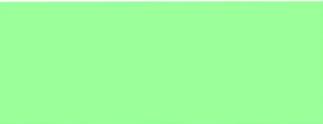




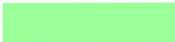
U.S. Citizenship
and Immigration
Services

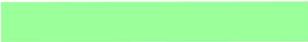
(b)(6)



Date: MAR 16 2015

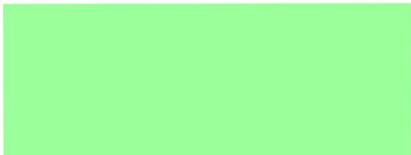
Office: NEWARK FIELD OFFICE

FILE: 

IN RE: Applicant: 

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:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,



Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Newark, New Jersey, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of the Philippines who was found to be 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 a crime involving moral turpitude. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) and is applying for a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States.

The field office director determined that although the criminal act for which the applicant was inadmissible occurred more than 15 years ago, she had not established that she had been rehabilitated and failed to establish that a qualifying relative would experience extreme hardship as a consequence of her inadmissibility. The Application for Waiver of Grounds of Inadmissibility (Form I-601) was denied accordingly. See *Decision of the Field Office Director*, dated July 30, 2014.

On appeal the applicant asserts that the field office director erred in denying the waiver application by determining the applicant had not been rehabilitated. The applicant contends that the decision did not analyze a conviction of the applicant that is a de minimis crime and would permit a finding of rehabilitation. The record contains a statement of regret from the applicant, letters of support for the applicant from members of her family and her minister, a job rating for the applicant, and evidence submitted in conjunction with the Application to Adjust Status (Form I-485). The entire record was reviewed and considered in rendering a decision on the appeal.

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.

The Board of Immigration Appeals (BIA) stated 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.

The record reflects that the applicant entered the United States as a B-1 visitor on January 27, 1990, with authorization to remain until March 26, 1990. The record further reflects that the applicant was convicted in California on [REDACTED] 1992, for Grand Theft Property under California Penal Code section 487 and Burglary under section 459, for which she was sentenced to probation of 36 months. The applicant submitted documentation from the Superior Court of California, [REDACTED] showing that a records search for 1990 through 1999 determined that her records had been destroyed, thus no court disposition has been submitted.¹

For cases arising in the Third Circuit, the determination of whether a conviction is a crime involving moral turpitude requires a categorical inquiry into “the elements of the statutory state offense . . . to ascertain the least culpable conduct necessary to sustain conviction under the statute.” *Jean-Louis v. Holder*, 582 F.3d 462, 465-66 (3d Cir. 2009) (citing *Knapik v. Ashcroft*, 384 F.3d 84, 88 (3d Cir. 2004)). The “inquiry concludes when [the adjudicator] determine[s] whether the least culpable conduct sufficient to sustain conviction under the statute ‘fits’ within the requirements of a [crime involving moral turpitude].” *Jean-Louis, supra*, at 470. However, if the “statute of conviction contains disjunctive elements, some of which are sufficient for conviction of [a crime involving moral turpitude] and others of which are not, [an adjudicator] . . . examin[es] the record of conviction for the narrow purpose of determining the specific subpart under which the defendant was convicted.” *Id.* at 466. This is true “even when clear sectional divisions do not delineate the statutory variations” *Id.* In so doing, an adjudicator may only look at the formal record of conviction. *Id.* 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”). The Third Circuit does not permit inquiry beyond the record of conviction. See *Jean-Louis, supra*, at 473-82 (rejecting *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)).

At the time of the applicant’s conviction, Cal. Penal Code § 487(a) stated that “[g]rand theft is theft committed . . . [w]hen the money, labor, or real or personal property taken is of a value exceeding four hundred dollars (\$400)” “Theft” is defined by Cal. Penal Code § 484(a), which at the time of the applicant’s conviction stated:

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 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 wealth or mercantile character and by thus imposing upon any person, obtains credit and

¹ The applicant stated on Form I-601 that she was arrested in 1992 for Grand Theft and Burglary and placed on probation and that in 1993 she was arrested for “similar charges” and sentenced to incarceration not to exceed 180 days.

thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft. . .

