U.S. Department of Homeland Security
20 Massachusetts Avenue NW, Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

H2

[redacted]

FILE: [redacted] Office: MIAMI, FL Date: NOV 03 2005

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 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.

Ellen L. Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Miami, Florida 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 Guatemala 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 (attempted sexual abuse). The record indicates that the applicant has a U.S. citizen spouse and child. The applicant seeks a waiver of inadmissibility in order to reside with his family in the United States.

The district director found that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *District Director's Decision,* dated January 10, 2001.

On appeal, counsel asserts that the district director erred in evaluating and applying the facts and law in denying the application. *Form I-290B*, dated, February 8, 2001.

The record contains a brief, affidavits from the applicant and his spouse, a psychological evaluation for the applicant's family, court and probation documents, information on country conditions in Guatemala and medical documents for the applicant's spouse. The entire record was reviewed and considered in arriving at a decision on the appeal.

The record reflects that on March 3, 1988, the applicant was convicted of attempted sexual abuse in the first degree.

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

> (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:

> (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 record is not clear as to the exact date on which the activity resulting in conviction occurred, however, it appears the activity took place in late 1987/early 1988. *See Applicant's Statement*, at 1, dated June 18, 1998. The activity definitely occurred before March 3, 1988, the date on which the applicant was convicted. The AAO notes that 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). As a decision has not been made on the case, the date of application for adjustment of status has technically not taken place yet. Therefore, section 212(h)(1)(A) of the Act applies to the applicant as the crime involving moral turpitude for which the applicant was found inadmissible occurred more than 15 years prior to the applicant's adjustment of status application.

The AAO finds that the district 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) of the Act.

In order to be eligible for a section 212(h)(1)(A) waiver, the applicant must demonstrate that his admission to the United States would not be contrary to its national welfare, safety, or security and that he is rehabilitated. The record indicates that the applicant is employed in two positions and works six days a week for roughly ten hours per day. *Psychological Evaluation*, at 7, dated February 9, 2001. There is no indication that the applicant has ever relied on the government for financial assistance. The record reflects that the applicant was sentenced to 5 years probation, therapy and time served. The applicant completed therapy and complied with the conditions of probation. The record reflects that the applicant made a positive adjustment in probation and was discharged from probation "early as improved". *Letter from Sr. Probation Officer*, undated. The record reflects that the applicant has not been charged with any additional crimes since his conviction in 1988. There is no indication that the applicant is involved with terrorist-related activities. Therefore, the record evidences that admitting the applicant to the United States would not be contrary to its national welfare, safety, or security and the applicant is rehabilitated.

The granting of the waiver is discretionary in nature. There are several favorable discretionary factors for the applicant. The applicant has been married to his U.S. citizen spouse for over eleven years and has a U.S. citizen daughter. The applicant's spouse states that the applicant, "...is a good and kind man and a wonderful father to our daughter...I have never once seen any indication that he could do anything even remotely harmful to any human being." *Affidavit of Applicant's Spouse*, at 1, dated June 18, 1998. The applicant has

other family ties to the United States in the form of the applicant's spouse's four siblings. The record reflects that the applicant is employed.

Furthermore, another favorable factor is that the applicant's inadmissibility will result in extreme hardship to his spouse and daughter if they relocate to Guatemala and will cause difficulty to them if they remain in the United States without the applicant. The record does not indicate that either the applicant's spouse or daughter have any ties to Guatemala and counsel states that the applicant's spouse does not speak Spanish. *Brief in Support of Appeal*, at 3, dated March 5, 2001. Guatemala has pervasive poverty (83%) and has not devoted sufficient resources to ensure adequate educational and health services for children. *Department of State 1999 Guatemala Country Reports*, at 1, 29, dated February 25, 2000. Counsel asserts that Guatemala's economy is based on commercial crops and as a mechanic, the applicant would not be able to make enough money to support his family. *Brief in Support of Appeal*, at 3. Counsel asserts that the applicant and his spouse would be unemployed in Guatemala due to the high unemployment rate, the fact that the applicant has been away for twenty years and the applicant's spouse does not speak Spanish. *Id.* Counsel states that the applicant's spouse has been plagued with several medical problems since her pregnancy in 1996, including surgeries due to a hernia and appendectomy and treatment for spinal stenosis. *Brief in Support of Appeal*, at 3. The record includes doctor's reports to verify these problems. The psychological evaluation states that the applicant's spouse has a history of depression. *Psychological Evaluation*, at 2. However, there are no medical documents to verify this statement. The psychological evaluation states that the applicant's spouse meets the criteria for major depressive episode and the applicant's child meets the criteria for adjustment disorder with anxiety. *Id.* at 8, 9. This is a one-time psychological evaluation and there is no evidence that the applicant's family members are receiving any treatment for the stated psychiatric problems.

The only unfavorable factor presented in the application is the applicant's conviction on March 3, 1988. Although the crime is very serious in nature, there is no police record detailing the circumstances surrounding the activity. *Letter from Probation Officer II*, dated September 26, 1997. The record only includes the applicant's account of the events in which he details being falsely accused by his uncle due to personal problems between the two and pleading guilty due to apparent legal negligence. *See Applicant's Statement*, at 1-2.

Based on a thorough review of the record, the AAO finds that the applicant has established that the favorable factors in his application outweigh the unfavorable factor. Therefore, the district director's denial of the I-601 application was 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 met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.