UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
MIAMI, FLORIDA

In the Matter of:	)	
[redacted]	)	**IN REMOVAL PROCEEDINGS**
RESPONDENT	)	

CHARGE: Section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act ("INA") as an alien who has been convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime.

ON BEHALF OF RESPONDENT:
[redacted]

ON BEHALF OF DEPARTMENT
[redacted]
Assistant Chief Counsel
Department of Homeland Security
333 S. Miami Avenue, Suite 200
Miami, FL 33130

WRITTEN DECISION AND ORDERS OF THE IMMIGRATION JUDGE

I. Procedural History

Respondent, [redacted] is a native and citizen of Cuba. See Exh. 1. On September 28, 2007, he was accorded lawful permanent resident status in the United States as of August 30, 2003. Id. On July 21, 2011, Respondent pled nolo contendere in the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida to Grand Theft pursuant to Fla. Stat. § 812.014(2)(c)(1) and adjudication of guilt was withheld. Exh. 2. He was sentenced to one day imprisonment with credit for one day time served and 18 months' probation. Id. On June 6, 2013, Respondent arrived at Miami International Airport in Miami, Florida and applied for admission as a lawful permanent resident.

On September 6, 2013, the Department of Homeland Security (DHS) initiated removal proceedings with the filing of a Notice to Appear (NTA) charging Respondent as an arriving alien inadmissible pursuant to INA § 212(a)(2)(A)(i)(I) as an alien who has been convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a crime involving moral turpitude (CIMT) (other than a purely political offense) or an attempt or conspiracy to commit such a crime. See Exh. 1.

On November 20, 2013, Respondent appeared, with counsel, before the court for a master calendar hearing. A continuance was granted for attorney preparation. On December 16, 2013, Respondent filed a Motion to Terminate Removal Proceedings. On January 14, 2014, DHS filed its Opposition to Motion to Terminate.

II. Removability

An alien is removable under INA § 212(a)(2)(A)(i)(I) if he has been convicted of, admits having committed, or admits committing acts which constitute the essential elements of, a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime. DHS alleges that Respondent was convicted of Grand Theft in violation of Fla. Stat. § 812.014(2)(c)(1) on July 21, 2011 and that the offense constitutes a CIMT. See Exh. 1.

Pursuant to INA § 101(a)(13)(C)(v), "an alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien. . .has committed an offense identified in section 212(a)(2), unless since such offense the alien has been granted relief under section 212(h) or 240A(a)." DHS bears the burden of establishing by clear and convincing evidence that a returning lawful permanent resident is to be regarded as seeking admission. Matter of Valenzuela-Felix, 26 I&N Dec. 53, 54 (BIA 2012); Matter of Rivens, 25 I&N Dec. 623, 625 (BIA 2011). An applicant for admission to the United States must establish clearly and beyond a doubt that he is entitled to be admitted and not inadmissible under INA § 212. INA § 240(c)(2)(A); 8 C.F.R. § 1240.8(b). The Board of Immigration Appeals (BIA) has held, however, that where an applicant for admission to the United States has a colorable claim to returning resident status, the burden is on DHS to establish by clear and convincing evidence that the applicant should be deprived of his lawful permanent resident status. Matter of Huang, 19 I&N Dec. 749 (BIA 1988). Therefore, in this case, DHS must establish by clear and convincing evidence that Respondent has been convicted of a CIMT such that he would be regarded as seeking admission.

In support of its allegation that Respondent was convicted of Grand Theft, DHS has submitted a certified Plea Order, Judgment, Order of Probation, and Information. See Exh. 2. These records comport with 8 C.F.R. § 1003.41 as documents or records admissible as evidence in proving a criminal conviction. The court notes that the Information charges Respondent for Grand Theft pursuant to Fla. Stat. § 812.014(2)(c)(1). Id. The Judgment indicates that, as to that charge, Respondent entered a plea of nolo contendere and that adjudication of guilt was withheld. Id. Respondent was assessed costs and sentenced to 18 months' probation. Id.

