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

U.S. Citizenship and Immigration Services

H2

[redacted]

FILE: [redacted] Office: SANTA ANA Date: DEC 0 3 2009

IN RE: [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:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Michael Rhew

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application for waiver of inadmissibility was denied by the Field Office Director, Santa Ana, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected.

The record reflects that the applicant is a native and citizen of Mexico. On March 10, 2006, the applicant's U.S. lawful permanent resident father, [redacted], filed a Petition for Alien Relative (Form I-130) on his behalf. On September 13, 2004, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485). The Form I-130 petition was approved on August 21, 2006.

On May 22, 2006, the director issued a Request for Evidence (Form I-72) to the applicant. The director informed the applicant that Service (U.S. Citizenship and Immigration Services or USCIS) records reveal that he is inadmissible to adjust status because he has been arrested or convicted of crimes. The director informed the applicant that the Attorney General (Secretary, Department of Homeland Security) may waive his ground of inadmissibility upon the establishment of extreme hardship to a qualifying relative, and instructed him to file an Application for Waiver of Grounds of Inadmissibility (Form I-601). The director noted that if the applicant failed to respond to the request within twelve (12) weeks, USCIS would make a decision on his case based on the evidence contained in the record.

On August 21, 2006, the director denied the applicant's Form I-485 adjustment application. In denying the application, the director stated that the record reflects that the applicant was convicted of crimes involving moral turpitude and is, therefore, 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). The director noted that the applicant failed to submit the requested Form I-601 application for a waiver of his bar to admission under section 212(h) of the Act, 8 U.S.C. § 1182(h).

On August 18, 2006, the applicant filed a Form I-601 waiver application, which was received by the director on August 22, 2006. On September 13, 2006, the director denied the application, stating that the applicant filed the Form I-601 four days after the 12 week deadline established on the Form I-72 request. The director noted that according to the record there was no underlying Form I-485 to base the adjudication of the application for a waiver of grounds of inadmissibility.

On October 12, 2006, counsel for the applicant filed a Form I-290B, Notice of Appeal, indicating that the notice was filed as a motion to reopen. On November 13, 2006, counsel submitted a brief in support of his motion to reopen, requesting the director to reopen the applicant's Form I-485 adjustment application. Counsel stated that the applicant's adjustment of status should be approved because USCIS issued an erroneous request for evidence. On November 16, 2006, the director denied the motion, stating that the applicant failed to provide any new facts demonstrating why he was not able to comply with the request (Form I-72) within the given time, and failed to establish that the prior decision was based on an incorrect application of law or USCIS policy.

On December 26, 2006, USCIS received a letter from counsel stating that the adjudication officer failed to consider the legal arguments contained in the brief. Counsel asserted that the applicant never needed to file a Form I-601 waiver application because the applicant was convicted of two infractions, which do not count as crimes. Counsel stated that the applicant's petty theft conviction falls under the petty offense exception. Counsel stated that the decision to require the applicant to file a waiver application was in gross error in law as no waiver application was ever needed. Counsel stated that the applicant was arrested for two counts of petty theft on the same date, December 23, 2001. Counsel stated that the two counts lapse into one crime because they resulted from one incident of facts. Counsel stated that because the applicant was sentenced to less than 180 days for a misdemeanor, the conviction falls under the "petty offense" exception requiring no waiver. Counsel asserted that the denial is a clear error of law by USCIS and the case should have been granted at the interview. Counsel contended that USCIS has abused its discretion and requests that the AAO issue an opinion on the matter.

On January 10, 2007, a district adjudication officer responded to counsel's letter, stating that a review of the record reflects that all factors were considered in determining the applicant's admissibility. The officer stated that the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having two misdemeanor convictions. The officer noted that although these convictions were within a single scheme, the two counts cannot be lapsed into one crime to have them fall under the "petty offense" exception. The officer determined that the case does not warrant a reopening.

On September 4, 2007, the director issued a USCIS motion to reopen or reconsider. The director stated that a review of the applicant's file shows that the applicant's Form I-290B and record should have been transferred to the AAO for adjudication of his appeal. The director noted that the Form I-290B should not have been adjudicated as a motion to reopen. The director ordered that the applicant's appeal and record be transferred to the AAO for action.

