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U.S. Department of Homeland Security
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Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

H2

[redacted]

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

IN RE: [redacted]

PETITION: 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 PETITIONER:

[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 Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Cuba who was found to be inadmissible to the United States under 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 crimes involving moral turpitude. The applicant has a U.S. citizen spouse and U.S. citizen step-children. He seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), so that he may reside in the United States with his family.

The director concluded that the applicant had 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. *Decision of the Director*, dated May 23, 2006.

On appeal, counsel contends that the applicant's wife and daughter would suffer extreme hardship as a result of the applicant's inadmissibility. *Counsel's Letter*, dated July 26, 2006.

The record indicates that the applicant was convicted of four crimes. In August 1977 he was convicted of robbery with forced entry in Cuba and sentenced to three years in prison. On December 28, 1982, in Dade County Florida, the applicant was arrested and charged with grand theft in the second degree and convicted on February 10, 1983. He was sentenced to 44 days in prison. On March 8, 1987, in Dade County Florida, the applicant was arrested and charged with obstructing a police officer and convicted on April 22, 1987. He was sentenced to one day in jail and fined. On November 30, 1995, the applicant was arrested for battery in the first degree at the misdemeanor level. On December 21, 1995 he pled nolo contendre and was sentenced to probation. On November 27, 1996 he was found to have violated his probation and his sentence was then modified.

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

> (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 . . . or an attempt or conspiracy to commit such a crime . . . is inadmissible.
>
> (B) Any alien convicted of two or more offenses... regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were five years or more 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) . . . 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 applicant has stated that he was convicted of a 1977 robbery in Cuba. While the record does not include his Cuban *Antecedentes Penales*, the AAO notes that robbery is a crime that the Board of Immigration Appeals (BIA) and U.S. courts have found to fall within the category of crimes involving moral turpitude. *Matter of Martin*, 18 I&N Dec. 226 (BIA 1982); *Matter of Carballe*, 19 I&N Dec. 357 (BIA 1986); *Ashby v. INS*, 961 F.2d 555 (5th Cir. 1992). The applicant was also convicted of grand theft under Florida statute 812.014. The AAO observes that, under this statute, an individual may be convicted of intending to permanently deprive an owner of property, a crime involving moral turpitude, or of temporarily depriving an owner of property without having the intent to steal, a crime that does not involve moral turpitude. *Matter of D*, I&N Dec. 143 (BIA 1941). In such "divisible" statutes, the AAO may look to the record of conviction to make a determination as to whether an applicant has been convicted of a crime involving moral turpitude. *See Matter of Short,* 20 I&N Dec. 136 (BIA 1989). The court in *Matter of Short* included the indictment or information, plea, verdict, and sentence in its definition of the record of conviction. *Matter of Short*, at 137-38. In the present matter, the record includes the information, which indicates that the applicant was convicted of a knowing intent to steal and, thus, the AAO finds his 1983 conviction is also for a crime involving moral turpitude.[1] Therefore, the applicant has been convicted of two crimes involving moral turpitude and must seek a waiver of inadmissibility under section 212(h) of the Act.

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[1] Although the applicant was also convicted of obstructing a police officer in 1987 and for battery in 1995, the AAO finds neither crime to constitute a crime involving moral turpitude. With regard to the applicant's conviction for misdemeanor battery in 1995, simple assault or battery is not, as a general rule, deemed to involve moral turpitude for the purposes of the immigration laws, even if the intentional infliction of physical injury is an element of the crime. *Matter of Fualaau,* 21 I&N Dec. 475, 477 (BIA 1996). As the Florida statute under which the applicant was convicted does not indicate any aggravating factors were present in the battery, the applicant's conviction is not a conviction for a crime involving moral turpitude.

The AAO finds that the officer in charge erred in basing his decision solely on section 212(h)(1)(B) of the Act. 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). The date of decision is the date of the final decision on the application for adjustment of status, which, in this case, must await the AAO's findings in the present matter.[2] Therefore, the applicant's I-485 application remains pending and the robbery and theft that have rendered the applicant inadmissible to the United States occurred more than 15 years ago, allowing him to seek a waiver of inadmissibility 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. There is no evidence in the record to indicate that the applicant has been involved in any activities that would undermine national safety or security. The record also reflects that the applicant has not been convicted of any additional crimes since his 1995 conviction, more than 13 years ago. Therefore, the AAO finds the record to demonstrate 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 discretionary factors for the applicant in this case include the applicant's U.S. citizen spouse and step-children, the absence of a criminal record since 1995, and the care that he provides for his family, as established by a letter from his step-daughter, [redacted], and his step-son, [redacted]. [redacted] states that the applicant helps her mother cook and clean, and also helps her with homework. *Letter from* [redacted], dated June 23, 2006. She states that he is the best father she could have hoped for. *Id.* [redacted] states that he has known the applicant to be a hard worker and a true father to his two sisters. *Letter from* [redacted], dated June 20, 2006. He states that he has known the applicant for fourteen years and admires his patience, loyalty, and devotion to his family. *Id.* The AAO finds these favorable factors to outweigh the unfavorable factors presented in the application, the applicant's convictions for robbery, grand theft, obstructing a police officer and battery. Accordingly, the appeal will be sustained.

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 now met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.

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[2] The AAO notes that the appeal of the Form I-601 is part of the process of adjustment of status and, therefore, technically, the application for adjustment of status is not final until the appellate process is complete.