Section 101(a)(48)(A) of the INA defines a "conviction," with respect to an alien, 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 imposition of costs and surcharges in the criminal sentencing context constitutes a form of "punishment" or "penalty" for purposes of establishing that an alien has suffered a "conviction" within the meaning of INA § 101(a)(48)(A). Matter of Cabrera, 24 I&N Dec. 459 (BIA 2008). Likewise, the imposition of probation is a form of "punishment" or "restraint." Matter of Punu, 21 I&N Dec. 224, 228 (BIA 1998). Accordingly, the court finds that Respondent's conviction for Grand Theft pursuant to Fla. Stat. § 812.014(2)(c)(1) constitutes a conviction for immigration purposes.

The BIA has described a crime involving moral turpitude (CIMT) as 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." Matter of Perez-Contreras, 20 I&N Dec. 615, 617-18 (BIA 1992). A finding that a crime is a CIMT under the INA requires that the crime involve both a culpable mental state and reprehensible conduct. Matter of Silva-Trevino, 24 I&N Dec. 687, 689 n.1 (A.G. 2008).

To determine whether a particular crime involves moral turpitude, the court must first engage in a "categorical" inquiry and look to "the inherent nature of the offense, as defined in the relevant statute, rather than the circumstances surrounding a defendant's particular conduct." Fajardo v. U.S. Att'y Gen., 659 F.3d 1303, 1305 (11th Cir. 2011). If the statute bans only actions that involve moral turpitude, then it is categorically a CIMT. Matter of Ortega-Lopez, 26 I&N Dec. 99, 100 (BIA 2013).

If the statutory definition of a crime encompasses some conduct that categorically would be grounds for removal as well as other conduct that would not, then, under the modified categorical approach, the record of conviction may also be considered. Jaggernauth v. U.S. Att'y Gen., 432 F.3d 1346, 1355 (11th Cir. 2005); see Descamps v. United States, 133 S. Ct. 2276, 2281 (2013) (application of the modified categorical approach is appropriate where the statute of conviction "sets out one or more of the elements in the alternative"). In the Eleventh Circuit, an adjudicator's CIMT analysis is limited to the categorical and modified categorical approaches; as such, the court may not look beyond the record of conviction. Fajardo, 659 F.3d at 1310-11 (rejecting the third-step approach outlined in Silva-Trevino, 24 I&N Dec. at 699). The record of conviction is generally limited to the charging document, information, plea, verdict or judgment, and sentence, but generally does not include the police report. Jaggernauth, 432 F.3d at 1354-55.

The BIA has long held that in order for a taking to be a theft offense that involves moral turpitude, a permanent taking must be intended. See Matter of Grazley, 14 I&N Dec. 330, 333 (BIA 1973) ("Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended."); see also Matter of R-, 2 I&N Dec. 819, 828 (BIA 1947) ("It is settled law that the offense of taking property temporarily does not involve moral turpitude.").

Florida Statutes section 812.014 states, in relevant part: "A person commits theft if he or

she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently: (a) Deprive the other person of a right to the property or a benefit from the property (b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property." The statute also provides: "It is grand theft in the third degree and a felony of the third degree. . .if the property is stolen is. . . [v]alued at $300 or more, but less than $5,000. . ." See Fla. Stat. § 812.014(2)(c).

The Eleventh Circuit, in the context of analyzing whether an offense is an aggravated felony, has held that Fla. Stat. § 812.014 is divisible because it requires either an intent to deprive or an intent to appropriate, and specifically contemplates a temporary taking. See Ramos v. U.S. Att'y Gen., 709 F.3d 1066, 1070 (11th Cir. 2013); see also Jaggernauth, 432 F.3d at 1354 (finding that Fla. Stat. § 812.014 is a divisible statute that describes two distinct intent standards, one of which does not necessarily involve intent to permanently deprive another person of a right to property or a benefit from the property). Therefore, Fla. Stat. § 812.014 encompasses conduct that is both morally turpitudinous and conduct that is not. Because the statute is divisible, the court must apply the modified categorical approach to determine whether Respondent's conviction constitutes a CIMT. In doing so, the court may consider the record of conviction. Jaggernauth, 432 F.3d at 1355. In this case, the court was provided with an Information for case number 48-2011-CF-006160-O, stating that

> [redacted], on the 6th day of May, 2011. . .did, in violation of Florida Statute 812.014(2)(c)(1), knowingly obtain or use, or endeavor to obtain or to use clothing and general merchandise, of a value of THREE HUNDRED DOLLARS ($300.00) or more, the property of another, to-wit: KOHL'S or [redacted], as owner or custodian thereof, with the intent to temporarily or permanently deprive said owner or custodian of a right to the property or a benefit therefrom, or to appropriate the property to the defendant's own use or to the use of a person not entitled thereto.

