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FILE:



Office: LOS ANGELES

Date:

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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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The District Director, Los Angeles, California, denied the waiver application. The Administrative Appeals Office (AAO) summarily dismissed the appeal of the denial of the waiver application. The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decisions will be affirmed and the application will be denied.

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 crimes involving moral turpitude. The applicant is the spouse of a U.S. citizen and the father of U.S. citizen children. He seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his spouse and children.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative or that the applicant had established he warranted a favorable exercise of discretion in waiving a crime involving moral turpitude that occurred more than 15 years prior. The district director denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated September 23, 2003.

The record reflects that, on June 20, 1981, the applicant was convicted of reckless driving in violation of section 23102(a) of the California Vehicular Code (CVC). The applicant was sentenced to 12 months of probation. On June 8, 1982, the applicant was convicted of theft in violation of section 484(a) of the California Penal Code (CPC). The applicant was sentenced to 5 days in jail. On December 18, 1983, the applicant was arrested and charged with rape by force. On April 11, 1984, the applicant pled guilty to unlawful sexual intercourse with a minor in violation of section 261.5 of the CPC and the rape by force charge was dismissed. The applicant was sentenced to 270 days in jail and 36 months of probation.

On September 7, 1987, the applicant was convicted of use/under the influence of a controlled substance in violation of section 11550 of the Health and Safety Code of California (HSCC). The applicant was sentenced to 90 days in jail. Section 11550 of the HSCC provides, in pertinent part:

No person shall use, or be under the influence of any controlled substance which is (1) specified in subdivision (b), (c), or (e), or paragraph (1) of subdivision (f) of Section 11054, specified in paragraph (14), (15), (21), (22), or (23) of subdivision (d) of Section 11054, specified in subdivision (b) or (c) of Section 11055, or specified in paragraph (1) or (2) of subdivision (d) or in paragraph (3) of subdivision (e) of Section 11055, or (2) a narcotic drug classified in Schedule III, IV, or V, except when administered by or under the direction of a person licensed by the state to dispense, prescribe, or administer controlled substances . . .

On April 4, 1992, the applicant was charged with driving under the influence in violation of 23152(a) of the CVC and driving a vehicle while having greater than 0.08 percent of alcohol in his blood in violation of section 23152(b) of the CVC. On May 5, 1992, the applicant was convicted of driving a vehicle while having

greater than 0.08 percent of alcohol in his blood and the charge of driving under the influence was dismissed. The applicant was sentenced to 36 months of probation.

On December 11, 1996, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), based on an approved Petition for Alien Relative (Form I-130) filed by the applicant's U.S. citizen spouse. On June 9, 1997, the applicant was charged with driving under the influence in violation of section 23152(a) of the CVC and driving a vehicle while having greater than 0.08 percent of alcohol in his blood in violation of section 23152(b) of the CVC. On August 25, 1997, the applicant was convicted of driving a vehicle while having greater than 0.08 percent of alcohol in his blood and the charge of driving under the influence was dismissed. The applicant was sentenced to 60 months probation.

On April 13, 1999, the applicant filed the Form I-601 with documentation supporting his claim that the denial of the waiver would result in extreme hardship to his family members.

On December 29, 2003, the applicant appealed the district director's decision to the AAO. On October 26, 2004, the AAO summarily dismissed the appeal because the applicant had failed to identify any erroneous conclusion of law or statement of fact in the district director's decision.

On November 29, 2004, the applicant filed a motion to reopen before the AAO. In support of the motion, counsel submitted proof that he had submitted a brief identifying a basis for the appeal and a copy of the brief. In the brief, counsel asserts that the district director erred in finding that the applicant's wife and children would not experience extreme hardship if the applicant were to be removed to Mexico and finding that the applicant did not warrant a favorable exercise of discretion. *See Applicant's Brief* dated November 14, 2003. The entire record was reviewed and considered in rendering a decision on in this case.

The record reflects that, on April 9, 1988, the applicant married his spouse, [REDACTED] [REDACTED] is a native of Mexico who became a lawful permanent resident in 1989 and a naturalized U.S. citizen in 1996. The applicant and [REDACTED] have a 20-year old son, an 18-year old daughter, a 17-year old son and an 11-year old son who are all U.S. citizens by birth. The record reflects that the applicant and [REDACTED] are in their 40's and there is no evidence that [REDACTED] [REDACTED] has any health concerns. The record reflects further that the applicant pays federal taxes.

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 . . .
 - (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. (emphasis added.)

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), (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]

(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 district director based the finding of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act on the applicant's admission to and convictions for theft and unlawful sexual intercourse with a minor, crimes involving moral turpitude and counsel does not contest the district director's determination of inadmissibility.

The AAO also finds that the applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), as an alien who has been convicted of use/under the influence of a controlled substance, a crime *relating* to a controlled substance. The AAO conducts the final administrative review and enters the ultimate decision for USCIS on all immigration matters that fall within its jurisdiction. The AAO reviews each case de novo as to all questions of law, fact, discretion, or any other issue that may arise in an appeal that falls under its jurisdiction. Because the AAO engages in de novo review, the AAO may deny an application or petition that fails to comply with the technical requirements of the law, without remand, even if the district or service center director does not identify all of the grounds for denial in the initial decision. See *Helvering v. Gowran*, 302 U.S. 238, 245-246 (1937); see also, *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

A section 212(h) waiver is generally not available to section 212(a)(2)(A)(i)(II) cases involving controlled substance crimes. Indeed, 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. In this case, the applicant was convicted of a violation related to an unknown controlled substance. The controlled substances referenced in section 11550 of the HSCC do not include marijuana. Therefore, the AAO finds that the applicant was convicted of a violation of a law related to a controlled substance other than marijuana. Thus, the applicant is statutorily ineligible to be considered for a section 212(h) waiver.

The AAO notes that, even if the applicant were not statutorily ineligible for relief, the applicant would not merit a waiver as a matter of discretion, whether he had established rehabilitation or extreme hardship to his family members. This would be due to the particular seriousness of the applicant's conviction for unlawful sex with a minor.

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 not met his burden. Accordingly, the previous decisions will be affirmed.

ORDER: The previous decisions are affirmed. The application is denied.