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U.S. Citizenship
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FILE:

Office: SAN FRANCISCO

Date:

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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)

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, San Francisco, California and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Nicaragua 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 crimes involving moral turpitude. The record further contains evidence that the applicant was convicted of a crime relating to a controlled substance (cocaine), which renders her inadmissible to the United States under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II). 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.

The district director concluded that the applicant failed to establish that she has a U.S. citizen or permanent resident parent, spouse, or child who would experience extreme hardship should the present waiver application be denied. *Decision of the District Director*, dated September 14, 2004. The district director denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Id.*

On appeal, the applicant contends that she is married to a permanent resident. *Statement from the Applicant*, submitted on October 13, 2004. She asserts that she is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act, as her crimes qualify for the "single scheme exception with 212." *Id.* at 1. The applicant asserts that her convictions were expunged, thus they may not serve as a basis for inadmissibility. *Id.* The applicant suggests that her suspended sentence for receiving stolen property in 1982 renders her conviction inapplicable for immigration purposes. *Id.* The applicant states that her convictions occurred prior to 1990, thus she is eligible for the "petty offense exception." *Id.*

The record contains statements from the applicant, the applicant's husband, the applicant's relatives, the applicant's employer, and the applicant's acquaintances; a copy of the applicant's marriage certificate; a copy of the applicant's husband's permanent resident card; tax and employment records; a copy of the applicant's passport and birth record, and; documentation regarding the applicant's criminal history. The entire record was reviewed and considered in rendering this decision.

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

- (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,
or

(II) a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

(ii) Exception.-Clause (i)(I) shall not apply to an alien who committed only one crime if-

....

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

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

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

[now the Secretary of Homeland Security (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 101(a) of the Act provides, in pertinent part:

As used in this Act-

(48)(A) The term "conviction" means, with respect to an alien, a formal judgment of *guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where-*

(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt, and

(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

(B) Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.

California Health and Safety Code section 11351 provides:

Except as otherwise provided in this division, every person who possesses for sale or purchases for purposes of sale (1) any controlled substance specified in subdivision (b), (c), or (e) of Section 11054, specified in paragraph (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055, or specified in subdivision (h) of Section 11056, or (2) any controlled substance classified in Schedule III, IV, or V which is a narcotic drug, shall be punished by imprisonment in the state prison for two, three, or four years.

The record reflects that the applicant has been convicted of multiple crimes, including: receipt of known stolen property under California Penal Code section 496 in 1983 for which she received a sentence of three years probation; Petty Theft under California Penal Code sections 484 and 488 in January 1986 for which she received a sentence of one year of probation, and; Petty Theft under California Penal Code sections 484 and 488 in June 1986 for which she received a sentence of

three years of probation.¹ Based on these convictions, the applicant was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act for having been convicted of crimes involving moral turpitude.

The record contains evidence that the applicant was convicted under California Health and Safety Code section 11351 in 1982 for possessing for sale a controlled substance (cocaine.) She received a sentence of three years probation. The applicant does not address this conviction on appeal.

The applicant provided an order from the Superior Court of California, County of San Francisco, dated August 23, 1990, that reflects that one of her convictions was reduced to a misdemeanor and expunged under California Penal Code section 1203.4. The court order discusses a single conviction, and references [REDACTED]. The applicant's criminal proceedings for her charges under California Health and Safety Code section 11351 and California Penal Code section 496 were under a single proceeding, noted as [REDACTED] thus the court's reference to the case number does not show which charge was subject to the expungement. The court noted that the applicant successfully completed her probation, yet as she received probation for each charge, such note does not serve to identify the conviction under review by the court. The court indicated that the charge in question was reduced to a misdemeanor, but as each of the applicant's convictions under [REDACTED] could be felonies, reduction to a misdemeanor could have applied to either charge. Accordingly, the court order on its face does not indicate whether the applicant's conviction under California Health and Safety Code section 11351 was reviewed or expunged.

The record contains a Form I-694, Notice of Appeal of Decision Under Section 210 or 245A, from the applicant's prior counsel, dated June 28, 1990, in which he asserted that the applicant was never convicted under California Health and Safety Code section 11351. Yet, records from the U.S. Federal Bureau of Investigation clearly reflect that the applicant received three years probation for that charge. On the Form I-694, the applicant's prior counsel further stated that the applicant's conviction under California Penal Code section 496 "can be and will be reduced by motion now to a misdemeanor and expunged under Penal Code Section 1203.4 and Section 17." *Statement from Prior Counsel on Form I-694*, dated June 28, 1990. As the court expungement order of August 23, 1990 was issued approximately two months after counsel asserted that such an order would be sought, the record shows by a preponderance of the evidence that the expungement order pertains to the applicant's charge under California Penal Code section 496.

Based on the foregoing, the applicant has not shown that her conviction under California Health and Safety Code section 11351 was expunged. Accordingly, the applicant is inadmissible under

¹ There is ample support to show that the applicant's conviction for receipt of stolen property under California Penal Code § 496(A) constitutes a conviction for a crime involving moral turpitude. See *Wadman v. INS*, 329 F.2d 812, 814-15 (9th Cir. 1964); *Matter of Patel*, 15 I&N Dec. 212, 213 (BIA 1975), *aff'd*, *Patel v. INS*, 542 F.2d 796 (9th Cir. 1976). The applicant has not asserted or shown that her theft crimes involved a temporary taking of property. Thus, there is ample support that her theft crimes constitute convictions for crimes involving moral turpitude. See *U.S. v Esparza-Ponce*, 193 F.3d 1133, 1135-37 (9th Cir. 1999).

section 212(a)(2)(A)(i)(II) of the Act for having been convicted of a crime involving a controlled substance.

There is no provision under the Act that allows for a waiver of inadmissibility when an applicant has been convicted of possession of cocaine. *See* section 212(h) of the Act. Because the applicant is statutorily ineligible for relief, no purpose would be served in discussing whether she has established extreme hardship to a qualifying relative, or whether she merits a waiver as a matter of discretion.

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 remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has not met her burden.

ORDER: The appeal is dismissed.