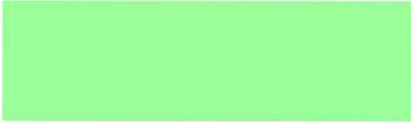




U.S. Citizenship
and Immigration
Services

(b)(6)



Date: **OCT 06 2014** Office: BOSTON, MA FILE: 

IN RE: Applicant: 

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:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Boston, Massachusetts, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as moot.

The applicant is a native and citizen of Cape Verde (Cabo Verde). The director found that the applicant was inadmissible 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 committing a crime involving moral turpitude. The applicant is seeking a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h).

The director concluded that the applicant had failed to establish extreme hardship to a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On appeal, the applicant states that the director's decision was erroneous and that if she is deported it will cause extreme hardship to her parents, husband and son.

Section 212(a)(2)(A)(i)(I) of the Act states, in pertinent parts:

- (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 the applicant was arrested and charged with Larceny over \$250 in violation of Massachusetts General Laws Annotated (M.G.L.A.) § 266(30)(A), and Receiving Stolen Property over \$250, in violation of M.G.L.A. § 266(60)(B), on December 5, 2005, in ██████████ Massachusetts. A docket report submitted into the record indicates that no formal judgment was entered on these charges, which stemmed from the same incident, and that the charges were dismissed based on recommendations from the probation department.

The record also reflects that the applicant was charged with two counts of Shoplifting by Concealing, in violation of M.G.L.A. § 266(30) on March 31, 2006, in ██████████ Massachusetts. A docket report submitted into the record indicates that these charges were dismissed based on recommendations from the probation department prior to any formal judgment of guilt being entered.

Section 101(a)(48) of the Immigration and Nationality Act (the Act) provides:

- (A) The term “conviction” means . . . a formal judgment of guilt . . . entered by a court or, if adjudication of guilt has been withheld, where—

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

Where an alien pleads guilty or nolo contendere, or is found guilty, but entry of the judgment is deferred by the court to allow for a period of probation and/or completion of a diversion program, the alien has been convicted for immigration purposes even if the charges are later dismissed. See *Matter of Marroquin-Garcia*, 23 I&N Dec. 705, 714-15 (A.G. 2005); *Matter of Roldan-Santoyo*, 22 I&N Dec. 512 (BIA 1999).

By contrast, an alien has *not* been convicted for immigration purposes where the criminal charges were dismissed following successful completion of a pretrial diversion program which occurred prior to any pleading or finding of guilt. *Matter of Grullon*, 20 I&N Dec. 12, 14-15 (BIA 1989) (citing *Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988)). For there to be no conviction in such a case, the alien must not have entered a plea of guilty or nolo contendere and there must have been no adjudication of guilt or imposition of punishment or restraint by a court. *Id.*

The docket reports submitted into the record indicate that no formal judgments were entered on her charges, that she did not enter any pleas on her charges and that no imposition of punishment or restraint was imposed on the applicant. The docket reports are certified and signed by a clerk of the court. Based on these findings, the applicant has not been convicted of a CIMT as that term is defined by section 101(a)(48) of the Act.

While the field office director found that the applicant had admitted to sufficient facts in order to find her inadmissible under section 212(a)(2)(A)(i)(I) of the Act, there is a specific process which must be followed to make such a finding. In order for the admission of acts which constitute the essential elements of a crime to be properly used as a basis for inadmissibility, three conditions must be met, including: 1) the admitted acts must constitute the essential elements of a crime in the jurisdiction in which they occurred; 2) the respondent must have been provided with the definition and essential elements of the crime prior to making the admission, and; 3) the admission must have been voluntary. *Matter of K-*, 7 I&N Dec. 594, 596-98 (BIA 1957). There is nothing in the record to indicate that this process was followed in the applicant's case.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. See Section 291 of the Act, 8 U.S.C. § 1361. In this case the record does not establish that the applicant is inadmissible under section 212(a)(2)(A). Accordingly, the appeal will be dismissed as moot.

ORDER: The appeal is dismissed.