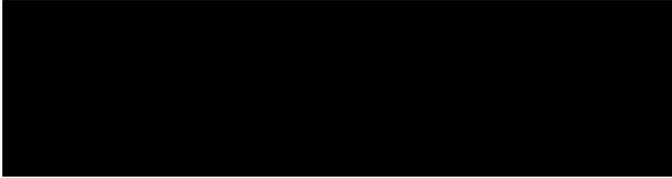


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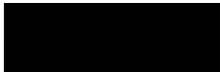
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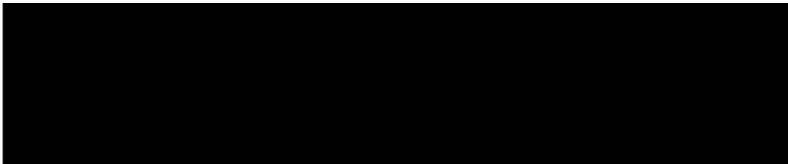
Date: **DEC 11 2008**

IN RE:



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

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.

A handwritten signature in black ink, appearing to read "John F. Grissom".

John F. Grissom, Acting Chief  
Administrative Appeals Office

**DISCUSSION:** The application was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Guyana who was found to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for having attempted to procure admission into the United States by fraud or willful misrepresentation of a material fact. The applicant is the spouse of naturalized United States citizen and the mother of two U.S. citizen children. She seeks a waiver of inadmissibility in order to reside in the United States with her spouse and children.

The Director concluded that the applicant had failed to establish that extreme hardship would be imposed upon a qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the Director*, dated July 29, 2006.

On appeal, the applicant contends that Citizenship and Immigration Services (CIS) erred as a matter of law in finding that she has failed to meet the burden of establishing extreme hardship to her qualifying relative, as required for a waiver under sections 212(i) of the Act. *Form I-290B; Attorney's brief*.

In support of these assertions, counsel submits a brief. The record also includes, but is not limited to, a letter from [REDACTED] a statement from the applicant's child; statements from the applicant's spouse; statements from the applicant; tax statements for the applicant and her spouse; W-2 forms for the applicant's spouse; bills; earnings statements for the applicant's spouse; a loan payment account statement; bank statements; a letter from [REDACTED] Attorney at Law; criminal court records and dispositions; and an employment letter for the applicant's spouse. The entire record was reviewed and considered in rendering this decision.

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

- (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.

Section 212(i) of the Act provides that:

- (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

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 -
  - (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 January 3, 1993, the applicant was arrested in New York and pled guilty on March 26, 1993 to the offense of petit larceny under New York Penal Law § 155.25. *Court records, First District Court of Nassau County*, dated December 24, 2002. A Certificate of Disposition states that the date of disposition was May 23, 2002 and that the applicant plead guilty to the amended charge 110/155.25 PL and was fined \$500.00 with surcharges of \$120.00. *Certificate of Disposition*, dated May 28, 2002. Petit larceny is a crime involving moral turpitude. *Caesar v. Ashcroft*, 355 F.Supp.2d 693, 703 (S.D.N.Y. 2005).

Although the Director failed to address it in his decision, the record also includes a court document that establishes that the applicant was arrested on December 20, 1997 in New York and pled guilty on June 19, 1998 to the offense of disorderly conduct under New York Penal Law § 240.20. *Court records, First District Court of Nassau County*, dated January 2, 2002. Although disorderly conduct is not a crime involving moral turpitude when evil intent is not necessarily involved, New York Penal Law § 240.20, Disorderly Conduct, includes both intent and reckless elements. When a statute covers offenses that involve moral turpitude and those that do not, it is considered a divisible statute. *See Matter of P-*, 6 I&N Dec. 193 (BIA 1954). In cases where a statute is divisible, it is permissible to look beyond the statute to consider such facts as may appear in the record of conviction to determine whether the conviction was rendered under the portion of the statute dealing with crimes that do involve moral turpitude. *Zaffarano v. Corsi*, 63 F.2d 757 (2d Cir. 1933). The record of conviction includes the charge (indictment or information), plea, verdict and sentence. *Id.* In this case, the record fails to include any documents beyond the court record stating that the applicant pled guilty to New York Penal Law § 240.20. As such, the applicant has not met her burden of proving that her 1998 conviction for disorderly conduct is not a crime involving moral turpitude. The AAO notes that the burden of proving admissibility rests entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Accordingly, the AAO finds that the applicant is inadmissible under section

