

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY

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



U.S. Citizenship
and Immigration
Services

H₂

DATE: OCT 28 2011

OFFICE:

CIUDAD JUAREZ, MEXICO FILE:

IN RE:

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v); Immigration and Nationality Act section 212(i); 8 U.S.C. § 1182(i); and Immigration and Nationality Act section 212(h), 8 U.S.C. § 1182(h).

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for Perry Rhew, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Ciudad Juarez, Mexico, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant, a native and citizen of Mexico, was found inadmissible under Immigration and Nationality Act (INA or the Act) § 212(a)(9)(B)(i)(II), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking readmission within ten years of his last departure from the United States. The applicant was also found to be inadmissible under INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I), based on his criminal convictions in the United States for petit theft and driving under the influence, and under INA § 212(a)(6)(C)(i) of the 8 U.S.C. § 1182(a)(6)(C)(i), for fraud or misrepresentation due to his failure to disclose his petty larceny conviction during his visa interview. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by his U.S. citizen wife. The applicant seeks a waiver of inadmissibility pursuant to INA § 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v); INA § 212(i), 8 U.S.C. § 1182(i); and INA § 212(h), 8 U.S.C. § 1182(h) based on extreme hardship to his U.S. citizen wife and children.

On April 1, 2009, the Field Office Director concluded that the hardship that the applicant's U.S. citizen wife would suffer did not rise to the level of extreme as required by the statute.

On appeal, counsel for the applicant asserts that the applicant is not inadmissible under INA § 212(a)(2)(A)(i)(I) because the applicant's petit theft conviction qualifies under the "petty offense exception" at INA § 212(a)(2)(A)(ii)(II), 8 U.S.C. § 1182(a)(2)(A)(ii)(II). Counsel further states that the applicant's U.S. citizen spouse is suffering from severe emotional, physical, and financial hardships and provides a copy of an unpublished AAO decision that he states was approved based on similar hardship.

In support of the waiver application, the record includes, but is not limited to, affidavits and letters written by the applicant's U.S. citizen spouse, a psychological report from Dr. [REDACTED] concerning the applicant's U.S. citizen spouse, medical records for the applicant's U.S. citizen spouse, a letter from the applicant's U.S. citizen child's day care center, correspondence with Congressman Tom Feeney, a letter from the applicant's U.S. citizen spouse's employer, photos of the applicant in the United States, documentation illustrating the applicant's completion of DUI counseling and a victim awareness program, tax returns for the applicant and his U.S. citizen spouse, tax returns and W-2 forms for co-sponsor [REDACTED] money transfers from the applicant's U.S. citizen spouse to the applicant, various bills for the applicant and his U.S. citizen spouse, a letter from [REDACTED] Elementary School, a letter from the applicant's previous employer in the United States, the applicant's marriage certificate, birth certificate for the applicant's U.S. citizen spouse, birth certificate for the applicant's U.S. citizen daughter, birth certificate for the applicant's U.S. citizen step-child, a letter from the applicant's U.S. citizen father-in-law, a letter from the applicant's U.S. citizen mother-in-law, Form I-290B, Form I-601, Forms G-325A, approved I-130 and I-129F petitions filed on the applicant's behalf by his U.S. citizen spouse, and records concerning the applicant's immigration history in the United States.

The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record was reviewed and considered in rendering a decision on the appeal. The AAO will first address the question of whether the applicant is admissible to the United States.

The Field Office Director found the applicant to be inadmissible under INA § 212(a)(2), which provides, in pertinent part:

(A)(i) 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, or...

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).

The record establishes that the applicant was convicted of Driving Under the Influence (DUI), on October 23, 2000, in the Brevard County Court, Florida, in violation of Florida Statute (FS) § 316.193(1), a second degree misdemeanor. The applicant was sentenced to eight months probation, ordered to pay a fine of \$250, and ordered to pay court costs of \$297. A simple DUI conviction does not constitute a crime involving moral turpitude. *In re Lopez-Meza*, 22 I & N Dec. 1188, 1193 (BIA 1999); *see also Matter of Torres-Varela*, 23 I. & N. Dec. 78 (BIA 2001).

