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FILE:

Office: SEATTLE (SPOKANE, WA)

Date: JAN 09 2007

IN RE:

PETITION: 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 PETITIONER:

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The applicant is a native and citizen of Canada who was found to be inadmissible to the United States 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 a crime involving moral turpitude. The applicant is the spouse of a citizen of the United States and has three children who are lawful permanent residents. She seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), so that she may reside in the United States with her spouse and children.

The District Director denied the Application for Waiver of Grounds of Excludability (Form I-601) as a matter of discretion and failed to address the issue of extreme hardship. *Decision of the District Director, dated December 21, 2004.*

On appeal, counsel contends that the applicant has provided evidence establishing extreme hardship to her spouse and children. *Form I-290B, dated February 1, 2005; Motion to Reopen, dated January 20, 2005.*

In support of these assertions, counsel submits a Motion to Reopen, dated January 20, 2005; The record also includes, but is not limited to, an affidavit by the applicant, dated January 19, 2005; an affidavit by the applicant's spouse, dated January 19, 2005; a GED certificate; letters of support from family and friends; an employment letter for the applicant's spouse; a probation order, dated February 22, 2000; Criminal Code of Canada, Part X, Fraudulent Transactions Relating to Contracts and Trade; records of conviction, Yarmouth Provincial Court, Province of Nova Scotia, dated August 15, 1989 and February 22, 2000; and a declaration from the applicant's spouse, dated October 19, 2004. The entire record was considered in rendering 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 . . . or an attempt or conspiracy to commit such a crime . . . is inadmissible.

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

- (h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . 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
(iii) the alien has been rehabilitated; or

(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 . . .

The record reflects that on August 15, 1989 the applicant was convicted of Theft under the Criminal Code of Canada for which she received a fine of \$200.00. *Record of Conviction, Yarmouth Provincial Court, Province of Nova Scotia*. On February 22, 2000 the applicant received seven convictions for Fraud under the Criminal Code of Canada for which she received one sentence of two years probation. *Record of Conviction, Yarmouth Provincial Court, Province of Nova Scotia*. These convictions stemmed from charges occurring from November 12, 1999 through November 30, 1999. *See Probation Order, dated February 22, 2000*. The applicant admitted to bouncing checks and was thus convicted of multiple check fraud offenses. *Form I-485; Form I-485 Processing Worksheet; Form I-601*.

Prior to addressing whether the applicant qualifies for the Form I-601 waiver, the AAO finds it necessary to address the issue of inadmissibility. The District Director found the applicant inadmissible under section 212(a)(2)(A)(i)(I) for having been convicted of crimes involving moral turpitude. *Decision of the District Director, dated December 21, 2004*. The AAO concurs that the conviction for Theft is a crime involving moral turpitude and that the applicant is inadmissible under section 212(a)(2)(A)(i)(I) for this offense. *See Okoro v. INS, 125 F.3d 920 (5th Cir. 1997)*. The AAO finds that the District Director erred in finding the convictions for Fraud under the Criminal Code of Canada to be crimes involving moral turpitude.

In *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), the Board of Immigration Appeals (Board) held that:

[M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general.

In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.) Neither the seriousness of the criminal offense nor the severity of the sentence imposed is determinative of whether a crime involves moral turpitude. *Matter of Serna*, 20 I&N Dec. 579, 581 (BIA 1992). Before one can be convicted of a crime of moral turpitude, the statute in question by its terms, must necessarily involve moral turpitude. *Matter of Esfandiary*, 16 I&N Dec. 659 (BIA 1979); *Matter of L-V-C*, 22 I&N Dec. 594, 603 (BIA 1999).

The Criminal Code of Canada under which the applicant was convicted states in relevant part the following:

Fraud

380.(1) Every one who, by deceit, falsehood or other fraudulent means, whether or not is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service.

(b) is guilty

- (i) of an indictable offence and is liable to imprisonment for a term not exceeding two years, or
- (ii) of an offence punishable on summary conviction,

where the values of the subject-matter of the offence does not exceed five thousand dollars.

All of the applicant's convictions for Fraud were under section 380.(1)(b) of the Criminal Code of Canada. *See Probation Order, dated February 22, 2000.* The AAO observes there is no intent element under this section of the statute. The AAO also notes that sections 380.(2), 381, 382 and 383 involve an intent element for the commission of Fraud. *See Criminal Code of Canada.* In *Matter of Zangwill*, the Board held that the issuance of bad checks where intent is not a necessary element of the statute does not constitute a crime involving moral turpitude. *18 I&N Dec. 22 (BIA 1981).* The Board noted that where a law governing the issuance of worthless checks, by its express terms, involves an intent to defraud, then a conviction of that law constitutes a crime involving moral turpitude for immigration purposes. *Id.* As the Canadian statute under which the applicant was convicted does not have an intent element, the AAO finds that her convictions for Fraud do not constitute crimes involving moral turpitude.

As noted previously, the applicant is still inadmissible under section 212(a)(2)(A)(i)(I) for her Theft conviction; however, as this conviction occurred over 15 years ago, the applicant does not need to show extreme hardship to a qualifying relative. To qualify for a 212(h) waiver, the applicant needs to show that her admission would not be contrary to the national welfare, safety or security of the United States and that she has been rehabilitated. The applicant has not had any criminal activity since her 1999 commission of bouncing checks that led to her convictions for Fraud in 2000. She is married to a U.S. citizen, obtained her GED in March 2003, and has numerous letters of support from family and friends. *See GED certificate; letters of support from family and friends.* The applicant cares for her three minor children. *Affidavit from the applicant.* She also has volunteered with the Salvation Army and is active in her church. *Id.; letters from family and friends.* The AAO finds that these favorable factors outweigh the unfavorable factors. The AAO therefore finds that the applicant qualifies for a 212(h) waiver for being inadmissible pursuant to 212(a)(2)(A)(i)(I) of the Act.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval rests with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met her burden.

ORDER: The appeal is sustained.