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U.S. Department of Homeland Security  
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Washington, DC 20529

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U.S. Citizenship  
and Immigration  
Services

H2

FILE:



Office: TAMPA, FLORIDA Date:

MAR 07 2005

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:

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 Miami, Florida. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decisions of the Director and the AAO will be withdrawn and the application declared moot.

The applicant is a native and citizen of Venezuela 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), for having been convicted of a crime involving moral turpitude. The applicant is the beneficiary of an approved Petition for Alien Relative filed by her U.S. citizen spouse. The applicant 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 and reside with her spouse.

The District Director concluded that the applicant had failed to establish that extreme hardship would be imposed upon his qualifying family member. The application was denied accordingly. *See District Director's Decision* dated October 12, 2000. The decision was affirmed by the AAO on appeal. *See AAO Decision*, dated August 9, 2001.

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

(A)(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.

. . . .

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

(h) The Attorney General [now the Secretary of Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) . . . if -

. . . .

(1) (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . . .

On motion to reconsider, counsel asserts that the District Director and the AAO erred in denying the waiver application because of a conviction of a crime involving moral turpitude. Counsel states that the applicant was never convicted of a crime involving moral turpitude and therefore is not inadmissible under the Act. In support of this assertion counsel submits a "Notice of Case Action" from the County Court of the Twelfth Judicial Circuit in and for Manatee County, Florida, which states that "criminal charges will not be filed as to retail theft" and a "Certificate of Disposition" from the Criminal Court of the City of New York which states that the matter would be adjourned in contemplation of dismissal.

The record reflects, and the applicant admitted in writing, that on May 9, 1983, she was arrested by the New York Police Department and charged with the offense of petit larceny and possession of stolen property. Additionally on May 31, 1994, the applicant was arrested by the Manatee County Sheriff's Office and charged with the offense of petit larceny (shoplifting).

Counsel further states that the applicant should be eligible for an exception pursuant to section 212(a)(2)(A)(ii)(II) of the Act, which provides for an exception to crimes involving moral turpitude if the maximum penalty for the crime involving moral turpitude is not more than one year and the actual sentence is not more than six months. Counsel states that the applicant was neither convicted of a crime nor confined to prison and therefore qualifies for the exception.

Furthermore counsel asserts that the District Director and the AAO misapplied the extreme hardship standard set forth in section 212(h) of the Act, and that the evidence in the record establishes extreme hardship to the applicant's spouse [REDACTED] stepchild and U.S. citizen niece who reside with the applicant and her spouse. In support of this assertion, counsel submits a brief and affidavits from family members and friends. The affidavits submitted address the applicant's good moral character.

Before the AAO can determine whether the applicant's qualifying family members would suffer extreme hardship if the applicant's waiver application is not granted it must first determine if the applicant is inadmissible under section 212(a)(2)(A)(ii)(II) of the Act. In his decision the District Director states that the applicant not only committed the thefts, but perjury as well. The record clearly indicates that the applicant was not convicted of any crime.

Conviction of a crime involving moral turpitude, or an attempt or conspiracy to commit such a crime, is not an absolute prerequisite to denial of admission under section 212(a)(2)(A)(i)(I) of the Act. The provision also provides that an alien who admits committing such a crime or admits committing acts that constitute the elements of such a crime is inadmissible. Several factors govern the validity of such admissions. *See Matter of G.M.*, 7 I&N 40 (Att'y Gen. 1956). First, it must be clear that the conduct in question amounts to a crime and is punishable as such in the jurisdiction where the acts were committed. *Matter of DeS.*, 1 I&N 553 (BIA 1943). Second, the alien must be advised in a clear and understandable manner of the essential elements of the crime. *Matter of K.*, 7 I&N 598 (BIA 1957). Third, the alien must admit *all* the acts constituting the essential elements of the crime; the immigration authorities may not infer facts the aliens refused to admit. *Matter of E.N.*, 7 I&N 153 (BIA 1956). Fourth, the admission must be voluntary, unequivocal and unqualified. *Matter of G.*, 1 I&N 225 (BIA 1942). Fifth, the alien need not admit the element of moral turpitude, though the crime must involve moral turpitude. *Matter of G.M.*, *supra*. Sixth, prior admissions made in the context of a criminal proceeding do not constitute an admission for exclusion purposes unless these proceedings actually result in conviction. *Matter of Winter*, 12 I&N 638 (BIA 1968).

A review of the record of proceedings fails to establish that the alien was advised of the definition of a crime involving moral turpitude and advised of all the essential elements of the crime. Based on the above facts the AAO finds that the applicant's written statement does not constitute admitting to the essential elements of a crime involving moral turpitude. Further, the applicant never admitted to perjury.

Because it has not been established that the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act, a section 212(h) waiver is not necessary. Accordingly, the applicant's motion to reconsider will be

granted and the August 9, 2001, AAO order dismissing the appeal will be withdrawn. The application for waiver will be dismissed as moot, since the applicant is not inadmissible.

**ORDER:** The AAO previous decision is withdrawn and the application is dismissed as moot.