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U.S. Citizenship
and Immigration
Services

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FILE:

Office: ST. LOUIS, MISSOURI

Date: **APR 23 2008**

IN RE:

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

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, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, St. Louis, Missouri, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the record does not establish that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), and the relevant waiver application is therefore moot.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act for procuring or seeking to procure an immigration benefit by fraud or willful misrepresentation of a material fact. The applicant is the spouse of a U.S. citizen and is the beneficiary of an approved Petition for Alien Relative. He seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to reside in the United States with his spouse.

The district director concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *See Decision of the District Director*, dated October 14, 2005.

On appeal, counsel asserts that U.S. Citizenship and Immigration Services (CIS) failed to consider all the evidence and take into account all of the relevant factors in determining whether denial of the waiver application would result in extreme hardship to the applicant's wife. Counsel further asserts that in requiring hardship that is "far beyond the norm," "very pronounced," or "excessive," CIS did not apply the appropriate standard. *See Brief in Support of Appeal* at 2-3. In support of the appeal, counsel submitted affidavits from the applicant's spouse as well as from friends and family members, documentation regarding the home the applicant and his wife own and their other joint financial obligations, photographs of the applicant with his family, and country conditions information on Mexico. The entire record was reviewed and considered in arriving at a decision on the appeal.

The record reflects that the applicant entered the United States without inspection in February 1996. He married his wife, a U.S. citizen, on June 23, 2000 and a Petition for Alien Relative filed by the applicant's wife was approved on March 19, 2001. The applicant and his wife have two children, a daughter born in 1999 and a son born in 2003. On January 15, 2002, the applicant was arrested after a domestic dispute with his wife in which he allegedly struck her on the back several times. The police report states that he was taken into custody for simple assault in the third degree, but that the applicant's wife did not want to sign a complaint against her husband. He was released the same day and was never formally charged with or convicted of a crime. *See Crime/ Incident Report from Sikeston, MO police department* dated January 15, 2002. On February 26, 2002, the applicant appeared for an interview for his application for adjustment of status. At that time he admitted to being arrested once for contempt of court in connection with a traffic violation, but did not disclose the arrest for domestic assault. He was asked to submit documentation concerning the arrest as well as documents related to his wife's affidavit of support. On September 3, 2003, the district director denied the application for adjustment of status for lack of prosecution, stating that the applicant had not submitted all of the documentation requested. The applicant filed a motion to reopen, and on June 5, 2004, the district director denied the motion, stating that the applicant was ineligible to adjust his status because he had provided false testimony about his past arrests and because he was not living with his wife in a valid marital relationship. *See Decision of the District Director* dated June 5, 2004. On July 9, 2004 the applicant filed a second application for adjustment of status and an application for a waiver of inadmissibility under section 212(i) of the Act.

Section 212(a)(6)(C) of the Act provides, in pertinent part:

- (i) 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 Act is inadmissible.

Prior to addressing whether the applicant qualifies for a waiver, the AAO will consider the issues related to the applicant's inadmissibility. The district director found that during his interview for adjustment of status on February 26, 2002, the applicant misrepresented his arrest record while under oath. *Decision of the District Director* dated June 5, 2004. According to the district director, the applicant admitted to only a single arrest for contempt of court and failed to mention his other arrest, which was later discovered through an investigation conducted by U.S. Immigration and Customs Enforcement. Based on this failure to mention his arrest for domestic assault, the district director found the applicant inadmissible to the United States under section 212(a)(6)(C)(i) of the Act for misrepresentation. *Id.* The issue is therefore whether the applicant's failure to disclose his arrest for domestic violence during his interview for adjustment of status constitutes a willful misrepresentation of a material fact that would render him inadmissible under section 212(a)(6)(C)(i) of the Act.

