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

U.S. Citizenship and Immigration Services

H2

[redacted]

Date: APR 13 2012 Office: [redacted] FILE: [redacted]

IN RE: Applicant: [redacted]

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:

[redacted]

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.

Thank you,

Michael Shumway

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Baltimore, Maryland, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal of the denial of the applicant's waiver application related to waiver under section 212(h) of the Act will be sustained. The matter will be returned to the director for further processing consistent with this decision.

The applicant is a native and citizen of Sierra Leone who was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for seeking admission into the United States by fraud or willful misrepresentation. The applicant is the spouse of a lawful permanent resident. The applicant sought a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), so as to immigrate to the United States.[1] The director concluded that the applicant had failed to establish that her bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On appeal, counsel argues that the instant case involves both emotional separation and financial hardship. Counsel indicates that the applicant is [redacted] financially supports her husband, and pays for her son's college tuition and board. Counsel states that the applicant has been in the United States for many years and no longer has contact with [redacted]. Counsel maintains that the applicant's parents are deceased and that all of the applicant's brothers and sisters are in the United States.

Upon review of the record, we find that the applicant has a shoplifting conviction and that the director did not address whether this offense renders the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the field office or service center does not identify all of the grounds for denial in the initial decision. *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).

Inadmissibility for having been convicted of a crime involving moral turpitude is under section 212(a)(2)(A)(i)(I) of the Act, which states, in pertinent parts:

> (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.

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[1] The district director erred in stating that the applicant sought a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), as this provision relates to unlawful presence.

(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 Board of Immigration Appeals (Board) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

> [M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general....
>
> In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

The record reflects that the applicant was charged with shoplifting in Maryland on May 6, 1996. Counsel states in the letter dated May 27, 2007 that judgment was suspended and the applicant was placed on probation and that her record was expunged.

At the time of the applicant's arrest, shoplifting constituted theft by virtue of Md. Code Art. 27, § 342(a), which stated:

> (a) *Obtaining or exerting unauthorized control*-A person commits the offense of theft when he willfully or knowingly obtains control which is unauthorized or exerts control which is unauthorized over property of the owner, and:
>
> (1) Has the purpose of depriving the owner of the property; or
>
> (2) Willfully or knowingly uses, conceals, or abandons the property in such manner as to deprive the owner of the property; or

(3) Uses, conceals, or abandons the property knowing the use, concealment or abandonment will deprive the owner of the property.

. . .

(f) *Penalty.* — (1) A person convicted of theft where the property or services that was the subject of the theft has a value of $300 or greater is guilty of a felony and shall restore the property taken to the owner or pay him the value of the property or services, and be fined not more than $1,000, or be imprisoned for not more than 15 years, or be both fined and imprisoned in the discretion of the court.

(2) A person convicted of theft where the property or services that was the subject of the theft has a value of less than $300 is guilty of a misdemeanor and shall restore the property taken to the owner or pay him the value of the property or services, and be fined not more than $500, or be imprisoned for not more than 18 months, or be both fined and imprisoned in the discretion of the court; however, all actions or prosecutions for theft where the property or services that was the subject of the theft has a value of less than $300 shall be commenced within 2 years after the commission of the offense.

Art. 27, § 340(c) defined "deprive" to mean "withhold property of another":

Permanently; or for such a period as to appropriate a portion of its value; or with the purpose to restore it only upon payment of reward or other compensation; or to dispose of the property and use or deal with the property so as to make it unlikely that the owner will recover it. *See* Md.Code (1954 Repl.Vol.1982)

The AAO notes that this case arises under the jurisdiction of the Fourth Circuit Court of Appeals. In *Prudencio v. Holder*, 669 F.3d 472 (4th Cir. 2012), the Fourth Circuit explicitly rejected the three-step procedural framework established in *Matter of Silva–Trevino,* 24 I&N Dec. 687 (A.G.2008), for determining whether an alien's conviction was for a crime involving moral turpitude. The Fourth Circuit affirmed the traditional categorical approach, finding that "an adjudicator . . . may consider only the alien's prior conviction and not the conduct underlying that conviction." *Prudencio,* 669 F.3d 472, 484 (4th Cir. 2012).

The Board has determined that to constitute a crime involving moral turpitude, a theft offense must require "an intention to intention to permanently deprive the owner of his property." *See In re Jurado-Delgado*, 24 I&N Dec. 29, 33 (BIA 2006). Nevertheless, we do not believe that the Board's decisions stand for the principle that any taking of property, so long as the perpetrator has the intent to relinquish the property at any time in the future, necessarily lacks the requisite mens rea to constitute a crime involving moral turpitude. For instance, an individual who takes property and then immediately sells or otherwise disposes of it as though he owns it, has the intent to permanently deprive the owner of the value of and rights to the property. We interpret a temporary deprivation not involving moral turpitude as one evincing the intent to keep the property only for a short and discrete period of time, such that the value of the property is not materially diminished and no significant infringement of the owner's rights occurs. Thus, we find that the definition of "deprive" under Maryland law necessarily encompasses takings that are not merely temporary in nature.