See Exh. 2.

Consistent with the statute of conviction, the Information alleges that Respondent intended to temporarily *or* permanently deprive the victim of property, or to appropriate the property. The Judgment, Plea Order, and Order of Probation do not provide further elucidation.

DHS argues that Matter of Jurado-Delgado, 24 I&N Dec. 29, 33 (BIA 2006), compels a finding that Respondent's conviction involved intent to permanently deprive such that his conviction pursuant to Fla. Stat. § 812.014(2)(c)(1) constitutes a crime involving moral turpitude. Specifically, DHS contends that under Matter of Jurado-Delgado, the Immigration Judge can presume that a taking was permanent where the Information indicates that goods were taken from a retail establishment. Id. In that case, the BIA held that retail theft pursuant to 18 Pa. Cons. Stat. § 3929(a)(1) constitutes a crime involving moral turpitude.[1] In that case, the BIA noted that

[1] Section 3929(a)(1) of 18 Pa. Cons. Stat. states, "A person is guilty of a retail theft if he: (1) takes possession of, carries away, transfers or causes to be carried away or transferred, any merchandise displayed, held, stored or

a conviction under the Pennsylvania retail theft statute "requires proof that the person took merchandise offered for sale by a store without paying for it and with the intention of depriving the store owner of the goods." Id. Under that circumstance, the BIA found that the nature of the offense led to the reasonable assumption that the offender's intent was to take the merchandise permanently. Id.

Florida's Grand Theft statute, however, differs significantly from the Pennsylvania statute at issue in Matter of Jurado-Delgado. The Pennsylvania statute includes only intent to deprive, without specifying whether that intent need be permanent or temporary. See 18 Pa. Cons. Stat. § 3929(a)(1). Here, Fla. Stat. § 812.014(2)(c)(1) specifically penalizes both temporary and permanent deprivation, as well as both temporary and permanent appropriation.

Further, Florida has a retail theft section similar to the statute at issue in Matter of Jurado-Delgado, which specifically requires "intent to deprive the merchant of possession, use, benefit, or full retail value" and does not distinguish between temporary and permanent takings. See Fla. Stat. § 812.015. Although both sections 812.014 (theft) and 812.015 (retail theft) address theft offenses, they are substantially different. Where the general theft provision contains the "temporary" and "permanent" language, the retail theft provision does not. Statutory interpretation is premised on the principle that statutory words have meaning and when the legislature includes language in one statutory provision but not in another related provision, that too has meaning. Pretka v. Kolter City Plaza II, Inc., 608 F.3d 744, 763 (11th Cir. 2010); see also Dean v. United States, 556 U.S. 568, 573 (2009) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). Unlike the Pennsylvania statute in Jurado-Delgado, Fla. Stat. § 812.014 has a broad definition of intent which includes temporary and permanent takings.

Although Respondent's Information suggests that his offense conduct involved taking merchandise from a store, the Information simply tracks the general statutory language of Fla. Stat. § 812.014, charging Respondent with an intent that includes both a temporary and permanent taking. Accordingly, this court finds that the presumption in Matter of Jurado-Delgado is not applicable to this case. Thus, the court cannot determine whether the deprivation intended was temporary or permanent. As a result, the court finds that Respondent's conviction for Grand Theft is not a conviction for a crime involving moral turpitude.

Based on the foregoing, the court finds that DHS has failed to establish by clear and convincing evidence that Respondent has been convicted of a CIMT such that he would be regarded as seeking admission. Therefore, the court will not sustain removability under section 212(a)(2)(A)(i)(I) of the INA. Accordingly, the court will grant Respondent's motion and terminate these removal proceedings.

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offered for sale by any store or other retail mercantile establishment with the intention of depriving the merchant of the possession, use or benefit of such merchandise without paying the full retail value thereof."

ORDERS

IT IS HEREBY ORDERED that the charge of removability under section 212(a)(2)(A)(i)(I) of the INA **IS NOT SUSTAINED.**

IT IS FURTHER ORDERED that Respondent's motion to terminate is **GRANTED.**

IT IS FURTHER ORDERED that Respondent's removal proceedings be **TERMINATED WITHOUT PREJUDICE.**

DATED this 23rd of January, 2014.