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 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). The applicant’s conviction for grand theft therefore constitutes a crime involving moral turpitude.

The applicant was also convicted of burglary under Cal. Penal Code § 459, which at the time of her conviction prohibited entry into a house, shop, or other building “with intent to commit grand or petit larceny or any felony.” The Board of Immigration Appeals (BIA) has maintained that the determinative factor in assessing whether burglary involves moral turpitude is whether the crime intended to be committed at the time of entry or prior to the breaking out involves moral turpitude. *Matter of M-*, 2 I&N Dec. 721, 723 (BIA 1946). *See also Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1020 (9th Cir. 2005) (stating that “[b]ecause the underlying crime of theft or larceny is a crime of moral turpitude, unlawfully entering a residence with intent to commit theft or larceny therein is likewise a crime involving moral turpitude.”); *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982) (holding that burglary with intent to commit theft is a crime involving moral turpitude).

The U.S. Supreme Court in *Descamps v. United States* held that the modified categorical approach does not apply to statutes that contain a single, indivisible set of elements. 133 S. Ct. 2276, 2282 (2013). In *Matter of Chairez*, 26 I&N Dec. 349 (BIA 2014), the Board interpreted *Descamps* as explaining that a criminal statute is divisible, so as to warrant a modified categorical inquiry, only if it lists multiple discrete offenses as enumerated alternatives or defines a single offense by reference to disjunctive sets of “elements,” more than one combination of which could support a conviction. *Id.* at 353 (citing *Descamps*, 133 S.Ct. at 2281, 2283). The BIA further explained that “an offense’s ‘elements’ are those facts about the crime which ‘[t]he Sixth Amendment contemplates that a jury — not a sentencing court — will find ... unanimously and beyond a reasonable doubt.’” *Id.* (quoting *Descamps*, 133 S.Ct. at 2288). The Board further stated that as they “are not given deference on this issue, going forward [they] are also bound to apply divisibility consistently with the individual circuits’ interpretation of divisibility under *Descamps*.” *Id.* at 354. *See also Matter of Chairez*, 26 I&N Dec. 478, 481 (BIA 2015) (stating that immigration judges must follow the law of the circuit court of appeals in whose jurisdiction they sit in evaluating issues of divisibility, so the interpretation of *Descamps* reflected in *Matter of Chairez*, 26 I&N Dec. 349 (BIA 2014), applies only insofar as there is no controlling authority to the contrary in the relevant circuit).

The present matter arises in the jurisdiction of the Third Circuit Court of Appeals, and the Third Circuit has applied a different interpretation of *Descamps* than that reflected in *Matter of Chairez*. In *United States v. Marrero*, 743 F.3d 389, 395-6 (3rd Cir. 2014), the court found that simple assault

under Pennsylvania law is a crime of violence under the U.S. Sentencing Guidelines because it is divisible under Descamps between intentional or knowing conduct, rather than reckless conduct. (“Because the Pennsylvania statute ‘list[s] potential offense elements in the alternative,’ it is ‘divisible,’ and the modified categorical approach applies.” *Id.* at 396.) The use of the modified categorical approach is therefore permissible to determine whether the applicant was convicted of burglary with the intent to commit larceny or another crime that involves moral turpitude. We note that the applicant has not supplied the court disposition and full record of conviction for this offense, and a letter from the convicting court indicates that these records are no longer available. However, regardless of whether the applicant’s conviction for burglary under Cal. Penal Code § 459 is a crime involving moral turpitude, she remains inadmissible under section 212(a)(2)(A)(i)(I) of the Act for her conviction for Grand Theft Property under Cal. Penal Code § 487, and she therefore requires a waiver of inadmissibility.

Section 212(h)(1)(A) of the Act provides that certain grounds of inadmissibility under section 212(a)(2)(A)(i)(I)-(II), (B), and (E) of the Act may be waived in the case of an alien who demonstrates to the satisfaction of the Attorney General that:

- (i) the alien is inadmissible only under subparagraph (D)(i) or (D)(ii) of such subsection or the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status.
- (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
- (iii) the alien has been rehabilitated.

