U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

H2

[redacted]

FILE: [redacted] Office: LOS ANGELES, CALIFORNIA Date: MAR 30 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 District Director, Los Angeles, California. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Mexico. He was found to be inadmissible to the United States pursuant to section 212(a)(2)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A), for having been convicted of crimes involving moral turpitude. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), so that he may remain in the United States with his legal permanent resident spouse and U.S. citizen children.

In a decision dated June 14, 2006, the director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On appeal, counsel for the applicant asserts that the Director erred in finding that the applicant's wife would not suffer extreme hardship due the the applicant's inadmissibility. Counsel contends that the applicant's wife would suffer extreme hardship based on her medical condition and her inability to afford medical care if the applicant is removed from the United States, whether his spouse is left in the United States to care for herself and her children, or if she joins him in Mexico. Counsel submitted additional evidence in support of these claims.

The entire record was reviewed and considered in rendering this decision.

> Section 212(a)(2) of the Act states in pertinent part that:
>
> (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 (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

A crime involves moral turpitude where knowing or intentional conduct is an element of the offense. *Matter of Perez-Contreras,* 20 I&N Dec. 615, 618 (BIA 1992).

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

> (h) The Attorney General may, in his discretion, waive the application of subparagraphs (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 reflects that on August 15, 1990, the applicant was convicted in Los Angeles, California of (1) "petty theft" under section 484(a) of the California Penal Code (CPC) and (2) "presenting false I.D. to a police officer" under section 148.9(a) of the CPC. The applicant was sentenced to one day imprisonment and two years probation. On November 25, 1992, the applicant was convicted of (1) "disorderly conduct/soliciting a lewd act" under section 647(a) of the CPC and (2) "indecent exposure" under section 314(1) of the CPC. On this occasion, the applicant was sentenced to twenty-five days imprisonment and three years probation. A review of the record and the applicable laws indicate that, as the Director correctly noted, engaging in lewd or dissolute conduct or soliciting another to do the same is a crime involving moral turpitude. *See U.S. v. Nunez-Garcia,* 262 F. Supp. 2d 1073 (C.D. Cal. 2003); *Matter or Alfonzo-Bermudez*, 12 I&N Dec. 225 (BIA 1967). Similarly, petty theft under section 484 of the CPC has been found to be a crime involving moral turpitude. *See U.S. v. Esparza-Ponce*, 193 F.3d 1133, 1135-37(9th Cir. 1999). Thus, the Director correctly determined that these two crimes involving moral turpitude rendered the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The Director's decision to deny the applicant's application for waiver of inadmissibility is based solely on consideration of extreme hardship to a qualifying relative under section 212(h)(1)(B) of the Act. However, the AAO finds that consideration of the eligibility of the applicant for waiver under section 212(h)(1)(A) is appropriate at this time, as explained below.

A section 212(h)(1)(A) waiver is dependent upon a showing that the activities for which the applicant is inadmissible occurred more than fifteen years before the date of the applicant's adjustment of status application; the applicant's admission to the United States would not be contrary to the national welfare,

safety, or security of the United States; and the applicant has been rehabilitated. *See* section 212(h)(1)(A) of the Act, 8 U.S.C. § 1182(h)(1)(A). Once eligibility for a waiver is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296 (BIA 1996).

In this case, the record shows that the applicant is eligible for a section 212(h)(1)(A) waiver. An application for admission or adjustment is a "continuing" application, adjudicated on the basis of the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). Here, the applicant filed a Form I-485, Application to Register Permanent Resident or Adjust Status, on November 2, 2004. The AAO notes that the Director denied the applicant's Form I-485 on February 8, 2006, before the applicant was afforded the opportunity to pursue the appellate process with respect to his application for waiver of inadmissibility. Therefore, the denial of the Form I-485 was premature and, as of today, the applicant is still seeking to adjust status to that of a permanent resident.

According to the record, the act or acts giving rise to the applicant's 1990 convictions took place on July 26, 1990. The 1992 convictions were based on a November 24, 1992 arrest, thus the activities for which the applicant was convicted necessarily took place on or before that date. Thus, the crimes involving moral turpitude for which the applicant was found inadmissible occurred more than 15 years prior to the applicant's application for adjustment of status.

In addition, the evidence indicates that the applicant has been rehabilitated and his admission to the United States would not be contrary to the national welfare, safety, or security of this country. In his declaration, the applicant takes responsibility for his past criminal activities and expresses remorse. *Declaration of* [redacted] dated August 24, 2006. In addition, he noted that they were "youthful mistakes" and that their effect on himself as well as his family has weighed heavily on him. *Id.* The applicant has not had any further arrests or convictions for over sixteen years. Furthermore, the applicant has been married for twelve years and appears to have provided a stable environment for his children as well as stepchildren throughout that time. *Id.; Declaration of* [redacted] dated August 24, 2006. Based on the evidence submitted with his Form I-485, it appears that the applicant has also been employed by the same employer, Sheet Metal Service, Inc., since 1996. In light of the foregoing, the AAO finds that the applicant has been rehabilitated and his admission is not contrary to the national welfare, safety, or security of the United States.

Further, the AAO notes that the applicant has submitted evidence on appeal showing that the applicant's spouse suffers from a variety of medical conditions including diabetes, hypertension, dyslipidemia, and had required surgery for abdominal hernia repair, all of which render her unable to work. *Letter from* [redacted] *M.D,* dated August 14, 2006; August 16, 2006 *Psychological Evaluation by* [redacted] *Ph.D.*, dated August 16, 2006; *Declaration of* [redacted] dated August 24, 2006. The applicant's wife indicated that because of her inability to work, she and her children are dependent on the applicant for financial support.

The AAO further finds that the applicant merits a waiver of inadmissibility as a matter of discretion.

The adverse factors in this case are the applicant's criminal convictions over sixteen years ago, his initial entry without inspection and periods of unauthorized presence. The positive factors in this case include the applicant's significant family ties in the United States, including his legal permanent resident spouse and two U.S. citizen children, who are emotionally and financially dependent on him. In addition, the applicant has lived in the United States for over nineteen years; he and his wife have been married and living together for twelve years; the applicant has been continuously employed by the same employer for thirteen years, and has paid taxes while working in the United States. He has taken responsibility for his past criminal history, has expressed remorse for it, and has not had any further arrests or convictions for over sixteen years.

In light of the above, the AAO finds that the applicant meets the requirements for waiver of his grounds of inadmissibility under section 212(h)(1)(A) of the Act. Furthermore, the record shows that the applicant has established that the favorable factors in his application outweigh the unfavorable factors, such that a favorable exercise of discretion is warranted.

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 and the application for waiver of inadmissibility is approved.