

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**



**U.S. Citizenship
and Immigration
Services**

PUBLIC COPY

H2

[REDACTED]

FILE:

[REDACTED]

Office: LOS ANGELES

Date: **JAN 31 2005**

IN RE:

[REDACTED]

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 PETITIONER:

[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, and is now before the Administrative Appeals Office (AAO), on appeal. The appeal will be sustained.

The applicant is a native and citizen El Salvador who was found to be inadmissible to the United States under 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. The applicant is the spouse of a United States citizen and the parent of two United States citizen children, and seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), so that he may reside in the United States with his wife and children.

The District Director, in originally considering the requested waiver, concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the District Director*, dated December 3, 2003. Counsel subsequently filed a timely Motion to Reopen/Reconsider the decision denying the waiver application and submitted additional evidence. The District Director denied the Motion to Reopen/Reconsider on March 30, 2004.¹ Counsel then filed the instant appeal.

On appeal, counsel contends that the District Director failed to adequately consider the favorable factors and balance them against the adverse factors in the case. In addition, counsel asserts that the District Director based the denial on limited information from the record, i.e., the affidavit submitted by the applicant's spouse, [REDACTED]. In particular, counsel notes that the District Director's decision noted that no documentation was submitted in support of the assertion that the family would be heartbroken and depressed if the applicant were deported. Counsel notes, however, that the Motion to Reopen contained numerous exhibits, including psychological evaluations of the applicant and his two sons conducted by Dr. Jorge Garcia, Ph.D., as well as school records, and declarations from friends, church members and others. *See Counsel's Appeal Brief*, dated May 12, 2004.

The AAO notes that the record contains numerous documents submitted in support of the applicant's application for a waiver of inadmissibility, and numerous additional documents submitted in support of the unsuccessful Motion to Reopen/Reconsider. The entire record was considered in rendering a decision on the current appeal.

The record reflects that the applicant is a forty-six-year-old native and citizen of El Salvador. He claims to have last entered the United States without inspection at San Ysidro, California on or about October 9, 1987, but to have resided in the United States since 1979.² While living in the United States during the early 1980's, the applicant was convicted of several criminal offenses. Although the numerous records relating to his criminal history are somewhat unclear, and in many cases difficult to read, the following is a list of the offenses, which include offenses identified by the applicant in the Form I-601, as well as additional offenses that the AAO has been able to identify from the record: 1) August 6, 1980, convicted of Grand Theft Auto, in violation of

¹ It appears from the record that prior to the decision denying the Motion to Reopen, the District Director on January 14, 2004, issued a denial of the Adjustment of Status Application (Form I-485), filed by the applicant on July 24, 1996.

² The applicant's statements come from the I-485 filed in 1996. The record reflects that subsequent to that time the applicant sought and obtained advance parole on or about September 1, 1998, and was paroled to the United States on October 22, 1998.

California Penal Code section 487.3; 2) 1981 convicted of trespassing in violation of California Penal Code section 602(j); 3) convicted in 1982 for second degree burglary in violation of California Penal Code section 459; 4) May 1985 convicted of assault with a firearm in violation of California Penal Code section 245(A)(2) ; 5) May 1985 arrested for burglary which resulted in revocation of probation previously granted for assault.³

The record reflects that the applicant married his spouse, [REDACTED] on July 10, 1989, in Los Angeles, California. She filed a Petition for Alien Relative (Form I-130) on behalf of the applicant on September 8, 1992, which was approved on November 19, 1992. The applicant's spouse became a naturalized U.S. citizen on August 9, 1996. In the intervening years, the applicant and his spouse had two U.S. citizen children together, [REDACTED] born April 26, 1990, and [REDACTED] August 22, 1995. The applicant filed an I-485 in order to adjust his status, on July 24, 1996. Additional processing of the I-485 occurred, and the applicant's counsel filed the Form I-601 waiver application on August 11, 2000. The application was ultimately denied on December 3, 2003, based on the District Director's finding that the applicant had failed to demonstrate extreme hardship to a qualifying family member. Counsel's subsequent Motion to Reopen/Reconsider was denied on March 30, 2004, and counsel submitted an appeal from that decision.

