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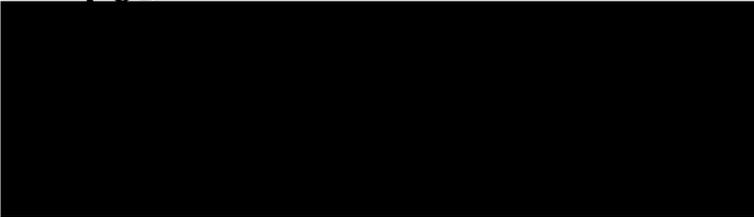
U.S. Department of Homeland Security
20 Massachusetts Avenue NW, Rm. 3000
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U.S. Citizenship
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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: NOV 15 2007

IN RE:

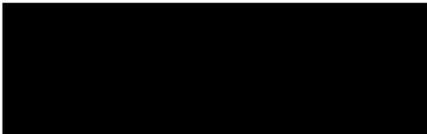
Applicant:



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 waiver application was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant is a native and citizen of Cuba 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 married to a naturalized United States citizen and he is the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant 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 United States citizen spouse.

The Director found that the applicant was ineligible to apply for a waiver under section 212(h)(1)(A) of the Act, in that his “conviction of a Crime Involving Moral Turpitude did not occur in excess of 15 years prior to his filing for adjustment of status.” *Director’s Decision*, dated June 15, 2006. Additionally, the Director found the applicant failed to establish that extreme hardship would be imposed on his spouse, under section 212(h)(1)(B) of the Act, and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Id.*

On appeal, the applicant’s wife states she depends on the applicant to help her around the house because of a work-related injury. *Letter attached to Form I-290B*, filed July 19, 2006.

The record includes, but is not limited to, two letters from the applicant’s wife, medical reports regarding the applicant’s wife’s injuries, and court dispositions for the applicant’s arrests and convictions. The entire record was reviewed and considered in arriving at a decision on the appeal.

The record reflects that on January 25, 1985, the applicant was convicted of assault in the second degree by the Supreme Court of State of New York and was sentenced to five (5) years probation.

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

(A) *Conviction of certain crimes.*—

- (i) In general.—Except as provided in clause (ii), any 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...

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

- (h) Waiver of subsection (a)(2)(A)(i)(I), (II), (B), (D), and (E).—The Attorney General [now the Secretary of Homeland Security, “Secretary”] may, in his

discretion, waive the application of subparagraphs (A)(i)(I)...of subsection (a)(2) if—

(1) (A) in the case of any immigrant it is established to the satisfaction of the [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 established to the satisfaction of the [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...

(2) the [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

The applicant was convicted of assault in the second degree on January 25, 1985. The applicant applied for adjustment of status on April 8, 1986. *Form I-485A*, filed April 8, 1986. The Director is correct in that the applicant's conviction did not occur in excess of 15 years prior to his filing for adjustment of status; however, an application for admission or adjustment is a "continuing" application, adjudicated on the basis of 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-485A application filed on April 8, 1986, so the applicant, as of today, is still seeking admission by virtue of his application for adjustment of status. Therefore, the crime 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 Director erred in finding the applicant ineligible for a waiver under section 212(h)(1)(A) of the Act. The applicant's wife states that the applicant "has stayed out of trouble for more than 21 years. Please consider that [the applicant] never had any trouble in his native Cuba, and [they] have been happily married for 18 years. [The applicant] holds a security Guard License in the State of New York.

To be a security Guard in NY [one] need[s] to clear [sic] by the FBI. [The applicant] was recently checked by Home-land [sic] Security when he applied for his HazMat endorsement as a Tractor Trailer driver and received the endorsement." Letter from [redacted] attached to Form I-290B, dated July 1, 2006; see also Letter from [redacted] Program Manager, Transportation Security Administration, dated June 22, 2005 (The applicant "do[es] not pose a security threat."). Additionally, the applicant's wife states that at the time of his conviction, the applicant "was 24 years old and as [the applicant] always tell[s] [her] that, when he committed this horrible act, 'he was drunk, stupid and young, a letal [sic] combination'. [The applicant] never drank again after that." Letter from [redacted] dated May 12, 2006. The applicant "is a productive member of society, a faithful tax payer, and aside from this brush with the law that he had, he has been a good citizen for over 22 years." *Id.* The record reflects that on April 10, 1987, the applicant was arrested for battery on a police officer and resisting arrest, and was convicted of obstructing justice-resisting arrest. The AAO notes that the applicant has not been convicted of any additional crimes since his last conviction in 1987, and has therefore established his rehabilitation. Additionally, the record of proceedings 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 record reflects that the applicant meets the requirements for waiver of his grounds of inadmissibility under section 212(h)(1)(A) of the Act. Further, the AAO notes that the applicant's wife would suffer emotional and financial hardship as a result of their separation from the applicant. See Letter from [redacted] attached to Form I-290B, *supra* (She "always [has] pain in [her] shoulder, wrist and neck...[The applicant] is [her] only help, [she is] a woman that can not [sic] have children. [The applicant] does the cooking, the cleaning and shopping in the house. Because of [her] injury [she] can not [sic] do any of those things, and neither carry any heavy things in [her] hands. If [the applicant is taken away, she] will be also homeless and will not be able to pay [her] mortgage, that [they] have together, and all [their] bills."); see also Notice of Decision, State of New York – Workers' Compensation Board, dated May 11, 2006 ("The claimant Elba Franquiz had a work related injury amended to include the neck and consequential shoulder."); see also Letter from Eastside Medical Group, dated February 15, 2006 (The applicant's wife was diagnosed with right cervical radiculopathy and herniated discs, right shoulder derangement with impingement as well as acromioclavicular sprain, right wrist ligamental sprain/tear, and left shoulder derangement-consequential in nature. The applicant's wife does physical therapy three times per week and weekly massage therapy.).

The favorable factors presented by the applicant are the hardship to his United States citizen wife, who depends on him for emotional and financial support; the applicant's stable work history in the United States; the applicant's history of paying his federal income taxes; and the lack of any other criminal convictions since his last conviction in 1987.

The unfavorable factors presented in the application are the applicant's convictions for assault in the second degree in 1985 and obstruction of justice in 1987. The AAO notes that the applicant has not been charged with any crimes since his last conviction and the applicant's crimes occurred more than 20 years ago.

While the AAO does not condone his actions, the applicant has established that the favorable factors in his application outweigh the unfavorable factors. The Director's denial of the I-601 application is withdrawn.

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.