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U.S. Citizenship
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FILE: [Redacted]

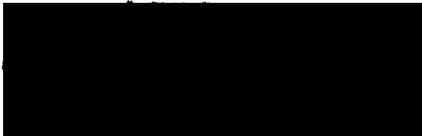
Office: BALTIMORE DISTRICT OFFICE

Date: JAN 28 2005

IN RE: [Redacted]

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

ON BEHALF OF APPLICANT:



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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Baltimore. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant is a 38-year-old native and citizen of Nigeria who was found inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (INA, the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I). She seeks a waiver of inadmissibility to remain in the United States and adjust her status to that of a lawful permanent resident pursuant to INA § 245, 8 U.S.C. § 1255, as the beneficiary of an approved employment-based immigrant visa petition in the category of a skilled worker or professional as described in INA § 203(b)(3)(A)(i) or (ii); 8 U.S.C. § 1153(b)(3)(A)(i), (ii). The entire record was reviewed and considered in rendering a decision on appeal.

Section 212(a)(2)(A) of the Act provides, 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 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—

...

(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 six months (regardless of the extent to which the sentence was ultimately executed).

8 U.S.C. § 1182(a)(2)(A). The district director based the finding of inadmissibility under this section on the applicant's conviction for gross misdemeanor theft by financial transaction card fraud, which counsel concedes is a crime involving moral turpitude. *Notice of Intent to Deny* (October 31, 2002) at 3.¹ The district director also concluded, "[m]oreover, the maximum penalty possible for your crime exceeds one-year imprisonment and/or you were sentenced to a term of imprisonment in excess of six months. Therefore, [the applicant] failed to meet the exception clause of Section 212(a)(2)(A)(ii)(II) of the Act." *Id.* This exception is commonly known as the petty offense exception.

¹ The AAO notes that the district director erred in stating that the applicant was convicted on July 21, 1988. Records of the Minnesota District Court submitted in connection with the waiver application show that July 21, 1988, was the date of the offense. The actual conviction date is not clear; sentence was pronounced on March 22, 1990.

On appeal, counsel contends that the applicant's conviction does meet the terms of the petty offense exception. She states the applicant "was charged and convicted under Section 609.52.2.1. of the Minnesota Criminal Code for "gross misdemeanor" this conviction [sic] carries a maximum penalty of up to one year sentence and/or a fine up to \$3000 – the maximum sentenced is misstated in the original intent to deny." *Letter in Support of Appeal* (May 1, 2003).

The evidence of record showing the applicant's conviction consists of a certified copy of an untitled case information card from the Minnesota District Court Administrator. The file also contains a copy of the applicant's Federal Bureau of Investigation (FBI) Record of Arrest and Prosecution ("RAP Sheet"), with an entry noting the applicant's arrest for "theft by card fraud" but containing no information regarding the statute under which she was charged or regarding the ultimate disposition of the arrest. The court information card also fails to identify under which statute the applicant was convicted, but lists the offense as "theft by financial transaction card fraud-G.M." In the space marked "Remarks," the sentence is recorded as, "stay of imp. 1 yr. Cond.: 1) L.A. 2) 100 fine." There is no explanation on the record for these abbreviated notations, of which the meaning is not self-evident.

Counsel asserts that the statute under which the applicant was convicted is Minnesota Statute 609.52.2.1, which provides, in pertinent part:

CHAPTER 609. CRIMINAL CODE; THEFT AND RELATED CRIMES

609.52. Theft

...

Subd. 2. Acts constituting theft. Whoever does any of the following commits theft and may be sentenced as provided in subdivision 3:

- (1) intentionally and without claim of right takes, uses, transfers, conceals or retains possession of movable property of another without the other's consent and with intent to deprive the owner permanently of possession of the property; or

Minn. Stat. § 609.52.2(1). Subdivision 3 of this statute provides five sentencing guidelines, outlining maximum sentences ranging from not more than 90 days to not more than 20 years imprisonment, depending upon the value of the property or services stolen, and the section under which the individual was convicted. *See* Minn Stat. § 609.52.3.

The AAO notes that Minnesota law also defines the following criminal offense, which appears closer in name to the offense listed in the court records:

CHAPTER 609. CRIMINAL CODE; CRIMES RELATING TO A BUSINESS

609.821. Financial transaction card fraud

...

Subd. 2. Violations; penalties. A person who does any of the following commits financial transaction card fraud:

(1) without the consent of the cardholder, and knowing that the cardholder has not given consent, uses or attempts to use a card to obtain the property of another, or a public assistance benefit issued for the use of another;

(2) uses or attempts to use a card knowing it to be forged, false, fictitious, or obtained in violation of clause (6);

(3) sells or transfers a card knowing that the cardholder and issuer have not authorized the person to whom the card is sold or transferred to use the card, or that the card is forged, false, fictitious, or was obtained in violation of clause (6);

(4) without a legitimate business purpose, and without the consent of the cardholders, receives or possesses, with intent to use, or with intent to sell or transfer in violation of clause (3), two or more cards issued in the name of another, or two or more cards knowing the cards to be forged, false, fictitious, or obtained in violation of clause (6);

(5) being authorized by an issuer to furnish money, goods, services, or anything else of value, knowingly and with an intent to defraud the issuer or the cardholder:

(i) furnishes money, goods, services, or anything else of value upon presentation of a financial transaction card knowing it to be forged, expired, or revoked, or knowing that it is presented by a person without authority to use the card; or

(ii) represents in writing to the issuer that the person has furnished money, goods, services, or anything else of value which has not in fact been furnished;

(6) upon applying for a financial transaction card to an issuer, or for a public assistance benefit which is distributed by means of a financial transaction card:

(i) knowingly gives a false name or occupation;

(ii) knowingly and substantially overvalues assets or substantially undervalues indebtedness for the purpose of inducing the issuer to issue a financial transaction card; or

(iii) knowingly makes a false statement or representation for the purpose of inducing an issuer to issue a financial transaction card used to obtain a public assistance benefit;

(7) with intent to defraud, falsely notifies the issuer or any other person of a theft, loss, disappearance, or nonreceipt of a financial transaction card; or

(8) without the consent of the cardholder and knowing that the cardholder has not given consent, falsely alters, makes, or signs any written document pertaining to a card transaction to obtain or attempt to obtain the property of another.

Minn. Stat. § 609.821. Again, the maximum sentences range from no more than one year to no more than 20 years imprisonment, depending upon the value of the property or services stolen and the particular section under which the individual is convicted. *See* Minn. Stat. § 609.821.3.

As stated above, the particular statute under which the applicant was convicted is not contained in the record. The unsupported assertion by counsel in her letter in support of the appeal does not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 503, 506 (BIA 1980). There is no indication in the record of what kind of theft for which the applicant was convicted or other evidence which can conclusively identify whether the maximum sentence the applicant could have received was more or less than one year. Further, the sentence that was actually imposed on the applicant is also unclear on this record. The burden of proving that the applicant is not inadmissible rests with the applicant. INA § 291, 8 U.S.C. § 1361. The record establishes that the applicant was convicted of a crime involving moral turpitude. The record does not contain sufficient evidence to find that the applicant qualifies for an exception to inadmissibility under INA § 212(a)(2)(A)(ii)(II). Therefore, the district director's finding of inadmissibility is affirmed. The question remains whether the applicant is eligible for a waiver.

Section 212(h) of the Act provides, in pertinent part:

The Attorney General [now the Secretary of Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . if—

(1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that—

(i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and