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

H2

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:

[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

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 appeal will be sustained.

The record reflects that the applicant is a 64-year-old native and citizen of the Philippines. 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). The record reflects that the applicant is the spouse of a U.S. citizen and father of three U.S. citizen children. He seeks a waiver of inadmissibility to remain in the United States with his family and adjust his status to that of a lawful permanent resident pursuant to INA § 245, 8 U.S.C. § 1255, as the beneficiary of an immediate relative petition filed on his behalf by his wife.

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.

8 U.S.C. § 1182(a)(2)(A)(I). The district director based the finding of inadmissibility under this section on the applicant's 1985 conviction of "aiding and abetting receipt of ticket for interstate or foreign transportation by use of stolen credit card, in violation of 15 USC 1644(e) and 18 USC 2" (purchasing airline tickets with fraudulent credit cards) for which he was sentenced to three years imprisonment, with all but 179 days suspended. *Order, J. Lawrence Irving, U.S. District Judge U.S. District Court for the Southern District of California* (April 29, 1985); *Decision of the District Director* (September 17, 2003) at 2. He was placed on five years probation, which term was completed and discharged on February 9, 1989. The applicant does not contest the district director's determination of inadmissibility.

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 district director found that the applicant failed to establish extreme hardship to his U.S. citizen spouse and children and denied the application for waiver pursuant to INA § 212(h)(1)(B). On appeal, counsel contends that the district director should have considered the applicant's eligibility for a waiver under INA § 212(h)(1)(A), because more than 15 years have passed since the applicant's conviction. The record does not reflect that the district director considered the applicant for such a waiver.

As stated above, the applicant was convicted in 1985. He applied for adjustment of status to that of a lawful permanent resident approximately twelve years later on November 5, 1997. The Board of Immigration Appeals held, "[a]n application for admission to the United States is a continuing application, and inadmissibility is determined on the basis of the facts and the law at the time the application is finally considered." *Matter of Alarcon*, 20 I&N 557, 562 (BIA 1992) (citations omitted). The applicant timely pursued this appeal to the AAO; thus, he remains an applicant for admission before the AAO and his eligibility for a waiver of inadmissibility will be determined on the basis of the facts at the time of the AAO's decision. Because his conviction was in 1985, the record reflects that the applicant meets the first requirement for a waiver of inadmissibility under INA § 212(h)(1)(A), in that more than 15 years elapsed from the date of the conviction to the time of the application for visa. Counsel is correct that the applicant should have been considered for a 212(h)(1)(A) waiver in 2003, 18 years after his conviction, when the district director denied the applicant's request for a waiver.

The record further reflects that the applicant appears to have had no further arrests since that time. *Federal Bureau of Investigation (FBI) Record of Arrest and Prosecution ("RAP Sheet")* (August 13, 2003). It therefore appears that the admission of the applicant would not be contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated. He is therefore statutorily eligible for a waiver of inadmissibility under INA § 212(h)(1)(A), 8 U.S.C. § 1182(h)(1)(A) and need not establish extreme hardship to a qualifying relative as required for a waiver under INA § 212(h)(1)(B), 8 U.S.C. § 1182(h)(1)(B).

The remaining question is whether he is eligible for a favorable exercise of discretion, as provided under INA § 212(h)(2), 8 U.S.C. § 1182(h)(2).

In discretionary matters, the alien bears the burden of proving eligibility in that favorable factors are not outweighed by adverse factors. *See Matter of T-S-Y*, 7 I&N Dec. 582 (BIA 1957). The positive factors in this case include the applicant's rehabilitation; his family ties to his U.S. citizen mother, wife, three children, and four grandchildren in the United States; his ties to the community including charitable activities with the Kiwanis Club, volunteering as a bowling coach for a youth program, and membership in their church; his home ownership; and his financial and other support of his elderly mother, who is afflicted with Alzheimer's disease. *See Applicant's Exh. A-V, inclusive*. The negative factor in this case is the crime for which the applicant seeks a waiver of inadmissibility.

The AAO finds that, although the crime committed by the applicant was serious and cannot be condoned, in view of the length of time (19 years) that has passed since the crime occurred, his lack of further criminal activity, and other factors indicated above, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.