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

U.S. Citizenship and Immigration Services

[redacted]

H5

Date: OCT 1 0 2012 Office: VERMONT SERVICE CENTER FILE: [redacted]

IN RE: Applicant: [redacted]

APPLICATION: *Application for Waiver of Grounds of Inadmissibility under sections 212(i), 212(h), and* 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i), 8 U.S.C. § 1182(h), and 8 U.S.C. § 1182(a)(9)(B)(v), respectively

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.*

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Michael Shumway

for Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Canada who was found to be inadmissible under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for seeking admission into the United States by fraud or willful misrepresentation; section 212(a)(2)(A) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of crimes involving moral turpitude; and section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year. The applicant seeks a waiver of inadmissibility pursuant to sections 212(i), 212(h), and 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(i), 8 U.S.C. § 1182(h), and 8 U.S.C. § 1182(a)(9)(B)(v), respectively, so as to immigrate to the United States. The director determined that the applicant had established extreme hardship to a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) as a matter of discretion.

On appeal, counsel asserts that the director determined that the favorable factors in the applicant's case were extreme hardship to the applicant's U.S. citizen spouse, who has anxiety and depression and lower back and knee pain, and takes care of her 88-year-old mother who has Parkinson's disease; but gave improper weight to the adverse factors. Counsel states that the director cited as adverse factors the applicant's convictions for possession of stolen property (1968), theft (1969, 1970, and 1986), and alcohol-related driving (1979, 1982, 1990, and 2000); and the immigration violations which were failure to appear at the adjustment interview in 2002, denial of the adjustment application, unlawful presence, unauthorized employment, lack of credibility in regard to the explanation for claiming lawful permanent residency, and the conviction in 2007 for improper entry under 8 U.S.C. § 1325. Counsel, citing cases in which the AAO previously granted section 212 waivers for aliens, argues that the applicant's adverse factors are comparatively less serious than those of previously granted cases and that the applicant committed no violent crime. Counsel contends that the applicant had only one conviction in the last 20 years, which occurred before the applicant's sobriety from attending Alcoholics Anonymous. Counsel declares that the applicant expressed remorse for attempting to cross the border, which the applicant had stated was a "stupid decision." Counsel contends that the submitted letters from employers, co-workers, and family members and friends attest to the applicant's good character. Counsel asserts that the mental and physical health problems of the applicant's wife have worsened since the applicant has been barred admission, and her financial hardships have increased. Counsel states that further evidence of the applicant's reputation are submitted on appeal.

We will first address the finding of inadmissibility.

The director found the applicant was inadmissible for having been convicted of crimes involving moral turpitude.

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.

Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines "conviction" for immigration purposes as:

> A formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where –
>
> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

The record reflects that the applicant pled guilty to and was convicted in Canada of possession of stolen property in 1968, and theft in 1969, 1970. In 1986, the applicant pled guilty to theft of merchandise.

In *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. First, in evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a "realistic probability, not a theoretical possibility," that the statute would be applied to reach conduct that does not involve moral turpitude. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). A realistic probability exists where, at the time of the proceeding, an "actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien's own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude." *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

However, if a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, "the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude." 24 I&N Dec. at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage inquiry in which the adjudicator reviews the "record of conviction" to determine if the conviction was based on conduct involving moral turpitude. *Id.* at 698-699, 703-704, 708. The record of conviction consists of documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.* at 698, 704, 708.

If review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. 24

I&N Dec. at 699-704, 708-709. However, this "does not mean that the parties would be free to present any and all evidence bearing on an alien's conduct leading to the conviction. (citation omitted). The sole purpose of the inquiry is to ascertain the nature of the prior conviction; it is not an invitation to relitigate the conviction itself." *Id.* at 703.

The record reflects that on May 2, 1968, the applicant was convicted of possession of stolen property in violation of section 296(A) of the Criminal Code of Canada. The applicant was sentenced to serve a day in jail and pay a fine. On December 11, 1969 and January 28, 1970, the applicant was convicted of theft under $50 in violation of section 280(B) of the Criminal Code of Canada. He was sentenced to serve 10 days in jail for the first offense, and a month in jail for the second offense.

In regard to the crime of possession of stolen property, the information stated that the applicant "did unlawfully have in his possession one pair of skis . . . the Property of [redacted] . knowing that it was obtained by the commission of an offence in Canada punishable by Indictment, to wit: Theft."

Where property is acquired without knowledge that it is stolen or without intent to deprive the rightful owner of his possession, the offense does not involve moral turpitude. *See Matter of K*, 2 I&N Dec. 90 (BIA 1944). As the information reflects that the applicant knew that he possessed stolen property, his crime involves moral turpitude pursuant to the holding in *Matter of K,* and as such, the crime renders the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

As to the applicant's theft convictions, the information dated November 22, 1969 stated that the applicant, on November 21, 1969 "did unlawfully steal a suede dress . . . the property of the Hudson's Bay Company." The information dated January 21, 1970 stated that the applicant on January 20, 1970 "did unlawfully steal one aquarium water pump . . . the property of Hudson's Bay Company."

The Board 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."). However, in *Matter of Jurado*, 24 I&N Dec. 29, 33-34 (BIA 2006), the Board found that violation of a Pennsylvania retail theft statute involved 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.

