



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

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF I-L-L-

DATE: NOV. 20, 2015

APPEAL OF NEW YORK DISTRICT OFFICE DECISION

APPLICATION: FORM I-601, APPLICATION FOR WAIVER OF GROUNDS OF
INADMISSIBILITY

The Applicant, a native and citizen of Jamaica, seeks a waiver of inadmissibility. *See* Immigration and Nationality Act (the Act) § 212(h), 8 U.S.C. § 1182(h). The Director of the New York District Office denied the application. The matter is now before us on appeal. The appeal will be sustained.

The Applicant is the beneficiary of an approved Form I-130, Petition for Alien Relative, filed on her behalf by her U.S. citizen daughter.

In a decision dated March 2, 2015, the Director found the Applicant to be inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for procuring or seeking to procure a visa, other documentation, or admission into the United States or other benefit under the Act by fraud or willfully misrepresenting a material fact. The Director determined that the Applicant did not establish that she had a qualifying relative for section 212(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), waiver of inadmissibility purposes and that she did not demonstrate that a qualifying relative would suffer extreme hardship if she were denied admission into the United States. The Form I-601 was denied accordingly.

On appeal, the Applicant asserts that she is not inadmissible under section 212(a)(6)(C)(i) of the Act, and that she filed the Form I-601 in order to waive her inadmissibility under section 212(a)(2)(A)(i) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i), for having been convicted of crimes involving moral turpitude. She asserts that she merits a waiver of inadmissibility pursuant to section 212(h)(1)(A) of the Act, 8 U.S.C. 1182(h)(1)(A) because the criminal offenses which render her inadmissible occurred over 15 years ago, and because the evidence demonstrates that she is rehabilitated and merits a favorable exercise of discretion.

The record includes, but is not limited to, the Applicant's statement, financial records, criminal records, and immigration records. The entire record was reviewed and considered in arriving at a decision on the appeal.

Upon review, the record contains insufficient evidence to support a finding that the Applicant is inadmissible under section 212(a)(6)(C)(i) of the Act. We note that the Director's decision also does not discuss a basis for the section 212(a)(6)(C)(i) of the Act inadmissibility finding, and that the

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Director stated in the Applicant's adjustment of status application denial that the Applicant was inadmissible based on crimes involving moral turpitude rather than due to fraud or willful misrepresentation of a material fact. We also note that a previous Form I-601 application and denial decision contained in the record were based on the Applicant's inadmissibility for crimes involving moral turpitude and did not refer to, or discuss, inadmissibility for fraud or willful misrepresentation of a material fact. The Applicant has therefore overcome the finding that she is inadmissible under section 212(a)(6)(C)(i) of the Act.

Section 212(a)(2)(A) of the Act provides, in relevant part:

- (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.

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

[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.

The evidence reflects that on [REDACTED] 1993, and again on [REDACTED] 1995, the Applicant was found guilty of shoplifting, in violation of 11 Delaware Code (Del. Code) § 840, which stated at the time of the Applicant's convictions that:

- (a) A person is guilty of shoplifting if, while in a mercantile establishment in which goods, wares or merchandise are displayed for sale, the person:
 - (1) Removes any such goods, wares or merchandise from the immediate use of display or from any other place within the establishment, with intent to appropriate the same to the use of the person so taking, or to deprive the owner of the use, the value or possession thereof without paying to the owner the value thereof; or

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- (2) Obtains possession of any goods, wares or merchandise by charging the same to any person without the authority of such person or to a fictitious person with a like intent; or
 - (3) Conceals any such goods, wares or merchandise with like intent; or
 - (4) Alters, removes or otherwise disfigures any label, price tag or marking upon any such goods, wares or merchandise with a like intent; or
 - (5) Transfers any goods, wares or merchandise from a container in which same shall be displayed or packaged to any other container with like intent; or
 - (6) Uses any instrument whatsoever, credit slips or chose in action to obtain any goods, wares or merchandise with intent to appropriate the same to the use of the person so taking or to deprive the owner of the use, the value or the possession thereof without paying to the owner the value thereof.
- (b) Any person willfully concealing unpurchased merchandise of any store or other mercantile establishment, inside or outside the premises of such store or other mercantile establishment, shall be presumed to have so concealed such merchandise with the intention of converting the same to the person's own use without paying the purchase price thereof within the meaning of subsection (a) of this section, and the finding of such merchandise concealed upon the person or among the belongings of such person, outside of such store or other mercantile establishment, shall be presumptive evidence of intentional concealment; and if such person conceals or causes to be concealed such merchandise upon the person or among the belongings of another, the finding of the same shall also be presumptive evidence of intentional concealment on the part of the person so concealing such merchandise.

