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U.S. Citizenship
and Immigration
Services

H2

[REDACTED]

FILE:

[REDACTED]

Office: LOS ANGELES, CA

Date: JUN 19 2006

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, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Los Angeles, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Mexico 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 crimes involving moral turpitude. The applicant is the spouse of a naturalized citizen of the United States 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 spouse and children.

The district director 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 October 5, 2004.

The AAO notes that the Form I-292 Decision page announcing the decision states that the district director is denying the applicant's Application for Waiver of Ground of Excludability (Form I-601). The record reflects that the applicant also requires approval of an Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212). As the focus of the discussion and the final determination of the district director contained therein address the applicant's Application for Waiver of Ground of Excludability (Form I-601), the AAO likewise focuses on the Form I-601 application and arrives at a decision solely regarding appeal of the Form I-601 application.

On appeal, counsel contends that the appeal should be granted because the decision of the district director used the wrong statute in adjudicating the matter. Counsel asserts that the correct standard of review is provided under section 212(h)(1)(A) of the Act as opposed to section 212(h)(1)(B) of the Act. Moreover, counsel indicates that if extreme hardship must be proved in the instant application, the decision of the district director failed to consider extreme hardship imposed on the applicant's children as provided for under section 212(h)(1)(B) of the Act. *Appeal Brief*, undated. In support of these assertions, counsel submits a brief and a declaration of the applicant's spouse. The entire record was reviewed and considered in arriving at a decision on the appeal.

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 [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 record reflects that the applicant's most recent conviction occurred on January 13, 1983.

An application for admission or adjustment of status 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). There has been no final decision correctly made on the applicant's I-485 application, so the applicant, as of today, is still seeking adjustment of status to that of a lawful permanent resident of the United States.

The crimes involving moral turpitude for which the applicant was found inadmissible occurred more than 15 years prior to the date on which the AAO is considering the applicant's appeal. The AAO finds that the district director erred in basing her decision on section 212(h)(1)(B) of the Act and failing to consider the eligibility of the applicant for waiver under section 212(h)(1)(A).

The record does not establish that the admission of the applicant to the United States would be "contrary to the national welfare, safety, or security of the United States." The other factors weighing in favor of the applicant include the fact that the applicant has not been charged with a crime since 1990, the applicant's convictions occurred more than 15 years ago, and the applicant was granted a certificate of rehabilitation in July 1999, demonstrating the applicant's rehabilitation.

The grant or denial of the above waiver does not turn only on fulfillment of the statutory requirements identified at section 212(h)(1)(A) of the Act. It also hinges on the discretion of the Secretary and pursuant to such terms, conditions and procedures as he may by regulations prescribe.

On appeal, the applicant's spouse states that she and the applicant have five United States citizen children and that she and the children cannot bear to be separated from the applicant. *Declaration of [REDACTED] in Support of I-212 Waiver Filed on Behalf of [REDACTED]* dated February 22, 2002. The applicant's spouse states that the applicant is "hard-working, attentive, supportive, and loving." *Id.* She indicates that she does not want to depart from the United States and reside in Mexico if the applicant's waiver is denied.

Id. The applicant's spouse asserts that she would lose everything that she and the applicant have worked for if the applicant's waiver request is denied. *Id.* She contends that she cannot afford the couple's bills and expenses in the absence of the applicant. *Id.*

The favorable factors in the application are the fact that the applicant has not been convicted of a crime since his convictions more than 15 years ago and the granting to him of a certificate of rehabilitation. In addition, the applicant is the spouse of a United States citizen and has five United States citizen children who have articulated that they will suffer hardship if they are separated from the applicant.

The unfavorable factors presented in the application are the applicant's multiple criminal convictions and the failure of the record to demonstrate the applicant's remorse for his actions. The AAO cannot emphasize enough the seriousness with which it regards these flagrant breaches of the law, however the applicant has established that the favorable factors in his application outweigh the unfavorable factors. The district director's denial of the I-601 application was thus improper.

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 now met that burden.** Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained and the application is approved.