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U.S. Citizenship
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FILE:



Office: SAN ANTONIO

Date:

FEB 25 2010

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:



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).

Michael Shumway

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The District Director, San Antonio, Texas, denied the waiver application that 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)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I). Thus the relevant waiver application is moot.

The record reflects that the applicant is a native and citizen of India. In a decision dated November 3, 2006 the district director found that the applicant was convicted of a crime involving moral turpitude and is therefore inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act). The applicant sought waiver of his ostensible inadmissibility. The district director also found that the applicant had not demonstrated that denial of the waiver application would result in extreme hardship to a qualifying relative as described in section 212(h) of the Act, and denied the waiver application accordingly.

On appeal, counsel contested the finding that the applicant is inadmissible and, in the alternative, asserted that the applicant's inadmissibility should be waived.

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

(i) In general. – Except as provided in clause (ii), any 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 . . . [is inadmissible].

Whether the district director relied on fraud or misrepresentation as a basis for the decision of denial is unclear. The AAO notes, however, that section 212(a)(6)(C)(i) of the Act provides:

In general.—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.

The applicant stated at his December 18, 2003 interview, and counsel admits on appeal, that, on or about February 1, 2000 and February 17, 2000, the applicant applied for a social security card at the Social Security office in Austin, Texas. The applicant presented his authentic, valid passport and a Form I-94 Departure Record that showed that the applicant was admitted as a Q-1 nonimmigrant although the applicant had not, in fact, been admitted as a Q-1 nonimmigrant and the I-94 was not valid. On the strength of those documents, the applicant was issued a social security card.

On appeal, counsel stated that the applicant obtained the card so that he might open a bank account and pay taxes on his income. Form W-2 Wage and Tax Statements in the record show that he used his social security number in the context of employment.

Counsel admitted that the applicant filed for and received a social security card, but stated that the applicant had never been convicted of a crime. Counsel also stated that the applicant's admission that he had applied for and received a social security card to which he was not entitled does not constitute disclosure of the commission of a crime involving moral turpitude within the meaning of section 212(a)(2)(A)(i) of the Act. Counsel also stated that because the applicant did not receive any immigration benefit based on his misrepresentations in obtaining a social security card, the applicant did not commit fraud or make a material misrepresentation within the meaning of section 212(a)(6)(C)(i) of the Act.

Although section 212(a)(6)(C)(i) was mentioned in the decision of denial, whether the district director intended to base the finding of inadmissibility in part on that ground is unclear. In any event, the AAO will discuss inadmissibility under that section. The applicant apparently did not use his social security card and number for any purpose other than to obtain employment, open a bank account., and pay taxes. The district director did not appear to assert that either opening a bank account or paying taxes is an immigration benefit.

The weight of authority concurs with counsel that employment is not an immigration benefit within the meaning of section 212(a)(6)(C)(i) of the Act. In *Beltran-Tirado v. I.N.S.*, 213 F.3d 1179 (9TH Cir. 2000), the court found, based on the legislative history of the 1990 amendment to 42 U.S.C. § 408, that Congress did not intend that working in the United States while in an immigration status that does not permit employment should be treated as a crime involving moral turpitude. Although that circuit decision does not bind the AAO in the instant case, the AAO is persuaded by the reasoning of the 9th circuit. The applicant did not make any material misrepresentation in seeking an immigration benefit and is not inadmissible pursuant to 212(a)(6)(C)(I).

The remaining issue is the applicant's possible inadmissibility pursuant to section 212(a)(2)(A) of the Act. The AAO notes, initially, that the district director did not make clear the particular criminal offense he believes the applicant admitted to committing the essential elements of, or admitted to committing.

Section 212(a)(2)(A) of the Act and related precedent draw a clear distinction between admitting to committing a crime involving moral turpitude and admitting to committing the elements of a crime involving moral turpitude. In this case, there is no evidence that the applicant specifically admitted to committing a crime. As such, he is not inadmissible for having admitted to committing a crime involving moral turpitude. The AAO will next addressed whether the applicant admitted that he committed the essential elements of a crime involving moral turpitude within the meaning of section 212(a)(2)(A) of the Act.