212(a)(2)(A) of the Act for having been convicted of crimes involving moral turpitude and must seek a waiver of inadmissibility under section 212(h) of the Act.

The record further reflects that, on March 16, 2001, the applicant stated on her Form I-485, Application to Register Permanent Resident or Adjust Status that she had never been arrested, cited, charged, indicted, fined or imprisoned for breaking or violating any law or ordinance, excluding traffic violations. *Form I-485*. The applicant is, therefore, also inadmissible under section 212(a)(6)(C) of the Act for having sought to procure an immigration benefit under the Act by willfully misrepresenting a material fact.

The Supreme Court in, *Kungys v. United States*, 485 U.S. 759 (1988) found that the test of whether concealments or misrepresentations were “material” was whether they could be shown by clear, unequivocal, and convincing evidence to be predictably capable of affecting, i.e., to have had a natural tendency to affect, the legacy Immigration and Naturalization Service’s (now CIS) decisions. In addition, *Matter of S- and B-C-*, 9 I&N Dec. 436 (BIA 1960; AG 1961) states that the elements of a material misrepresentation are as follows:

A misrepresentation made in connection with an application for visa or other documents, or with entry into the United States, is material if either:

- a. the alien is excludable on the true facts, or
- b. 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 proper determination that he be excluded.

*Matter of S- and B-C-*, 9 I&N Dec. 436, 448-449 (AG 1961).

In this case, the applicant’s failure to disclose her convictions on the Form I-485 shut off a line of inquiry relevant to her eligibility for adjustment, one that might well have resulted in a proper determination that she be excluded. Therefore, the applicant is also inadmissible under section 212(a)(6)(C) of the Act and must seek a waiver under section 212(i) of the Act.

A section 212(i) waiver of the bar to admission resulting from violation of section 212(a)(6)(C) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse or parent of the applicant. A section 212(h) waiver of the bar to admission resulting from violation of section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent or child of the applicant. The AAO will conduct its analysis based on the 212(i) waiver, as that is the more restrictive standard.

The plain language of the statute indicates that hardship the applicant herself would experience upon removal is not directly relevant to the determination as to whether she is eligible for a waiver. The only relevant hardship in the present case is hardship suffered by the applicant’s naturalized U.S. citizen spouse if the applicant is removed. If extreme hardship is established, it is but one favorable

factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

*Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-566 (BIA 1999) provides a list of factors the Board of Immigration Appeals deems relevant in determining whether an alien has established extreme hardship pursuant to section 212(i) of the Act. These factors include the presence of a lawful permanent resident or United States citizen family ties to this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate.

The AAO notes that extreme hardship to the applicant's spouse must be established whether he resides in Guyana or the United States, as he is not required to reside outside the United States based on the denial of the applicant's waiver request. The AAO will consider the relevant factors in adjudication of this case.