Section 212(a)(2)(A) of the Act 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

³ The AAO believes that this is an accurate listing of the applicant's convictions as determined from a review of the arrest and conviction documents in the record. Although the dates do not always coincide with the offenses listed in the applicant's Form I-601, the discrepancy may be due to the fact that the applicant had numerous arrests that did not result in convictions.

[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 applicant was convicted of the numerous crimes specified above, and the record also contains evidence of several other arrests relating to the applicant, although the evidence submitted indicates that in several cases the charges were either dismissed or no disposition exists or was made available from the corresponding jurisdictions. Counsel does not contest the fact that the applicant has been convicted of crimes involving moral turpitude and requires a waiver of inadmissibility in order to pursue adjustment of status.

Upon review of the record, the AAO finds that the District Director considered the applicant's eligibility for a waiver only under section 212(h)(1)(B) of the Act concluding that he had failed to establish extreme hardship to a qualifying family member for eligibility under subsection. However, it does not appear that the District Director considered whether the applicant qualified for a waiver under the alternative ground of section 212(h)(1)(A) of the Act relating to offenses committed more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status. The AAO finds that the applicant's waiver application should have been considered under this subsection in addition to or in lieu of its consideration under section 202(h)(1)(B) of the Act. The AAO will next consider the applicant's eligibility for a waiver of inadmissibility under section 212(h)(1)(B) pursuant to our *de novo* authority. See *Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The record reflects that the applicant meets the technical time related requirements for the subsection (A) waiver. The applicant's last conviction occurred in 1985. Although the applicant filed his I-485 in 1996, approximately thirteen years after the commission of his last offense, the Board of Immigration Appeals (BIA) has determined that an application for admission to the United States is a continuing application, with an alien's eligibility determined on the basis of the facts and law at the time the application is finally considered. *Matter of Alarcon*, 20 I&N Dec. 562 (BIA 1992), citing *Matter of Cheng and Chen*, 19 I&N Dec. 203 (BIA 1984).⁴ The convictions are of a sufficient age that he qualifies for the waiver. However, the applicant must still meet the two additional requirements, i.e., that his admission to the United States would not be contrary to the national welfare, safety or security of the United States, and that he has been rehabilitated. The AAO will address these two criteria in reverse order.

There is a significant amount of evidence in the record addressing the issue of the applicant's rehabilitation. The AAO begins its analysis by reviewing the statements submitted by the applicant and his spouse. See *Statement of Ricardo Moran Cortez*, dated January 5, 2004, and *Statements of Sandra Janet Moran*, dated January 5, 2004, and October 18, 2003. The applicant's statement notes that his difficulties began while a youth in El Salvador, where he lived with his parents until he was eight years old, at which time his father

⁴ Although *Matter of Alarcon* upheld the Immigration Judge's (IJ) determination that the alien was ineligible for a waiver under section 212 (1)(A), its finding was based on the fact that at the time of the IJ's decision, the alien had not accrued fifteen years since the commission of the offense and not because of a finding that the filing of the application to adjust status operated to cut-off the accrual of time from the commission of the crime. The AAO further notes that in its decision the BIA, in evaluating the applicant's eligibility for a waiver under subsection (A) noted that he remained ineligible for a waiver under subsection (A) (see footnote 4), as only twelve years had elapsed at the time of the BIA's decision.

abandoned the family. According to the applicant, his criminal troubles began shortly thereafter when he began to drink excessively and associate with violent individuals. After losing his job in El Salvador, and as he describes it, "hitting rock bottom" the applicant decided to come to the United States in 1979 at the age of twenty-one. Although he initially lived with a friend, it appears he was asked to leave, and subsequently began his life of crime in the United States after joining a street gang. As the applicant notes, he "became involved with people and activities that influenced my behavior, behavior that I have regretted for more than eighteen years." He engaged in criminal activities to support a drug habit, and ultimately was arrested and convicted of the various offenses described above, including the assault with a deadly weapon offense, which, according to the evidence in the record, occurred when the applicant shot another individual four times with a handgun.

