

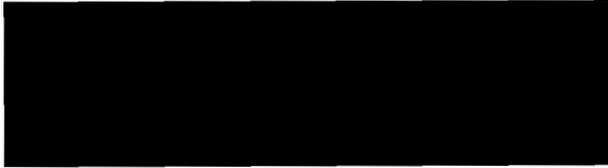
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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FILE:



Office: CALIFORNIA SERVICE CENTER

Date **MAY 27 2009**

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.

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, California Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the applicant is not 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, thus, moot. The matter will be returned to the Director for continued processing.

The applicant is a native of Guadeloupe and a citizen of Haiti 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 son of a lawful permanent resident and seeks a waiver of inadmissibility in order to reside in the United States with his mother.

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 August 10, 2006.

On appeal, counsel contends that United States Citizenship and Immigration Services (USCIS) erred in finding the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act, as he has never been convicted of, pled guilty to, nor admitted to having committed a crime involving moral turpitude or a violation, conspiracy, or attempt to violate the controlled substance act. *Form I-290B*.

In support of the waiver, the record includes, but is not limited to, earnings statements, tax statements, and Forms W-2 for the applicant's mother; a bank statement for the applicant's mother; a statement from the applicant's mother; a statement from the applicant; criminal court records and documents for the applicant; and genetic testing results. The entire record was reviewed and considered in rendering this decision.

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 . . .

Section 212(h) of the Act provides that a waiver of inadmissibility is dependent first upon a showing that the bar to admission imposes an extreme hardship on a qualifying family member. If extreme hardship is established, the Secretary then assesses whether an exercise of discretion is warranted.

Prior to addressing whether the applicant qualifies for a waiver, the AAO finds it necessary to address the issue of inadmissibility. On May 25, 2001, a delinquency action was brought against the applicant for lewd or lascivious battery and on December 21, 2001, the applicant entered a plea of nolo contendere to one count of lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age under Florida Statute § 800.04. At the time, the applicant was 17 years old. *Court records, Circuit Court of the Twentieth Judicial Circuit in and for Collier County, Florida, dated December 21, 2001.* Adjudication of delinquency was withheld and the applicant was placed on Juvenile Probation. *Id.* On February 29, 2000 the applicant filed a Form I-485, Application to Register Permanent Residence or Adjust Status in which he stated that he had never been arrested, cited, charged, indicted, fined, or imprisoned for breaking or violating any law or ordinance, excluding traffic violations. *Form I-485.* During his interview on December 29, 2004, the applicant claimed under oath that he had never been arrested. *Id.* On the Form I-601, Application for Waiver of Ground of Excludability, dated September 8, 2004, the applicant stated that his license had been suspended and he received a ticket for it. He further stated that he had never been arrested for any reason at all. *Id.*

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.

The AAO notes that 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 USCIS) 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).

Juvenile delinquency is not a crime in the United States and an adjudication of delinquency is not a conviction for a crime within the meaning of the Act. *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981). As such, a juvenile delinquency conviction is not a crime involving moral turpitude. The AAO therefore also finds that the applicant’s failure to disclose his arrest and subsequent plea of nolo contendere to lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age under Florida Statute § 800.04 was not a material misrepresentation, as he was not excludable on the true facts and it did not shut off a line of inquiry that was relevant to his eligibility and might well have resulted in a proper determination that he be excluded. Accordingly, the AAO finds that the applicant is not inadmissible to the United States under section 212(a)(6)(C) of the Act for willful misrepresentation of a material fact. The waiver filed pursuant to sections 212(i) of the Act is therefore moot.

ORDER: The appeal is dismissed as the underlying waiver application is moot. The Director shall reopen the denial of the Form I-485 application on motion and continue to process the adjustment application.