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U.S. Department of Homeland Security
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**U.S. Citizenship
and Immigration
Services**

PUBLIC COPY

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FILE: [REDACTED] Office: LOS ANGELES DISTRICT OFFICE

Date: JAN 28 2005

IN RE: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(h) of the
Immigration and Nationality Act (INA), 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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Los Angeles. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter remanded to the director for further action consistent with this decision.

The record reflects that the applicant is a native and citizen of Mexico. The applicant was found inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (INA, the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I). He seeks a waiver of inadmissibility to remain in the United States and adjust status to that of a lawful permanent resident pursuant to INA § 245, 8 U.S.C. § 1255, as the beneficiary of an approved immigrant relative petition filed on his behalf by his 35-year-old son [REDACTED]

The district director found that the applicant failed to establish extreme hardship to the petitioning U.S. citizen son and denied the application accordingly. On appeal, counsel contends that the district director failed to consider hardship to the applicant's lawful permanent resident spouse and his other U.S. citizen son, [REDACTED] aged 14. The AAO notes that, although counsel indicated that a more detailed brief and/or evidence would be submitted within 45 days of filing the appeal (October 15, 2003), as of this date, the record does not contain any additional materials. Therefore, the record is considered complete, and the AAO shall render a decision based upon the evidence before it at the present time. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(2)(A) of the Act provides, 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 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.

(ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if—

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correction institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or

(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 six months (regardless of the extent to which the sentence was ultimately executed).

8 U.S.C. § 1182(a)(2)(A). The district director did not state the basis for the inadmissibility determination in the record below. Based on notes in the file it appears that the inadmissibility finding was based on the applicant's 1983 conviction for a 1982 aggravated assault, 1989 arrest for violation of probation imposed as punishment for the 1982 aggravated assault, and subsequent imposition of a two-year sentence for the 1982 assault after revocation of probation. The applicant does not contest the inadmissibility finding, but asserts that he is qualified for a waiver.

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

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

. . . and

(2) the [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. . .

8 U.S.C. § 1182(h). The activities for which the applicant was found inadmissible occurred more than 15 years ago. While the record reflects that the applicant has an extensive arrest record dating between 1968 and 1989, the latest criminal record on file shows that he had no criminal activity for a period of nearly ten years. His criminal record was last updated on November 5, 1998, over six years ago. CIS policy generally

considers the validity period of fingerprint results and associated record to be approximately 15 months. Neither the AAO nor the applicant can apply to the Federal Bureau of Investigation (FBI) for an update of the applicant's criminal background check. Because the applicant's eligibility for a waiver of inadmissibility under INA § 212(h)(1)(A) hinges upon an assessment of his rehabilitation and potential dangerousness to the community, the AAO finds it necessary to remand the proceedings to the district director for an update of the applicant's criminal record through the FBI, and an adjudication of eligibility under INA § 212(h)(1)(A).

In the event the applicant is found ineligible for a waiver under INA § 212(h)(1)(A), the district director should also re-adjudicate the question of eligibility for a waiver under INA § 212(h)(1)(B), explicitly taking into account evidence of hardship as to all qualifying relatives of record. The decision below did not appear to take into account, as it should have, the hardship to the applicant's lawful permanent resident spouse and *both* U.S. citizen children. The determination of hardship on the applicant's qualifying relatives should not be limited to the hardship faced by the petitioner. The AAO notes, however, that it is not clear whether the applicant submitted any supporting evidence of the immigration status and hardship of his wife and second son. If the lack of evidence of additional qualifying relatives is the reason for their exclusion from consideration, the director's decision should state so.

In summary, the AAO finds it necessary to remand the present matter to the director for a new decision in the applicant's case after obtaining an updated criminal record. If the new decision is adverse to the applicant, the decision shall be certified to the AAO for review.

ORDER: The director's decision is withdrawn and the matter remanded to the director for further action consistent with the present decision.