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U.S. Department of Homeland Security
20 Massachusetts Avenue NW, Rm. 3000
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

H2

[redacted]

FILE: [redacted] Office: NEW YORK, NY Date: FEB 20 2009

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.

John F. Grissom, Acting Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, New York, New York. The matter 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 Colombia who was found to be inadmissible to the United States pursuant to section 212(a)(2)(D)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(D)(i), for having engaged in prostitution within ten years of filing for adjustment of status. The record indicates that the applicant has a U.S. citizen spouse. The applicant seeks a waiver of inadmissibility in order to reside in the United States.

The district director concluded that no waiver was available and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated September 5, 2007, served September 11, 2007.

On appeal, counsel asserts that the director erred in finding that no waiver is available and failed to consider the applicant's eligibility for a section 212(h)(1)(A) waiver. *Form I-290B*, at 3, received October 10, 2007.

The record includes, but is not limited to, counsel's brief, the applicant's criminal record, the applicant's statement and the applicant's spouse's statement, the applicant's spouse's employment letter and the applicant's adjustment of status application. The entire record was reviewed and considered in arriving at a decision on the appeal.

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

> Any alien who-
>
> > (i) ...has engaged in prostitution within 10 years of the date of application for...adjustment of status... 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), (B), (D) . . . 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 alien is inadmissible only under subparagraph (D)(i) or (D)(ii)** . . . or 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 reflects that the applicant pled guilty on February 8, 2001 to prostitution under Article 230.00 of the New York State Penal Code. Therefore, the applicant is inadmissible under section 212(a)(2)(D)(i) of the Act and is required to establish eligibility for a waiver under the standard of section 212(h)(1)(A) of the Act due to her inadmissibility under section 212(a)(2)(D)(i) of the Act.[1]

In order to be eligible for a section 212(h)(1)(A) waiver, the applicant must demonstrate that her admission to the United States would not be contrary to its national welfare, safety, or security and that she is rehabilitated. The record indicates that the applicant is currently employed. *Applicant's Form G-325A*, dated November 27, 2006. The record reflects that the applicant's spouse is employed as well. *Letter from New York City Transit Verifications Specialist*, dated July 24, 2007. Based on their employment, it does not appear that the applicant will be a financial burden on the United States and there is no indication that the applicant has ever relied on the government for financial assistance.

The record reflects that the applicant received one year of conditional discharge. *Certificate of Disposition*, certified December 4, 2006. The record reflects that the applicant has not been charged with any additional crimes since her conviction in 2001. There is no indication that the applicant is involved in any activities that would pose a threat to the public safety or U.S. security. Therefore, the record evidences that admitting the applicant to the United States would not be contrary to its national welfare, safety, or security and that the applicant is rehabilitated.

The granting of the waiver is discretionary in nature. The favorable factors in this matter include the applicant's U.S. citizen spouse, her payment of taxes and general hardship to her spouse.

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[1] The AAO notes that there is a question as to whether the applicant's offense would constitute a crime involving moral turpitude under section 212(a)(2)(A)(i)(I) of the Act. Even if the AAO concluded that it is, the applicant's conviction qualifies for the petty theft exception under section 212(a)(2)(A)(ii)(II) of the Act.

The unfavorable factors include the applicant's conviction, unauthorized period of stay and unauthorized employment in the United States.

Based on a thorough review of the record, the AAO finds that the applicant has established that the favorable factors in her application outweigh the unfavorable factors. Therefore, the district director erred in denying the I-601 application.

In discretionary matters, the applicant bears the full burden of proving 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.