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FILE:



Office: PORTLAND, OREGON, DISTRICT OFFICE

Date: SEP 29 2006

IN RE:



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:



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 District Director, Portland, Oregon. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant, [REDACTED] a national and citizen of Nicaragua, 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 a crime involving moral turpitude. Mr. [REDACTED] seeks a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain with his family in the United States.

The District Director based the finding of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act on the applicant's conviction on March 4, 1987, of first-degree burglary in the Los Angeles County Superior Court of California. *District Director's Decision*, dated December 12, 2005.

The District Director also found that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly, based on the requirements of section 212(h)(1)(B) of the act. *Id.* The decision addresses Mr. [REDACTED]'s assertion that he was eligible for a waiver under section 212(h)(1)(A) of the Act, which does not require that he establish extreme hardship, because the crime for which he was found inadmissible was committed over 15 years ago. The District Director disagreed with this assertion, explaining that Mr. [REDACTED] had filed his request for adjustment of status (Form I-485) on July 23, 1999, less than 15 years after he committed the crime. *Id.*

On appeal, counsel for Mr. [REDACTED] states that the District Director erred in concluding that Mr. [REDACTED] was not eligible for a waiver under 212(h)(1)(A) of the Act because an adjustment of status application is an ongoing application that remains pending until a final adjudication is made. *Notice of Appeal to the Administrative Appeals Office (AAO)(Form I-290B)*, dated December 28, 2005; *Brief*, dated February 15, 2006. Counsel also states that it was error to find that Mr. [REDACTED] parents would not suffer extreme hardship if [REDACTED] were forced to go to Nicaragua. *Id.*

The record contains letters from Mr. [REDACTED] father, mother, and four siblings, indicating how devastating it would be for them and for Mr. [REDACTED] if he were forced to relocate to Nicaragua, stating that he would be separated from his entire family and from appropriate treatment for his mental illness and would be forced to return to the country they had to flee due to government repression; a missing person notice placed in a local newspaper in California in 1987 by Mr. [REDACTED] father asking for help from the public in locating Mr. [REDACTED] a letter from a parole and probation officer with the Washington County Community Corrections office indicating that Mr. [REDACTED] had successfully completed his probation in 2004; a letter from Dr. Vinocur, Mr. [REDACTED]'s psychiatrist at [REDACTED] a community mental health agency, affirming that Mr. [REDACTED] had been a client of their program in 1996 and again from 1998 to the present and expressing concern that removal from his continuous treatment and medication and the care of his family would be detrimental to his mental health; and reports on general country conditions in Nicaragua and specifically, the lack of mental health care facilities and treatment for mental illness in Nicaragua, including reports from the

World Health Organization. Copies of the naturalization certificates for two of Mr. [REDACTED] siblings and permanent resident cards for his parents and three other siblings are also included in the record.

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 (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

Section 212(h) of the Act provides, in pertinent part, that:

The Attorney General [now, Secretary, Homeland Security, “Secretary”] may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) . . . if –

(1) (A) . . . it is established to the satisfaction of the Attorney General 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 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 indicates that Mr. [REDACTED] was convicted of burglary in Los Angeles in 1987, a crime involving moral turpitude. Citing to *Matter of Alarcon*, 20 I & N Dec. 557 (BIA 1992), counsel correctly points out that Mr. [REDACTED] current application for adjustment of status is more than 15 years after the occurrence of the activity for which he is inadmissible; he is therefore statutorily eligible for a waiver pursuant to section 212(h)(1)(A) of the Act. *Matter of Alarcon* clarifies that an application for adjustment of status, similar to an application for admission, “*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” (emphasis added). *Id.* at 562. Mr. [REDACTED] application therefore remains pending until a final determination is made on this appeal.

The AAO finds that the District Director erred in basing his decision on section 212(h)(1)(B) of the Act and failing to consider the eligibility of Mr. [REDACTED] for a waiver under section 212(h)(1)(A). The AAO also finds that the applicant meets the requirements of section 212(h)(1)(A) of the Act and that there is thus no need to make a hardship determination as required under section 212(h)(1)(B) of the Act.

According to the District Director, during his adjustment interview on January 8, 2001, Mr. [REDACTED] admitted to having a conviction for “criminal mischief” in 1998; counsel noted in a cover letter accompanying Mr. [REDACTED] waiver application (I-601), dated October 1, 2003, that Mr. [REDACTED] was convicted in 2001 for “public indecency,” for which he received three years probation. The District Director concluded in his decision of December 12, 2005, that Mr. [REDACTED] had committed one crime of moral turpitude, the 1987 burglary conviction for which Mr. [REDACTED] was found inadmissible and for which Mr. [REDACTED] now seeks a waiver of inadmissibility. The AAO will base this decision on that finding.

The record reflects that Mr. [REDACTED] was born in 1961, and he and his family were forced to flee Nicaragua during the Nicaraguan civil war in the early or mid-1980s; his parents and siblings are all either U.S. citizens or permanent residents; he has been diagnosed with a mental illness for which he has been receiving consistent treatment and medication since 1996; he lives with his parents, and his siblings live in close proximity. His entire family and his psychiatrist have expressed deep concern for Mr. [REDACTED]’s well-being and they comprise a solid support system for him. Although it is clear that Mr. [REDACTED] has had problems with the law in the past, the record does not establish that his admission to the United States would be “contrary to the national welfare, safety, or security of the United States.” The record includes a letter noting successful completion of probation in 2004; the crime for which he is inadmissible occurred almost 20 years ago, and the “criminal mischief” offense occurred eight years ago. The applicant has an otherwise clean record and has shown a willingness to abide with programs, both for treatment and for rehabilitation, thus demonstrating his rehabilitation. He has therefore met the requirements for a waiver of his ground of inadmissibility under section 212(h)(1)(A) of the Act.

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 rests with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met his burden.

**ORDER:** The appeal is sustained.