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U.S. Citizenship
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Services

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FILE: [REDACTED]

Office: SEATTLE, WA

Date: AUG 26 2005

IN RE: [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:



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 District Director, Seattle, Washington, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who was found 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 (robbery in the first degree). The record indicates that the applicant is a derivative beneficiary of an approved Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant filed by his mother. The applicant's mother self-petitioned as a spouse of a U.S. citizen under section 204(a)(1)(A)(iii) of the Act. The applicant seeks a waiver of inadmissibility in order to reside with his family in the United States.

The district director concluded that the applicant's equities are not sufficient to counterbalance his criminal conviction and to show he is a person of good moral character. *Decision of the District Director*, dated May 16, 2005. The district director found that the applicant committed an aggravated felony under section 101(f) of the Act and is therefore statutorily barred from a requisite showing of good moral character. *See id.*

On appeal, counsel contends that the district director improperly added an additional requirement of good moral character when adjudicating the section 212(h) waiver and that the applicant is eligible for a section 212(h) waiver. *Brief in Support of Appeal*, dated June 20, 2005.

The record includes, but is not limited, to the aforementioned brief, a declaration from the applicant, a psychological report and social worker's letter for the applicant's mother, the applicant's educational certificates, support letters for the applicant and the applicant's paternity suit documents. The entire record was considered in rendering this decision.

The record reflects that on March 25, 2002, the applicant was found guilty of robbery in the first degree, a crime involving moral turpitude.

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.

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

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

....



- (1)(C) the alien qualifies for classification under clause (iii) or (iv) of section 204(a)(1)(A) or classification under clause (ii) or (iii) of section 204(a)(1)(B); and
- (2) the Attorney General [Secretary], 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.

Counsel asserts that the district director erred in requiring that the applicant show good moral character and that the applicant is eligible for a discretionary waiver providing that he qualifies for classification under section 204(a)(1)(A)(iii) of the Act. *See Brief in Support of Appeal*, at 3.

Sec. 204(a)(1)(A) of the Act provides, in pertinent part:

(iii) (I) An alien who is described in subclause (II) may file a petition with the Attorney General [Secretary] under this clause for classification of the alien (and any child of the alien) if the alien demonstrates to the Attorney General [Secretary] that--

(aa) the marriage or the intent to marry the United States citizen was entered into in good faith by the alien; and

(bb) during the marriage or relationship intended by the alien to be legally a marriage, the alien or a child of the alien has been battered or has been the subject of extreme cruelty perpetrated by the alien's spouse or intended spouse.

(II) For purposes of subclause (I), an alien described in this subclause is an alien--

(aa)(AA) who is the spouse of a citizen of the United States;

....

(bb) who is a person of good moral character;

Counsel states that section 204(a)(1)(A)(iii) of the Act distinguishes between the alien (the applicant's mother) and the child of the alien (the applicant), and states that in subclause II the alien, not the child of the alien, must demonstrate good moral character. *Brief in Support of Appeal*. at 4.

The district director also cites 8 C.F.R. §204.2(c)(1), which states in pertinent part:

(vii) A self-petitioner will be found to lack good moral character if he or she is a person described in section 101(f) of the Act.

Counsel asserts that the district director applied this regulation too broadly by applying it to a derivative beneficiary, the applicant, as the regulation only refers to the self-petitioner and not the applicant. *Brief in Support of Appeal*. at 4. The AAO finds these contentions to be persuasive and finds that the district erred in requiring a showing of good moral character for the applicant.

Therefore, the decision to grant a section 212(h) waiver is discretionary as the applicant is qualified through classification under section 204(a)(1)(A)(iii) of the Act.

In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

See Matter of Mendez-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Id.* at 300. (Citations omitted). The AAO will use these factors as guidance in evaluating whether section 212(h)(1)(C) relief is warranted in the exercise of discretion.

Counsel states that the applicant has resided in the United States since he was ten, has completed all of his education in the United States and has a U.S. citizen child, lawful permanent resident mother and sister who live in the United States. *Brief in Support of Appeal*. at 7. Counsel states that the applicant has no family in Mexico, has no place to live in Mexico, is not fluent enough in Spanish to live in Mexico and is unlikely to find employment in Mexico. *Id.* Counsel further states that the applicant has no negative history of immigration violations and has reformed and rehabilitated himself. *Id.* The record includes a statement of remorse from the applicant and copies of his GED, first-aid training and computer programming certificates. The record also includes statements from the applicant's mother and sister that state that the applicant has changed for the better.

