eligibility for a waiver under section 212(h)(1)(C) of the Act, we find it unnecessary to assess her eligibility for a waiver pursuant to section 212(h)(1)(B) of the Act, based on extreme hardship to her U.S. children.

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, that burden has been met.

ORDER: The appeal is sustained.

⁴ The record contains a Verification of Birth Facts for another child born in Texas on [REDACTED] 2012; however, no birth certificate was submitted for this child.