

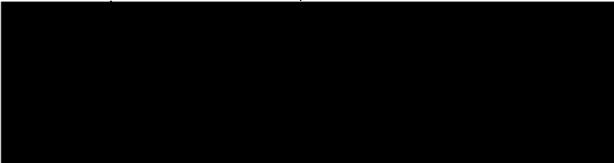
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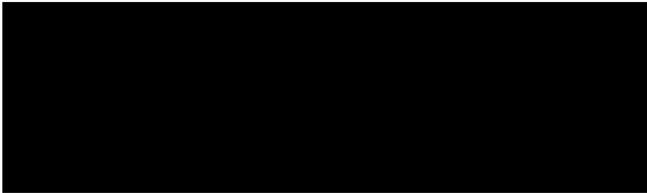


FILE: [REDACTED] Office: LOS ANGELES (SAN BERNARDINO) Date: **DEC 12 2007**

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:



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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The applicant, a citizen of Mexico, was found 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 crimes involving moral turpitude. The applicant is the spouse of a United States citizen and 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 with his wife and family.

The District Director concluded that the applicant had failed to establish that extreme hardship would be imposed on any qualifying relatives and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility. On appeal, counsel contends that the applicant is no longer inadmissible, as more than fifteen years have passed since commission of his crimes. In the alternative, counsel contends that the applicant's wife and stepson would suffer extreme hardship if he is required to return to Mexico. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(2) of the Act provides, in pertinent part:

(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:

(h) The Attorney General [now Secretary, Homeland Security, "Secretary"] 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

Section 212(h) of the Act provides that a waiver of the bar to admission is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. Once extreme hardship is established, CIS must then assess whether to exercise discretion.

The record establishes that the applicant has been convicted of three crimes involving moral turpitude. On August 15, 1980, the applicant pleaded guilty to the crime of unlawful intercourse. The applicant's unlawful intercourse in this case consisted of the crime of statutory rape. At the age of twenty-five, the applicant had intercourse with a sixteen-year-old girl. He was sentenced to 120 days imprisonment and five years of probation.

Three years later, on September 1, 1983, a jury found the applicant guilty of two crimes: (1) forcible rape, and (2) oral copulation by force.¹ He and another individual were convicted of acting in concert to rape a sixteen-year-old girl.² On October 28, 1983, he was sentenced to a seven-year term of confinement in a California state prison. Counsel and the applicant do not dispute that these offenses constituted crimes involving moral turpitude. The applicant was deported from the United States on January 23, 1987. He re-entered the United States, without inspection, in 1990.

On appeal, counsel contends that the District Director erred in her adjudication of this petition. For instance, counsel states that the District Director erred in not considering that fifteen years had passed since the applicant's commission of the crimes. Counsel also contends that the District Director erred in stating that hardship to the couple's son may not be considered.

The AAO will first address section 212(h)(1)(A) of the Act. As noted previously, the applicant's convictions occurred in 1980 and 1983—more than fifteen years ago. Accordingly, CIS must analyze whether the applicant is entitled to a waiver under section 212(h)(1)(A) of the Act, and the District Director erred in not undertaking such an analysis.

There is no question as to the passage of fifteen years of time, so the AAO will next analyze the next two issues, which are whether the applicant has rehabilitated, and whether his continued presence in the United States would be contrary to the national welfare, safety, or security of the United States.

Counsel makes several assertions regarding applicant's rehabilitation. First, counsel notes the simple passage of time with no additional criminal violations—since the applicant's last conviction in 1983, twenty-four years ago, he has committed no additional crimes. Counsel also cites to a psychological

¹ The District Attorney's June 19, 1983 brief accused the applicant of "willfully and unlawfully by means of force and fear of immediate and unlawful bodily injury have and accomplish an act of sexual intercourse with and against the will of [the victim]."

