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: CHICAGO, IL Date: JAN 22 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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Ellen C. Johnson

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting District Director ("district director"), Chicago, Illinois, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Poland 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. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States.

The district director concluded 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 Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated April 21, 2006.

On appeal, counsel for the applicant contends that the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act, as he has only been convicted of one crime involving moral turpitude, and that crime meets the petty offense exception found in section 212(a)(2)(A)(ii) of the Act. Counsel further contends that denial of the present waiver application would result in extreme hardship to the applicant's U.S. citizen wife.

The record contains a brief and letters from counsel; statements from the applicant and his wife; a copy of the applicant's birth certificate; a copy of the applicant's passport; banking, tax, and mortgage documentation for the applicant; a copy of the applicant's marriage certificate; a copy of the applicant's wife's naturalization certificate, and; documentation relating to the applicant's criminal convictions. The entire record was reviewed and considered in rendering this decision.

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.
>
> (ii) Exception.-Clause (i)(I) shall not apply to an alien who committed only one crime if-
>
> > . . . .
> >
> > (II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment

> for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

Section 212(h) of the Act provides, in pertinent part, that:

> (h) The Attorney General [now Secretary, Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraphs (A)(i)(I) [or] (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
>
> (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 [now the Secretary of Homeland Security (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 was convicted of three crimes: driving under the influence of alcohol under Illinois Administrative Code § 11-501A2 for his conduct on December 31, 1995; theft, possession of stolen property under Illinois Compiled Statute § 16-1D1 for his conduct on August 1, 1991, and; retail theft under Illinois Revised Statutes § 16A-3A for his conduct on August 1, 1991.

There is ample support to show that the applicant's conviction for driving under the influence ("DUI") is not a crime involving moral turpitude. Nothing in the record shows that the applicant's DUI was aggravated, thus his conviction was for simple DUI. *See Matter of Lopez-Meza*, 22 I&N Dec. 1188, 1194 (BIA 1999). The applicant received a sentence of one year of supervision, with no incarceration, which further supports that his DUI conviction does not constitute conviction of a crime involving moral turpitude.

Counsel contends that the applicant's convictions for theft and retail theft arose out of the same incident, thus they should be treated as a single offense for the purpose of determining whether the applicant has been convicted of more than one crime involving moral turpitude. However, counsel has not cited any legal authority to support that the two convictions should be treated as a single offense.

Counsel asserts that the applicant's conviction for theft, possession of stolen property does not constitute a crime involving moral turpitude, pursuant to the decision of the Board of Immigration Appeals ("BIA") in *Matter of K*, 2 I&N Dec. 90 (BIA 1944). However, in *Matter of K* the BIA found that possession of stolen property is not a crime involving moral turpitude where the applicant did not have knowledge that the property under his control was stolen. *Matter of K*, 2 I&N Dec. at 91. In the present matter, the applicant was convicted of "knowingly obtain[ing] control over certain stolen property," thus the record shows that he was aware he was in possession of stolen property. *Misdemeanor Complaint*, dated August 1, 1991. It is noted that the applicant was convicted of possession of stolen property in connection with his conduct that also led to a conviction for retail theft, which serves as evidence that he was aware that he was obtaining stolen property. Accordingly, the applicant's conviction for theft, possession of stolen property under Illinois Administrative Code § 16-1D1 constitutes a crime involving moral turpitude. *See, e.g., Matter of Serna*, 20 I&N Dec. 579 (BIA 1992).

There is ample support that the applicant's conviction for retail theft under Illinois Revised Statutes § 16A-3A constitutes a crime involving moral turpitude. *See, e.g., Da Rosa Silva v. INS*, 263 F.Supp. 2d 1005, 1010-12 (E.D. Pa. 2003). The applicant does not contest whether this conviction is a crime involving moral turpitude.

As the applicant has been convicted of more than one crime involving moral turpitude, he is not eligible for the "petty offense exception" found in section 212(a)(2)(A)(ii) of the Act. Based on the foregoing, the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

In examining whether the applicant is eligible for a waiver, the AAO will assess whether he meets the requirements of section 212(h)(1)(A) of the Act. The applicant's most recent conviction for which he is inadmissible involved his conduct on August 1, 1991. As this conduct took place over 15 years ago, he meets the requirement of section 212(h)(1)(A)(i) of the Act.

The record does not reflect that admitting the applicant would be contrary to the national welfare, safety, or security of the United States. Section 212(h)(1)(A)(ii) of the Act. While the applicant was convicted of DUI, he performed the culpable conduct on December 31, 1995, approximately 13 years ago. The record does not show that the applicant has engaged in criminal activity since his conviction in 1995. There is nothing in the record that suggests that the applicant has exhibited violent behavior at any time. The applicant has not been a public charge since his arrival in 1986. Accordingly, the applicant has shown that he meets the requirement of section 212(h)(1)(A)(ii) of the Act.

The applicant has shown by a preponderance of the evidence that he has been rehabilitated. Section 212(h)(1)(A)(iii) of the Act. As discussed above, there is no evidence that he has engaged in criminal activity since his conviction in 1995. The record shows that he has conducted himself well during the last 13 years, including purchasing property in the United States, working and paying taxes, providing emotional and economic support for his U.S. citizen wife and stepdaughter, and participating with his community through religious activities. The record does not reflect that the applicant has a propensity to engage in further criminal activity. Accordingly, the applicant has shown that he meets the requirement of section 212(h)(1)(A)(iii) of the Act.

Based on the foregoing, the applicant has shown that he is eligible for consideration for a waiver under section 212(h)(1)(A) of the Act.

In determining whether the applicant warrants a favorable exercise of discretion under section 212(h) of the Act, the Secretary must weigh positive and negative factors in the present case.

The negative factors in this case consist of the following:

The applicant has been convicted of multiple crimes, including retail theft, possession of stolen property, and DUI.

The positive factors in this case include:

The applicant has family ties to the United States, including his wife and stepdaughter; the applicant has not been convicted of a crime since 1995, in approximately 13 years; the applicant owns property in the United States; the applicant works and pays taxes; the applicant provides emotional and economic support for his U.S. citizen wife and stepdaughter, and; the applicant participates with his community through religious activities.

The positive factors in this case outweigh the negative factors.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met his burden that he merits approval of his application.

ORDER: The appeal is sustained.