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U.S. Department of Homeland Security
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Washington, DC 20536

U.S. Citizenship and Immigration Services

FILE: Office: GUANGZHOU, CHINA Date: FEB 25 20

IN RE:

PETITION: 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 PETITIONER:

INSTRUCTIONS:

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

Robert P. Wiemann, Director
Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Officer in Charge, Guangzhou, China, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the application declared moot.

The applicant is a native and citizen of China who was found to be inadmissible to the United States 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 married daughter of a United States citizen and is the beneficiary of an approved Petition for Alien Relative (LIN-95-204-50606). She seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), so that she may remain in the United States with her U.S. citizen parents.

The officer in charge (OIC) concluded that the applicant failed to prosecute her claim of extreme hardship. The application was denied accordingly. *See* Decision of Officer in Charge, dated March 14, 2000.

On appeal, counsel asserts that the offense committed by the applicant was political in nature; that extreme hardship to the applicant's parents will occur if the waiver is not granted; that more than 15 years have elapsed since commission of the crime and that neither counsel nor the applicant received the Immigration and Naturalization Service [now Citizenship and Immigration Services]'s request for additional information prior to the issuance of the OIC decision.

In support of these assertions, counsel submits an affidavit of the applicant with translation, dated May 30, 2003; two letters from counsel, dated May 29, 2003 and June 24, 2003, respectively; two affidavits of the applicant's father, dated August 6, 1998 and May 26, 2003, respectively; a letter from a physician treating the applicant's father, dated April 9, 2003; a penalty reduction certificate for the applicant from China and translation, dated May 11, 1998; criminal records for the applicant from China and translations; reports and articles addressing country conditions in China and copies of labels for medications prescribed to the applicant's father. The entire record was considered in rendering a decision on the appeal.

The record reflects that on August 29, 1990, the applicant was convicted of misappropriating public funds and sentenced to five years imprisonment.

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

> (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-
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> > (I) a crime involving moral turpitude . . . or an attempt or conspiracy to commit such a crime . . . is inadmissible.

Section 212(h) of the Act provides, in pertinent part:

> (h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if
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> > (1)(A) in the case of an immigrant it is established to the satisfaction of the Attorney General [Secretary] that –
> >
> > > (i) . . . 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,
>
> . . . .
>
> (1)(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . .

Counsel initially asserts that the applicant is innocent and that she was improperly convicted of the crime of misappropriating public funds. This assertion is unpersuasive. "[C]ollateral attacks upon an [applicant's] conviction do not operate to negate the finality of his conviction unless and until the conviction is overturned." *In Re Max Alejandro Madrigal-Calvo*, 21 I&N Dec. 323, 327 (BIA 1996) (citations omitted.) Moreover, the AAO cannot go behind the judicial record to determine the guilt or innocence of an alien. *Id*

Counsel further asserts that the applicant should be found eligible for a waiver under section 212(h)(1)(A) of the Act as the illegal acts resulting in her conviction occurred in October 1988 and, as of October 2003, more than 15 years have elapsed since their occurrence. This assertion is also unpersuasive. The statute states that the Attorney General [Secretary] may waive the application where the activities occurred 15 years before the date "of the alien's application for a visa, admission, or adjustment of status." The applicant applied for adjustment of status in 1995, no more than five years after the occurrence of the activities that rendered her inadmissible to the United States. Therefore, the applicant is not eligible for a waiver under section 212(h)(1)(A) of the Act.

> "To render an alien ineligible under [section] 212(a)(2)(A)(i)(I), the conviction must be for a statutory offense which involves moral turpitude. The presence of moral turpitude is determined by the nature of the offense for which the alien was convicted, and not by an independent analysis of the acts underlying the conviction. Therefore, evidence relating to the underlying act, including the testimony of the applicant, is not relevant to a determination of whether the conviction involved moral turpitude except when the statute is divisible ... or a political offense ... The presence of moral turpitude in a statutory offense is determined according to the moral standards prevailing in the United States.
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> The following definition of the term "moral turpitude" was cited with approval by the Attorney General in his opinion of October 13, 1933 (37 Op. A.G. 293) and by various Federal Courts, including the U.S. Supreme Court:
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> It is defined as anything done contrary to justice, honesty, principle, or good morals; an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow man, or to society in general, contrary to the accepted and customary rule of right and duty between man and man. Moral turpitude implies something immoral in itself, regardless of the fact whether it is punishable by law. It must not merely be mala prohibita, but the act itself must be inherently immoral. The doing of the act itself, and not its prohibition by statute, fixes the moral turpitude..."

*See* F.A.M. 40.21(A), notes 2.1-2.2. The AAO finds the nature and character of the acts undertaken by the applicant in committing the crime of misappropriation of public funds are similar to those necessary to commit crimes against governmental authority which do not constitute moral turpitude, including tax violations. Further, the actions taken by the applicant are not similar to those acts necessary to commit crimes against governmental authority which fall within the definition of moral turpitude, including bribery and counterfeiting. *Id.* at note 2.3-2. Therefore, the AAO finds that the applicant's conviction for misappropriation of public funds does not constitute a crime involving moral turpitude within the meaning of section 212(a)(2)(A) of the Act.

Because the grounds for inadmissibility set forth in the OIC's decision are determined to be in error, the applicant has not been determined to be inadmissible under the Act. The applicant's appeal will be sustained and her waiver of inadmissibility application will be declared moot.

**ORDER:** The appeal is sustained. The waiver application is moot, as the applicant has not been determined to be inadmissible.