APPEAL DUE: FEBRUARY 24, 2014

[redacted]
Immigration Judge

cc: [redacted] Assistant Chief Counsel
[redacted] - Counsel for Respondent
Respondent

[redacted]

NON-DETAINED

Department of Homeland Security
Immigration and Customs Enforcement
333 South Miami Avenue; Second Floor
Miami, FL 33130

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
MIAMI, FLORIDA

In the Matter of

[redacted] File No: [redacted]

In Removal Proceedings

Immigration Judge: [redacted] Next Hearing: [redacted]

DEPARTMENT OF HOMELAND SECURITY OPPOSITION TO MOTION TO TERMINATE

The Department of Homeland Security ("DHS") opposes the respondent's Motion to Terminate filed on De because the respondent was convicted under Florida's Theft Statute Section 812.014.

DHS agrees that the Florida theft statute encompasses both temporary and permanent takings and is considered "divisible". *Matter of Jaggernauth v. U.S. Attorney General* 432 F.3d 1346 (11th Cir. 2005). However, courts must employ the modified categorical approach, reviewing the entire record of conviction to determine whether the Florida theft crime at issue involves a permanent taking and thus qualifies as a crime involving moral turpitude ("CIMT"). *Id.* The Board has "found it appropriate to

consider the nature and circumstances surrounding a theft offense" when determining whether there was an intent to permanently deprive. *Matter of Jurado*, 24 I&N Dec. 29 (BIA 2007). For example, when cash is taken, the Board has concluded it is reasonable to assume the taking was intended to be permanent. *Matter of Grazley*, 14 I&N Dec. at 333. Similarly, when a retail theft occurs, the Board has concluded that it is reasonable to assume the taking was intended to be permanent. *Matter of Jurado*, 24 I&N Dec. 330 (BIA 2003).

In this case, the respondent was convicted for taking "merchandise" from a retail establishment. There is no basis in the record for the Immigration Judge to conclude that the respondent intended a temporary taking from Kohl's Department Store, that is, that he intended to briefly steal the property from them and return it later. Indeed, it is reasonable to conclude that the theft of any property from a store was intended to be a permanent taking. The respondent's records of convictions therefore establish that his crimes involve moral turpitude.

Finally, the Eleventh Circuit Court of Appeal's decision in *Ramos v. Attorney General*, 709 F.3d. 1066 (11th Cir. 2013), does not dispose of whether the Georgia or Florida theft statutes are CIMT's. In fact, the case was remanded for the Board of Immigration Appeals to consider whether *Ramos* is removable for a CIMT.

Wherefore, based on the current case law, the Immigration Judge should find that the respondent has been convicted of a CIMT. And therefore DHS respectfully requests that the respondent's motion to terminate be denied.

Respectfully submitted,

[redacted]Assistant Chief Counsel
U.S. Immigration and Customs Enforcement
333 South Miami Avenue, 2nd Floor
Miami, FL 33130

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded via regular mail to respondent's attorney on January 14, 2014, at the following address:

[redacted]

[redacted]
Assistant Chief Counsel

[redacted]

THE UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
MIAMI, FLORIDA

In the Matter of: [redacted]	**File No.:** [redacted]
In REMOVAL PROCEEDINGS	

Immigration Judge: [redacted]

Master Hearing [redacted]

MOTION TO TERMINATE PROCEEDINGS

[redacted] [redacted]

THE UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
MIAMI, FLORIDA

In the Matter of: [redacted]	**File No.:** [redacted]
In REMOVAL PROCEEDINGS	

Immigration Judge: [redacted] **Master Hearing** [redacted]

MOTION TO TERMINATE PROCEEDINGS

Respondent hereby moves this court to terminate his case in light of the 11th Circuit's recent decision in Ramos v. Attorney General, 709 F.3d. 1066 (11th Cir. 2013) and Jaggernauth v. Att'y Gen., 432 F.3d 1346 (11th Cir. 2005).