The applicant does not dispute on appeal the finding that her theft offense was a crime involving moral turpitude. Rather, counsel claimed in the letter dated May 27, 2007 that the conviction was expunged and the record of conviction was destroyed and cannot be found. In regard to the claim that the applicant's conviction was expunged, in *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003), the Board held that

> [I]f a court with jurisdiction vacates a conviction based on a defect in the underlying criminal proceedings, the respondent no longer has a "conviction" within the meaning of section 101(a)(48)(A). If, however, a court vacates a conviction for reasons unrelated to the merits of the underlying criminal proceedings, the respondent remains "convicted" for immigration purposes.

Thus, for a conviction to be vacated for immigration purposes, the vacatur must be based on a defecting in the underlying criminal proceedings. In view of counsel's statement that the theft offense was expunged due to the applicant's completion of probation, the applicant remains convicted for immigration purposes. Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish eligibility for the benefit sought. Accordingly, we find the applicant's theft offense is a crime involving moral turpitude rendering her inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The director found the applicant to be inadmissible for seeking admission into the United States by fraud or willful misrepresentation. 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.

U.S. Citizenship and Immigration Service (USCIS) records show that [redacted] the alleged brother of the applicant, filed the Petition for Alien Relative (Form I-130), on behalf of the applicant, which was approved on March 20, 1992, and that the applicant was found to have submitted fraudulent birth certificates in support of her Application to Register Permanent Resident or Adjust Status (Form I-485). Specifically, three birth certificates containing different information were submitted:

- [redacted]

The birth certificates are discrepant in their serial numbers, the spelling and order of the applicant's name, the applicant's time of birth, the name of the applicant's mother, the nationality of the applicant's father, and in the birth registration information of centre name, the volume number, and the page number. For example, the birth certificate (No. W/F1017, Serial No. 1016) shows that [redacted] at 5:00 a.m, and the event was registered at [redacted]

[redacted]

Moreover, two versions of the petitioner's birth certificate were submitted:

- [redacted]
-

These birth certificates are discrepant in their serial numbers, the name and nationality of the father, and the witness date.

In the letter dated August 19, 2004 the applicant stated the following regarding her birth certificates:

> I must first of all explain the problem with the birth certificates that I submitted. There was never a time that I willfully or falsely [tried] to claim immigration benefits by submitting falsified documents. Because I could not locate my original birth certificate, I requested a copy from [redacted] During my interview with [redacted] I explained that it was wrong because my dad was not a [redacted] as stated on the certificate and I cannot use it but want him to see that I was trying to get the right one. He reviewed it and gave the original back to me. Certificate Nos. [redacted] the same information except for the serial and certificate numbers and signature dates. Since I have not traveled to [redacted] for almost 15 years, and all my relatives now live in the US, I can only depend on what is sent to me. Also, after the war, I do not know exactly what is going on or the new policies for requesting such information form the government. My other siblings are experiencing the same problems with their birth certificates. . . . If I should request another copy of my birth certificate from the [redacted] today I am told that the serial number and certificate number will always change but the birth information will remain the same as you see in the previous certificates. Because I do not want to further complicate the processing of my petition, my brother [redacted] (Petitioner) and I decided on DNA testing which was done at the BRT lab in Baltimore. . . .

The petitioner claims that she did not "willfully or falsely" submit falsified documents as she submitted the documents which were provided to her [redacted] and that the DNA (deoxyribonucleic acid) test results that were submitted into the record prove her sibling relationship to the petitioner.

In regard to the applicant's submitted tests from [redacted] USCIS requires that testing is performed at an American Association of Blood Banks (AABB) accredited laboratory. BRT Laboratories, Inc. is an accredited laboratory. The report dated August 17, 2004 from the laboratory states that the applicant provided passport number [redacted] for purposes of identification. But the

copy of the applicant's passport in the record is number [redacted] and is different from the passport used for identification purposes at the laboratory. Petitions filed to accord fourth preference classification to brothers and sisters require establishing the claimed relationship of the petitioner to the beneficiary. The director found the applicant was inadmissible for submitting conflicting birth certificates. If the sibling relationship is valid, that is, if the AAO were to accept the DNA test result, it is plausible that misrepresentation involving the birth certificates was not willful, but rather the result of failures within the [redacted] and that there was no misrepresentation as to the fact relevant to her eligibility – her claimed sibling relationship to the Form I-130 petitioner. However, due to the discrepancy in the DNA test results, we cannot be certain of this, or that the applicant is eligible for the approved I-130 classification or adjustment of status.

