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U.S. Citizenship
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FILE:

[REDACTED]

Office: BALTIMORE, MD

Date: DEC 05 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:

[REDACTED]

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 Interim District Director, Baltimore, Maryland denied the Form I-601, Application for Waiver of Grounds of Inadmissibility. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Jamaica 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 (theft). The record indicates that the applicant is the spouse of a U.S. citizen and has three children, at least two of whom are U.S. citizens. The applicant seeks a waiver of inadmissibility in order to reside with her spouse in the United States.

The district director concluded that the record failed to reflect that the applicant had a qualifying relationship for a waiver of inadmissibility. *Decision of the District Director*, dated October 30, 2003.

On appeal, counsel contends that the applicant has a qualifying relative in the form of her U.S. citizen spouse. *Form I-290B*, dated December 10, 2003.

The record includes, but is not limited, a copy of the applicant's marriage certificate and the applicant's spouse's naturalization certificate. The entire record was reviewed and considered in arriving at a decision on the appeal.

The record reflects that on May 23, 1986, the applicant was charged with theft and subsequently was convicted. The record also reflects that on July 29, 1987, the applicant was convicted of offering, exposing and keeping paper as money.

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:

(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 . . .

The interim district director failed to mention the applicant's conviction for offering, exposing and keeping paper as money, a crime involving moral turpitude. The activity resulting in this conviction occurred on June 1, 1987. The activity resulting in the theft conviction occurred before May 23, 1986, the date the applicant was charged, however, the record is not clear as to whether the theft conviction constitutes a crime involving moral turpitude. The AAO notes that an application for admission or adjustment is a "continuing" application, adjudicated based on the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). The date of application is technically the date of decision on the application for adjustment of status, which was made on October 30, 2003. Therefore, section 212(h)(1)(A) of the Act applies to the applicant as the crime involving moral turpitude for which the applicant was found inadmissible occurred more than 15 years prior to the applicant's adjustment of status application.

The AAO finds that the district director erred in basing his decision on section 212(h)(1)(B) of the Act and failing to consider the eligibility of the applicant for a waiver under section 212(h)(1)(A) of the Act.

In order to be eligible for a section 212(h)(1)(A) waiver, the applicant must demonstrate that her admission to the United States would not be contrary to its national welfare, safety, or security and that she is rehabilitated. There is no indication that the applicant has ever relied on the government for financial assistance or will rely on the government for financial assistance, as her spouse's income exceeds the required amount on the affidavit of support. The record reflects that the applicant was sentenced to 30 days in a pre-release unit for women, a \$50 fine, three years probation, and restitution for her two convictions. The applicant's probation was extended by approximately eight months, apparently for problems paying the restitution in a timely manner although this problem was resolved. The record reflects that the applicant was charged with battery and malicious destruction of property on May 12, 1993, however, these charges were nolle prossed. There is no indication that the applicant has been convicted of any crimes since 1987. There is no indication that the applicant is involved with terrorist-related activities. Therefore, the record evidences that admitting the applicant to the United States would not be contrary to its national welfare, safety, or security and the applicant is rehabilitated.

The granting of the waiver is discretionary in nature. The favorable discretionary factors for the applicant include marriage to a U.S. citizen, three children in the United States (at least two of whom are U.S. citizens), residence in the United States for over twenty years, rehabilitation for her crimes, the age of her crimes and employment in the fields of foster care and house cleaning.

The unfavorable factors present in the application are the applicant's criminal convictions and entering the United States without inspection. The record indicates that the applicant attempted to use counterfeit U.S. currency on two occasions. There is no information on the theft conviction other than that the penalty was a \$50 fine. The record does not indicate that these crimes were serious in nature as the applicant served only 30 days in jail and paid monetary penalties for the offenses.

The AAO finds that the crimes committed by the applicant cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Therefore, the district director's denial of the I-601 application was proper.

In discretionary matters, the applicant bears the full burden of proving his eligibility for discretionary relief. *See Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976). Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.