Respondent became a Lawful Permanent Resident as of August 30, 2003. On or about July 21, 2011, Respondent was convicted for the offense of Grand theft in the 3rd degree, in violation of Florida statute §812.014 (1)(a), §812.014 (1)(b) and §814.014 (2)(c). According to the Information, Respondent:

> "unlawfully and knowingly obtain[ed] or endeavor[ed] to obtain the property of Kohl's [department store], to-wit: merchandise, of the value of three hundred dollars ($300.00) or more, by less than five thousand dollars ($5,000.00), with the intent to either temporarily or permanently deprive Kohl's of the right to use the property or a benefit from the property, or to appropriate the property to his own use or the use of any person not entitled to the use of the property, contrary to F.S. 812.014(1)(a), F.S. 812.014(1)(b) and F.S. 812.014(2)(c)1, (L2)."

[redacted] [redacted]

For this conviction, Respondent served 1 day in jail followed by 18 months of probation. In June 2013, Respondent returned to the United States after a trip abroad and applied for admission at Miami International Airport as an arriving alien/returning permanent resident. At that time, Respondent was issued a Notice to Appear (NTA) and charged with inadmissibility under INA § 212 (a)(2)(A)(i)(I) for having been convicted a crime involving moral turpitude (CIMT) based on Respondent's July 2011 conviction.

ARGUMENT

RESPONDENT IS NOT INADMISSIBLE UNDER INA § 212(a)(2)(A)(i)(I) BECAUSE GRAND THEFT UNDER FLA. STAT. §812.014 (1)(a) IS NOT NECESSARILY A CRIME INVOLVING MORAL TURPITUDE

A crime involving moral turpitude (CIMT) is one which is "inherently base, vile, or depraved, contrary to the accepted rules of morality and the duties owed between persons or society in general". Matter of Franklin, 20 I&N Dec. 867, 868 (BIA 1994). "Moral turpitude has been defined as an act which is per se morally reprehensible and intrinsically wrong, or malum in se, so it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude." Id. In determining whether a crime involves moral turpitude, "[t]he statute under which the conviction occurred controls. If it defines a crime in which turpitude necessarily inheres, then the conviction is for a crime involving moral turpitude for the purposes of the deportation statute." Matter of Short, 20 I&N Dec. 136,137 (BIA 1989).

The main method of determining whether a conviction is a CIMT is the categorical approach. Under this approach, the court compares the elements of the defendant's offense to those of the generic definition of the crime. See Itani v. Ashcroft, 298 F.3d 1213, 1216 (11th Cir. 2002). In comparing the elements of the offense to those in the generic definition of the crime, the court considers "the inherent nature of the offense, as defined in the relevant statute, rather

than the circumstances surrounding a defendant's particular conduct." Fajardo v. U.S. Att'y Gen., 659 F.3d 1303, 1305. In the case of an alien's removability or inadmissibility, the accepted definitions are spelled out in INA §1101(a)(43). The court then uses a combination of discretion and state and federal criminal statutes to determine if the alien's conduct falls within the INA definitions. However, when a statute sweeps too broadly, creating alternative scenarios where it cannot be determined by the generic definitions of the statute whether or not the proscribed conduct falls within the statute, the court may, in this limited circumstance, employ the more limited scope of the modified categorical approach.

The modified categorical approach serves as a tool to allow the court or jury to determine which crime a defendant has been convicted of when the statute under which the defendant is convicted is divisible. A statute is divisible 'when a statute lists multiple, alternative elements, and so effectively creates "several different . . . crimes,'" some of which may involve moral turpitude and some which may not. Descamps v. United States, 133 S.Ct. 2276,2285, quoting Nijahawan v. Holder, 129 S.Ct. 2294 (2009). Once a statute is found to be divisible, "[the court] may examine some items in the state-court record, including charging documents, jury instructions, and statements made at guilty plea proceedings, to determine if the defendant was actually found to have committed the elements of the generic [crime]." Descamps at 2296.

The Supreme Court has held that in order for a conviction to be considered a "theft offense", the offense must match the generic definition of theft. Gonzalez v. Duenas-Alvarez, 549 U.S. 183 (2007). That "generic definition," the Court recognized, has been stated by the Board and by many of our sister circuits as "the taking of property . . . with the *criminal intent to deprive* the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." Id. at 189. In the instant case, the Florida theft statute is overbroad because it

[redacted] [redacted]

criminalizes a temporary *or* permanent depravation of property . . . *or* the appropriation of property, so the court may use the modified categorical approach to determine whether Respondent's conduct is a crime involving moral turpitude.