The AAO does not have jurisdiction over appeals from adjudication of Form I-130 petitions, and so we cannot alter the decision rendered on the Form 1-130 filed on the applicant's behalf. In that the DNA test results have been found to establish the sibling relationship at issue, and the Form I-130 approved, we also cannot affirm the finding that the applicant has made a willful misrepresentation of the material fact, or that she requires a waiver of inadmissibility under section 212(i) of the Act. As the applicant is also inadmissible under section 212(a)(2)(A)(i)(I) of the Act, we will address the merits of the Form I-601 application regarding waiver of that inadmissibility only, as provide for in section 212(h) of the Act. Nevertheless, the director should consider the discrepancy noted and if not satisfied that the DNA test results demonstrate the requisite sibling relationship, take appropriate action to obtain valid documentation proving the relationship, and/or refer the case to the office that decided the Form I-130 for further adjudication, to possibly include the initiation of revocation proceedings.

The record establishes that the applicant has been convicted of a crime involving moral turpitude. The waiver for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act is found under section 212(h) of the Act. That section 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
> > >
> > > (ii) the alien has been rehabilitated . . .

Section 212(h)(1)(A) of the Act provides that the Attorney General may, in his discretion, waive the application of subparagraph (A)(i)(I) of subsection (a)(2) if 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. An application for admission or adjustment of status is

considered a "continuing" application and "admissibility is determined on the basis of the facts and the law at the time the application is finally considered." *Matter of Alarcon*, 20 I.&N. Dec. 557, 562 (BIA 1992) (citations omitted). Since the conviction rendering the applicant inadmissible occurred on May 6, 1996, which is more than 15 years ago, it is waivable under section 212(h)(1)(A)(i) of the Act.

Section 212(h)(1)(A)(ii) and (iii) of the Act requires that the applicant's admission to the United States not be contrary to the national welfare, safety, or security of the United States; and that the applicant establish his rehabilitation. Evidence in the record to establish the applicant's eligibility under section 212(h)(1)(A)(ii) and (iii) of the Act consists of letters commending her character. The applicant's husband stated in the letter dated October 30, 2008 that the applicant is a dedicated mother and wife and is a born-again Christian. He stated that the applicant is involved with church activities and is also a founder of the [redacted] The applicant's husband conveys that for the past two years the applicant has been the sole provider for their family. The pastor [redacted] stated in the letter dated [redacted] that has known the applicant for over eight years and that the applicant is a person of excellent character who is respected in the community and parish. The pastor conveyed that the applicant has served in ministries in the parish and has been active in the community. In view of the record, which shows that the applicant has not committed any crimes since 1996, and has been actively involved in the community and church, the AAO finds that the applicant has provided sufficient evidence to demonstrate that her admission to the United States is not contrary to the national welfare, safety, or security of the United States, and that she has been rehabilitated, as required by section 212(h)(1)(A)(ii) and (iii) of the Act.

In *Matter of Mendez-Moralez,* 21 I&N Dec. 296, 301 (BIA 1996), the Board stated that once eligibility for a waiver is established, it is one of the favorable factors to be considered in determining whether the Secretary should exercise discretion in favor of the waiver. Furthermore, the Board stated that:

> In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

Id. at 301.

The AAO must then, "[B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country. " *Id.* at 300. (Citations omitted).

The adverse factor in the present case is the criminal conviction of theft.[2] The favorable factors in the present case are applicant's ongoing participation in her community and church, and the passage of 15 years since her criminal conviction. The AAO finds that the crime committed by the applicant is serious in nature, nevertheless, when taken together, we find the favorable factors in the present case outweigh the adverse factor, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

As previously noted, there is a discrepancy in the DNA test results. Although we sustain the applicant's appeal of the denial of her waiver application for a waiver under section 212(h) of the Act, the director should consider the discrepancy and, if not satisfied that the DNA test results demonstrate the requisite sibling relationship, take appropriate action to obtain valid documentation (possibly another DNA test) proving the relationship, and/or refer the case to the office that decided the Form I-130 for further adjudication, possibly to initiate revocation proceedings.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of proving eligibility rests with the applicant. *See* section 291 of the Act. Regarding waiver of inadmissibility under section 212(h) of the Act, the applicant has now met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal of the denial of the applicant's waiver application is sustained as related to waiver of inadmissibility under section 212(h) of the Act. The matter is returned to the director for further action consistent with this decision.

[2] For reasons stated above, we will not consider the applicant to have engaged in fraud or willful misrepresentation of a material fact for purposes of the discretionary analysis of the applicant's waiver application under section 212(h) of the Act.