The record establishes that the applicant was also convicted of Petit Theft, on January 21, 1998, in the Brevard County Court, Florida, in violation of FS § 812.014(2)(d), a second degree misdemeanor. The applicant was sentenced to 27 days in jail and the maximum sentence for a second degree misdemeanor in Florida is 60 days. FS § 775.082. The applicant has not presented and the AAO is unaware of any prior case in which a conviction has been obtained under Florida Statute § 812.014 for conduct not involving moral turpitude.¹ The applicant's conviction, however, qualifies for the petty offense exception under INA § 212(a)(2)(A)(ii)(II) as the

¹ The AAO is aware of the Eleventh Circuit's decision in *Sanchez Fajardo v. Atty. Gen.*, No. --- F.3d ---, 2011 WL 4808171 (11th Cir. October 12, 2011), however, as the applicant's conviction falls under the petty offense exception, it is not necessary to determine the effect of this decision at this time.

maximum penalty possible for his conviction did not exceed one year and he was not sentenced to more than six months imprisonment. As such, based on the documents in the record, the applicant is not inadmissible under INA § 212(a)(2)(A)(i)(I).

The Field Office Director also determined that the applicant was inadmissible under INA § 212(a)(6)(C), which 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.

A misrepresentation is generally material only if by making 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); *see also Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998); *Matter of Martinez-Lopez*, 10 I&N Dec. 409 (BIA 1962; AG 1964). A misrepresentation or concealment must be shown by clear, unequivocal, and convincing evidence to be predictably capable of affecting, which is, having a natural tendency to affect, the official decision in order to be considered material. *Kungys* at 771-72. The BIA has held that a misrepresentation made in connection with an application for visa or other documents, or for entry into the United States, 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 proper determination that he be excluded.

Matter of S- and B-C-, 9 I&N Dec. 436, 448-449 (BIA 1960; AG 1961).

The Field Office Director states that during his immigrant visa interview, the applicant admitted that he had prior arrests and convictions related to driving and alcohol, but failed to disclose his theft conviction. The AAO notes that there is no sworn statement or official record in the file of this statement by the applicant. The record does, however, illustrate that the applicant previously disclosed the theft conviction and provided a police report for the conviction. The Field Office Director found that due to the applicant's failure to disclose that he had been arrested and convicted for charges other than ones related to driving and alcohol at his immigrant visa interview, he was inadmissible under INA § 212(a)(6)(C) for willfully misrepresenting a material fact. Because the applicant's 1998 conviction for petit theft in Florida did not render him inadmissible to the United States and the record establishes that the conviction was previously disclosed in earlier applications made by the applicant, the AAO concludes that the applicant would not have been ineligible to receive an immigrant visa based on this ground even had he revealed the theft conviction at his immigrant visa interview. Consequently, the applicant's misrepresentation is not material and the applicant is not inadmissible under INA § 212(a)(6)(C)(i) for a willful misrepresentation of a material fact.

The applicant was also found to be inadmissible under INA § 212(a)(9)(B)(i)(II), 8 U.S.C. §1182.

Section 212(a)(9)of the Act provides, in pertinent part:

(B) ALIENS UNLAWFULLY PRESENT.-

(i) In general.- Any alien (other than an alien lawfully admitted for permanent residence) who-

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 244(e) prior to the commencement of proceedings under section 235(b)(1) or section 240), and again seeks admission within 3 years of the date of such alien's departure or removal, or

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

(ii) Construction of unlawful presence.- For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.

...