The initial inquiry is whether the Florida statute is divisible and whether to apply the categorical approach or the modified categorical approach in determining whether a conviction is a theft offense and consequently, a CIMT. Respondent was convicted under Fla. Stat. §812.014(1), which reads:

> A person commits a theft if he or she knowingly obtains or uses, or endeavors to obtain or use, the property of another with intent to, *either temporarily or permanently* (emphasis added):
>
> (a) Deprive the other person of a right to the property or a benefit from the property.
> (b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.

In Jaggernauth v. U.S. Attorney General, 432 F.3d 1346, the 11th Circuit accepted this generic definition and held that a theft statute that included two disjunctive intent requirements—an intent to *deprive* and an intent to *appropriate*—was divisible. The 11th Circuit concluded that the Florida statute (Fla. Stat. § 812.014(1)) encompassed two distinct mens rea: an intent to deprive and an intent to appropriate. Id. at 1353–54. The court then determined that the Florida statute's intent-to-appropriate clause (subpart (b)) could not include a "criminal intent to deprive the owner of the rights and benefits of ownership," as the generic definition of theft requires. Id. at 1353. Because the statute punishes both crimes that are theft offenses and crimes that are not, the statute is divisible. Id. "Because the Florida statute is divisible, the fact of the alien's conviction alone (categorical approach) does not necessarily mean that she had committed a theft offense." Id.

[redacted] [redacted]

If a conviction under a particular statute does not categorically qualify as a theft offense, we then look to the record of conviction—including documents involving the charging document, plea agreement, or sentence—to determine whether it clearly establishes that the alien's conviction qualifies as a theft offense (modified categorical approach). Jaggernauth at 1355.

Applying the modified categorical approach in Jaggernauth, the court examined the charging document and found that the charging document submitted against the alien "tracked the general language" of the statute, but "did not specify under which subsection [the alien] was charged." Id. at 1349. That omission left open the possibility that the alien was convicted for theft with the intent the appropriate only. Because there remained the possibility that the alien's conviction could have been for a crime that is not a theft offense as defined under Gonzalez, the court held that the Government failed to establish that the alien was convicted of a theft offense and the Board's order of removal was vacated. Ramos at 1070.

The court in Jaggernauth has already held that the Florida statute's intent-to-appropriate clause could not include a "criminal intent to deprive the owner of the rights and benefits of ownership," as the generic Gonzalez definition of theft requires.

Based on the Information for the instant case, Respondent was convicted of taking property "with the intent to *either temporarily or permanently* deprive [the owner, Kohl's department store] of the right to the property or a benefit of the property, *or to appropriate the property* . . ." (emphasis added). From the language of the charging document and conviction record, it is still not possible to determine whether Respondent's conviction was based on an intent to deprive or an intent to appropriate either permanently or temporarily. The court has long

[redacted] [redacted]

held that "in order for a taking to be a theft offense that involves moral turpitude, a permanent taking must be intended." See Matter of Grazley, 14 I&N Dec. 330, 333 (BIA 1973).

DHS may argue that courts have routinely held that the "theft of goods from a retail establishment are crimes involving moral turpitude." In re Jimmy Roberto Jurado-Delgado, 24 I&N Dec. 29 (BIA 2006). In Jurado, the respondent was convicted of theft under a PA statute that "provides that a person is guilty of retail theft if he 'takes possession of . . . any merchandise . . . offered for sale by any store. . . without paying the full retail value thereof.'" 18 Pa. Const. Stat. §3939(a)(1) (1991). However, the instant case is distinguishable from Jurado because, where the PA statute specifically speaks to the taking of property from *any* store, the Florida statute's scope is generically broader and, thus, divisible. As such, the modified categorical approach should be used. DHS must meet its burden of inadmissibility "by evidence which is clear, unequivocal, and convincing." Woodby v. INS, 385 U.S. 276 (1966). Because the conviction record does not make clear whether Respondent's *intent* was a permanent deprivation, as required by Jaggernauth, DHS us unable to meet its burden of proof to establish inadmissibility. Additionally, as an 11th Circuit case, Ramos, not Jurado, is controlling here.

