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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: CHICAGO, IL

Date:

DEC 04 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:

SELF-REPRESENTED

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 "John F. Grissom".

John F. Grissom, Acting Chief  
Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the District Director, Chicago, Illinois, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the record does not establish that the applicant is inadmissible under section 212(a)(9)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(i) and the relevant waiver application is therefore moot.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to section 212(a)(9)(A)(i) of the Act for having illegally re-entered the United States after being deported. The applicant is the spouse of a U.S. citizen and is the beneficiary of an approved Petition for Alien Relative. He seeks a waiver of inadmissibility and permission to reapply for admission into the United States after deportation in order to reside in the United States with his spouse.

The district director determined that the applicant was inadmissible to the United States and requested that the applicant file an Application for Waiver of Grounds of Inadmissibility (Form I-601) and Application for Permission to Reapply for Admission Into the United States After Deportation or Removal (Form I-212). *See Request for Evidence* dated December 19, 2002. The district director concluded that the applicant was ineligible for a waiver of inadmissibility because he was inadmissible under section 212(a)(9)(A)(i) of the Act, for which no waiver is available. *See Decision of the District Director*, dated March 14, 2005.

On appeal, the applicant states that he is a good, moral, responsible person and requests that a waiver be granted so that he can remain in the United States with his wife and three children. *See letter from applicant in support of appeal* dated May 12, 2005.

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

(9) ALIENS PREVIOUSLY Removed.-

(A) Certain aliens previously removed.-

(i) Arriving aliens.-Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(ii) Other aliens.-Any alien not described in clause (i) who-

(I) has been ordered removed under section 240 or any other provision of law, or

(II) departed the United States while an order of removal was outstanding, and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(iii) Exception.-Clauses (i) and (ii) shall not apply to an alien seeking admission within a period

if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General has consented to the alien's reapplying for admission.

The record reflects that the applicant entered the United States without inspection in September 1984 and was served with an Order to Show Cause charging him with deportability under former section 241(a)(2) of the Act on April 26, 1990. The applicant waived his right to appear before an immigration judge and was granted voluntary departure on April 27, 1990. *See Form I-274, Notice and Request for Disposition*, dated April 27, 1990. The applicant departed the United States and re-entered without inspection on April 30, 1990. He was again served with an Order to Show Cause on May 1, 1990 charging him with deportability under former section 241(a)(2) of the Act. The Order to Show Cause was canceled and the applicant was granted voluntary departure. *See Form I-274, Notice and Request for Disposition* dated May 1, 1990. The applicant pleaded guilty to illegal entry before the U.S. District Court for the Western District of Texas on May 1, 1990. He then departed the United States under the order of voluntary departure on August 28, 1990. *See Form I-274, Notice and Request for Disposition* dated August 28, 1990. The applicant reentered the United States without inspection in 1995 and has remained in the United States since that date.

The AAO notes that the applicant was convicted of the crime of criminal mischief, a third degree felony, on April 24, 1990 in the 14th Judicial District Court of Dallas County, Texas. Section 28.03(a) of the Texas Penal Code provides:

A person commits the offense of criminal mischief if, without the effective consent of the owner:

- (1) he intentionally or knowingly damages or destroys the tangible property of the owner; or
- (2) he intentionally or knowingly tampers with the tangible property of the owner and causes pecuniary loss or substantial inconvenience to the owner or a third person.

The Board of Immigration Appeals has held that crimes involving criminal mischief and destruction of property do not involve moral turpitude unless malicious intent is required. *See Matter of N-*, 8 I&N Dec. 466 (BIA 1959) (absent proof of intent Delaware conviction for malicious mischief did not necessarily involve base act contrary to moral standards); *Matter of C-*, 2 I&N Dec. 716 (BIA 1946) (Canadian conviction for malicious mischief and damaging private property did not involve moral turpitude because offense did not contain a requirement of malicious intent). As the statute under which the applicant was convicted requires the act be committed only intentionally or knowingly and not with malicious intent, the crime does not involve moral turpitude.

Based on the record, the AAO finds that the applicant, who was never ordered deported by an immigration judge, but rather departed the United States under an order of voluntary departure on two occasions and later reentered the United States without inspection, is not inadmissible under section 212(a)(9)(A) of the Act. Further, he was not convicted of a crime involving moral turpitude and is therefore not inadmissible under section 212(a)(2)(A)(I) of the Act. The waiver application is therefore moot, and, since the applicant was never deported, he is not required to seek permission to reapply for admission into the United States after deportation or removal.

In proceedings for application for waiver of grounds of inadmissibility, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant is not required to file the waiver application. Accordingly, the appeal will be dismissed as moot.

**ORDER:** The appeal is dismissed as moot and the prior decision of the director is withdrawn. The director shall reopen the denial of the I-485 application on Service motion and continue processing the application for adjustment of status.