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

H2

FILE:

Office: MANILA, PHILIPPINES

Date: MAY 23 2006

IN RE:

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 waiver application was denied by the Acting Immigration Attaché, Manila, Philippines, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of the Philippines 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 parent of a naturalized United States citizen and the spouse of a lawful permanent resident of the United States. He is the beneficiary of an approved Petition for Alien Relative (Form I-130) 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 daughter.

The acting immigration attaché 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 Acting Immigration Attaché*, dated April 7, 2004.

On appeal, the applicant states that his criminal case has been terminated and indicates that, as a result, his civil rights have been restored. The applicant contends, “[T]he alleged ground for the denial of my application has no legal nor factual bases.” *Form I-290B*, dated May 3, 2004. Counsel asserts that the decision of the acting immigration attaché erred in failing to provide a reasoned explanation and states that the applicant clearly demonstrates that his spouse and daughter would suffer extreme hardship if the applicant were not granted a waiver. *Applicant’s Brief in Support of Appeal of Acting Immigration Attache*, dated August 19, 2004. In support of these assertions, counsel and the applicant provide documentation relating to the applicant’s criminal history; an affidavit of the applicant’s daughter; a copy of the United States birth certificate of the child of the applicant’s daughter; a copy of a divorce decree terminating a prior marriage of the applicant’s daughter; copies of financial documents of the applicant’s daughter; a copy of the naturalization certificate of the applicant’s daughter; a psychological report, dated July 25, 2004 and letters of support. The entire record was reviewed and considered in rendering a decision on the applicant’s 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 on January 31, 1989, the applicant was convicted of Falsification of Documents in the Philippines. The applicant was sentenced to one year, eight months and one day imprisonment and fined. The applicant filed for probation and was granted four years of probation in lieu of imprisonment on October 13, 1989.

The AAO acknowledges the applicant's assertion that his case has been terminated and that, as a result, his civil rights have been restored. *Form I-290B*. The AAO notes, however, "[C]ollateral attacks upon an [applicant's] conviction do not operate to negate the finality of his conviction unless and until the conviction is overturned." *In Re Max Alejandro Madrigal-Calvo*, 21 I&N Dec. 323, 327 (BIA 1996) (citations omitted.) Moreover, the AAO cannot go behind the judicial record to determine the guilt or innocence of an alien. *Id.* "[A]n alien is considered convicted for immigration purposes upon the initial [finding of a conviction] and that he remains convicted notwithstanding a subsequent state action purporting to erase all evidence of the original determination of guilt through a rehabilitative procedure." *In re Roldan-Santoyo*, 22 I. & N. Dec. 512, 523 (BIA 1999).

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 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 crime 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 acting immigration attaché erred in basing his 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 applicant has not been charged with a crime since his conviction and the applicant's crime occurred more than 15 years ago, 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). It also hinges on the discretion of the Secretary and pursuant to such terms, conditions and procedures as he may by regulations prescribe.

Counsel contends that the applicant's daughter and spouse would suffer extreme hardship as a result of relocation to the Philippines in order to reside with the applicant. Counsel states that the applicant's daughter has a child from a previous marriage with whom she resides in the United States. *Applicant's Brief in Support of Appeal of Acting Immigration Attache* at 4. Counsel indicates that the applicant's daughter and her former spouse share custody of their child and that if the applicant's daughter relocates to the Philippines and takes her child along, she will violate the custody agreement. *Id.* See also *Joint Parenting Agreement*, dated March 12, 2004. Counsel further asserts that the applicant's daughter enjoys a successful career in her chosen profession in the United States as a surgical care nurse. *Applicant's Brief in Support of Appeal of Acting Immigration Attache* at 4. Counsel states that relocation to the Philippines would result in the loss of her career progression and require the applicant's daughter to begin her career anew in a country where she would face difficulty in finding employment at a similar level and rate of pay. *Id.* at 4-5. Moreover, counsel contends that the applicant's daughter is currently pursuing a graduate degree in nursing that is paid for by her employer and would forego this opportunity if she departed from the United States. *Id.* at 5. Counsel indicates that the applicant's spouse would likewise face extreme hardship if she returned to the Philippines in order to reside with the applicant. Counsel asserts that the applicant's spouse suffers from hypertension and diabetes for which she receives care in the United States. *Id.* Counsel states that the applicant's spouse would be unable to obtain the requisite care in the Philippines owing to prohibitive costs. *Id.* See also *Psychological Report*, dated July 25, 2004. A submitted psychological report indicates that the applicant suffers from diabetes, hypertension and glaucoma. *Psychological Report*. The report states that the applicant is unable to afford the care required in the Philippines. *Id.*

The favorable factors in the application are the fact that the applicant has not been charged with a crime since his conviction; the fact that the applicant's only crime occurred more than 15 years ago and the hardship imposed on the applicant's spouse and child as a result of his inadmissibility. The AAO notes that, in light of the applicant's current age of 70 years, the likelihood of the commission of additional crimes is diminished.

The unfavorable factor presented in the application is the applicant's conviction for Falsification of Documents in the Philippines in January 1989.

Though the applicant's criminal actions cannot be condoned, the applicant has established that the favorable factors in his application outweigh the unfavorable factors.

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.