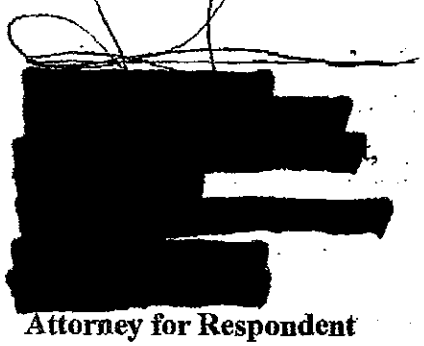
DHS may also argue that, according to Jurado, "when a retail theft occurs, the Board has concluded that it is reasonable to assume that the taking was intended to be permanent." However, more recent 11th Circuit decisions have declined to follow the *assumptions* permitted by Jurado. See Fajardo v. U.S. Att'y Gen., 659 F.3d 1303 (11th Cir. 2011) (finding that the Board cannot consider evidence beyond the record of conviction in determining whether an alien has been convicted of a crime involving moral turpitude). In fact, in a recent unpublished opinion, the BIA has even found that retail theft under the Florida theft statute is not a CIMT. See In re: Tameka Lorraine Butler, BIA July 26, 2013).

[redacted] [redacted]

CONCLUSION

In light of the 11th Circuit decision in Ramos v. Attorney General, Respondent is not inadmissible pursuant to INA §212(a)(2)(A)(i)(I). Because Florida statute §812.014 is divisible and the record of conviction is unclear as to whether Respondent's conviction falls under the portion of the statute that is a CIMT or the portion that is not a CIMT, the charges of inadmissibility cannot be sustained. The court should find that Respondent's conviction is not for a crime involving moral turpitude and thus terminate removal proceedings.

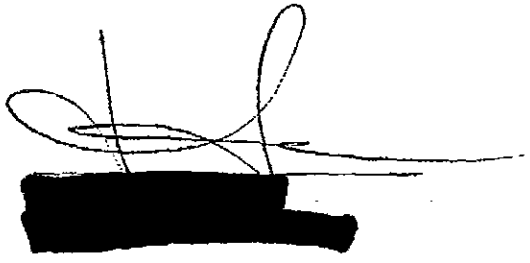
Respectfully Submitted,



Attorney for Respondent

Certificate of Service

On [redacted] I, [redacted]erved a copy of the foregoing and any attached pages to **U.S. Department of Homeland Security** at the following address U.S. Department of Homeland Security, ICE Office of Chief Counsel (MIA), 333 South Miami Ave., Suite 200, Miami, FL 33130 by Hand Delivery/First Class U.S. Mail.



[redacted]

U.S. Department of Homeland Security

Notice to Appear

In removal proceedings under section 240 of the Immigration and Nationality Act:

Subject ID : [redacted] FIN #: [redacted] File No: [redacted]

SIGMA Event: [redacted] DOB: [redacted] Event No: [redacted]

In the Matter of: [redacted]

Respondent: _____ currently residing at:

[redacted] (407)715-5160

(Number, street, city and ZIP code) (Area code and phone number)

☒ 1. You are an arriving alien.

☐ 2. You are an alien present in the United States who has not been admitted or paroled.

☐ 3. You have been admitted to the United States, but are removable for the reasons stated below.

The Department of Homeland Security alleges that you:

1. You are not a citizen or national of the United States.
2. You are a native of Cuba and a citizen of Cuba.
3. On September 28, 2007, you were accorded Lawful Permanent Resident status of the United States, as of August 30, 2003.
4. On or about July 21, 2011, you were convicted in the Circuit Court of the Ninth Judicial Circuit, in and for Orange County, Florida (Case Number 48-11-CF-6160-O/A), for the offense of Grand Theft Third Degree, in violation of Florida Statute 812.014(2)(c)(1). For this offense, you were sentenced to one (1) day in jail with one (1) day credit for time served followed by eighteen (18) months probation.
5. On or about June 6, 2013, you arrived at Miami International Airport, Miami, Florida, and applied for admission to the United States as a Lawful Permanent Resident.

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

See Continuation Page Made a Part Hereof

☐ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.

☐ Section 235(b)(1) order was vacated pursuant to: ☐8CFR 208.30(f)(2) ☐8CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at:

333 South Miami Avenue, Suite 700 Miami FLORIDA US 33130

(Complete Address of Immigration Court, including Room Number, if any)

on November 20, 2013 *(Date)* at 09:00 A.M. *(Time)* to show why you should not be removed from the United States based on the charge(s) set forth above.

[redacted] CHIEF CBP OFFICER

(Signature and Title of Issuing Officer)

Date: August 30, 2013 MIAMI, FLORIDA

(City and State)

This Notice to Appear supersedes the Notice to Appear issued on June 6, 2013

See reverse for important information

Form I-862 (Rev. 08/01/07)

Notice to Respondent

Warning: Any statement you make may be used against you in removal proceedings.