In *Matter of K*, 7 I&N Dec. 594 (BIA 1957), the Board of Immigration Appeals made clear that, in order for an admission of the commission of the elements of a crime involving moral turpitude to be effective under section 212(a)(2)(A) of the Act, the applicant must have been furnished an understandable definition of the offense defined by those elements. There is no indication in the record that the applicant was informed as to what statutory offense his actions and intent allegedly violate. As such, he cannot be found to have effectively admitted committing the elements of a crime involving moral turpitude within the meaning of section 212(a)(2)(A) of the Act.

Even if the applicant's admission were otherwise effective, the AAO questions whether his admission would show that he had committed a crime involving moral turpitude. In this regard, the AAO notes that offenses related to impermissibly obtaining or using a social security card are found at 42 U.S.C. § 408(a).

More specifically, 42 U.S.C. § 408(a)(7)(A) pertains to knowingly and willfully using a social security card issued on the basis of false information. However, 42 U.S.C. § 408(a)(7)(A) only pertains to using a social security number for the purpose of receiving a payment or benefit not due. A violation of that section clearly constitutes a crime involving moral turpitude. In this case there is no indication, however, that the applicant attempted to obtain any payments or benefits that were not due to him. In addition to the applicant's admission being ineffective pursuant to the decision in *Matter of K, supra*, he has not admitted to committing the elements of that offense.

The statute at 42 U.S.C. § 408(a) states, in pertinent part,

(6) [Whoever] willfully, knowingly, and with intent to deceive the Commissioner of Social Security as to his true identity (or the true identity of any other person) furnishes or causes to be furnished false information to the Commissioner of Social Security with respect to any information required by the Commissioner of Social Security in connection with the establishment and maintenance of the records provided for in section 405(c)(2) of this title

....

shall be guilty of a felony and upon conviction thereof shall be fined under title 18 or imprisoned for not more than five years, or both.

That offense criminalizes providing false information for the purpose of misrepresenting one's identity in obtaining a social security card. However, the applicant does not appear to have provided false information for that purpose. Rather than misrepresenting his identity, he misrepresented the visa category pursuant to which he was present in the United States, and, thereby, misrepresented that he was permitted to work in the United States. That is not the behavior criminalized in 42 U.S.C. § 408(a)(6). In addition to the applicant's admission being ineffective pursuant to *Matter of K, supra*, the applicant has not admitted to the elements of that offense.

The applicant has admitted that he used a forged document in order to obtain employment in the United States when his visa status did not permit him to do so. The AAO notes that the use or possession of such document is punishable under section 274C of the Act, but only when that use or possession is for the purpose of obtaining an immigration benefit. As was noted above, employment is not an immigration benefit. The applicant's admission, in addition to being ineffective, does not constitute an admission to a crime described in that section.

The applicant has admitted that he worked out of status. The AAO is unaware, however, that merely accepting employment while present in the United States in an immigration status that does not permit employment has been found to be a crime involving moral turpitude. The applicant's

admitting the elements of that offense was ineffective pursuant to *Matter of K, supra*, and, in any event, admitting to the elements of that offense would not be an admission to the elements of a crime involving moral turpitude.

The record contains no indication that the applicant has been convicted of a crime involving moral turpitude. The applicant has not admitted to having committed a crime involving moral turpitude. The applicant has not admitted to having committed the elements of a crime involving moral turpitude. The AAO therefore finds that the applicant is not inadmissible pursuant to Section 212(a)(2)(A) of the Act.

Based on the record, the AAO finds that the applicant is neither inadmissible under section 212(a)(2)(A)(i)(II) of the Act nor otherwise. The waiver application is therefore moot. As the applicant is not required to file the waiver, the appeal of the denial of the waiver will be dismissed.

ORDER: The appeal is dismissed as moot. The application is approved.