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U.S. Citizenship  
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MAR 08 2005

[Redacted]

FILE:

[Redacted]

Office: LOS ANGELES, CA

Date:

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, Director  
Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Interim District Director, Los Angeles, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of El Salvador 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 United States citizen and seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), so that he may reside in the United States with his spouse and children.

The interim district director concluded that the Immigration and Naturalization Service [now Citizenship and Immigration Services] has the discretion to deny the Application for Waiver of Grounds of Excludability (Form I-601). The interim district director found that based on the applicant's conviction for two felonies, the waiver should be denied and denied it accordingly. *Decision of the Interim District Director*, dated September 22, 2003.

On appeal, counsel states that the decision of the interim district director did not properly consider the emotional and financial hardship to the applicant's spouse and children. Counsel further contends that the Attention Deficit Hyperactivity Disorder suffered by the applicant's child should not be dismissed and appropriate weight should be given to the fact that the applicant's crime is 20 years old. *Form I-290B*, dated October 22, 2003.

In support of these assertions, counsel fails to submit any additional documentation into the record. The record contains a declaration of the applicant's spouse, undated and a letter from a physician treating the applicant's son, dated August 13, 2003. The entire record was considered in rendering this decision.

The record reflects that on April 14, 1983, the applicant was convicted of Burglary and Assault with Intent to Commit Rape. The applicant was sentenced to three years of state imprisonment.

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 applicant was convicted of the crime of Burglary and Assault with Intent to Commit Rape, in April 1983 based on actions taken by the applicant during 1982. The applicant applied for adjustment of status by filing a Form I-485 on March 9, 1998. Therefore, the crime 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. Further, 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). There has been no final decision made on the applicant's I-485 application, so the applicant, as of today, is still seeking admission by virtue of adjustment; more than 15 years elapsed from the time of the activities which rendered him inadmissible and the date of the instant decision.

The AAO finds that the interim district director erred in basing her 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 reflects that the applicant has not been charged with any additional crimes since his conviction in 1983. 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 record reflects that the applicant meets the requirements for waiver of his grounds of inadmissibility under section 212(h)(1)(A) of the Act. Further, the AAO notes that the applicant's spouse and children would suffer hardship as a result of their separation from the applicant. Counsel contends that the inadmissibility of the applicant would cause extreme financial hardship to the applicant's spouse. *Hardship Declaration of Maria Santamaria*. The applicant's spouse indicates that in the absence of the applicant, she will be unable to afford the medicine that her son requires to treat his Attention Deficit Hyperactivity Disorder. *Id. See also Letter from Daryl Nucum*, dated August 13, 2003 (establishing that the applicant's son is prescribed Ritalin SR). Counsel asserts that the applicant's spouse and children would suffer extreme hardship if they relocated to El Salvador to remain with the applicant. *Hardship Declaration of Maria Santamaria*. The applicant's spouse states that she came to the United States when she was nine years old and that her family is here. *Id.* She indicates that there would be no support for her and her children in another country. *Id.*

The only unfavorable factor presented in the application is the applicant's conviction for Burglary and Assault with Intent to Commit Rape in April 1983. The AAO notes that the applicant has not been charged with a crime since his conviction and the applicant's crime occurred more than 15 years ago, demonstrating the applicant's rehabilitation.

The applicant has established that the favorable factors in his application outweigh the unfavorable factors. The interim district director's denial of the I-601 application was thus improper.

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 is approved.