Counsel asserts that the applicant's mother will suffer extreme hardship if the applicant is removed from the United States as she is suffering from depression and would rely on the applicant to support her. *See Id.* at 8-9. The record includes a psychological evaluation, which states that the applicant's mother is suffering from

depression and post-traumatic stress disorder. *Psychologist's Letter*, at 7, dated June 6, 2005. However, this is a one-time evaluation with no recommendations for a plan of treatment. The record also includes a letter from the applicant's mother's social worker for the last three years which states that she was diagnosed with depression and post-traumatic stress disorder and has received medication and counseling. *Social Worker's Letter*, at 1, dated February 18, 2005. No evidence of medication is in the record. Counsel also states that the applicant's sister would suffer if the applicant were removed, as he would fill the role of father as her own father does not care for her. *Id.* at 9. The applicant's sister's counselor states that she would be devastated if they were not reunited. *Counselor's Letter*, dated March 7, 2005.

Counsel further states that the applicant has been a good father to his daughter and the fact that the applicant is a VAWA derivative should be given considerable weight. *Id.* However, the record indicates that the applicant has committed many crimes after the birth of his daughter and that the paternity of the applicant's daughter was determined two years after the daughter's birth by order of the court for child support services. *See Motion for Summary Judgment on Parentage*, dated September 10, 2001. The record contains support letters from former teachers, a pastor and friends stating that the applicant is a good person who should be given a second chance in the United States. Lastly, there is no indication that the applicant has served in the U.S. Armed Forces, has a history of stable employment or has property or business ties in the United States.

The adverse factors for the applicant are numerous. The applicant entered the United States without inspection in 1993. From August 17, 1998 until April 12, 2002, the applicant has been convicted of residential burglary (twice), theft of a firearm, assault in the third degree, possession of stolen property, possession of drug paraphernalia, second degree robbery and first degree robbery. The record also indicates that the applicant has several convictions for not having a valid operator's license and driving with a suspended license. The nature and circumstances of the ground of inadmissibility, the first-degree robbery conviction, are very serious. The applicant was aware that one of his accomplices in the relevant first-degree robbery had a gun. *Prosecuting Attorney Case Summary*, undated.

Furthermore, 8 C.F.R. §212.7(d) states in pertinent part:

(d) Criminal grounds of inadmissibility involving violent or dangerous crimes. —

The Attorney General [Secretary], in general, will not favorably exercise discretion under section 212(h)(2) of the Act . . . with respect to immigrant aliens who are inadmissible under section 212(a)(2) of the Act in cases involving violent or dangerous crimes, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of the application for adjustment of status or an immigrant visa or admission as an immigrant would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the alien's underlying criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act.

First-degree robbery is a crime of violence and the applicant has not made a showing of an extraordinary circumstance as defined in 8 C.F.R. §212.7(d). Regardless of a showing of an extraordinary circumstance, the

applicant is not entitled to a favorable exercise of discretion as his adverse factors outweigh his favorable factors.

In addition, the AAO finds that the applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act for his conviction of possession of drug paraphernalia. In *Minh Duc Luu-Le v. Immigration and Naturalization Service* (No. [REDACTED] August 3, 2000), the Ninth Circuit Court of Appeals upheld a decision of the Board of Immigration Appeals (BIA) affirming an Immigration Judge's determination that a conviction for possession of drug paraphernalia was a conviction for violation of a law relating to a controlled substance.

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

(i) In general. – Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –

....

(II) a violation of (or conspiracy or attempt to violate) 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 (21 U.S.C. 802)), is inadmissible.

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

The Attorney General may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), (D), and (E) or subsection (a)(2) *and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana* (emphasis added.)

The Act makes it very clear that the section 212(h) waiver applies only to controlled substance cases that involve a single offense of possession of 30 grams or less of marijuana. The record indicates that the applicant's conviction was for possession of drug paraphernalia, not possession of marijuana. Thus, the applicant is statutorily ineligible to be considered for a section 212(h) waiver for his drug paraphernalia conviction.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h), the burden of establishing that the application merits approval remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.