The record reflects further that on [REDACTED] 1997, the Applicant was found guilty of shoplifting, in violation of New Jersey Statutes Annotated (N.J.S.A.) § 2C: 20-11, which stated at the time of the Applicant's conviction that:

- (b) [S]hoplifting shall consist of any one or more of the following acts:
- (1) For any person purposely to take possession of, carry away, transfer or cause to be carried away or transferred, any merchandise displayed, held, stored or offered for sale by any store or other retail mercantile establishment with the intention of depriving the merchant of the possession, use or benefit of such merchandise or converting the same to

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the use of such person without paying to the merchant the full retail value thereof.

- (2) For any person purposely to conceal upon his person or otherwise any merchandise offered for sale by any store or other retail mercantile establishment with the intention of depriving the merchant of the processes, use or benefit of such merchandise or converting the same to the use of such person without paying to the merchant the value thereof.
- (3) For any person purposely to alter, transfer or remove any label, price tag or marking indicia of value or any other markings which aid in determining value affixed to any merchandise displayed, held, stored or offered for sale by any store or other retail mercantile establishment and to attempt to purchase such merchandise personally or in consort with another at less than the full retail value with the intention of depriving the merchant of all or some part of the value thereof.
- (4) For any person purposely to transfer any merchandise displayed, held, stored or offered for sale by any store or other retail merchandise establishment from the container in or on which the same shall be displayed to any other container with intent to deprive the merchant of all or some part of the retail value thereof.
- (5) For any person purposely to under-ring with the intention of depriving the merchant of the full retail value thereof.
- (6) For any person purposely to remove a shopping cart from the premises of a store or other retail mercantile establishment without the consent of the merchant given at the time of such removal with the intention of permanently depriving the merchant of the possession, use or benefit of such cart.

In addition, the Applicant was found guilty on [REDACTED], 2005, of engaging in prostitution (offense date [REDACTED], 1992), in violation of N.J.S.A. § 2C: 34-1B(1), which stated that, "A person commits an offense if: (1) the actor engages in prostitution."

The Board has determined that to constitute a crime involving moral turpitude, a theft offense must require the intent to permanently take another person's property. *See Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973) ("Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended."). *See also, In re Jurado-Delgado*, 24 I&N Dec. 29, 33 (BIA 2006). Here, the statutes under which the Applicant was convicted for shoplifting were for crimes involving moral turpitude. Practicing prostitution has also been found to be a crime involving moral turpitude. *See Matter of W-*, 4 I&N Dec. 401 (CO. 1951). Accordingly, the

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Applicant is inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act, for having been convicted of crimes involving moral turpitude.¹ The Applicant does not contest her inadmissibility on appeal.

Section 212(h) of the Act provides, in relevant part:

The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if –

(1) (A) in the case of any immigrant it is established to the satisfaction of the [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
- (iii) the alien has been rehabilitated; or

(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 [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 . . .

Section 212(h)(1)(A) of the Act provides that we may waive the application of inadmissibility under section 212(a)(2)(A)(i)(I) if the activities for which the Applicant is inadmissible occurred more than 15 years before the date of her application for a visa, admission, or adjustment of status. Section 212(h)(1)(A) of the Act also 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 has been rehabilitated.

The Applicant's Form I-485, Application to Register Permanent Residence or Adjust Status, was filed on January 22, 2014. We also note that an application for admission is a "continuing" application, and admissibility is adjudicated on the basis of the law and facts in effect on the date of

¹ The Applicant was also convicted of conspiracy to promote or commit a misdemeanor on [REDACTED], 1993, in violation of Del. Code § 511, and she was convicted of improper behavior/disorderly conduct on [REDACTED] (offense date [REDACTED] 1995), in violation of N.J.S.A. § 2C: 33-2A; however, these offenses do not constitute crimes involving moral turpitude.

