

11. Information related to
the...
Immigration and Naturalization Service

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



U.S. Citizenship
and Immigration
Services



H2

Date: JUN 22 2012 Office: KINGSTON, JAMAICA

FILE: [REDACTED]

IN RE: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h), 8 U.S.C. § 1182(h) and Section 212(i), 8 U.S.C. § 1182(i) of the Immigration and Nationality Act.

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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,

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Kingston, Jamaica, and is now before the Administrative Appeals Office (AAO) on appeal. As the waiver application is unnecessary, the appeal will be dismissed. Absent other grounds of inadmissibility or ineligibility, the applicant appears eligible for an immigrant visa.

The applicant is a native of the United Kingdom and a citizen of Jamaica who was found 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), for having been convicted of a crime involving moral turpitude. The applicant is the daughter of two U.S. citizens and seeks a waiver to reside with her parents in the United States.

In his decision, dated March 11, 2010, the field office 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, the applicant states that she has only been convicted of one crime (theft), that she was tried summarily in the Magistrate's Court, and consequently the maximum penalty for her conviction was six months imprisonment. She states that she was sentenced to community service. She states further that her conviction falls under the petty offense exception and that her inadmissibility is making her mother, who suffers various medical ailments, very sad.

Section 212(a)(2)(A) of the Act 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 (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . 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 Board of Immigration Appeals (BIA) 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.)

In *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. First, in evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a “realistic probability, not a theoretical possibility,” that the statute would be applied to reach conduct that does not involve moral turpitude. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability exists where, at the time of the proceeding, an “actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien’s own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude.” *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

However, if a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, “the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude.” 24 I&N Dec. at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage inquiry in which the adjudicator reviews the “record of conviction” to determine if the conviction was based on conduct involving moral turpitude. *Id.* at 698-699, 703-704, 708. The record of conviction consists of documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.* at 698, 704, 708.

If review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. 24 I&N Dec. at 699-704, 708-709. However, this “does not mean that the parties would be free to present any and all evidence bearing on an alien’s conduct leading to the conviction. (citation omitted). The sole purpose of the inquiry is to ascertain the nature of the prior conviction; it is not an invitation to relitigate the conviction itself.” *Id.* at 703.

The record indicates that on August 15, 2007, the applicant was arrested in London for theft for events that occurred on June 27, 2007. On November 22, 2007, in the Camberwell Green Magistrates Court, she pled not guilty to the charge, but then was adjudicated guilty and sentenced to 150 hours of community service.

The AAO notes that in her letter, dated April 5, 2010, the applicant explains that her crime was tried in the Magistrate's Court and that in the United Kingdom when a crime is tried summarily in the Magistrate's Court the maximum penalty is six months in prison or a fine. The applicant has submitted an unsigned letter, purportedly from the law firm of Wainwright & Cummins, stating that the crime of theft can be tried either summarily in a Magistrates Court or on indictment in the Crown Court. The letter states that a theft crime tried summarily in a Magistrates Court carries a maximum punishment of six months in prison, but a theft crime tried on indictment in the Crown Court carries a maximum penalty of seven years in prison.

The AAO finds that the applicant's conviction meets the requirements for the petty offense exception. The website of the government of the United Kingdom confirms that minor theft offenses are dealt with only by magistrates' courts and that the maximum punishment for a single offense in the magistrate's court is six months in prison and/or a fine of up to £5,000. See http://www.direct.gov.uk/en/CrimeJusticeAndTheLaw/Goingtocourt/DG_196034. The applicant's criminal record indicates that her conviction was tried in a magistrate's court. Although the field office director noted that the applicant had been arrested and charged with theft on February 23, 2001, and common assault on June 29, 2007, because the applicant was not ultimately convicted of these charges¹, they cannot be used as the basis of inadmissibility under section 212(a)(2)(A) of the Act.

Thus, based on the present record, the applicant is not inadmissible under section 212(a)(2)(A) of the Act. In proceedings for application for waiver of grounds of inadmissibility, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. The decision of the field office director will be withdrawn and the appeal will be dismissed as the underlying waiver application is unnecessary.

ORDER: The appeal is dismissed as the underlying waiver application is unnecessary. Absent other grounds of inadmissibility or ineligibility, the applicant appears eligible for an immigrant visa.

¹ We note that the applicant was given reprimand for the events of February 23, 2001, but there is no further information in the record. Reprimands do not constitute criminal convictions under U.K. law, and are typically given to juveniles. (see http://www.direct.gov.uk/en/CrimeJusticeAndTheLaw/Beingstoppedorarrestedbythepolice/DG_196450)