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U.S. Citizenship
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Services

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FILE:



Office: MIAMI, FLORIDA

Date: DEC 23 2004

IN RE:



PETITION: 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:

SELF-REPRESENTED

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting District Director, Miami, Florida, and is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter remanded for entry of a new decision.

The applicant is a native and citizen of Nicaragua who submitted a Form I-485 Application to Adjust Status on March 22, 1999, under the Nicaraguan Adjustment and Central American Relief Act (NACARA). He was found to be inadmissible to the United States pursuant to § 212(a)(6)(E)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(E)(i) as an alien who knowingly assisted another alien to enter the United States illegally.

On July 17, 2002, the director issued a single decision denying both the application to adjust status and the waiver application. It appears that the director failed to issue a Notice of Intent to Deny (NOID) the adjustment of status application prior to issuing the final denial. The appeal is remanded to the director in order for him to adjudicate the adjustment of status and waiver applications separately. The AAO notes that, regarding the adjustment of status application, regulations require the district director to send the applicant a NOID and afford him time to respond prior to issuing a final decision. The appeal of the denial of the waiver should be reviewed pursuant to the instructions below.

The director found the applicant subject to the bar against aliens who assist other aliens to enter the United States illegally. A waiver of this bar is available, if the alien helps only a parent, spouse, son, or daughter to enter the country illegally. Since the applicant assisted unrelated individuals, the acting director found him ineligible for the waiver and denied the Application for Waiver of Grounds of Excludability (Form I-601).

On appeal, the applicant points out that although he was arrested on the charge of assisting an alien to illegally enter the United States, he was convicted of a different charge under 8 USC § 1325 and 18 USC § 3. The record reveals that the original charge was dropped, as the applicant pled guilty to the charge of aiding an unlawfully present alien after that alien's entrance into the United States. The applicant was sentenced to six months suspended jail time and one year of probation. While this activity is not subject to the bar to inadmissibility described at § 212(a)(6)(E)(i) of the Act, it constitutes a crime involving moral turpitude. The AAO, thus, agrees that the application of the bar to inadmissibility found at § 212(a)(6)(E)(i) of the Act is incorrect, but finds the applicant is subject to § 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. The applicant is the spouse of a citizen of the United States and the father of four U.S. citizen children. A waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h) is available to the applicant.

In addition to the applicant's 1984 transgression, on May 22, 1989 in Miami, Florida, he was convicted of burglary, a felony, in violation of Florida Statute 810.02. He was sentenced to two years of probation. This also constitutes a crime involving moral turpitude. The applicant is thus subject to § 212(a)(2)(A) of the Act, which states 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 . . . or an attempt or conspiracy to commit such a crime . . . is inadmissible.

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

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if -

- (1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that -

- (i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,
- (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
- (iii) the alien has been rehabilitated; or

- (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 . . .

- (2) the Attorney General, in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status

The applicant committed the Miami Beach burglary almost 16 years ago on January 22, 1989. The applicant is therefore eligible for a waiver pursuant to § 212(h)(1)(A)(i) of the Act. The instant application is remanded to the district director for a full examination of the issues relating to the applicant's inadmissibility under § 212(a)(2)(A) of the Act, and his eligibility for a waiver pursuant to the standards described at § 212(h)(1)(A)(i) of the Act. The director must afford the petitioner reasonable time to provide evidence pertinent to these issues and any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The application is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.