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



**U.S. Citizenship
and Immigration
Services**

H2

[Redacted]

Date: **SEP 07 2012** Office: PHILADELPHIA, PA

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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Philadelphia, Pennsylvania. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted. The previous decisions of the district director and the AAO will be withdrawn and the waiver application is determined to be unnecessary.

The applicant, a native and citizen of Bulgaria, was found inadmissible to the United States 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 committed the essential elements of a crime involving moral turpitude. Specifically, the district director found that the applicant had used a fraudulent Form I-551, Temporary Evidence of Lawful Admission for Permanent Residence, to obtain a social security number for the purposes of working in the United States. The applicant seeks a waiver of inadmissibility in order to remain in the United States with his U.S. citizen spouse.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated January 9, 2007. The AAO found that the applicant's use of a fraudulent Form I-551, Temporary Evidence of Lawful Admission for Permanent Residence, to obtain a social security number for the purposes of working in the United States does not render him inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having committed the essential elements of a crime involving moral turpitude; he is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude (retail theft); he had failed to establish that extreme hardship would be imposed upon a qualifying relative; and his appeal should be dismissed accordingly. *AAO Decision*, dated May 13, 2010.

On motion, counsel asserts that the applicant was not convicted of retail theft and a waiver application is not required. *Form I-290B*, dated June 11, 2010.

The record includes, but is not limited to, counsel's motion, relevant law, the applicant's spouse's statement and referenced exhibits. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(2)(A)(i)(I) of the Act provides, in pertinent part:

[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.

Section 212(h) of the Act 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 –

....

(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 [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 . . .

The record reflects that the applicant was arrested in or around [REDACTED] 2002 and was charged with retail theft in violation of section 3929 of the Pennsylvania Consolidated Statutes (PCS), a misdemeanor of the first degree, as determined by the value of the merchandise stolen (\$202), punishable, as noted in section 106 of the PCS, by a maximum of five years imprisonment. The record reflects that the applicant was required to remain under the Accelerated Rehabilitative Disposition (ARD) Program and subject to the administrative supervision of the Cumberland County District Attorney's Office for a period of 6 months, was ordered to pay an ARD fee and costs, had to successfully complete community service and counseling, and was required to submit to urine tests.

Counsel asserts that the applicant had a restraint on his liberty imposed, however, the requirement of Section 101(a)(48)(A)(i) of the Act was not met and he was therefore not convicted of a crime for immigration purposes.

Section 101(a)(48) of the Act states the following:

- (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 had 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.

Chapter 3 of the Pennsylvania Rules of Criminal Procedure contains the rules on the ARD process. A defendant may be accepted into the ARD program before or after the filing of an information and further proceedings on the charges shall be postponed during the term of the program. Pa. R. Crim. P. 314-315. The conditions of the program may be such as may be imposed with respect to probation after conviction of a crime, including restitution, except that a fine may not be imposed. Pa. R. Crim. P. 316. If the judge finds that the defendant has committed a violation of a condition of the program, the judge may order, when appropriate, that the program be terminated, and that the attorney for the Commonwealth shall proceed on the charges as provided by law. Pa. R. Crim. P.

318. When the defendant shall have completed satisfactorily the program prescribed and complied with its conditions, the defendant may move the court for an order dismissing the charges. In some counties, court agencies or the district attorney's office have procedures for initiating the dismissal of the charges upon the defendant's successful completion of the program. Pa. R. Crim. P. 319. When the judge orders the dismissal of the charges against the defendant, the judge shall also order the expungement of the defendant's arrest record. Pa. R. Crim. P. 320. Therefore, to participate in the ARD program, there need not be a finding or plea of guilt, or an admission of facts. The record reflects that the applicant successfully completed the ARD program. The AAO finds that applicant's six month period of supervision is a restraint on his liberty that satisfies the second prong of section 101 (a)(48)(A) of the Act. However, there is no evidence that a judge or jury has found him guilty or he has entered a plea of guilt or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, as required by the first prong of section 101(a)(48)(A) of the Act.

The AAO concludes that the applicant has not been convicted of a crime involving moral turpitude. Accordingly, the waiver application is unnecessary.

ORDER: The previous decisions of the district director and the AAO are withdrawn and the waiver application is determined to be unnecessary.