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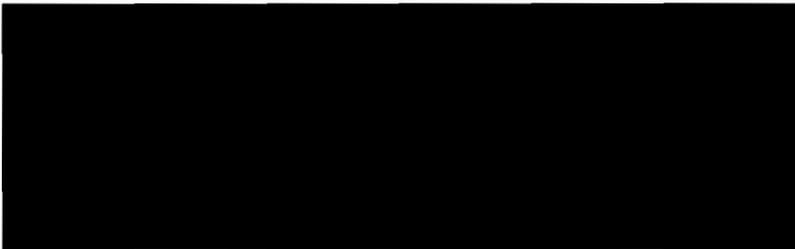
IN RE:



APPLICATION:

Application for Waiver of Ground of Inadmissibility under sections 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h) and 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i)

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, St. Paul, Minnesota, and is now before the AAO on appeal. The appeal will be dismissed, the previous decision of the district director will be withdrawn and the application declared moot. The matter will be returned to the district director for continued processing.

The applicant, a native and citizen of Argentina, was found inadmissible for admitting to having committed acts which constitute the essential elements of a violation relating to a controlled substance under section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(II). The applicant was also found inadmissible under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for seeking to procure a visa, other documentation, or admission into the United States or other benefit provided under the Act by fraud or willful misrepresentation. The applicant seeks waivers of inadmissibility under sections 212(h) and 212(i) of the Act in order to remain in the United States with his U.S. citizen wife.

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 Excludability (Form I-601) accordingly. *Decision of the District Director*, dated June 27, 2006.

In support of the appeal, counsel for the applicant submits a brief, dated July 27, 2006. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(2)(A) of the Act provides, in pertinent 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, or
 -
 - (II) a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act) . . . is inadmissible.

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

The Attorney General [now Secretary, Homeland Security, (Secretary)] may, in his discretion, waive the application of ... subparagraph (A)(i)(II) . . .

(1) (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

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 immigrant 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 indicates that in January 2006, the applicant was convicted of Loitering, a violation of section 385.50 of the Minneapolis Code of Ordinances, based on an August 31, 2003 incident and subsequent arrest. *See Hennepin County Criminal Courts Case History*, dated January 23, 2006. The applicant was ordered to pay a fine; no prison sentence was imposed. The applicant did not disclose the above-referenced incident and/or arrest on the Form I-485, Application to Register Permanent Residence or Adjust Status (Form I-485). Upon further questioning at his Form I-485 interview on November 3, 2005, the applicant outlined the above incident to the interviewing officer and moreover, admitted that he had smoked "weed," a common name for marijuana, in Argentina, but had never used any drugs in the United States.

With respect to the district director's finding that the applicant was inadmissible under 212(a)(2)(A)(i)(II) of the Act, for having admitted to a controlled substance violation, the AAO notes that in order for the admission of acts which constitute the essential elements of a crime to be properly used as a basis for inadmissibility, three conditions must be met, including: 1) the admitted acts must constitute the essential elements of a crime in the jurisdiction in which they occurred; 2) the respondent must have been provided with the definition and essential elements of the crime prior to making the admission, and; 3) the admission must have been voluntary. *Matter of K-*, 7 I&N Dec. 594, 596-98 (BIA 1957).

Upon review, the record does not reflect that the applicant was provided with the essential elements of the criminal law which he allegedly admitted to violating. The AAO has reviewed all evidence in the record, including notes in connection with the applicant's adjustment of status interview. No references were made to Argentina's criminal code or statute with respect to the applicant's admitted drug-related conduct. The record does not show that the applicant was provided the essential elements of any criminal law prior to his admission to marijuana use.

The AAO recognizes the burden on an interviewing officer due to the requirement to cite the elements of specific criminal law in an adjustment interview, particularly given the great range of topics or criminal conduct that may arise in the course of the discussion. However, finding an applicant inadmissible based on criminal conduct in the absence of a conviction in a court of law is a very serious matter. Where an applicant has not been afforded a criminal trial with respect to his conduct, or where he may not have the opportunity to be represented by counsel experienced in criminal matters, the decision of the BIA in *Matter of K-* sets a minimum requirement that such applicant is informed of the elements of the criminal law or laws which he has allegedly transgressed prior to taking an admission and using that admission as a basis for inadmissibility. *Matter of K-*, 7 I&N Dec. 594, 596-98 (BIA 1957). As the record does not reflect that any essential elements of a crime were discussed with the applicant prior to his admission of using marijuana, the record does not establish that his admission may be used as a basis for inadmissibility.

Based on the foregoing, the AAO finds that the applicant's statements in his adjustment interview regarding his prior use of marijuana in Argentina do not constitute the admission of committing acts which constitute the essential elements of a crime relating to a controlled substance, as contemplated by section 212(a)(2)(i)(II) of the Act, due to the fact that the criteria for admissions provided by the BIA in *Matter of K-* were not met. *Matter of K-*, 7 I&N Dec. 594, 596-98 (BIA 1957). Accordingly, the applicant is not inadmissible under section 212(a)(2)(i)(II) of the Act.¹

¹ Alternatively, the AAO notes that the applicant's conviction for loitering does not result in an inadmissibility finding under section 212(a)(2)(A)(i)(I) of the Act, for a crime involving moral turpitude. In examining whether a crime involves moral turpitude, the Board of Immigration Appeals [the Board] 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. Assault may or may not involve moral turpitude. Simple assault is generally not considered to be a crime involving moral turpitude.

