identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

H2

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JAN 06 2009

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.

Ellen C. Johnson

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the Form I-601, Application for Waiver of Grounds of Inadmissibility under Section 212(h) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(h). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a 64-year-old native and citizen of Cuba. The director found the applicant to be inadmissible to the United States under section 212(a)(2)(A) of the Act, 8 U.S.C. §1182(a)(9), for having been convicted of a crime involving moral turpitude. The applicant admits having been convicted of car theft in Cuba in the 1960s. The applicant was paroled into the United States in 1980 and currently seeks to adjust his status to lawful permanent resident under the Cuban Adjustment Act is the beneficiary of an approved Petition for Alien Relative filed on his behalf by her U.S. citizen spouse. He presently seeks a waiver of inadmissibility claiming that his inadmissibility would cause extreme hardship to his spouse.

The director determined that the applicant was inadmissible as an alien convicted of a crime involving moral turpitude. The director further found that the applicant was ineligible for a waiver of inadmissibility because he was not legally married to [redacted] and denial of a waiver would not cause extreme hardship to his step-son. Accordingly, the application for a waiver of inadmissibility was denied.

On appeal, the applicant, through counsel, maintains that his crime was a purely political offense. *See* Applicant's Appeal Brief. Alternatively, the applicant claims that the petty offense exception in section 212(a)(2)(A)(ii)(I) of the Act, 8 U.S.C. § 1181(a)(2)(A)(ii)(I), applies. *Id.* The appeal is accompanied by evidence that the applicant and Bertha Castellanos were legally married on August 10, 2006.

Section 212(a)(2)(A) of the Act, 8 U.S.C. § 1182(a)(2)(A), 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.
>
> (ii) Exception
>
> Clause (i)(I) shall not apply to an alien who committed only one crime if-
>
> (I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of

application for a visa . . . and the date of application for admission to the United States . . .

Section 212(h) of the Act, 8 U.S.C. § 1182(h), provides, in pertinent part:

(h) The [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marihuana if -

(1) (A) in the case of any immigrant it is established to the satisfaction of the [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 before the AAO does not contain a copy of the criminal records relating to the applicant's theft conviction. The AAO nonetheless notes that the applicant admitted, in an addendum attached to his application, that he was convicted in the 1960s for theft of an automobile belonging to a government official. *See* Addendum A. The applicant further states that he was imprisoned for 12 years. In the absence of the conviction documents, the AAO cannot determine the date when the criminal acts in question were committed such that a finding could be made on the applicability of the petty offense exception. The AAO also cannot determine whether the applicant's crime was "completely or totally" political. *See Matter of O'Cealleagh*, 23 I&N Dec. 976 (BIA 2006). The burden of proving admissibility to the United States rests with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. The applicant has failed to establish that either the political or the petty offense exception apply to his case, therefore the AAO affirms the director's finding that the applicant is inadmissible as charged under section 212(a)(2)(A) of the Act, 8 U.S.C. § 1182(a)(2)(A).

Having found that the applicant is inadmissible, the AAO must now determine whether he is eligible for a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h). In this regard, the AAO finds that more than fifteen years have elapsed since the applicant committed any crime.

As noted above, the record does not contain evidence of the exact date of commission or conviction for the car theft offense in Cuba. Nevertheless, the applicant has been in the United States since 1980. The record indicates that he was convicted in 1990 for misdemeanor disorderly conduct, and in 1982 he was arrested on a weapons charge. *See* Miami-Dade Criminal Record. The 1982 arrest resulted in one count being *nolle prossed* and another where adjudication was withheld and the applicant sentenced to probation. *Id.* The record thus establishes that more than 15 years have elapsed since the applicant committed any crime. Therefore, he is eligible for consideration for a waiver under section 212(h)(1)(A) of the Act, 8 U.S.C. § 1182(h)(1)(A).

A waiver under section 212(h)(1)(A) of the Act, 8 U.S.C. § 1182(h)(1)(A), depends upon a finding that the activities for which the applicant is inadmissible occurred more than 15 years before the date of the alien's application for adjustment of status, that the applicant's admission to the United States would not be contrary to the national welfare, safety, or security of the United States, and that the applicant has been rehabilitated.

The record contains a letter from the applicant's wife and step-son, as well as pictures of his family. The letters evidence the applicant's deeply rooted family ties in the United States. On the basis of the evidence in the record, the AAO finds that the applicant's admission to the United States would not be contrary to the national welfare, safety, or security of the United States.[1] The AAO further finds that the applicant has been rehabilitated.[2]

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 that his equities in the United States 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

[1] In this regard, the AAO notes that the applicant was found eligible for parole into the United States in 1980 by a consular official who was advised by the applicant of his car theft conviction. *See* Form I-597.

[2] Having found the applicant eligible for a waiver under section 212(h)(1)(A) of the Act, the AAO need not address his claim of extreme hardship.

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-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "balance 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). After carefully considering the applicant's length of residence in the United States, his family and community ties, and evidence of his good character and rehabilitation, the AAO finds that the applicant's equities outweigh any negative factors. The applicant therefore merits a grant of his waiver application as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212 of the Act, the burden of proving eligibility rests with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.