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

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FILE:

Office: LOS ANGELES

Date:

JAN 08 2007

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

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 and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated February 17, 2005.

The record reflects that, on July 5, 1983, the applicant was convicted of attempted burglary in violation of section 459 of the California Penal Code (CPC). The applicant was sentenced to 18 months of probation and 15 days in jail. On December 1, 1983, the applicant was convicted of burglary in violation of section 459 of the CPC. The applicant was sentenced to 36 months of probation and 365 days in jail. On December 5, 1984, the applicant was convicted of grand theft in violation of section 487.2 of the CPC. The applicant was sentenced to 24 months of probation and 60 days in jail. On June 2, 1997, the applicant's conviction for burglary was set aside and the charges were dismissed pursuant to section 1203.4 because he had fulfilled the conditions of his probation. On August 1, 1997, the applicant's conviction for attempted burglary was set aside and the charges were dismissed pursuant to section 1203.4 because he had fulfilled the conditions of his probation. On February 21, 1991, the applicant's conviction for grand theft was set aside and the charges were dismissed pursuant to section 1203.4 because he had fulfilled the conditions of his probation.

On July 15, 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 27, 2003, 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 appeal, counsel contends that the district director erred in failing to consider the extreme hardship to the applicant's spouse and children if he were to be removed to Mexico. *See Applicant's Brief* dated April 18, 2005. Counsel also asserts that the applicant is eligible for a waiver since 15 years have passed since he committed the crimes, he has shown rehabilitation, and his admission would not be contrary to the national welfare, safety or security of the United States. In support of the appeal, counsel submitted the above-referenced brief, an affidavit from the applicant's daughter, an employment letter for the applicant's spouse and copies of documentation previously provided. The entire record was reviewed and considered in rendering a decision in this case.

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 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 attempted burglary, burglary, and grand theft, crimes involving moral turpitude. Counsel does not contest the district director's determination of inadmissibility.

The record reflects that, on February 5, 1988, the applicant married [REDACTED] Ms. [REDACTED] who is a U.S. citizen by birth. The applicant's mother is a native and citizen of Mexico who became a lawful permanent resident in 2000. The applicant's brother is a native of Mexico who became a naturalized U.S. citizen in 1998. The applicant's wife's parents and siblings are U.S. citizens or lawful permanent residents. The applicant and Ms. [REDACTED] have a 21-year old son, a 20-year old daughter and a 17-year old daughter who are all U.S. citizens by birth. The applicant's 20-year old daughter has two children who are both U.S. citizens by birth. The record reflects further that the applicant is employed and pays federal taxes.

The record reflects that the applicant applied for adjustment of status on July 15, 1996. 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). No final decision has been made on the applicant's Form I-485, so the applicant, is still seeking admission by virtue of adjustment of status. Therefore, the crimes involving moral turpitude for which the applicant was found inadmissible occurred more than 15 years prior to the applicant's application for adjustment of status.

The AAO finds that the district director erred in basing his decision on section 212(h)(1)(B) of the Act and failed to consider the eligibility of the applicant for waiver under section 212(h)(1)(A). The record reflects that the applicant has not been convicted of any crimes since his convictions for attempted burglary, burglary and grand theft in 1983 and 1984. The record establishes that, since 1984, the applicant does not possess a criminal record in the United States. The record further establishes that the applicant has been rehabilitated and that the admission of the applicant to the United States would not be "contrary to the national welfare, safety, or security of the United States."

The record reflects that the applicant meets the requirements for a waiver of his grounds of inadmissibility under section 212(h)(1)(A) of the Act. Further, the AAO notes that, even though the applicant's family would not suffer *extreme* hardship, they would suffer emotional and financial hardship as a result of their separation from the applicant. The applicant contributes approximately \$28,000 to the household income. The applicant not only provides financial assistance to his 20-year old daughter and grandchildren, but also acts as a surrogate father to his grandchildren. The applicant and Ms. [REDACTED] have been married for over 18 years and it would be an emotional hardship for them to be separated if the applicant were removed from the United States. Additionally, it would be a hardship for Ms. [REDACTED] and her children to accompany the applicant to Mexico because they would face adjustment to a lower standard of living, separation from friends and family, a new culture and language.

The unfavorable factors presented in the application are the applicant's convictions for attempted burglary, burglary and grand theft in 1983 and 1984. The AAO notes that the applicant has not been charged with a crime since 1984 and the applicant's crimes involving moral turpitude occurred more than 15 years ago, demonstrating the applicant's rehabilitation. The applicant has a U.S. citizen spouse to whom he has been married over 18 years, he has been steadily employed for over 17 years, he has paid taxes during this employment, he is settled in the community and provides emotional and financial support to family members in the United States.

The applicant has established that the favorable factors in his application outweigh the unfavorable factors. The district director's denial of the Form I-601 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.