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



U.S. Citizenship  
and Immigration  
Services

H2

Date: **AUG 08 2012**

Office: PHILADELPHIA

FILE: [REDACTED]

IN RE: Applicant: [REDACTED]

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

for Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Acting District Director, Philadelphia, Pennsylvania. On November 19, 2009, the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted. The previous decisions of the Acting District Director and the AAO will be withdrawn and the waiver application declared unnecessary as the applicant is not inadmissible. The appeal will be dismissed, and the matter will be returned to the Acting District Director for continued processing.

The applicant is a native and citizen of St Lucia who was found by the acting district director to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude; and under section 212(a)(9)(B)(i)(II), of 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. The director concluded that the applicant had failed to establish that his 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, the AAO determined that the director erred in finding the applicant was inadmissible for unlawful presence under section 212(a)(9)(B)(i)(II) of the Act. As to the applicant's theft conviction, the AAO agreed with the director that the applicant was inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude, and that the applicant had failed to establish extreme hardship to a qualifying relative.

On motion, counsel challenges the finding that the applicant is inadmissible for having been convicted of a crime involving moral turpitude. Counsel argues that the applicant's theft conviction was disposed of through the Accelerated Rehabilitative Disposition (ARD) Program of the Delaware County Pennsylvania District Attorney, and thus, does not constitute a conviction pursuant to section 101(a)(48) of the Act, 8 U.S.C.A. § 1101(a)(48).

The AAO grants counsel's motion. For the reasons set forth in this decision, we find that the applicant is not inadmissible under section 212(a)(2)(A) 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.

The definition of "conviction" is set forth in section 101(a)(48) of the Act, which states:

The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

The statute encompasses within the definition of 'conviction' situations in which adjudications of guilt have been withheld, as long as the defendant's guilt has been established by a judge or jury, by a plea, or by admission, and a judicial officer orders some form of punishment, penalty, or restraint on the defendant's liberty.

As to the instant case, the submitted record of conviction reflects that the applicant was charged with theft on March 4, 2000. The court's order dated October 18, 2000, stated that the court accepted the motion of the District Attorney to place the applicant into the ARD program. By stipulation between counsel, all summary offenses charged were withdrawn, with the option of reinstatement in the event the applicant was removed from the program. The applicant was placed on probation and ordered to pay the costs of the program and perform community service. The submitted criminal records reflect that the applicant never entered a plea to the charge of theft, and the judge never made a finding of guilt against the applicant. The ADR Program does not require the judge to make a finding of guilt or the accused to enter a plea of guilt. See Pa. R. Crim. P 313-316. (ADR Program). As to the applicant, [REDACTED] with the Philadelphia District Attorney's Office, stated in the letter dated October 6, 2003, that no inference of guilt or innocence should be associated with an ARD disposition, and that there is no guilty plea associated with ARD. It is a first time offender diversion to trial program, resulting in expungement of the offender's criminal record as long as court costs are paid and probation is completed. [REDACTED] stated that the applicant was placed in the ARD program and his record was expunged on July 22, 2002.

In *Matter of Grullon*, the Board held that a conviction does not exist, for immigration purposes, where the alien never entered a plea to the charges against him, and the alien's criminal charges were dismissed without prejudice following his successful completion of a pretrial intervention program prescribed by section 944.025 of the Florida Statutes. 20 I&N Dec. 12, 14-15 (BIA 1989).

Therefore, we find that the applicant does not have a "conviction" within the meaning of section 101(a)(48)(A) of the Act. The record before the AAO reflects that the applicant never entered a plea to the charges against him, and the judge never entered a finding of guilt against the applicant. Upon the applicant's successful completion of the ARD program, the charge against him was withdrawn, and his record was expunged. As the applicant does not have a theft "conviction" for purposes of immigration law, the applicant is not inadmissible under section 212(a)(2)(A) of the Act.

Thus, the waiver application is not necessary and the issue of whether the applicant established extreme hardship to a qualifying relative pursuant to the Act is necessary and will not be addressed. Accordingly, the previous determinations of inadmissibility by the Acting District Director and the AAO are withdrawn. As the waiver application is unnecessary, the appeal will be dismissed.

**ORDER:** As the applicant is not inadmissible, the waiver application is unnecessary. The appeal is dismissed and the matter is returned to the Philadelphia Field Office for further processing.