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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: ATLANTA Date: JUL 28 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 Grissom

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The District Director, Atlanta, Georgia, denied the waiver application that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the applicant is not inadmissible and the waiver application is, therefore, moot.

The applicant is a native and citizen of England, the wife of a U.S. citizen, the parent of a U.S. citizen son, and the beneficiary of an approved Form I-130 petition. The district director found the applicant inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act) for having been convicted of a crime involving moral turpitude. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with her husband and child.

The District Director concluded that the applicant had not demonstrated that denial of the waiver application would result in extreme hardship to a qualifying relative as described in section 212(h) of the Act, and denied the application accordingly.

On appeal, counsel asserted that the applicant had been convicted of a single minor offense and is qualified for the petty offense exception to inadmissibility. That exception is found at section 212(a)(2)(A)(ii)(II) of the Act. Counsel argued, in the alternative, that the applicant has demonstrated that failure to approve the waiver application would cause the applicant's husband extreme hardship.

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

> (i) In general. – Except as provided in clause (ii), any 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].
>
> (ii) Exception. – Clause (i)(I) shall not apply to an alien who committed only one crime if-
>
> > (I) the crime was committed when the alien was under 18 years of age . . . . or
> >
> > (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).

The record shows that the applicant was arrested, on May 7, 1995, in Arlington, Virginia, under the

name [redacted], for a violation of Virginia Code 18.2-95, grand larceny. Subsequently, on June 19, 1995, the applicant was convicted, pursuant to her plea, of the reduced charge of violating Virginia Code 18.2-96, petit larceny. The applicant was sentenced to 60 days confinement with 55 days of that sentenced suspended. The applicant was also required to perform 40 hours of community service.

Clause (ii) of Virginia Code 18.2-95, grand larceny, the statute pursuant to which the applicant was originally charged, states that one is guilty of committing that crime if one "commits simple larceny not from the person of another of goods and chattels of the value of $200 or more." A violation of that statute is punishable by up to twenty years confinement.

Clause 2 of Virginia Code 18.2-96, petit larceny, the statute pursuant to which the applicant was subsequently convicted, states that one is guilty of that crime if one commits simple larceny not from the person of another of goods and chattels of the value of less than $200, except as otherwise provided in situations not relevant in the instant case. That crime is a Class 1 misdemeanor, and punishable by confinement for not more than 12 months.

Thus, the crime of which the applicant was convicted is punishable by not more than one year of imprisonment, and the applicant was sentenced to less than six months confinement. As such, the applicant's conviction falls squarely within the petty offense exception to inadmissibility pursuant to section 212(a)(2)(A)(i)(I) of the Act. The applicant is not inadmissible based on that conviction, which was the basis relied upon in the decision of denial.

Although the issue was not raised in the decision of denial, the AAO will consider the argument that the applicant is, nevertheless, inadmissible pursuant to section 212(a)(6)(C)(i) of the Act for failing to report her arrest and conviction when seeking visas to enter the United States.

Section 212(a)(6)(C)(i) of the Act provides:

> In general.—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.

In an interview conducted, on February 4, 2005, by a USCIS officer, the applicant stated that she did not believe she had reported her conviction on the application for the last visa she received, on June 27, 1997. The record contains no other evidence pertinent to any possible misstatement by the applicant's pertinent to her criminal record.

The applicant's statement that she does not believe she correctly reported her criminal history is an insufficient basis to find that she committed fraud or misrepresentation. Further, even assuming that the applicant misstated her criminal history, as she believes she did, the applicant's conviction of a single offense of petit larceny, would not, because of the petty offense exception, have affected the outcome of her visa application, and was not, therefore, material. Pursuant to section 212(a)(6)(C)(i) of the Act, inadmissibility for misrepresentation requires a material misrepresentation. The applicant is not, therefore, inadmissible pursuant to section 212(a)(6)(C)(i)

of the Act.

An additional issue exists in this case that this decision will address, although the decision of denial did not rely upon it.

In an interview before a USCIS officer, conducted on February 4, 2006, the applicant admitted that her arrest shown above resulted when she had stolen clothing of the value of "$250 or $2,500." An argument might be made that the applicant has admitted to having stolen an amount between $250 and $2,500, inclusive, and that she has, therefore, admitted the elements of a violation of Virginia Code 18.2-95, grand larceny, a crime punishable by more than one year's confinement, which crime is not covered by the petty offense exception. This argument would continue that, having admitted the elements of such an unexcepted crime of moral turpitude, the applicant is inadmissible pursuant to the third clause of section 212(a)(2)(A)(i) of the Act.

Pursuant to *Matter of K*, 7 I. & N. Dec. 594, 597 (BIA 1957), however, in order to rely on an applicant's admission of having committed the elements of a crime involving moral turpitude to demonstrate inadmissibility, USCIS must show that the applicant was advised of the elements of the crime in question, and must have admitted not only that she committed the elements of that crime but concurred in the legal conclusion that the facts render her guilty of the crime upon which USCIS seeks to rely. The record does not show that these requirements have been met in this case.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant is not inadmissible and was therefore not required to file the waiver application. Accordingly, the appeal will be dismissed as moot.

ORDER: The appeal is dismissed as moot.