The AAO concludes that the applicant is not inadmissible under section 212(a)(6)(C)(i) of the Act. In a declaration submitted with his waiver application, the applicant stated that during the interview he "was very nervous and afraid [he] would get deported." He did not deny willfully concealing the January 2002 arrest. However, for section 212(a)(6)(C)(i) of the Act to apply, the misrepresentation committed by the applicant must also be material. In *Matter of S- and B-C-*, 9 I&N Dec 436 (BIA 1960 AG 1961), the Attorney General established the following test to determine whether a misrepresentation is material:

- A misrepresentation . . . is material if either (1) the alien is excludable on the true facts, or (2) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded. *Id.* at 447.

The arrest in question did not result in a conviction and would therefore not in itself render the applicant inadmissible. It is also not clear whether the applicant made an admission as to the elements of the crimes, but even if the applicant had admitted to committing simple assault as indicated in the police incident report, it does not appear that commission of this crime would render the applicant inadmissible. U.S. courts and the BIA have held that not all crimes involving assault or battery are considered crimes involving moral turpitude. For example, the BIA in *In re Sanudo*, 23 I&N Dec. 968, 970-971 (BIA 2006), stated that "not all crimes involving the injurious touching of another reflect moral depravity on the part of the offender, even though they may carry the label of assault, aggravated assault, or battery under the law of the relevant jurisdiction." (citing *Matter of B-*, 1 I&N Dec. 52, 58 (BIA, A.G. 1941) (finding that second-degree assault under Minnesota law does not qualify categorically as a crime involving moral turpitude (following *United States ex rel. Zaffarano v. Corsi*, 63 F.2d 757, 758 (2d Cir. 1933))). In *Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996), the BIA held that third-degree assault under the law of Hawaii, an offense of recklessly causing bodily injury to another person, is not a crime of moral turpitude. And in *Matter of Perez-Contreras*, 20 I&N

Dec. 615 (BIA 1992), it concluded that third-degree assault under the law of Washington, an offense of negligently causing bodily harm accompanied by substantial pain which caused considerable suffering, is not a crime of moral turpitude.

Further, the misrepresentation is not material under the second part of the test because failure to disclose his arrest did not shut off a line of inquiry that would have resulted in a finding of inadmissibility or ineligibility for any immigration benefit sought. As the offense in question does not appear to be a crime involving moral turpitude, an admission to the elements of the crime would not have rendered the applicant inadmissible. Further, although the district director's decision to deny the applicant's motion to reopen referred to a subsequent police report in finding that the applicant was "not living with [his] wife in a valid marital relationship," the record indicates that they were living together in a bona fide marriage at the time of the adjustment of status interview. *See Decision of District Director* dated June 5, 2004; *see also Crime/ Incident Report from Sikeston, MO police department* dated April 16, 2002 (stating that during a domestic dispute over their daughter, the applicant informed the police that he and his wife were not living together). Although disclosure of the arrest would have revealed the applicant and his wife were experiencing marital difficulties around the time of the February 26, 2002 interview, evidence on the record indicates they were living together in a bona fide marriage, and there is no indication that the disclosure would have revealed facts that rendered the applicant ineligible for the benefit sought. A misrepresentation is generally material only if by it the alien received a benefit for which he would not otherwise have been eligible. *See Kungys v. United States*, 485 U.S. 759 (1988) (stating that to determine whether a concealment is material, the test is "whether the concealment has a natural tendency to influence the decision . . . , sufficient to raise a fair inference that a statutory disqualifying fact actually existed."). *See also Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998); *Matter of Gilikevorkian*, 14 I&N Dec. 454 (BIA 1973); *Matter of Martinez-Lopez*, 10 I&N Dec. 409 (BIA 1962; AG 1964); and *Matter of S- and B-C-*, *supra*.

Based on the record, the AAO finds that the applicant, in failing to disclose that he had been arrested on charges of simple domestic assault, did not misrepresent a material fact for immigration purposes and is not inadmissible under section 212(a)(6)(C)(i) of the Act. The waiver application filed pursuant to section 212(i) of the Act is therefore unnecessary.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of proving eligibility remains entirely with the applicant. *See Section 291 of the Act*, 8 U.S.C. § 1361. Here, the applicant is not required to file the waiver. Accordingly, the appeal will be dismissed as moot.

ORDER: The appeal is dismissed as moot.