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

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

[REDACTED]

H5

Date: **MAY 30 2012**

Office: PHILADELPHIA, PA

FILE: [REDACTED]

IN RE: [REDACTED]

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

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 Field Office Director, Philadelphia, Pennsylvania and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the applicant is not inadmissible and the underlying waiver application is unnecessary. Absent any other findings of inadmissibility, the applicant appears to be eligible to adjust status.

The applicant is a native and citizen of Nigeria who was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having attempted to procure admission into the United States by fraud or willful misrepresentation when she failed to disclose her criminal record on her adjustment application or during her adjustment interview. The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to remain in the United States with her U.S. citizen spouse.

In a decision, dated August 25, 2009, the field office director found that the applicant had submitted no evidence 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 states that the applicant did not willfully misrepresent a material fact in order to procure an immigration benefit because she was not aware that she had been arrested. Counsel also states that the applicant's spouse and child will suffer extreme hardship as a result of her inadmissibility.

The record indicates that on October 19, 2004 the applicant was charged with filing a Fraudulent Insurance Claim, Theft by Deception, and Attempted Theft by Deception. The applicant then pled guilty to Attempted Theft by Deception, was made to pay a fine, and place on probation for a period of 12 months. The other two charges were dropped.

On the applicant's application for adjustment (I-485) and during her adjustment interview on March 20, 2009, the applicant testified under oath that she had never been arrested and answered "no" to Question 1b in Part 3 of the Form I-485, which states, "...have you ever been arrested, cited, charged, indicated, fined, or imprisoned for breaking or violating any law or ordinance, excluding traffic violations."

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.

The AAO finds that the applicant's misrepresentation of her criminal record does not subject her to inadmissibility under section 212(a)(6)(C)(i) of the Act because the misrepresentation was not material. In finding the applicant inadmissible under section 212(a)(6)(C)(i), the field office director did not explicitly address the materiality requirement. A misrepresentation is generally material only if by it the alien received a benefit for which he would not otherwise have been eligible. *See Kungys v. United States*, 485 US 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) and *Matter of S- and B-C-*, 9 I&N Dec. 436 (BIA 1950; AG 1961). Had the applicant answered truthfully when asked about her criminal record and disclosed her conviction, it would not have resulted in her being found inadmissible.

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 AAO notes that although Attempted Theft by Deception is otherwise a crime involving moral turpitude, the conviction in this case qualifies for the petty offense exception. In *Nugent v. Ashcroft*, the Third Circuit held that theft by deception constituted a crime involving moral turpitude. 367 F.3d 162, 165 (3rd Cir. 2004). The maximum sentence for Attempted Theft by Deception is 12 months in prison and the applicant was not sentenced to imprisonment, but was placed on probation for 12 months.

Therefore, as the applicant was admissible under the true facts, we find that her misrepresentation is not material.

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 applicant is not inadmissible and the underlying waiver application is unnecessary. Absent any other findings of inadmissibility or grounds of ineligibility, the applicant appears to be eligible to adjust status.