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U.S. Citizenship
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[REDACTED]

FILE: [REDACTED]

Office: MIAMI, FL

Date: JUN 20 2005

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.

Robert P. Wiemann

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting District Director, Miami, Florida, 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 a crime involving moral turpitude. The applicant is the spouse of a naturalized citizen of the United States and seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), so that she may reside in the United States with her spouse.

The acting district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and that because of the severity of the crimes that the applicant had committed, she was not entitled to a favorable exercise of discretion. The acting district director denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the Acting District Director*, dated September 26, 2001.

On appeal, counsel contends that the record clearly establishes that if the applicant is denied adjustment of status and is removed from the United States, it will result in extreme hardship to her husband. *Form I-290B*, dated October 24, 2001.

In support of this assertion, counsel submits a brief, dated November 18, 2001. The entire record was reviewed and considered in arriving at a decision on the appeal.

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 on June 3, 1964, the applicant was convicted of prostitution in New York, New York. On May 25, 1978, the applicant was convicted of possession of a weapon in New York, New York. On July 18, 1988, the applicant was convicted of burglary of structure, armed robbery, kidnapping with a weapon, false imprisonment and attempted robbery in the Circuit Court of Dade County, Florida. The 1988 conviction resulted in a sentence of five years in prison of which the applicant served three years and four months.

An application for admission or adjustment of status 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). There has been no final decision correctly made on the applicant's I-485 application, so the applicant, as of today, is still seeking adjustment of status to that of a lawful permanent resident of the United States. The crimes involving moral turpitude for which the applicant was found inadmissible occurred more than 15 years prior to the date on which the AAO is considering the applicant's appeal. The AAO finds that the acting district director erred in basing his decision on section 212(h)(1)(B) of the Act and failing to consider the eligibility of the applicant for waiver under section 212(h)(1)(A).

The record does not establish that the admission of the applicant to the United States would be "contrary to the national welfare, safety, or security of the United States." The applicant has not been charged with a crime since her convictions and the applicant's crimes occurred more than 15 years ago, demonstrating the applicant's rehabilitation.

The grant or denial of the above waiver does not turn only on fulfillment of the statutory requirements identified at section 212(h)(1)(A) of the Act. It also hinges on the discretion of the Secretary and pursuant to such terms, conditions and procedures as he may by regulations prescribe.

Counsel contends that the applicant has been present in the United States since 1964 and has never departed since her initial entry; that at the applicant's advanced age it would be extremely difficult for her to begin a new life in another country; and that the applicant's strongest family ties are in the United States. Counsel further contends that the applicant would be considered a traitor in her home country of Cuba and would most likely be jailed upon her return; that the applicant's spouse is retired and unemployed and that the couple lives on limited financial means and in the absence of one another, each would become destitute. *Brief in Support of Application for Adjustment of Status under NACARA and 212(H) Waiver*, dated November 18, 2001.

The favorable factors in the application include the fact that the applicant has not been charged with a crime since her convictions more than 15 years ago. In light of the applicant's current age of 69 years, the likelihood of the commission of additional crimes is diminished. In addition, the applicant has resided in the

United States for over 40 years and is the spouse of a United States citizen who would suffer hardship if she were to leave. Also, the country to which the applicant is removable, Cuba, is a nation with which the United States does not maintain diplomatic relations.

The unfavorable factors presented in the application are the applicant's multiple criminal convictions.

Though the applicant's criminal actions cannot be condoned, the applicant has established that the favorable factors in her application outweigh the unfavorable factors.

In discretionary matters, the applicant bears the full burden of proving her 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 is approved.