The reasoning in *Jurado* applies to the present case as it involves retail theft. Thus, we find that the applicant's commission of two retail theft offenses, which involve knowingly taking goods of another, would have been committed with the intention of retaining the merchandise permanently, and as such, the crime involves moral turpitude and renders the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

On June 16, 1986, the applicant pled guilty to theft of merchandise. On the same day as the guilty plea, the judge ordered an absolute discharge of the offense and did not impose any punishment. Section 730 of the Criminal Code of Canada stated that the trial judge has discretion, if the accused pleads guilty or is found guilty, either to (a) order that the accused be discharged absolutely, or (b)

order that he be discharged on conditions prescribed in a probation order. Section 730 also stated that the effect of absolute discharge is that the offender is not deemed to have been convicted of the offence, and that the offender may appeal from the determination of guilt as if it were a conviction. Thus, pursuant to the definition of "conviction" under section 101(a)(48)(A) of the Act, and for the purposes of immigration law only, we find the applicant was convicted of theft of merchandise on June 16, 1986.

Pursuant to the reasoning in *Jurado,* the applicant's conviction for theft of merchandise would have been committed with the intention of retaining the merchandise permanently. Thus, his crime involves moral turpitude and renders the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The director decided that the applicant was inadmissible for unlawful presence, which is under section 212(a)(9)(B) of the Act. That section provides, in part:

> (B) Aliens Unlawfully Present
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> > (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 . . . and again seeks admission within 3 years of the date of such alien's departure or removal, or
> > >
> > > (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.
>
> . . . .

The director stated that the applicant entered the United States on May 30, 2000 as a visitor and that he was not issued the I-94 card. On May 10, 2001, the applicant filed an adjustment application, which was denied on June 19, 2003. The director stated that the applicant claimed to return to Canada for a period of two to three months each year from 2005 to 2006. The director concluded that the applicant accrued unlawful presence as of the denial of the adjustment application and was inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for more than one year. As the applicant has not disputed inadmissibility on appeal, and the record does not indicate the finding of inadmissibility to be erroneous, we will not disturb the finding of the director.

Lastly, the director determined that the applicant was inadmissible for seeking admission into the United States by fraud or willful misrepresentation.
Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

> (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

We agree with the director's determination that the applicant's failure to disclose in Part 3 of the adjustment of status application submitted March 10, 2001, that he had been "arrested, cited, charged, indicted, fined, or imprisoned for breaking or violating any law or ordinance" was a willful misrepresentation in that the applicant intended to conceal his criminal history and eligibility for admission into the United States. Moreover, we agree with the director in that the applicant's false claim of permanent resident status at the Oroville, Washington, port of entry on September 22, 2007, was a willful misrepresentation made for the purpose of procuring admission into the United States. It is asserted that the applicant erroneously believed that he had derived permanent resident status because he had employment authorization and a social security card from filing the adjustment application. However, even though the applicant received employment authorization and a social security card, we are not persuaded that the applicant didn't know that temporary employment authorization and a social security card did not provide him with lawful permanent resident status. Accordingly, the applicant is inadmissible under section 212(a)(6)(C) of the Act for willful misrepresentations of the material fact of the applicant's eligibility for a visa and admission into the United States.

The director determined that the applicant established extreme hardship to a qualifying family member for purposes of relief under section 212(h) of the Act.

In *Matter of Mendez-Moralez,* 21 I&N Dec. 296, 301 (BIA 1996), the Board stated that once eligibility for a waiver is established, it is one of the favorable factors to be considered in determining whether the Secretary should exercise discretion in favor of the waiver. Furthermore, the Board stated that:

> In evaluating whether section 212(h)(1)(B) 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 family if he 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 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).

Id. at 301.

The AAO must then, "[B]alance 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 factors adverse to the applicant in the instant case are the convictions for possession of stolen property in 1968; theft in 1969 and 1970; driving while disqualified in 1979, driving while ability impaired in 1982; theft of merchandise in 1986; and alcohol-related convictions in 1990 and 2000; the immigration violations of misrepresentation of his criminal history in the adjustment application; unlawful presence in the United States after denial of the adjustment application; procuring admission to the United States on multiple occasions by falsely representing himself to be a visitor to the United States while having the true intention to live and work here; seeking admission to the United States on September 22, 2007 by falsely claiming to be a lawful permanent resident; and the conviction on October 25, 2007 for improper entry in violation of 8 U.S.C. § 1325, by eluding examination and inspection by immigration officers.

The favorable factors are the extreme hardship to the applicant's wife, who has stress and depression as well as physical ailments as described in the submitted documents by [redacted], a licensed clinical social worker, and in the physician's letter dated June 22, 2010; the hardship to the applicant's mother-in-law, who has Parkinson's disease as well as other serious health problems; and the letters commending the applicant's character.

When we consider and balance the favorable factors against the adverse factors, we find that the adverse factors outweigh the favorable factors. We also give negative weight to the fact that the applicant has significant immigration violations and that the events that constitute adverse factors in this case are indicative of the applicant's lack of honesty and disregard for the law, and that the applicant has sought to diminish his wrongful actions rather than express remorse for them. The applicant in the declaration dated January 28, 2010 sought to mitigate his conviction for improper entry and in the sworn statement dated September 22, 2007 and the January 28 letter the applicant sought to justify his false claim of having lawful permanent residency. Therefore, we find that the grant of relief in the exercise of discretion is not warranted in this case.

In proceedings for application for waiver of grounds of inadmissibility under sections and 212(h) 212(i), and 212(a)(9)(B)(i)(II) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.