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.)

With respect to the applicant's conviction for loitering, in order to determine whether this constitutes a crime involving moral turpitude, the AAO must examine the statute itself to determine whether the inherent nature of the crime involves moral turpitude. If the statute defines a crime in which moral turpitude necessarily inheres, then the conviction is for a crime involving moral turpitude for immigration purposes, and our analysis ends.

Section 385.50 of the Minneapolis Code of Ordinances states, in pertinent part:

(a) No person shall loiter:

(1) On the streets or in a public place or in a place open to the public with intent to solicit for the purposes of prostitution, illegal narcotic sale, distribution, purchase or possession, or any other act prohibited by law;

(2) On the streets or in a public place or in a place open to the public or in a private place with intent to commit any act of burglary, robbery; theft or theft-related crime, or with intent to vandalize or damage public or private property.

(i) A violation of this section is a misdemeanor punishable by up to ninety (90) days in jail and/or a one thousand dollar (\$1,000.00) fine. The city prosecutor may request that the court impose, as a condition of pretrial release or probation, that the defendant be geographically restricted from a reasonable and limited area surrounding the location where the crime allegedly occurred. The specific boundaries and duration of the geographic restriction shall be determined by the court and described to the defendant on-the-record or in writing.

The AAO finds that the Board's decision in *Matter of P*, 2 I. & N. Dec. 117 (BIA 1944) is relevant to this analysis. In *Matter of P*, the Board stated that one of the criteria adopted to ascertain whether a particular crime involves moral turpitude is that it be accompanied by a vicious motive or corrupt mind. "It is in the intent that moral turpitude inheres." *Id.* at 121. In this case, the intent required to be convicted of loitering is the intent to solicit. The statute does not outline a requirement that the act of loitering show a vicious motive or a corrupt mind, as referenced in *Matter of P*. As such, the AAO concludes that the applicant's conviction for loitering does not result in an inadmissibility finding under section 212(a)(2)(A)(i)(I) of the Act, for a crime involving moral turpitude.

Even if the AAO were to find that the conviction for loitering is a crime of moral turpitude, the AAO notes that said conviction meets the requirements set forth for a petty offense exception under section 212(a)(2)(A)(ii) of the Act.

The AAO must next analyze whether the applicant's failure to disclose the above-referenced arrest and subsequent conviction for loitering makes the applicant inadmissible under section 212(a)(6)(C) of the Act, for fraud and/or willful misrepresentation. Counsel maintains that even if a misrepresentation was made by the applicant with respect to the above-referenced incident, arrest and conviction, the misrepresentation was not material in nature as the applicant was not excludable on the true facts.

The Department of State's Foreign Affairs Manual [FAM] further provides, in pertinent part:

Materiality does not rest on the simple moral premise that an alien has lied, but must be measured pragmatically in the context of the individual case as to whether the misrepresentation was of direct and objective significance to the proper resolution of the alien's application for a visa....

"A misrepresentation made in connection with an application for a visa or other documents, or with entry into the United States, is material if either:

- (1) The alien is excludable on the true facts; or
- (2) The misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might have resulted in a proper determination that he be excluded." (Matter of S- and B-C, 9 I&N 436, at 447.)

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

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).

As previously noted, the maximum penalty for loitering is ninety (90) days in jail and/or a one thousand dollar (\$1,000.00) fine. As such, even if the AAO had concluded that the applicant's conviction for loitering is for a crime involving moral turpitude, the AAO finds that the applicant's conviction would fall within the petty offense exception set forth in section 212(a)(2)(A)(ii) of the Act.

DOS Foreign Affairs Manual, § 40.63 N. 6.1. Although the AAO is not bound by the Foreign Affairs Manual, it finds its analysis to be persuasive.

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 U.S. 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). If one were to interpret that the applicant should have marked “yes” to the question on the Form I-485 regarding prior arrests and should have said “yes” when asked about prior arrests at his I-485 interview, the fact that the applicant had been arrested and ultimately convicted of loitering would not have resulted in his inadmissibility, as discussed in extensive detail above. Therefore, having been arrested and ultimately convicted of loitering is not material and the applicant’s omission is not a material misrepresentation. The applicant is thus not inadmissible with respect to this issue.

In conclusion, the AAO finds that the district director erred in determining that the applicant was inadmissible under sections 212(a)(2)(A) and/or 212(a)(6)(C) of the Act. As such, the waiver application is unnecessary and the issue of whether the applicant established extreme hardship to a qualifying relative need not be addressed. Accordingly, the appeal will be dismissed, the prior decision of the district director is withdrawn and the instant application for a waiver is declared moot.

ORDER: The appeal is dismissed, the prior decision of the district director is withdrawn and the instant application for a waiver is declared moot. The district director shall reopen the denial of the Form I-485 application on motion and continue to process the adjustment application.