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the decision. See *Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992) (an alien seeking to adjust his or her status to that of a lawful permanent resident is assimilated to the position of an applicant for entry into the United States.) In this case, the activities rendering the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act occurred more than 15 years before the application for adjustment of status. Therefore, the Applicant meets the requirement under section 212(h)(1)(A)(i) of the Act.

The record reflects that it has been over 18 years since the Applicant last committed a crime. The record reflects further that the Applicant has resided in the United States since 1990, and that she has significant family ties in this country. The Applicant explains in a letter that she initially entered the United States in 1990 to buy goods to resell in Jamaica. She indicates that she was unable to purchase goods and that she decided to remain in the country to earn money because she was the main provider for her mother, siblings, and children in Jamaica. She states that it was difficult to find work, she became homeless at one point, and that she also became pregnant with her third child. The Applicant indicates that out of desperation to support herself and her family she began shoplifting and selling the stolen products for money. She indicates that after her mother died in [REDACTED] 1997, however, she began to attend church and to work regularly as a housekeeper to support her family, and that she now works at a company with her daughter. She states that she regrets and is sorry for her past offenses, and she asks that her application to remain in the country be granted.

The record contains evidence and letters reflecting that the Applicant has stable employment and attesting to the Applicant's good character, her close family relationship, and her involvement and contributions to her church and charitable activities. In addition, a psychological evaluation contained in the record reflects that the Applicant's U.S. citizen daughter, born [REDACTED] 1991, suffers from symptoms of anxiety and depression due to fears related to the Applicant's possible departure from the country. Upon review, the record reflects that the applicant's 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.

For waivers of inadmissibility, the burden is on the Applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Matter of Mendez-Morales*, 21 I&N Dec. 296, 299 (BIA 1996). The adverse factors evidencing an individual's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

We note that *Matter of Marin*, 16 I & N Dec. 581 (BIA 1978), involving a section 212(c) waiver, is used in waiver cases as guidance for balancing favorable and unfavorable factors and this cross application of standards is supported by the Board. In *Matter of Mendez-Morales*, the Board, assessing the exercise of discretion under section 212(h) of the Act, stated:

We find this use of *Matter of Marin*, *supra*, as a general guide to be appropriate. For the most part, it is prudent to avoid cross application, as between different types of

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relief, of particular principles or standards for the exercise of discretion. *Id.* However, our reference to *Matter of Marin, supra*, is only for the purpose of the approach taken in that case regarding the balancing of favorable and unfavorable factors within the context of the relief being sought under section 212(h)(1)(B) of the Act. *See, e.g., Palmer v. INS*, 4 F.3d 482 (7th Cir.1993) (balancing of discretionary factors under section 212(h)). We find this guidance to be helpful and applicable, given that both forms of relief address the question of whether aliens with criminal records should be admitted to the United States and allowed to reside in this country permanently.

Matter of Mendez-Morales at 300.

In *Matter of Mendez-Morales*, in evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the Board stated that:

The factors adverse to the applicant 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, recency and seriousness, and the presence of other evidence indicative of an 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 the alien began his 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 and service to 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 (citation omitted).

The Board further states that upon review of the record as a whole, a balancing of the equities and adverse matters must be made to determine whether discretion should be favorably exercised. The equities that the applicant for section 212(h)(1)(B) relief must bring forward to establish that he merits a favorable exercise of administrative discretion will depend in each case on the nature and circumstances of the ground of exclusion sought to be waived and on the presence of any additional adverse matters, and as the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence. *Id.* at 301.

The unfavorable factors in this case are the Applicant's criminal history, unauthorized employment, and her unauthorized period of stay in the United States. The favorable factors are the hardship the Applicant's U.S. citizen daughter would face if the Applicant were denied admission into the country, the Applicant's regret for her past conduct, the passage of over 18 years since the

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Applicant's last criminal offense, her lengthy residence in the United States, and letters attesting to her good character. Upon review, a favorable exercise of discretion is appropriate in this case.

In application proceedings, it is the Applicant's burden to establish eligibility for the immigration benefit sought. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met.

ORDER: The appeal is sustained.

Cite as *Matter of I-L-L-*, ID# 14170 (AAO Nov. 20, 2015)