Following the applicant's release from prison, he states that he was deported to Mexico, where he remained for approximately four weeks, after which he re-entered the United States without inspection at San Ysidro, California.⁵ Following his return to the United States, he again began to associate with the same criminal gang members. However, the applicant's statement describes how his life began to change for the better. He describes the night of September 26, 1986, when he was approached by two individuals, [REDACTED] and [REDACTED] his future wife's aunt and uncle, who conducted faith outreach to skid row neighborhoods. According to the applicant, he began living with the [REDACTED] began attending church services, and remained living in their home from that night until he married his wife in July of 1989. According to the applicant's statement, he never returned to drug abuse or any type of criminal behavior since that night, and has "been a passionate and faithful Christian since September 16, 1986, a period exceeding seventeen years." See *Applicant's Statement Dated January 5, 2004, at p.3.*

According to the evidence in the record, the applicant has been a deacon in the Pentecostal church since 1988, and has assisted with various other duties such as collecting the Sunday offering, organizing food distribution to the needy, counseling young adults, and preaching the sermon on Wednesday night services on a rotating basis, and visiting members absent from services. The record contains several items that corroborate the applicant's statement. Among these documents are the statements of the applicant's wife, [REDACTED] a letter from [REDACTED] and [REDACTED] dated January 4, 2004, a statement offered by Esteban Roque Conde, Pastor of the applicant's church, which verifies that the applicant has been a member since 1986, and serves as a deacon. See *Letter from Esteban Roque Conde, dated July 2000.* In addition, the record contains additional letters of recommendation, including a letter from Reverend Santos Ramos, Chaplain of the University of California Medical Center which states that the applicant served as a volunteer one day per week during 1989, during which time he visited patients, performed peer counseling and offered encouragement to those in grief. See *Letter from Reverend Santos, Ramos, Chaplain USC Medical Center, dated July 10, 1991.*

Aside from the letters addressing his spiritual life, the record also contains several letters from the family and friends of the applicant and his wife affirming that the applicant has been very supportive of his wife and children, particularly in assisting his wife cope with significant difficulties in her past arising from sexual abuse perpetrated by her father. In addition, psychological evaluations in the record for the applicant's family

⁵ The fact that the applicant was deported to Mexico instead of El Salvador was no mistake, but rather appears to have been orchestrated by the applicant who misled the arresting officers into thinking that he was a national of Mexico, instead of providing them with his true nationality. In addition, it is also apparent from the various criminal records submitted by the applicant's counsel that the applicant has used numerous aliases while engaged in his California crime spree during the first half of the 1980s.

members indicate that the applicant serves as a significant stabilizing force within the family. *See Evaluations dated December 24, 2003, and December 27, 2003 from Jorge Garcia, Ph.D.*

In addition to the evidence of the contributions made by the applicant to his community and his family, it is noted that the record reflects that he has maintained a stable employment history in recent years. The record contains a letter from what the AAO assumes is the applicant's current employer, Unique Protective Services, confirming that as of August 21, 2003, the applicant was employed as a day shift supervisor, where, according to the company president, he has performed well and has been an outstanding full-time employee since September 29, 2000, earning \$11 per hour. *See Letter from Paul Cottrell, President of Unique Protective Services, dated August 21, 2003.* The documents in the record reflect that the applicant and his spouse have filed tax returns and appear to have a stable family income. Consequently, the AAO finds that the evidence in the record indicates that the applicant has expressed remorse for his prior criminal history, has been rehabilitated, and is now leading a productive life with his family in the United States.

Finally, the AAO turns next to the remaining issue in evaluating the applicant's eligibility for a waiver, i.e., whether the applicant's admission would not be contrary to the national welfare, safety, or security of the United States. The AAO believes that the serious nature of the applicant's offenses, and the fact that he had become a habitual criminal, rendered him a danger to the national welfare, safety, or security of the United States. However, the evidence in the record indicates that he has led a law abiding and productive life for over twenty years. As such, his admission would no longer be considered contrary to the national welfare, safety or security of the United States. Although it is apparent that the applicant at one time posed a significant risk to the community, he can now be considered a law abiding and productive member of society. Consequently, the AAO finds that the applicant has satisfied the remaining requirement for the grant of a waiver under section 212(h)(1)(A). In light of this determination, the AAO finds it unnecessary to address the District Director's findings as to the applicant's eligibility under section 212(h)(1)(B).

In proceedings for an application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met his burden that he merits approval of his application.

ORDER: The appeal is dismissed.