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U.S. Citizenship
and Immigration
Services

Date: **APR 15 2013**

Office: BANGKOK

FILE: [REDACTED]

IN RE: Applicant: [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]

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 our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-190B, 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 a 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,

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 Field Office Director, Bangkok, Thailand, and is now before the Administrative Appeals Office (AAO) on appeal. As the applicant is not inadmissible, the appeal will be dismissed as the waiver application is unnecessary.

The applicant is a native and citizen of Vietnam 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 a crime involving moral turpitude. The applicant is the parent of a U.S. citizen. She filed an Application for Waiver of Ground of Inadmissibility (Form I-601) on April 6, 2011. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with her U.S. citizen daughter.

In a decision dated March 6, 2012, the field office director denied the Form I-601 application for a waiver, finding that the applicant failed to establish that her U.S. citizen daughter would experience extreme hardship as a consequence of her inadmissibility. The field office director noted that the applicant did not show that the qualifying relative's hardship was more severe than that suffered by the relatives of any individual who is refused admission into the United States.

On appeal, counsel for the applicant states that the field office director erred in finding that the record evidence did not establish that the applicant's bar to admission would result in extreme hardship to her U.S. citizen daughter. Counsel avers that the additional evidence submitted on appeal outlining psychological and emotional difficulties to the applicant's U.S. citizen daughter demonstrate extreme hardship to her qualifying relative.

The record includes, but is not limited to: counsel's brief; a declaration by the applicant's daughter; school records and awards; information regarding the yearly salary of registered nurses; student loan documentation; a copy of the applicant's daughter's naturalization certificate; hospital records concerning the applicant's daughter's psychological hardships; declaration by the applicant's husband; and documentation regarding the applicant's criminal history.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record has been reviewed and considered in rendering a decision on the appeal.

Section 212(a)(2)(A) of the Act provides, 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.

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.)

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 September 2, 2008, the applicant was charged in the Superior Court of [redacted] of misdemeanor grand theft in violation of section [redacted] of the

The criminal complaint alleges that on August 30, 2008, “the applicant did unlawfully take money and the personal property of Macy’s, which had a value exceeding four hundred dollars (\$400).” On September 3, 2008, the applicant pled guilty to one count of misdemeanor grand theft before the [REDACTED]. The guilty plea form indicates that the maximum sentence for [REDACTED] is one year in prison and a \$1,000 fine. For this offense, the applicant was sentenced to 20 days in jail with seven days credit for time served, 13 days of community service, three years of informal probation, and was fined \$220.00. The field office director found the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude.

At the time of the applicant’s conviction, [REDACTED] provided that:

Grand theft is theft committed in any of the following cases:

- (a) When the money, labor, or real or personal property taken is of a value exceeding four hundred dollars.

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).

In *Castillo Cruz v. Holder*, 581 F.3d 1154 (9th Cir. 2009), the Ninth Circuit Court of Appeals addressed the issue of whether a theft offense in California constitutes a crime involving moral. See 581 F.3d at 1157. The Ninth Circuit reviewed lower court case law on theft convictions 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. 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 Cal. Penal Code § 487(a) is categorically a crime involving moral turpitude because it requires the permanent intent to deprive the victim of his or her property. See also *Flores Juarez v. Mukasey*, 530 F.3d 1020, 1021 (9th Cir. 2008) (noting that petty theft is a crime involving moral turpitude); *Cantu v. Gonzalez*, 168 Fed. Appx. 210 (9th Cir. 2006) (noting that an alien’s conviction for grand theft in violation of California Penal Code § 487(a) constitutes a conviction for a crime involving moral turpitude). The applicant is therefore inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The applicant does not dispute her inadmissibility on appeal.

However, though the applicant would be inadmissible under section 212(a)(2)(A)(i)(I) of the Act because her offense is a crime involving moral turpitude, the petty offense exception in section

212(a)(2)(A)(ii)(II) of the Act applies. Section 212(a)(2)(a)(ii) of the Act states in pertinent part, that:

(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).

law indicates that for misdemeanor offenses, a person may be sentenced to imprisonment for a term not exceeding one year. See Additionally, the record shows that the applicant was not sentenced to a term of imprisonment in excess of 6 months; she was only sentenced to 20 days in jail with seven days credit for time served. The AAO acknowledges that the applicant was sentenced to three years of informal probation. However, the Board has held that when a criminal court issues an order placing a defendant on probation, "the alien has not had a sentence imposed of him in excess of six months for purposes of the petty offense exception." *Matter of Castro*, 19 I&N Dec. 692, 694 (BIA 1988); see also *Matter of Gonzalez- Zoquiapan*, 24 I&N Dec. 549, 554 (BIA 2008) (noting that an alien sentenced to probation is eligible for the petty offense exception); *Matter of Cortez Canales*, 25 I&N Dec. 301, 306 (BIA 2010) (finding that an alien sentenced to 60 days imprisonment and five years of probation was eligible for the petty offense exception). The evidence in the record thus establishes that the applicant's conviction for misdemeanor grand theft in violation of falls within the petty offense exception set forth in the Act.

Based on the aforementioned discussion, the applicant is not required to file a section 212(h) waiver. As such, the waiver application is unnecessary.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. See Section 291 of the Act, 8 U.S.C., § 1361. Here, the applicant is not required to file a waiver. Accordingly, the appeal will be dismissed as the waiver application is unnecessary.

ORDER: The appeal will be dismissed as the applicant is not inadmissible and the waiver application is unnecessary.