In the present matter, the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The record shows that the actions for which the applicant was found inadmissible occurred more than 20 years ago. The record does not reflect that admitting the applicant would be contrary to the national welfare, safety, or security of the United States.

The field office director determined that the applicant had not shown that she has been rehabilitated due to an [REDACTED] 2012, arrest and subsequent conviction in [REDACTED] New Jersey, for Disorderly Conduct. The record shows the applicant was convicted on [REDACTED] 2013, under New Jersey statute 2C:33-2A (1) and received a fine of \$358.

N.J.S.A. 2C:33-2. Disorderly conduct

- a. Improper behavior. A person is guilty of a petty disorderly persons offense, if with purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof he
 - (1) Engages in fighting or threatening, or in violent or tumultuous behavior; or
 - (2) Creates a hazardous or physically dangerous condition by any act which serves no

legitimate purpose of the actor.

On appeal the applicant concedes that she was convicted of disorderly conduct after being arrested and charged with petty theft. She argues, however, that the conviction was for a violation considered a petty disorderly person offense carrying such a small set of penalties that it should be considered a de minimis crime. The applicant cites a decision of the U.S. Court of Appeals for the Third Circuit remanding of a case to the Board of Immigration Appeals to decide whether a “disorderly persons offense” can even be considered a crime. The applicant contends that the conviction should be considered to not be a crime, but at worst determined to be a quasi-criminal offense which would be considered de minimis for adjudication purposes. She further states that one interaction with the criminal justice system in 22 years does not indicate she is not rehabilitated.

The applicant states that since her 1992 conviction for a crime involving moral turpitude she has raised a family, become a grandmother, been a diligent employee, and lived a quiet life. The applicant states that when she arrived in the United States she was blinded by all the material things and tempted to do wrong, which she now regrets. She states that since her arrests in 1992 and 1993 she has lived a good life raising her children and is now involved with her church. She states that she is a good person, no threat to the community, and a long-time productive worker with a steady job. She further states that family members depend on her and believe her to be a good person.

Letters from the applicant’s children state that she is supportive and cares for the family. They state that the applicant takes care of her children and grandchildren and helps with money, food, and advice. They state that the applicant sacrifices for the family and is selfless and that her grandchildren are attached to her. A letter from the applicant’s minister states that he has known her since 1997 and finds her to be of good moral character. A rating from the applicant’s employer rates her as “above standards” and notes that she provides quality care for patients, is professional, and is an “essential part” of her department.

We find that the applicant’s 2013 conviction for disorderly conduct does not support a finding that she has failed to establish that she had been rehabilitated since her conviction for a crime involving moral turpitude more than 20 years ago. The applicant has shown by a preponderance of the evidence that she has been rehabilitated. Although the applicant was convicted in 2013 of disorderly conduct, there is no evidence that she has been convicted of a crime involving moral turpitude since 1992, more than 20 years ago. The record shows that the applicant is employed, is active in her church, provides emotional and economic support to her children, and is regarded by others as having good moral character. Accordingly, the applicant has shown that she meets the requirement of section 212(h)(1)(A)(iii) of the Act. Based on the foregoing, the applicant has shown that she is eligible for consideration for a waiver under section 212(h)(1)(A) of the Act.

In determining whether the applicant warrants a favorable exercise of discretion under section 212(h) of the Act, the Secretary must weigh positive and negative factors in the present case. The negative factors in this case are the applicant’s conviction in 1992 for a crime involving moral turpitude, her 2013 disorderly conduct conviction, and her remaining in the United States beyond her period of authorized stay after her 1990 entry. The positive factors in this case include hardship to the applicant’s family as a result of the applicant’s inadmissibility, the applicant’s significant family and community ties to the United States, her continued gainful employment, and the lack of a further criminal record for over 20 years except for her disorderly conduct conviction. While the applicant’s

(b)(6)

NONPRECEDENT DECISION

Page 7

criminal convictions and immigration violation are serious, the positive factors in this case outweigh the negative factors.

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.