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

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PUBLIC COPY

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: MAR 16 2006

IN RE: Applicant: [redacted]

APPLICATION: Application for Permission to Reapply for Admission into the United States after Deportation or Removal under section 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

ON BEHALF OF APPLICANT: SELF-REPRESENTED

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Nicaragua who entered the United States without inspection on or about October 14, 1984. On November 29, 1990, the applicant adjusted his status to that of a lawful permanent resident based on an approved Application for Asylum and for Withholding of Removal (Form I-589). On October 9, 1990, in the Municipal Court of California, County of Santa Clara, the applicant was convicted of the offense of annoying or molesting a child in violation of section 647.6 of the California Penal Code (CPC). In addition, on July 1, 1993, in the Municipal Court of California, County of Alameda, the applicant was convicted of the offense of petty theft in violation of section 484(a) of the CPC. On July 14, 2000, the applicant was served with a Notice to Appear (NTA) for a removal hearing before an immigration judge. On August 28, 2000, an immigration judge ordered the applicant removed from the United States pursuant to section 237(a)(2)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1227(a)(2)(A)(ii), as an alien who at any time after admission is convicted of two or more crimes involving moral turpitude. Consequently, on September 12, 2000, the applicant was removed form the United States. The applicant is inadmissible under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii). He seeks permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii) in order to travel to the United States and reside with his U.S. citizen mother and children.

The Director determined that the applicant was inadmissible under 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 crimes involving moral turpitude and that he is not eligible for any exceptions or waivers under the Act based on the severity of his crimes. Additionally, the Director determined that the unfavorable factors in the applicant's case outweighed the favorable ones. The Director then denied the Form I-212 accordingly. *See Director's Decision* dated December 15, 2004.

The AAO notes that the record contains a Notice of Entry of Appearance as Attorney or Representative (Form G-28) that was not signed by the applicant. Therefore the AAO will not be sending a copy of the decision to the attorney mentioned on the Form G-28, but this office will accept the submitted information.

Section 212(a)(9)(A) of the Act states in pertinent part:

> (A) Certain aliens previously removed.-
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> . . . .
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> (ii) Other aliens.- Any alien not described in clause (i) who-
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> (I) has been ordered removed under section 240 or any other provision of law, or
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> (II) departed the United States while an order of removal was outstanding, and seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an aliens convicted of an aggravated felony) is inadmissible.

> (iii) Exception.- Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General [now Secretary, Homeland Security, "Secretary"] has consented to the alien's reapplying for admission.

On appeal, counsel states that the Service held that the applicant is not eligible for re-admission due to his conviction of a crime in violation of section 647.6 of the CPC. Counsel refers to recent decisions by the Ninth Circuit Court of Appeals that states that a crime in violation of CPC section 647.6 is not an "aggravated felony", and, therefore, the applicant is eligible to file an Application for Waiver of Grounds of Inadmissibility (Form I-601) under section 212(h) of the Act, 8 U.S.C. § 1182(h). In addition, counsel states that the applicant's conviction and his other offenses are all misdemeanors. Counsel further states that the applicant's favorable factors include that the fact that he was an LPR for ten years; his extended family resides in the United States; and he entered the United States at a relatively early age. Finally, counsel states that the applicant feels tremendous remorse for his actions and sincerely hopes that the waiver will be granted in the interest of family unity.

No place in the decision did the Director state that the applicant was convicted of an aggravated felony and therefore the AAO will not discuss the Ninth Circuit Court of Appeals cases referred to by counsel. Based on his convictions the applicant is 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 crimes involving moral turpitude.

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.
> >
> > . . . .

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

> (h) The Secretary may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) . . . if -
>
> > (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 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 AAO agrees with counsel and finds that the Director erred in stating that the applicant is not eligible for any exceptions or waivers under the Act. If the Form I-212 is granted the applicant will be eligible to file a Form I-601 pursuant to section 212(h) of the Act. These proceedings are limited to the issue of whether or not

the applicant meets the requirements necessary for the ground of inadmissibility under section 212(a)(9)(A)(ii) of the Act to be waived.

In *Matter of Tin,* 14 I&N Dec. 371 (Reg. Comm. 1973), the Regional Commissioner listed the following factors to be considered in the adjudication of a Form I-212 Application for Permission to Reapply After Deportation:

> The basis for deportation; recency of deportation; length of residence in the United States; applicant's moral character; his respect for law and order; evidence of reformation and rehabilitation; family responsibilities; any inadmissibility under other sections of law; hardship involved to himself and others; and the need for his services in the United States.

Matter of Lee, 17 I&N Dec. 275 (Comm. 1978) further held that a record of immigration violations, standing alone, did not conclusively support a finding of a lack of good moral character. *Matter of Lee* at 278. *Lee* additionally held that,

> [T]he recency of deportation can only be considered when there is a finding of poor moral character based on moral turpitude in the conduct and attitude of a person which evinces a callous conscience [toward the violation of immigration laws] . . . . In all other instances when the cause of deportation has been removed and the person now appears eligible for issuance of a visa, the time factor should not be considered. *Id.*

The AAO finds that the favorable factors in this case are the applicant's family ties in the United States, his U.S. citizen mother and children, and his prior legal residence in the United States.

The AAO finds that the unfavorable factors in this case include the applicant's convictions of crimes involving moral turpitude, (annoying or molesting a child and petty theft) and his other criminal record (various arrests and convictions for driving under the influence).

The applicant's actions in this matter cannot be condoned. The applicant has not established by supporting evidence that the favorable factors outweigh the unfavorable ones.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that the applicant is eligible for the benefit sought. After a careful review of the record, it is concluded that the applicant has failed to establish that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.