Alien Registration: This copy of the Notice to Appear served upon you is evidence of your alien registration while you are under removal proceedings. You are required to carry it with you at all times.

Representation: If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Executive Office for Immigration Review, pursuant to 8 CFR 3.16. Unless you so request, no hearing will be scheduled earlier than ten days from the date of this notice, to allow you sufficient time to secure counsel. A list of qualified attorneys and organizations who may be available to represent you at no cost will be provided with this notice.

Conduct of the hearing: At the time of your hearing, you should bring with you any affidavits or other documents, which you desire to have considered in connection with your case. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Notice to Appear and that you are inadmissible or removable on the charges contained in the Notice to Appear. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Government. At the conclusion of your hearing, you have a right to appeal an adverse decision by the immigration judge.

You will be advised by the immigration judge before whom you appear of any relief from removal for which you may appear eligible including the privilege of departure voluntarily. You will be given a reasonable opportunity to make any such application to the immigration judge.

Failure to appear: You are required to provide the DHS, in writing, with your full mailing address and telephone number. You must notify the Immigration Court immediately by using Form EOIR-33 whenever you change your address or telephone number during the course of this proceeding. You will be provided with a copy of this form. Notices of hearing will be mailed to this address. If you do not submit Form EOIR-33 and do not otherwise provide an address at which you may be reached during proceedings, then the Government shall not be required to provide you with written notice of your hearing. If you fail to attend the hearing at the time and place designated on this notice, or any date and time later directed by the Immigration Court, a removal order may be made by the immigration judge in your absence, and you may be arrested and detained by the DHS.

Mandatory Duty to Surrender for Removal: If you become subject to a final order of removal, you must surrender for removal to one of the offices listed in 8 CFR 241.16(a). Specific addresses on locations for surrender can be obtained from your local DHS office or over the internet at http://www.ice.gov/about/dro/contact.htm. You must surrender within 30 days from the date the order becomes administratively final, unless you obtain an order from a Federal court, immigration court, or the Board of Immigration Appeals staying execution of the removal order. Immigration regulations at 8 CFR 241.1 define when the removal order becomes administratively final. If you are granted voluntary departure and fail to depart the United States as required, fail to post a bond in connection with voluntary departure, or fail to comply with any other condition or term in connection with voluntary departure, you must surrender for removal on the next business day thereafter. If you do not surrender for removal as required, you will be ineligible for all forms of discretionary relief for as long as you remain in the United States and for ten years after departure or removal. This means you will be ineligible for asylum, cancellation of removal, voluntary departure, adjustment of status, change of nonimmigrant status, registry, and related waivers for this period. If you do not surrender for removal as required, you may also be criminally prosecuted under section 243 of the Act.

Request for Prompt Hearing

To expedite a determination in my case, I request an immediate hearing. I waive my right to a 10-day period prior to appearing before an immigration judge.

Before: _____

(Signature of Respondent)

Date: _____

_____

(Signature and Title of Immigration Officer)

Certificate of Service

This Notice To Appear was served on the respondent by me on August 30, 2013, in the following manner and in compliance with section 239(a)(1)(F) of the Act.

☐ in person ☐ by certified mail, returned receipt requested ☒ by regular mail

☐ Attached is a credible fear worksheet.

☒ *Attached is a list of organization and attorneys which provide free legal services.*

The alien was provided oral notice in the SPANISH language of the time and place of his or her hearing and of the consequences of failure to appear as provided in section 240(b)(7) of the Act.

[redacted] CHIEF CBP OFFICER

_____ _____

(Signature of Respondent if Personally Served) *(Signature and Title of officer)*

U.S. Department of Homeland Security

Continuation Page for Form I862

Alien's Name	File Number SIGMA Event: Event No:	Date
[redacted]	[redacted]	[redacted]

ON THE BASIS OF THE FOREGOING, IT IS CHARGED THAT YOU ARE SUBJECT TO REMOVAL FROM THE UNITED STATES PURSUANT TO THE FOLLOWING PROVISION(S) OF LAW:

Section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act, as amended, in that you are an alien who has been convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime.

Signature	Title
[redacted]	CHIEF CBP OFFICER