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

U.S. Citizenship and Immigration Services

[redacted]

H2

FILE: [redacted] Office: CLEVELAND, OH (CINCINNATI) Date: MAR 08 2011

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Michael Stumpf

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Cleveland, Ohio and is now before the Administrative Appeals Office (AAO) on appeal. The District Director's decision will be withdrawn and the matter will be remanded to the District Director for further consideration consistent with this decision.

The applicant is a native and citizen of Mexico who was found to be 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 applicant is the mother of two U.S. citizens. She seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States.

The District Director found that the applicant had failed to establish that the bar to her admission would result in extreme hardship for a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *District Director's Decision*, dated June 9, 2008.

On appeal, counsel states that the District Director's denial was clearly erroneous and constitutes an abuse of discretion. *Form I-290B, Notice of Appeal or Motion*, dated July 11, 2008.

In support of the application, the record contains, but is not limited to, counsel's brief, statements from the applicant and her two U.S. citizen children, documentation of the applicant's charitable donations, proof of the applicant's payments to clear her tax debt, country conditions materials on Mexico and documentation of the applicant's criminal history. The entire record was reviewed and all relevant evidence considered in arriving at a decision on the appeal.

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 –
>
> (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

The record reflects that on September 4, 2000, the applicant, under the name Carmen Tenorio, was arrested on a charge of petty theft under Fairfield (Ohio) Codified Ordinances (FCO) § 545.05(a)(1), a charge which was subsequently dismissed. On August 16, 2001, she was arrested for a violation of Ohio Revised Code § 2913.02 and on October 16, 2001, was found guilty, fined, ordered to pay court costs, and sentenced to six months in jail, a sentence which was suspended.[1]

In his June 9, 2008 denial of the applicant's adjustment application, the District Director found that although the applicant had not been convicted in connection with her arrest for theft under FCO § 545.05(a)(1), she had testified at her November 22, 2004 and May 18, 2007 interviews with U.S.

[1] The applicant's only other conviction is for driving without a driver's license in violation of Hamilton (Ohio) Codified Ordinances § 335.01.

Citizenship and Immigration Services (USCIS) that her September 4, 2000 arrest was the result of a knowing and willful attempt to steal items from a supermarket. The District Director found the applicant's testimony to constitute an admission to having committed acts constituting the essential elements of the crime of shoplifting. Based on her admission and her conviction for theft under Ohio Revised Code § 2913.02, the District Director concluded that the applicant had committed multiple acts involving moral turpitude and was inadmissible to the United Sates under section 212(a)(2)(i)(I) of the Act.

While the AAO agrees that inadmissibility under section 212(a)(2)(A)(i)(I) of the Act may be based on an admission to having engaged in acts that constitute the essential elements of a crime involving moral turpitude, we do not find the record to contain sufficient evidence to establish that the applicant in the present case has made such an admission.

The Board of Immigration Appeals (BIA) has established rules of procedure for determining whether an individual who has not been convicted of a crime, is, nevertheless, inadmissible for having admitted to acts that constitute the essential elements of that crime. *See Matter of P--*, I&N Dec. 33 (BIA 1941); *Matter of J--*, 2 I&N Dec. 285 (BIA 1945); *Memorandum of Solicitor General,* dated May 29, 1945; *Matter of K--*, 7 I&N Dec. 594 (BIA 1957). To have an admission qualify as having been validly obtained, the record must establish that certain procedural requirements have been met: the admitted conduct must constitute the essential elements of a crime in the jurisdiction in which it occurred; the applicant must have been provided with the definition and essential elements of the crime prior to his or her admission; the applicant must admit the conduct constituting the essential elements of the crime and that he or she committed the offense; and the applicant's admission must be voluntary. *Id.*

These requirements have been incorporated into the Foreign Affairs Manual (FAM) of the Department of State for use by consular officers overseas in determining inadmissibilities and are found in section 40.21(a), Note 5.1 of Volume 9 of the FAM, which states, in pertinent part:

> If it is necessary to question an alien for the purpose of determining whether the alien is ineligible to receive a visa as a person who has admitted the commission of the essential elements of a crime involving moral turpitude, the consular officer shall make the verbatim transcript of the proceedings under oath a part of the record. In eliciting admissions from visa applicants concerning the commission of criminal offenses, consular officers shall observe carefully the following rules of procedure:

The consular officer shall give the applicant a full explanation of the purpose of the questioning. The applicant shall then be placed under oath and the proceedings shall be recorded verbatim.

