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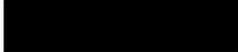
U.S. Citizenship
and Immigration
Services

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FILE:



Office: ST. PAUL, MN

Date:

DEC 06 2008

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The District Director, St. Paul, Minnesota denied the Form I-601, Application for Waiver of Grounds of Inadmissibility. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Canada 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 a crime involving moral turpitude. The record indicates that the applicant is the spouse of a U.S. citizen. The applicant seeks a waiver of inadmissibility in order to reside with his spouse in the United States.

The district director concluded that the record failed to establish that the applicant's spouse would suffer extreme hardship if he were to be removed from the United States, as required for the approval of a waiver of inadmissibility under section 212(h)(1)(B) of the Act. Accordingly, the district director denied the application. *Decision of the District Director*, dated November 15, 2006.

On appeal, counsel contends that the district director improperly applied the law related to the applicant's Form I-601 and failed to examine extreme hardship to the applicant's spouse in light of the totality of the circumstances. *Form I-290B*, dated November 30, 2006.

The record includes, but is not limited to counsel's brief; statements from the applicant and the applicant's spouse; letters in support of the applicant's waiver request from his family, friends, coworkers and employer; financial records for the applicant and his spouse; photographs of the applicant and his spouse, and their residence; and records related to the applicant's criminal history. The entire record was reviewed and considered in arriving at a decision on the appeal.

The record reflects that the applicant was convicted on September 11, 1991 of breaking and entering under section 348(1) of the Criminal Code of Canada (CCC) and was sentenced to 30 days in jail. It also establishes that, on July 28, 1993, the applicant pled guilty to theft of monies under section 334(b) of the CCC and was sentenced to 12 months probation and fined \$550.

Section 212(a)(2)(A) of the Act states in pertinent part, that:

- (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:

- (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 AAO finds the district director to have erred in considering the applicant's eligibility for a waiver solely in relation to the requirements of section 212(h)(1)(B) of the Act. Based on the record before it, the AAO concludes that the applicant is eligible for waiver consideration under section 212(h)(1)(A) of the Act as the actions for which he has been found inadmissible took place more than 15 years before he applied for adjustment of status.

The applicant was sentenced on September 11, 1991 for a breaking and entering crime that occurred on August 31, 1991. The theft of monies to which the applicant pled guilty in 1993 took place on or about April 20, 1990. The AAO notes that an application for admission or adjustment 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). The date of decision is the date of the final decision on the application for adjustment of status, which, in this case, must await the AAO's findings in the present matter.¹ Therefore, section 212(h)(1)(A) of the Act applies to the applicant as the crimes for which he has been found inadmissible to the United States occurred more than 15 years prior to his application for adjustment of status.

In order to be eligible for a section 212(h)(1)(A) waiver, the applicant must demonstrate that his admission to the United States would not be contrary to its national welfare, safety, or security and that he is rehabilitated. There is no indication that the applicant has ever relied on the government for financial assistance or will rely

¹ The AAO notes that the appeal of the Form I-601 is part of the process of adjustment of status and, therefore, technically, the application for adjustment of status is not final until the appellate process is complete.

on the government for financial assistance. The record demonstrates that the applicant and his spouse are both successfully employed. The record contains no indication that the applicant is involved with terrorist-related activities, has engaged in criminal activity in the United States and or has been convicted of any crimes in Canada since 1993. The AAO notes that, in 1994, the applicant was charged with failure to comply with the reporting conditions of his probation under his 1993 conviction for theft, but that as of June 24, 1998, proceedings against the applicant in this matter were stayed and any outstanding warrants vacated. Further documentation related to the applicant's 1993 conviction establishes that, on December 7, 1995, the Provincial Court in Parksville, British Columbia issued a warrant for the applicant, ordering him to serve a 33-day sentence for failure to meet the payment deadline for the \$550 fine assessed against him. The warrant does not indicate that it was executed.² The record also includes more than 30 letters in support of the applicant's waiver application from family members, friends and coworkers attesting to his character and the positive role he plays in their lives. Based on the evidence before it, the AAO finds that admitting the applicant to the United States would not be contrary to its national welfare, safety, or security and that the applicant is rehabilitated.

The granting of the waiver is discretionary in nature. The favorable discretionary factors for the applicant in the present case include his marriage to a U.S. citizen, the absence of a criminal record in the United States, his rehabilitation following the crimes he committed in Canada and the esteem in which he is held by those with whom he works and lives. The unfavorable factors are the applicant's criminal convictions and his unlawful employment in the United States from 1998-2003, as described in the Form G-325A, Biographic Information sheet, and attachment submitted by the applicant. While the crimes committed by the applicant cannot be condoned, the AAO nevertheless finds that taken together, the favorable factors in the present case outweigh the adverse factors. Accordingly, the appeal will be sustained,

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). In the present matter, the applicant has met his burden.

ORDER: The appeal is sustained.

² The AAO notes that the applicant states that he paid the \$550 fine in 2000 but that he failed to keep the receipt.