Upon review of the record, the AAO finds that the director was initially correct in adjudicating the applicant's Form I-290B as a motion to reopen or reconsider. Immigration regulations provide that a motion to reopen or reconsider shall be submitted on the Form I-290B and may be accompanied by a brief. 8 C.F.R. § 103.5(a)(1)(iii). The official having jurisdiction over the motion is the official who made the latest decision in the proceeding unless the affected party moves to a new jurisdiction. 8 C.F.R. § 103.5(a)(1)(ii). In the instant case, counsel indicated on the Form I-290B that he was filing the notice as a motion to reopen. Counsel stated in the brief that the applicant requests the director to reopen his Form I-485 adjustment application. Therefore, the director's initial decision to adjudicate the applicant's Form I-290B as a motion to reopen was in accordance with the applicable immigration regulations. Moreover, the AAO notes that it does not have appellate jurisdiction over an appeal from the denial of an application for adjustment of status.[1]

[1] The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. See DHS Delegation Number 0150.1 (effective March 1, 2003); see also 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003).

The AAO acknowledges that the Form I-290B indicates that it relates to the decision dated September 13, 2006, which is the date the director denied the applicant's Form I-601 waiver application. However, even if the AAO were to consider the applicant's Form I-290B as an appeal of the denial of his Form I-601, the AAO would have to dismiss the appeal as moot. The AAO observes that the applicant was instructed to file a Form I-601 within twelve weeks of the director's May 22, 2006 request for evidence, but the applicant failed to timely file such application. Pursuant to 8 C.F.R. § 103.2(b)(8)(iv), twelve weeks is the maximum period allowed for a response to a request for evidence. By the time the director received the applicant's Form I-601, the applicant's underlying Form I-485 adjustment application had already been denied.[2] A Form I-601 application for a waiver of inadmissibility is viable when filed with a pending adjustment of status application or immigrant visa application. *See* 8 C.F.R. § 212.7(a). Therefore, the applicant no longer had an underlying application to support the filing of his Form I-601 waiver. There is no evidence showing that the adjustment application was reopened by the director after being denied on August 21, 2006.

The AAO also notes that it agrees with the adjudication officer's determination that the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having committed two crimes involving moral turpitude. 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].") 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 record reflects that on December 23, 2001, the applicant was arrested by the Westminster (California) Police Department and charged with two counts of misdemeanor petty theft. The first count was for petty theft in violation of Cal. Penal Code §§ 484 and 488. The second count was for petty theft of property from merchant in violation of Cal. Penal Code §§ 484(a) and 490.5. On January 24, 2002, the applicant pled guilty to both of the offenses. The applicant was sentenced for the first count to 80 hours of community service and a payment to a crime prevention fund. The court suspended the applicant's sentence for the second count. The court's finding of guilt renders the applicant convicted for immigration purposes. *See* Section 101(a)(48) of the Act.[3] The Ninth Circuit Court of Appeals in *Castillo-Cruz v. Holder* determined that petty theft under Cal. Penal Code § 484(a) requires the specific intent to deprive the victim of his or her property permanently, and therefore, it is a crime categorically involving moral turpitude. 581 F.3d 1154, 1160 (9th Cir. 2009).

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[2] If the petitioner or applicant fails to respond to a request for evidence or to a notice of intent to deny by the required date, the application or petition may be summarily denied as abandoned, denied based on the record, or denied for both reasons. 8 C.F.R. § 103.2(b)(13)(i).

[3] The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court.

Section 237(a)(2)(A)(ii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(ii), provides an exception for the ground of *deportability* arising from multiple criminal convictions involving moral turpitude, which occur out of a single scheme of criminal misconduct, but section 212 of the Act contains no equivalent exception for ground of *inadmissibility*. The issue in the instant case is the applicant's admissibility for adjustment of status to permanent resident. *See* Section 245(a) of the Act, 8 U.S.C. § 1255(a). Since this expection is not available under section 212 of the Act, the applicant has been convicted of two offenses involving moral turpitude, and the "petty offense" exception for one offense involving moral turpitude does not apply.[4] Therefore, the AAO concurs with the adjudication officer's determination that the applicant is inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Act.

Based on the foregoing, the applicant's Form I-290B must be rejected by the AAO. The applicant must submit a new Form I-485 application or visa application and a new Form I-601 application, with appropriate fees, for the adjudication of a waiver of inadmissibility. *See* 8 C.F.R. 103.2(a)(7)(ii).

ORDER: The appeal is rejected.

[4] The "petty offense" exception can be found at section 212(a)(2)(A)(ii)(II) of the Act.