> (1) The crime, which the alien has admitted, must appear to constitute moral turpitude based on the statute and statements from the alien. It is not necessary for the alien to admit that the crime involves moral turpitude.
>
> (2) Before the actual questioning, the consular officer shall give the applicant an adequate definition of the crime, including all essential elements. The consular

officer must explain the definition to the applicant in terms he or she understands, making certain it conforms to the law of the jurisdiction where the offense is alleged to have been committed.

(3) The applicant must then admit all the factual elements which constituted the crime.

(4) The applicant's admission of the crime must be explicit, unequivocal and unqualified.

The procedures articulated in BIA and U.S. court decisions, and set forth in the FAM are in place for important policy reasons. As the applicant has not been convicted of theft under FCO § 545.05(a)(1) in any criminal proceeding, finding her to have admitted to the essential elements of this crime requires the due process just described.

The AAO notes the August 3, 2007 letter from the applicant's prior counsel in which she indicates that she was provided the opportunity to explain to her client the consequences of admitting to a theft offense. However, this acknowledgement is not sufficient to establish that the District Director followed the procedures set forth above in determining that the applicant had admitted to committing the essential elements of retail theft. We find no sworn statement or other formal written record from the interview that establishes what the applicant understood prior to her admission, that she admitted to all the factual elements of the theft or that her admission was explicit, unequivocal and unqualified. Accordingly, the applicant's statements regarding the actions that led to her arrest for theft under FCO § 545.05(a)(1) may not be used to establish that she has admitted to the essential elements of a crime involving moral turpitude.

In that the record establishes only that the applicant has been convicted of a single theft offense under Ohio Revised Code § 2913.02, the AAO finds no need to determine whether her conviction is for a crime involving moral turpitude that would bar her admission to the United States under section 212(a)(2)(i)(I) of the Act. Even if the applicant's theft offense were to be found a crime involving moral turpitude, she is eligible for the petty offense exception under section 212(a)(2)(ii)(II) of the Act, which states:

(ii) Exception

Clause (i)(I) shall not apply to an alien who committed only one crime if-

. . . .

(II) the maximum penalty possible for the crime of which the alien was convicted . . . 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 applicant's violation of Ohio Revised Code § 2913.02 is a misdemeanor of the first degree for which the maximum sentence of imprisonment is no more than six months. Further, the applicant's suspended sentence of imprisonment did not exceed six months. Accordingly, the petty offense exception applies to her conviction under Ohio Revised Code § 2913.02 and she is not inadmissible to the United States under section 212(a)(2)(i)(I) of the Act.

The AAO notes, however, that the applicant may be inadmissible under section 212(a)(6)(C)(i) of the Act, which states:

> (i) 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 chapter is inadmissible.

In reviewing the record, the AAO has found a Form I-213, Record of Deportable Alien, dated October 7, 1998, which indicates that the applicant on October 2, 1998 "presented" a fraudulent Social Security card to an Information Officer of the legacy U.S. Immigration and Naturalization Service (INS, now USCIS). The Form I-213 does not, however, report the circumstances under which the INS officer obtained the card or in what way the Social Security card was found to be fraudulent. Further, the record fails to indicate that the applicant has ever been questioned about this event. Absent additional information, the AAO is unable to determine that the applicant presented a fraudulent document to an INS officer to obtain a benefit under the Act, thereby rendering her inadmissible to the United States under section 212(a)(6)(C)(i) of the Act.

Accordingly, for the reasons indicated in the preceding discussion, the AAO will withdraw the District Director's decision and remand the matter to the District Director for a determination of whether the applicant is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, which may require further interview of the applicant. The District Director shall then issue a new decision based on the evidence of record.

ORDER: The District Director's decision is withdrawn. The waiver application is remanded to the District Director for further consideration and the issuance of a new decision. The new decision, if adverse to the applicant, shall be certified to the AAO for review.