

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

[REDACTED]

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DATE: OCT 26 2012 Office: MIAMI, FL FILE: [REDACTED]

IN RE: Applicant: [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,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Field Office Director, Miami, Florida, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the field office director for action consistent with this decision.

The applicant is a native of South Africa and a citizen of Canada 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 procuring admission to the United States by fraud or willful misrepresentation of a material fact. The applicant's spouse is a U.S. citizen. She seeks a waiver of inadmissibility in order to reside in the United States.

The field office 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 Field Office Director*, dated October 26, 2010.

On appeal, counsel asserts that the applicant is not inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act. *Form I-290B*, received November 24, 2010.

The record includes, but is not limited to, counsel's brief, the applicant's statements and the applicant's immigration and criminal records. The entire record was reviewed and considered in rendering a decision on the appeal.

The record reflects that the applicant applied for admission to the United States on September 22, 2008, and she was referred to secondary inspection. Criminal checks made in secondary inspection revealed an August 4, 1988 charge for theft under \$1000 in violation of Section 322 of the Canadian Criminal Code (reflecting a suspended sentence and 18 months of probation). The applicant was permitted to withdraw her application for admission, she was advised to present certified court documents on the disposition of her arrest, and she was provided an I-192 waiver packet. Counsel asserts that the applicant's immigration records do not support findings that she was told that she was inadmissible based on her crime, and the full nature and significance of the I-192 waiver package was not explained to her. Counsel asserts that her immigration records indicate that she was not told that she could not enter the United States without a waiver and she was not "instructed" to file a waiver. The applicant claims that she procured admission to the United States on September 22, 2008, at another port of entry, and December 6, 2008. The applicant did not disclose her August 4, 1988 conviction for theft under \$1000 in violation of Section 322 of the Canadian Criminal Code. Therefore, the field office director found her inadmissible pursuant to section 212(a)(6)(C)(i) of the Act for procuring admission to the United States by fraud or willful misrepresentation of a material fact.

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.

Section 212(i) of the Act provides that:

- (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

The record reflects that the applicant was convicted of a crime involving moral turpitude. However, the maximum sentence possible for her crime was six months and she received 18 months of probation. Therefore, she is eligible for the petty offense exception under section 212(a)(2)(A)(ii) of the Act, and she is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

Section 212(a)(2)(A) of the Act states in pertinent part, that:

(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 test of whether a misrepresentation is material was restated by the United States Supreme Court in the context of a proceeding to revoke naturalization. *See Kungys v. U.S.*, 485 U.S. 759 (1988). The court held in *Kungys* that the false statements must be shown to have been predictably capable of affecting the decisions of the decision-making body for it to be material. *Id.* at 771-72. A misrepresentation made in connection with an application for a visa or other document, or in

connection with an entry into the United States, has a natural tendency to influence the decision on the person's case, if either:

- the alien is inadmissible/removable/ineligible on the true facts; or
- the misrepresentation tends to cut off a line of inquiry, which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he or she is inadmissible.

*See Matter of S- and B-C-*, 9 I&N Dec. 436 (BIA 1961).

In the event that the applicant was actually admitted to the United States on September 22, 2008 and December 6, 2008, she failed to disclose her criminal background while seeking admission to the United States on those two occasions. When seeking admission, she was not inadmissible under section 212(a)(2)(A)(i)(I) of the Act based on the true facts. In addition, her alleged misrepresentations (or, perhaps more accurately, omissions) would not have cut off a line of inquiry which might well have resulted in a proper determination that she was inadmissible. The AAO finds that the alleged misrepresentations would not have been material and she is not inadmissible under section 212(a)(6)(C)(i) of the Act as a consequence. In the event that she entered the United States without inspection, she would also not be inadmissible under section 212(a)(6)(C)(i) of the Act, as there would not have been a misrepresentation made before an immigration officer.

However, the applicant's driver's license records, Form I-601 and Form G-325A reflect that she has been in the United States at various times between 2005 and the present. The record is not clear as to the dates of all of her entries and whether she was lawfully admitted, and as such raises the possibility that she was unlawfully present for significant periods. We cannot rule out inadmissibility under section 212(a)(9)(B) and 212(a)(9)(C) of the Act, depending on the actual manner of her entries and the amount of unlawful presence that she may have accrued. The AAO notes that it is the applicant's burden of proof to demonstrate she is not inadmissible. She has failed to present proof that she was admitted to the United States or that she did not accrue unlawful presence.

Section 212(a)(9)(B)(i) of the Act provides:

Any alien (other than an alien lawfully admitted for permanent residence) who –

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 1254a(e) of this title) prior to the commencement of proceedings under section 1225(b)(1) or section 1229(a) of this title, and again seeks admission within 3 years of the date of such alien's departure or removal, or

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of

such alien's departure or removal from the United States, is inadmissible.

Section 212(a)(9)(C)(i) of the Act states, in pertinent part:

(C) Aliens unlawfully present after previous immigration violations.-

(i) In general.-Any alien who-

(I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

(II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law, and who enters or attempts to reenter the United States without being admitted is inadmissible.

(ii) Exception.—Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if . . . the Attorney General [now the Secretary of Homeland Security] has consented to the alien's reapplying for admission....

The AAO will remand the applicant's case for further proceedings in order to determine whether the applicant is inadmissible under section 212(a)(9)(B) and/or section 212(a)(9)(C) of the Act. In the event that the field office director finds the applicant inadmissible under section 212(a)(9)(B) of the Act, the field office director will give the applicant an opportunity to respond to this finding and to present evidence to establish eligibility for a section 212(a)(9)(B) waiver. Should the field office director subsequently deny the waiver application, the field office director shall certify the decision to the AAO for review.

In the event that the field office director finds the applicant inadmissible under section 212(a)(9)(C) of the Act, the field office director will give the applicant the opportunity to respond to this finding. Should the field office director subsequently deny the waiver, the field office director shall certify the decision to the AAO for review.

**ORDER:** The matter is remanded to the field office director for further proceedings consistent with this decision.