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U.S. Citizenship  
and Immigration  
Services

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H3

[REDACTED]

FILE:

[REDACTED]

Office: CALIFORNIA SERVICE CENTER

Date: DEC 05 2008

IN RE:

[REDACTED]

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)

ON BEHALF OF APPLICANT:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom, 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 dismissed as the underlying application is moot. The matter will be returned to the director for continued processing.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(I), for having been unlawfully present in the United States for more than 180 days. The applicant is married to a United States citizen and has a U.S. citizen daughter. She seeks a waiver of inadmissibility in order to reside in the United States with her husband.

The director based his finding of inadmissibility on section 212(a)(9)(B)(i)(I) of the Act. *Director's Decision*, dated July 27, 2006. The director found that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Id.*

On appeal, counsel states that United States Citizenship and Immigration Services (USCIS) erred in applying circuit court case law arising out of the first and ninth circuit courts, as the applicant resides in the jurisdiction of the second circuit court. *Attachment to Form EOIR-29*, dated August 21, 2006. In addition, counsel states that the director did not properly consider the emotional impact of the applicant's inadmissibility and the impact her inadmissibility would have on her six-year-old daughter. *Id.*

The AAO notes that although the applicant resides in the jurisdiction of the second circuit court, case law from other circuit courts can be used as persuasive authorities in adjudicating an immigration application.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

(B) Aliens Unlawfully Present.-

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . prior to the commencement of proceedings under section 235(b)(1) or section 240, and again seeks admission within 3 years of the date of such alien's departure or removal, . . . is inadmissible.

....

(v) Waiver. - The Attorney General [Secretary] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

In the present application, the record indicates that the applicant entered the United States without inspection in January 1996. In December 1997 the applicant departed the United States. She then re-entered the United States in October 1999 and has not departed since her December 1997 departure. Thus, the applicant accrued unlawful presence from April 1, 1997, the date of enactment of unlawful presence provisions under the Act, until December 1997, the date she departed the United States. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(i)(I) of the Act for being unlawfully present in the United States for a period of more than 180 days, but less than one year. Pursuant to section 212(a)(9)(B)(i)(I), the applicant was barred from again seeking admission within three years of her departure in December 1997. It has now been more than three years since the departure that made the inadmissibility issue arise in the applicant's case. The applicant is no longer inadmissible under section 212(a)(9)(B)(i)(I) of the Act.

However, the AAO notes that there is an issue as to the applicant's inadmissibility under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of two crimes.

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

(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.

On November 30, 1992 the applicant was arrested and charged with committing Theft of Property, a violation under California Penal Code § 484(a). Her arraignment was scheduled for June 12, 1997, the applicant was not present the day of her arraignment and a bench warrant was issued for her arrest.

On October 21, 1997, the applicant was again arrested and charged with committing Theft of Property, a violation under California Penal Code § 484(a). Her arraignment was scheduled for November 13, 1997, the applicant was not present the day of her arraignment and a second bench warrant was issued for her arrest.

On July 12, 2005, the applicant pled guilty to the charge of Theft of Property under California Penal Code § 484(a) for her October 21, 1997 arrest and was ordered to pay a \$100 fine.

California Penal Code § 484(a) states:

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...

The AAO notes that the court disposition shows that the applicant's conviction for Theft of Property was amended to a California Penal Code § 484(a) infraction pursuant to California Penal Code § 490.1 infraction.

California Penal Code § 490.1 states:

(a) Petty theft, where the value of the money, labor, real, or personal property taken is of a value which does not exceed fifty dollars (\$50), may be charged as a misdemeanor or an infraction, at the discretion of the prosecutor, provided that the person charged with the offense has no other theft or theft-related conviction.

...

A violation which is an infraction under this section is punishable by a fine not exceeding two hundred fifty dollars (\$250).

In addition, California Penal Code § 19.6 states, "An infraction is not punishable by imprisonment."

On July 14, 2005, on a people's motion, the court ordered the complaint from the applicant's November 30, 1992 arrest for Theft of Property to be amended by interlineations to add a violation of California Penal Code 602(k), Trespassing on Lands under Cultivation, as count two in the complaint. The applicant plead nolo contendere to the trespassing charge and was placed on summary probation for 24 months, sentenced to one day in jail and ordered to pay a \$100 fine. Count one, the charge of Theft of Property from the applicant's November 30, 1992 arrest, was dismissed in the furtherance of justice, pursuant to California Penal Code, § 1385.

California Penal Code § 602(K) states, in pertinent part:

[E]very person who willfully commits a trespass by any of the following acts is guilty of a misdemeanor:

(k) Entering any lands, whether unenclosed or enclosed by fence, for the purpose of injuring any property or property rights or with the intention of interfering with, obstructing, or injuring any lawful business or occupation carried on by the owner of the land, the owner's agent or by the person in lawful possession.

The AAO finds that the applicant's conviction for Trespassing on Lands under Cultivation under California Penal Code § 602(k) is not a crime involving moral turpitude.

The Board of Immigration Appeals (BIA) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992):

[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.

Although evil intent signifies a crime involving moral turpitude, willfulness in the commission of the crime does not, by itself, suggest that it involves moral turpitude. *Goldeshtein v. INS*, 8 F.3d 645 (9<sup>th</sup> Cir. 1993). In the applicant's case the record of conviction is complete and the AAO finds that although the statute includes willfulness in the commission of the crime there is no evil or malicious intent. Thus, the applicant's conviction for Trespassing on Lands under Cultivation under California Penal Code section 602(k) is not a crime involving moral turpitude, making the applicant's conviction for Theft of Property under section 484(a) of the California Penal Code the only crime involving moral turpitude of which the applicant was convicted. The AAO finds that this crime qualifies for the petty offense exception to inadmissibility. Section 212(a)(2)(A) of the Act provides in pertinent part:

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

....

(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).

As stated above, the maximum penalty possible for the applicant's conviction under § 484(a) of the California Penal Code is a \$200 fine with no possibility of imprisonment. The applicant was ordered to pay a \$100 fine. Thus, as the applicant's conviction for Trespassing on Lands under Cultivation under California Penal Code § 602(k) is not a crime involving moral turpitude and that the applicant's conviction for Theft of Property under California Penal Code § 484(a) falls within the petty offense exception, the AAO finds that the applicant is not inadmissible.

The appeal will be dismissed as the underlying waiver application is moot. The matter will be returned to the director for continued processing.

ORDER: The appeal is dismissed and the matter returned to the director for continued processing.