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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

H2

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JUN 25 2010

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. section 1182(h)

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Ron Rosenberg for

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, California Service Center. 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 Cuba. He was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a Crime Involving Moral Turpitude (CIMT). The applicant is the spouse of a naturalized U.S. citizen and has four U.S. citizen children. 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 had failed to establish that the bar to his admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on June 7, 2008.

On appeal, counsel for the applicant asserts the director failed to consider social and humane factors in evaluating extreme hardship to the applicant.

Section 212(a)(2)(A) of the Act 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 . . . or an attempt or conspiracy to commit such a crime . . . 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) . . . 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 the applicant was convicted of conspiracy to commit theft of interstate commerce, 18 U.S.C. § 659 and 371, in United States District Court, Southern District of New York, on August 3, 1981 (Case No. 81-00221-02).[1] Crimes involving theft and larceny have long been held to constitute CIMTs. *Matter of De La Neues*, 18 I&N Dec. 140 (BIA 1981); *Matter of Garcia*, 11 I&N Dec. 521 (BIA 1966). Any crime involving conspiracy is a CIMT so long as the underlying crime would constitute a CIMT. *Matter of Short* 20 I&N Dec. 136 (BIA 1989). As such, the applicant has been convicted of a CIMT. The applicant does not contest this finding.

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, which in this case must wait the AAO's findings in the present matter. Any activities resulting in CIMT convictions which occurred fifteen years prior to the final decision on an application may be waived pursuant to section 212(h)(1)(A) of the Act. An examination of the record reveals that the applicant's conviction on August 3, 1981, was over fifteen years prior to the date of his application. As such, he may establish eligibility for a waiver by showing that he is not a risk to the welfare, safety or security of the United States and has been rehabilitated pursuant to section 212(h)(1)(A). The director's decision, as it examined the applicant's waiver application under section 212(h)(1)(B), will be withdrawn.

Although counsel refers to *Matter of Mendez-Morales,* 21 I&N Dec. 296 (BIA 1996), and asserts the director failed to discuss the social and humane factors in establishing extreme hardship to the applicant. The AAO would note that the point of authority to which counsel refers to pertains to establishing extreme hardship, the criteria for an a waiver under section 212(h)(1)(B). *Matter of*

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[1] The applicant was convicted on August 3, 1981 in the United States District Court for the Southern District of New York for the offense of (Count I): unlawfully, willfully and knowingly conspiring together with others to commit offenses against the United States, to wit, to violate Title 18, U.S. Code, Section 659 (Title 18, U.S. Code, Section 371); for the offense of (Count II), unlawfully, willfully and knowingly embezzling, stealing, taking, carrying away and concealing certain goods and chattels which were moving as, and were part of, and constituted an interstate shipment of freight, express and other property (Title 18, U.S. Code, Section 659 and 2); and for the offense of (Count III), unlawfully, willfully and knowingly possessing goods and chattels which were moving as, and where part of, and constituted an interstate shipment of freight, express and other property, knowing such goods and chattels to have been embezzled and stolen (Title 18, U.S. Code, Section 659 and 2).

Mendez-Morales is, however, relevent in an examination of the exercise of discretion once the applicant has established that he has established that his admission would not be contrary to the welfare, safety and security of the United States and has been rehabilitated. Section 212(h)(1)(A) of the Act. An examination of the record reveals the applicant is prima facie eligible to seek a waiver under section 212(h)(1)(A) of the Act, and it is therefore not necessary to establish extreme hardship to a qualifying relative.

The record reveals sufficient evidence to establish that the applicant's admission would not be contrary to the welfare, safety and security of the United States. The applicant's conviction occurred 28 years ago. His conviction was not for a violent or dangerous crime. He has not been convicted of any additional crimes since that time. In addition, the record contains evidence that the applicant has been rehabilitated, including documentation that he successfully completed his probation, is not at risk for recidivism, and statements from friends and family attesting to his good moral character. The applicant is nearly 70 years old and has been married for 26 years to a U.S. citizen. As such, the record indicates that his admission would not be contrary to the welfare, safety and security of the United States and has been rehabilitated.

In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

> In evaluating whether . . . 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 criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

Matter of Mendez-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance 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).

As noted by counsel, the applicant has resided in the United States since 1972, for over three decades. The applicant has significant family ties in the United States, and evidence in the record indicates that he was a stable and positive influence in the support of his family of four U.S. citizen children. As stated, the applicant is now nearly 70 years old and his criminal conviction was 28 years ago. Although the AAO does not condone the applicant's criminal conviction, as noted above, the lack of any recent criminal activity lessens the impact of this negative factor, and as such the AAO finds that the favorable factors outweigh the unfavorable factors in this case. The AAO therefore finds that the applicant qualifies for a 212(h) waiver of his inadmissibility pursuant to 212(a)(2)(A)(i)(I) of the Act.

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 rests with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met his burden.

ORDER: The appeal is sustained.