



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

H6

[REDACTED]

DATE: **NOV 08 2012** Office: NEWARK

FILE: [REDACTED]

IN RE: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under sections 212(h) and 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v), (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 Field Office Director, Newark, New Jersey, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as applicant is not inadmissible and the underlying waiver application is unnecessary.

The applicant is a native of Senegal and a citizen of France who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking readmission within 10 years of her last departure from the United States. The applicant was also found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act, for having been convicted of a crime involving moral turpitude. The applicant seeks a waiver of inadmissibility in order to reside in the United States with her U.S. citizen husband and children.

The director determined that the applicant failed to establish extreme hardship to a qualifying relative and that she merits a favorable exercise of discretion, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *See Decision of the Field Office Director*, dated November 30, 2010.

On appeal, counsel asserts that the director failed to properly weigh the positive factors presented in the waiver application.

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

(B) ALIENS UNLAWFULLY PRESENT.-

(i) In general.- 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 244(e) prior to the commencement of proceedings under section 235(b)(1) or section 240), 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.

The record reflects that on March 4, 2005, the applicant applied for admission to the United States under the Visa Waiver Program. She was not admitted, but paroled into the United States for a period not to exceed June 3, 2005. The applicant remained in the United States beyond her period of authorized stay and on March 10, 2009 she filed an application to register permanent residence or adjust status (Form I-485) based on an underlying petition for alien relative (Form I-130). On

June 20, 2008, the applicant was issued an authorization for parole of alien into the United States (Form I-512L) based on her pending adjustment application. The applicant subsequently traveled abroad and on October 6, 2008 she presented the advance parole document at John F. Kennedy airport for parole into the United States. The applicant's inspection was deferred until November 12, 2008 because of her criminal record. On November 12, 2008, she appeared for her deferred inspection and she was paroled into the United States.

The director determined that the applicant was subject to the ground of inadmissibility under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for more than one year and seeking readmission within 10 years of her last departure from the United States. In *Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012), the Board of Immigration Appeals (BIA) held that an alien who leaves the United States temporarily pursuant to advance parole under section 212(d)(5)(A) of the Act does not make a departure from the United States within the meaning of section 212(a)(9)(B)(i)(II) of the Act. Here, the applicant obtained advance parole under section 212(d)(5)(A) of the Act, temporarily left the United States pursuant to that grant of advance parole, and was paroled into the United States to pursue a pending application for adjustment of status. In accordance with the BIA's decision in *Matter of Arrabally*, the applicant did not make a departure from the United States for the purposes of section 212(a)(9)(B)(i)(II) of the Act. Consequently, the applicant is not inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

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-

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or

(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.)

The record reflects that on [REDACTED] 2006, the applicant was convicted in the Supreme Court of New York, New York County of forgery in the third degree in violation of New York Penal Law § 170.05, a class A misdemeanor (Case Number [REDACTED]). The applicant was sentenced to conditional discharge for a period of one year. At the time of the applicant's conviction, New York Penal Law § 170.05 provided, "A person is guilty of forgery in the third degree when, with intent to defraud, deceive or injure another, he falsely makes, completes or alters a written instrument." Fraud has, as a general rule, been held to involve moral turpitude. The U.S. Supreme Court in *Jordan v. De George* concluded that "Whatever else the phrase 'crime involving moral turpitude' may mean in peripheral cases, the decided cases make it plain that crimes in which fraud was an ingredient have always been regarded as involving moral turpitude. . . . Fraud is the touchstone by which this case should be judged. The phrase 'crime involving moral turpitude' has without exception been construed to embrace fraudulent conduct." 341 U.S. 223, 232 (1951).

The director determined that the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude. However, the applicant is eligible for the "petty offense" exception to inadmissibility arising under section 212(a)(2)(A)(i)(I) of the Act. Section 212(a)(2)(A)(ii)(II) of the Act provides an exception for aliens who have been convicted of only one crime if the maximum penalty possible for the crime of which the alien was convicted did not exceed imprisonment for one year and the alien was not sentenced to a term of imprisonment in excess of 6 months. Here, the applicant qualifies for the exception because she was not sentenced to imprisonment and the maximum possible term of imprisonment for her class A misdemeanor would have been one year. See N.Y. Penal Law § 70.15 (McKinney 2006). Therefore, the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

ORDER: The appeal is dismissed as the underlying waiver application is unnecessary.