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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

H2

FILE: [redacted] Office: PHOENIX, ARIZONA Date: AUG 09 2004

IN RE: Applicant: [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 APPLICANT:

[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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Phoenix, Arizona. A subsequent appeal and two motions to reopen were dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a third motion to reopen. The motion will be granted and the previous decisions of the District Director and the AAO will be reaffirmed.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to 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 (CMIT). The applicant is the beneficiary of an approved Petition for Alien Relative as the spouse of a U.S. citizen. He now seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), so that he may remain in the United States and reside with his U.S. citizen spouse.

The District Director concluded that the applicant had failed to establish that extreme hardship would be imposed upon his qualifying family member. The application was denied accordingly. *See District Director's Decision* dated February 27, 2001. The decision was affirmed by the AAO on appeal and on a motion to reopen. *See AAO Decisions,* dated December 13, 2001, and July 2, 2003. A second motion to reopen was dismissed by the AAO on July 2, 2003.

The record reflects that on February 21, 1997, the applicant was convicted in the Superior Court of Arizona, Maricopa County of two counts of the offense of Aggravated D.U.I., a class 4 felony, nondangerous and nonrepetitive offense in violation of A.R.S. § 28-697, 692(A)(1), 692(A)(2), 444, 445, 448, 13-701, 702, and 801. The applicant was sentenced to four months imprisonment for each count and probation for three years. The District Director found that the applicant's conviction was a crime involving moral turpitude.

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

> (A)(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, that:

> (h) 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) (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 . . . .

In this third motion to reopen counsel states that pursuant to the May 27, 2003, Ninth Circuit Court of Appeals decision, *Hernandez-Martinez v. Ashcroft,* 329 F.3d 1117 (9th Cir. 2003), the applicant's conviction

is not a crime involving moral turpitude and therefore not inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act.

In *Hernandez-Martinez* the Ninth Circuit Court of Appeals states:

> petitions for review of the decision of the Board of Immigration Appeals (the Board) holding him to be convicted of a crime of moral turpitude by virtue of his conviction under Arizona law of aggravated driving under the influence. We hold that the statute under which was convicted is divisible and its range does not include only crimes of moral turpitude. Accordingly, we grant petition. . . . On June 15, 1998, he was convicted of aggravated driving or being in actual physical control of a vehicle while under the influence of intoxicating liquor or drugs (aggravated DUI) in violation of Arizona Revised Statutes §§ 28-692(A)(1) and 28-697(A)(1). . . .
>
> Judge Wardlaw wrote separately: "I am pleased to concur in the judgment. I write to clarify that the offense of Driving Under the Influence ("DUI") with a suspended license, as defined by Arizona Revised Statute § 28-697(A)(1), is not a deportable crime of moral turpitude as a matter of either Ninth Circuit or BIA caselaw. . . .

Since this case arises in the Ninth Circuit, *Hernandez-Martinez* is controlling. In the instant case the applicant was convicted for aggravated DUI in violation of Arizona Revised Statutes 28-692 and 28-697(A)(1) and therefore based on the above facts it is clearly shown that the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act for his DUI convictions.

However, the record of proceedings also reveals that on January 29, 1996, in the Mesa City Court, State of Arizona, the applicant was convicted of the offenses of Assault in violation of A.R.S. § 13-1203(A)(1) and Resisting Arrest in violation of A.R.S. § 13-2580(A)(1). The applicant was sentenced to six months probation and a fine of $300.00.

Matter of Medina, 15 I&N Dec. 611 (BIA 1976) held that intent or knowledge can serve as the basis for a finding of moral turpitude in criminal conduct. *Matter of Baker*, 15 I&N Dec. 50 (BIA 1974) and *Matter of Goodalle* 12 I&N Dec. 106 (BIA 1967), both found assault to be a CIMT. *Matter of Danesh,* 19 I&N Dec. 669 (BIA 1988) found assault on a peace officer to be a CIMT where it involves 1) bodily harm to the victim; 2) Knowledge that the victim is an officer; and 3) is performing an official duty. The BIA found that such conduct exhibits a deliberate disregard for the law, a violation of accepted rules of morality and the duties owed to society.

There have been cases where assault has been held not to be a CIMT, but they specify that intentional or reckless conduct is excluded from the statutory definition of the crime. A.R.S. § 13-1203 for which the applicant was convicted of states: "A person commits assault by: 1) Intentionally, knowingly or recklessly causing any physical injury to another person." In addition, the record reveals that the assault was inflicted on a police officer while he was performing his duties. Therefore the applicant remains inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a CIMT.

In this third motion to reopen counsel did not provide any new evidence or documentation regarding the extreme hardship that would be imposed upon the applicant's spouse if he is not permitted to remain in the United States.

The issues in this matter were thoroughly discussed by the District Director and the AAO in their prior decisions. A review of the documentation in the record, when considered in its totality reflects that the applicant has failed to show that his U.S. citizen spouse would suffer extreme hardship if he were removed from the United States. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether the applicant merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the prior AAO's decisions dismissing the appeal will be affirmed.

ORDER: The AAO's previous decisions are affirmed.