U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
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[redacted]

FILE: [redacted] Office: ATLANTA, GA Date: JUL 07 2009

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i) and Section 212(h) of the Immigration and Nationality Act (INA), 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.

Michael Grissom

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Atlanta, Georgia, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the underlying application is moot. The matter will be returned to the field office director for continued processing.

The applicant is a native and citizen of El Salvador who was found to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for having procured admission into the United States by fraud or willful misrepresentation when applying for a nonimmigrant visa and under section 212(a)(2)(A)(i)(I) of 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 son of a lawful permanent resident and has a U.S. citizen daughter. He seeks a waiver of inadmissibility pursuant to sections 212(i) and 212(h) of the Act in order to reside in the United States with his family.

The district director found the applicant inadmissible under section 212(a)(6)(C)(i) of the Act for failing to disclose three prior arrests when applying for an H1B nonimmigrant visa. *Decision of the District Director*, dated February 7, 2006. The district director also found the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having committed the crime of Theft by Shoplifting, a crime involving moral turpitude. The district director found that the applicant failed to submit evidence that his only potential qualifying relative under section 212(i) of the Act, his lawful permanent resident father, was in fact a lawful permanent resident. The district director then concluded that the applicant failed to establish that a qualifying family member would suffer extreme hardship as a result of his inadmissibility. The application was denied accordingly.

On appeal, counsel asserts that the applicant does not concede that omitting to inform the immigration service of his conviction rises to the level of fraud as stated in 212(a)(6)(C)(i) of the Act. Counsel also asserts that the applicant's father and child would suffer extreme hardship as a result of the applicant's inadmissibility to the United States. *Counsel's Brief,* dated June 2, 2005.

The record indicates that the applicant was arrested in 1990 and 1991 for driving under the influence. The record also indicates that the applicant was arrested on February 13, 1991 and convicted in September 1991 for Theft by Shoplifting in Cobb County, Georgia, presumably in violation of section 16-8-14 of the Georgia Code. The applicant was sentenced to twelve months probation.[1]

[1] The original sentencing form for the applicant's theft by shoplifting conviction states that he was sentenced to twelve months confinement, which may be served on probation. The applicant later filed and was granted a Motion to Correct Sentence Nunc Pro Tunc that corrected the applicant's original sentencing to state twelve months probation. *See Consent Order*, dated December 23, 2003.

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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> > 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 has determined that to constitute a crime involving moral turpitude, a theft offense must require the intent to permanently take another person's property. *See Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973) ("Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended."). In *Matter of Jurado*, 24 I&N Dec. 29, 33-34 (BIA 2006), the BIA found that violation of a Pennsylvania retail theft statute involved moral turpitude because the nature of retail theft is such that it is reasonable to assume such an offense would be committed with the intention of retaining merchandise permanently. The reasoning in *Jurado* is applicable to the present case because the applicant's crime was shoplifting. He was thus convicted of knowingly taking goods of another with the intent to permanently deprive that person of such goods, a crime involving moral turpitude. However, the applicant's conviction falls within the petty offense exception under section 212(a)(2)(a)(ii) of the Act

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-
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> . . . .
>
> > (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).

In the present case, the applicant was convicted of Theft by Shoplifting, a misdemeanor, but was not sentenced to a prison term. The applicant was instead sentenced to twelve months probation. The maximum penalty, under Georgia law, for Theft by Shoplifting is twelve months confinement. See Ga. Code § 17-10-3. The evidence in the record thus establishes that the applicant's conviction falls within the petty offense exception set forth in the Act and the applicant is not inadmissible under section 212(a)(2)(a)(ii) of the Act.

As stated above, the applicant was also found inadmissible under section 212(a)(6)(C)(i) of the Act. The district director found that in 1996 and 2001 the applicant failed to disclose his two prior arrests for driving under the influence and one conviction for theft by shoplifting when applying for an H1B visa.

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

> (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

The Department of State Foreign Affairs Manual (FAM) offers interpretations regarding the statutory reference to misrepresentations under section 212(a)(6)(C) of the Act. Stated in part: ... (2) silence or the failure to volunteer information does not in itself constitute a misrepresentation.... *DOS Foreign Affairs Manual*, § 40.63 N4.1-N.46.

The record is not clear as to whether the applicant purposely failed to disclose his conviction and two arrests. The record does not contain the applicant's visa applications. In a sworn statement taken during the applicant's adjustment interview, on September 9, 2005, he stated that he did not disclose or discuss his arrests during his visa interviews, but that he believed he disclosed his arrests on his visa applications through his attorney. He also indicated that he could not be certain if this disclosure had been made.

The AAO notes that even if the applicant failed to disclose the conviction and his arrest, this information is not material. The Supreme Court in *Kungys v. United States*, 485 US 759 (1988), found that the test of whether concealments or misrepresentations are "material" is whether they can be shown by clear, unequivocal, and convincing evidence to have been predictably capable of affecting, i.e., to have has a natural tendency to affect, the government's decisions. In addition, Matter of S- and B-C-, 9 I&N Dec. 436 (BIA 1960; AG 1961) states that the elements of a material misrepresentation are as follows:

> 1. the alien is excludable on the true facts, or
>
> 2. the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well resulted in proper determination that he be excluded.

Based on this standard, the applicant's misrepresentation was not material. The disclosure of the two arrests and one conviction would not have had a bearing on the applicant's admissibility because his conviction fell under the petty offense exception. Thus, the applicant is not inadmissible under section 212(a)(6)(C) of the Act.

Accordingly, the applicant is not inadmissible and the district director's findings regarding this conviction and the applicant's failure to disclose his arrests and conviction are withdrawn. The applicant's waiver of inadmissibility application is thus moot and the appeal will be dismissed.

ORDER: The applicant's waiver application is declared moot and the appeal is dismissed. The director shall reopen the denial of the Form I-485 application on motion and continue to process the adjustment application.