If the applicant's spouse travels with the applicant to Guyana, the applicant needs to establish that her spouse will suffer extreme hardship. The applicant's spouse was born in Guyana. *Form G-325A, Biographic Information sheet, for the applicant's spouse*, dated December 28, 2000. Both of his parents are deceased. *Id.* Although the record is unclear as to when the applicant's spouse came to the United States, the record documents that the applicant's spouse has maintained a residence in the United States since 1994. *Id.* On December 9, 2002 the applicant's spouse was the victim of an accident in which he struck his head and lost consciousness for an unknown period of time. *Letter from [REDACTED] Board Certified in Neurology*, dated January 26, 2004. His injuries include a status post head trauma with a transient post concussion headache syndrome, a cervical radiculopathy secondary to disc herniations at C4/5, C5/6, C6/7 with impingements, a thoracic disc herniation at T11/12, and a lumbosacral radiculopathy secondary to a disc herniation at L5/S1. *Id.* His prognosis is guarded and he is left with a permanent partial disability. *Id.* The applicant's spouse states that since his accident, he has been disabled, unable to work, and still suffers from different kinds of pain. *Statement from the applicant's spouse*, dated August 23, 2006; *Form W-2 Wage and Tax Statement*, 2003. While the record does not directly address how the applicant's spouse would be affected if he travels with the applicant to Guyana, the AAO acknowledges the health concerns faced by the applicant's spouse and that his medical condition restricts his ability to work. When looking at the aforementioned factors, particularly the length of time the applicant's spouse has resided in the United States, his significant health condition, his established relationship with his doctor, the restrictions placed on his ability to work, and the added responsibilities placed on his family due to his health issues, the AAO finds that the applicant has demonstrated extreme hardship to her spouse if he were to reside in Guyana.

If the applicant's spouse resides in the United States, the applicant needs to establish that her spouse will suffer extreme hardship. As previously noted, the applicant's spouse injured his neck, left arm and back in an accident that occurred in 2002. *Letter from [REDACTED] Board Certified in*

*Neurology*, dated January 26, 2004. The injuries he sustained have left him permanently partially disabled and he has been unable to work. *Id.*; *Statement from the applicant's spouse*, dated August 23, 2006. The applicant's spouse's Form W-2 Wage and Tax Statement for 2003 shows that he earned \$1,500.00 as compared to \$47,000.00 in 2001. *Form W-2; Tax statements 2001 and 2003 for the applicant and her spouse*. The record documents numerous expenses for the applicant and her spouse. *See cable, telephone, and utility bills, and loan payment account information*. The AAO also notes that the applicant and her spouse have two children, ages 12 and 4. *See birth certificates for the applicant's children*. While the children are not qualifying relatives for the purposes of this analysis, the AAO will look at hardship to the children as it affects the applicant's spouse. The AAO acknowledges the added responsibilities of having to take care of minor children when one of the parents is disabled. According to the child of the applicant and her spouse, the applicant takes her to school and takes care of her brother. *Statement from the applicant's child*, dated August 25, 2006. These days, she states, the applicant's spouse depends on the applicant as well because he is very sick. *Id.* If the applicant goes to Guyana, she does not know what will happen to her or her brother. *Id.* She believes the applicant's spouse will go mad because he cannot read and write properly and he cannot help her with her homework. *Id.*

The AAO observes that the parents of the applicant's spouse are deceased and the parents of the applicant live in Guyana. *Forms G-325A, Biographic Information sheets, for the applicant and her spouse*. It acknowledges the significant difficulties the applicant's spouse would encounter in caring for his minor children as a result of his permanent disability. It also acknowledges the applicant's need for the care provided by the applicant since his 2002 accident. The applicant's spouse states that the applicant has always been by his side and has taken good care of him. *Statement from the applicant's spouse*, dated August 23, 2006. When looking at the aforementioned factors, specifically the applicant's partial disability and the impact it has had upon his ability to work and take care of his family, the AAO finds that the applicant has demonstrated extreme hardship to her spouse if he were to reside in the United States.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States, which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

The adverse factors in the present case are the applicant's prior misrepresentation, her convictions in 1993 for petit larceny and 1998 for disorderly conduct, and her unlawful residence in the United States.

The favorable and mitigating factors are her U.S. citizen spouse and children, the approved Form I-130 benefiting her, the extreme hardship to her spouse if she were refused admission, and her long-term and supportive relationship with her spouse and their two children.

The AAO finds that, although the immigration violations committed by the applicant were serious and cannot be condoned, when taken together, the favorable factors in the present case outweigh the

adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

**ORDER:** The appeal is sustained.