² A mitigating circumstance regarding this criminal act is the existing relationship between the applicant and the victim. While the sexual relationship was illegal due to her age, the AAO notes that the couple was dating at the time of the violation, and that the victim visited the applicant while he was in jail for statutory rape. While this certainly does not excuse the criminal act, it does diminish a finding that this act indicates that the applicant is a danger to the community at large.

evaluation submitted by [REDACTED] Ph.D., a licensed psychologist, dated February 22, 2005. Dr. [REDACTED] states, at page 13, the following with regard to the applicant's rehabilitation:

After interviewing [the applicant] and his wife [name withheld], I am unable to find any evidence of impairment such as loss of impulse control, poor frustration tolerance, alcoholism or drug addiction³ and any mental disorder or condition that would increase [the applicant's] vulnerability to re-offending. [The applicant's wife], while expressing shock and strong disapproval over [the applicant's] actions in the 1983 incident that lead to his incarceration and deportation, repeatedly emphasized that the man she [has known] for 13 years is completely unlike the man who committed the earlier offenses. Specifically, she said he remains calm and even tempered when interacting with her, even when her mood fluctuates markedly and when she acts in an irritable and demanding manner. Because of physical problems possibly related to hormonal changes she is often uninterested in having sexual relations with [the applicant], who remains understanding and calm.

The relationship between both individuals is strong, selfless, and understanding, a positive factor that makes it less likely that [the applicant] will commit another criminal offense.

The factors that rendered him vulnerable at the time he engaged in reckless, thoughtless, and criminal misconduct were his relative youth and immaturity, his prodigious alcohol consumption and the influence of like minded peers. None of these factors are currently present. He is gainfully employed, actively involved in the lives of his wife and her severely disabled son, no longer abuses alcohol and does not associate with an anti-social peer group.

Furthermore, aside from illegally entering the country in the early 1990's he has not engaged in any criminal misconduct and is not suffering from a mental disorder or a personality disorder. He is a strong and essential asset to his family. . . .

As further evidence of the applicant's rehabilitation, the record contains several letters from family members, friends, and previous employers attesting to his good character. The AAO finds that the statements of the psychologist, the applicant's advanced age, evidence of a stable marriage, the character reference letters, and, most importantly, the passage of twenty-four years with no further criminal acts establish that the applicant has rehabilitated and poses no further danger to the public. For the same reasons, the AAO finds further that admission of the applicant would not be contrary to the national welfare, safety, or security of the United States.

The record, therefore, reflects that the applicant meets the requirements for waiver of his grounds of inadmissibility under section 212(h)(1)(A) of the Act. However, the grant or denial of the waiver does not turn only on the mere passage of fifteen years of time. It also hinges on the discretion of the Secretary and pursuant to such terms, conditions and procedures as he may by regulations prescribe.

³ The AAO notes the involvement of both alcohol and illegal drugs in the 1983 incidents.

The favorable factors in this matter are the applicant's United States citizen wife, United States citizen stepson, the major role he plays in his disabled stepson's life,⁴ his rehabilitation, gainful employment, letters of recommendation, and the passage of twenty-four years since his most recent violation. The unfavorable factors in this matter are the applicant's criminal violations, his re-entry after removal, and periods of unauthorized presence.

The AAO finds that the crimes committed by the applicant were serious in nature and cannot be condoned. Nonetheless, it finds that the applicant has established that the favorable factors in his application outweigh the unfavorable factors. Therefore, a favorable exercise of the Secretary's discretion is warranted.

Finally, the AAO notes that the District Director also found the applicant inadmissible under 8 C.F.R. § 212(a)(8). However, the District Director did not indicate why the applicant would be permanently ineligible for United States citizenship. The file does not indicate that the applicant is permanently ineligible for United States citizenship, and the AAO withdraws the District Director's finding in this regard.

In proceedings for application for waiver of grounds of inadmissibility under sections 212(h), the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has sustained that burden. Accordingly, this appeal will be sustained and the waiver application approved.

ORDER: The appeal is sustained. The waiver application is approved.

⁴ The record establishes that the applicant's stepson, a citizen of the United States, suffers from Norrie Syndrome. Through extensive documentation from his medical team and caretakers, the record establishes that the applicant's stepson is wheelchair-bound; that he is five months of age mentally and nine months of age physically (he was nineteen years old at the time these letters were written); that he has a tumor in his head; and that, while he is able to make some noises and sounds, he is totally dependent upon his mother and the applicant to care for him (as he is cognitively impaired, blind, deaf, nonverbal, incontinent, and unable to feed himself or take any of his five medications himself). The record also contains evidence documenting the role that the applicant plays in the care of his stepson, which includes feeding him, bathing him, dressing him, changing his soiled undergarments, singing to and dancing with him, and providing financial support.