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

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[REDACTED]

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: AUG 28 2008

IN RE: [REDACTED]

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 PETITIONER:

[REDACTED]

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, Director
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 applicant is a native and citizen of Honduras 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 (First Degree Robbery). The applicant is the husband of a U.S. Citizen and the beneficiary of an approved Petition for Alien Relative. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h) in order to remain in the United States with his wife.

The service center director concluded that the applicant had failed to establish extreme hardship would be imposed on a qualifying relative. The waiver application was denied accordingly. *See Decision of the Service Center Director* dated April 12, 2006.

On appeal, counsel states that the waiver application was improperly denied and the applicant had established that a denial of the waiver would result in extreme hardship to his family. *See Notice of Appeal* filed May 15, 2006. Counsel additionally states that the waiver application was prepared without the assistance of an attorney and the preparer did not tell the applicant that he needed to submit documentation to establish extreme hardship to the qualifying relative. *See letter from counsel in support of appeal* dated July 3, 2008. Counsel further states that the applicant should be given another opportunity to prove extreme hardship to his family members. *Id.* Evidence submitted with the waiver application includes letters from the applicant and his wife and documentation submitted in support of the applicant's application for adjustment of status. The entire record was reviewed and considered in arriving at a decision on the 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 (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

Section 212(h) states in pertinent part:

(h) The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) . . . if-

(1)(A) [I]t is established to the satisfaction of the Attorney General that-

(i) [T]he 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 applicant was convicted of first degree robbery, a crime involving moral turpitude, on November 26, 1990 in Nassau County, New York. This conviction renders the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The crime involving moral turpitude for which the applicant was found inadmissible occurred in 1990. Since more than 15 years have passed since the criminal activity for which he was convicted, the applicant is statutorily eligible for a waiver pursuant to section 212(h)(1)(A) of the Act. The AAO therefore finds that the service center director erred in basing his decision on section 212(h)(1)(B) of the Act and failing to consider the eligibility of the applicant for a waiver under section 212(h)(1)(A).

The record reflects that the applicant is a forty-three year-old native and citizen of Honduras who has resided in the United States since April 1982, when he entered without inspection. His wife is a thirty-one year-old native and citizen of the United States. They reside together in the Bronx, New York with their U.S. Citizen daughter, who is now eleven years old. The applicant has three other U.S. Citizen children.

In addition to his 1990 conviction for robbery, the applicant was also arrested and charged with resisting arrest, fighting, and possession of a controlled substance on February 8, 1989, and for assault in 1994, but these charges were dismissed. 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." Further, the record establishes that the applicant has rehabilitated. He has not been convicted of a crime in over eighteen years and records indicate that he has been employed in the United States and has filed income tax returns. *See U.S. Individual Income Tax Returns filed jointly with the applicant's spouse for tax years 2002 to 2004, submitted with affidavit of support.*

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y*, 7 I&N Dec. 582 (BIA 1957).

In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

See Matter of Mendez-Morales, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, “[B]alance the adverse factors evidencing an alien’s undesirability as a permanent resident with the social and humane considerations presented on the alien’s behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country.” *Id.* at 300. (Citations omitted).

The adverse factors in the present case are the applicant’s November 26, 1990 conviction for the offense of first degree robbery and his illegal entry into the United States in April 1982 and unlawful presence from that date until he filed his application for adjustment of status on September 2, 2003.

The favorable factors in the present case are the applicant’s family ties in the United States, including a U.S. Citizen wife to whom he has been married since December 2000, and four U.S. Citizen children. Evidence on the record also indicates that the applicant has been employed in the United States and has filed income tax returns.

The AAO finds that the crime committed by the applicant is serious in nature and cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. 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 met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.