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

The record establishes that the applicant entered the United States without inspection in May 1994. On November 4, 2004, the applicant filed Form I-485, Application to Adjust Status. The application was denied on February 1, 2005. The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary] as an authorized period of stay for purposes of determining bars to admission under section 212 (a)(9)(B)(i)(I) and (II) of the Act. *See Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act*, dated May 6, 2009. The applicant departed the United States voluntarily in November 2005. The record illustrates that the applicant was apprehended after unlawfully entering the United States without inspection on three occasions since his initial departure in 2005. On each occasion he was inside the United States less than 180 days. The periods of unlawful presence under sections 212(a)(9)(B)(i)(I) and (II) are not counted

in the aggregate. *Id.* Nonetheless, for the purposes of inadmissibility under INA § 212(a)(9)(B)(i)(II), the applicant accrued more than one year of continued unlawful presence from April 1, 1997, the effective date of the unlawful presence provisions under the Act, until November 4, 2004, the date of his proper filing of the Form I-485. The record does not indicate the date of the applicant's last departure from the United States. It is clear from the record, however, that his last departure was within the last ten years and he therefore remains inadmissible under INA § 212(a)(9)(B)(i)(II). A waiver is available for this ground of inadmissibility under INA § 212(a)(9)(B)(v); however, as set forth below, the applicant is inadmissible under grounds for which he is not presently eligible for a waiver. As such, no purpose would be served in assessing the applicant's eligibility for a waiver under INA § 212(a)(9)(B)(v).

The AAO finds that the applicant is also inadmissible under INA § 212(a)(9)(A)(i), 8 U.S.C. § 1182(a)(9)(A)(i); and INA § 212(a)(9)(C), 8 U.S.C. § 1182(a)(9)(C).²

INA § 212(a)(9)(A)(i) states that:

(A) Certain aliens previously removed.-

(i) Arriving aliens.- Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within five years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

...

(iii) Exception.- Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the [Secretary of Homeland Security] has consented to the alien's reapplying for admission.

INA § 212(a)(9)(C) provides, in pertinent part:

Aliens unlawfully present after previous immigration violations.-

(i) In general.- Any alien who-

² An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the original decision does not identify all of the grounds for denial. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO conducts appellate review on a *de novo* basis).

(I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

(II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law, and who enters or attempts to reenter the United States without being admitted is inadmissible.

(ii) Exception.- Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's embarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Attorney General [now, Secretary, Department of Homeland Security] has consented to the alien's reapplying for admission.

The record illustrates that the applicant was apprehended after entering the United States without inspection on at least three occasions since his departure in November 2005. The applicant was apprehended by U.S. Customs and Border Protection on September 24, 2009, October 2, 2009, and March 26, 2010 near the U.S. border with Mexico. On the first two occasions, the applicant was granted voluntary return to Mexico. On the last occasion, he was ordered removed pursuant INA § 235(b)(1) and was also criminally prosecuted for illegal entry under 8 U.S.C. § 1325(a)(1), a misdemeanor.

As a result of his expedited removal order which was entered on March 26, 2010, the AAO finds that the applicant is inadmissible INA § 212(a)(9)(A)(i) for a period of five years after his last departure from the United States. An individual inadmissible under that section of law may apply for permission to reapply for admission, Form I-212, during the five year period. In the applicant's case, however, he is also inadmissible pursuant to section 212(a)(9)(C)(i) of the Act for having reentered the United States without being admitted after a period of more than one year of unlawful presence in the United States. The record makes clear the applicant had accrued more than one year of unlawful presence in the United States before his departure in November 2005 and his subsequent unlawful reentries into the United States in 2009 and 2010. An alien who is inadmissible under section 212(a)(9)(C)(i)(I) of the Act may not apply for consent to reapply for admission unless the alien has been outside the United States for more than 10 years since the date of the alien's last departure from the United States. See *Matter of Diaz and Lopez*, 25 I&N Dec. 188 (BIA 2010); *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007); and *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006) *aff'd*, *Gonzalez v. Dept. of Homeland Security*, 508 F.3d 1227, 1242 (9th Cir. 2007). The record makes clear that the applicant has not resided outside the United States for the required ten years since his last departure. Accordingly, the applicant is statutorily ineligible to seek an exception from his inadmissibility under section 212(a)(9)(C)(ii) of the Act at this time.

As no exception is presently available to the applicant for his section 212(a)(9)(C)(i) inadmissibility, the AAO finds that no purpose would be served in considering the merits of his Form I-601 waiver application. Accordingly, the appeal will be dismissed.



Page 8

ORDER: The appeal is dismissed.