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FILE:

Office: LOS ANGELES

Date: JUN 06 2007

IN RE:

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The district director, Los Angeles, California, denied the waiver application. The matter is now on appeal before the Administrative Appeals Office (AAO) in Washington, DC. The appeal will be sustained.

The applicant () is a native and citizen of Mexico who was found inadmissible to the United States pursuant to 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 committed a crime involving moral turpitude. () is the husband of a naturalized citizen () of the United States, and the father of U.S. citizen children. The applicant seeks a waiver of inadmissibility under section 212(h) of the Act.

The district director concluded that the applicant failed to establish extreme hardship would be imposed on a qualifying relative, and accordingly denied the Application for Waiver of Excludability (Form I-601). *Decision of the District Director*, dated April 23, 2004.

On appeal, counsel makes the following statements. The applicant committed a crime of moral turpitude; however, the district director failed to meaningfully review the waiver application. The applicant's conviction under Cal. Penal Code § 288(a) on March 29, 1988 occurred more than 15 years before the date of his application for a section 212(h) waiver on April 19, 2004; he therefore qualifies for a waiver under section 212(h)(1)(A) of the Act. The applicant was convicted of a misdemeanor under federal law. Under federal law, an offense is defined as a misdemeanor if the maximum authorized term of imprisonment is one year or less and the minimum authorized term of imprisonment is 5 days. The applicant served 6 months in jail and was given 5 years probation. His conviction should be considered a misdemeanor and a "petty offense" for purposes of the Act. Section 212(a)(2)(A)(ii)(II) of the Act waives offenses with a sentence of 6 months or less. Accordingly, as () has a misdemeanor conviction, he should not be required to file a waiver for a petty offense. Even if required to file a waiver, he merits favorable discretion under section 212(h)(1)(A) of the Act. The applicant's admission to the United States is not contrary to the national welfare, safety, or security and he has rehabilitated. () has only one conviction that happened over 16 years ago. He complied with the terms of his probation and it was terminated before the completion of the five years. On January 14, 1993, the California court terminated his probation and dismissed the conviction against him pursuant to Cal. Penal Code § 1203.4. The California court found that the applicant had been rehabilitated and granted him the relief sought. The applicant's wife indicated that the probation officer recommended to the court that her husband's probation be terminated and the case against him dismissed. The applicant successfully completed four months of counseling sessions with Acacia Counseling. The applicant is remorseful for his crime. The applicant has submitted letters attesting to his good character. The applicant is active with the Christian Congregation of the Jehovah Witnesses. The applicant merits a favorable decision under section 212(h)(1)(B) of the Act.

Section 212(a)(2) of the Act states 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:

(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 district director found that the applicant's conviction under Cal. Penal Code § 288(a) was for a crime involving moral turpitude. She therefore found the applicant inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act. Counsel does not challenge the director's finding of inadmissibility based on this ground. Counsel disagrees with the district director's denial of the section 212(h) waiver of admissibility.

In this proceeding, the AAO will address the district director's denial of the section 212(h) waiver of admissibility. The entire record has been reviewed in rendering this decision.

The applicant was convicted under Cal. Penal Code § 288(a), which is a felony. The felony complaint states the following:

On or about January 12, 1988 . . . the crime of LEWD ACT UPON A CHILD was committed by the applicant, who did willfully, unlawfully, and lewdly commit a lewd and lascivious act upon and with the body and certain parts and members thereof of [], DOB: 2/9/80, a child under the age of fourteen years, with the intent of arousing, appealing to, and gratifying the lust, passions, and sexual desires of the said defendant(s) and the said child. It is further alleged that the above offense is a serious felony within the meaning of Penal Code Section 1192.7(c)(6).

Felony Complaint, Count I, filed March 29, 1988.

On March 29, 1988, the defendant pled guilty to 288(a). The sentence of imprisonment in the state prison for a total of six years was suspended by the judge. Supervised probation was granted for five years. The defendant was to spend the first six months in county jail. He was ordered not to associate with the victim or minors under the age of 14 years. He was ordered to cooperate with the probation officer to plan for psychological or psychiatric treatment; seek and maintain training, schooling, or employment; maintain a residence; and obey all laws, orders, rules and regulations of the probation department and the court. *Minutes Entered March 29, 1988, the Superior Court of California, County of Los Angeles, case number A887865.*

The probation officer recommended that the period of probation be terminated and the case be dismissed. The period of probation was ordered terminated by the judge pursuant to Section 1203.3, Penal Code. The case was ordered dismissed. The plea or conviction of guilty was ordered set aside, a plea of not guilty was ordered entered and the case was dismissed pursuant to Section 1203.4, Penal Code. *Order Signed by the Judge of the Superior Court of California, County of Los Angeles, on January 14, 1993. Minutes Entered on January 14, 1993, case number A887865.*

For a waiver under section 212(h)(1)(A) of the Act, the person needs to establish that the activities for which he or she is inadmissible occurred more than 15 years before the date of his or her application for a visa, admission, or adjustment of status. In the context of an adjustment application, such as the situation presented here, the Board of Immigration Appeals (BIA) has held that adjustment is an admission. In *Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992), the BIA states that an application for admission to the United States is a continuing application, and admissibility is determined on the basis of the facts and the law at the time the application is finally considered.

The record here reflects that the Form I-130, Immigrant Petition for Relative, Fiance, or Orphan, was filed on May 12, 1992, and approved on September 4, 1992. *Form I-797*. The Form I-485, Application to Register Permanent Residence or Adjust Status, was filed by the applicant on January 6, 1998, and it was subsequently denied. The applicant submitted the Form I-601 on April 19, 2004, which was denied on April, 23, 2004, and subsequently appealed. It has been more than 15 years since the denial and appeal of the Form I-601. Thus, the crime involving moral turpitude for which the applicant was found inadmissible occurred more than 15 years prior to the applicant's application for a visa, admission, or adjustment of status, as required by section 212(h)(1)(A)(i) of the Act.

Section 212(h)(1)(A)(ii) of the Act requires that the applicant's admission to the United States not be contrary to the national welfare, safety, or security of the United States. The record reflects that the applicant's probation ended about two months early and the judge dismissed the conviction pursuant to Cal. Penal Code § 1203.4. He completed four months of counseling sessions with Acacia Counseling. The applicant states that he is remorseful for his crime. It is noted that there is no documentation in the record that describes with specificity the acts committed by the applicant upon which his conviction is based. The record reflects that the applicant is active with his church, dedicating an average of 26.33 hours a month in helping people learn of the word of God. The record contains a reference letter from the applicant's employer. The letter from Coan Construction Company, Inc. indicates that the applicant has been gainfully employed there since February 24, 1999. The AAO notes that the applicant has not been charged with any additional crimes since his conviction, which occurred 19 years ago. The record therefore indicates that the applicant's admission to the United States is not contrary to the national welfare, safety, or security of the United States.

Section 212(h)(1)(A)(ii) of the Act requires that the applicant establish that he or she has been rehabilitated. The record reflects that the applicant's probation ended early, with the judge dismissing the conviction pursuant to Cal. Penal Code § 1203.4. He completed counseling sessions. The applicant expresses remorse for his crime. He has not been charged with any additional crimes since his 1988 conviction. The AAO therefore finds that the record indicates that the applicant has been rehabilitated.

The applicant has established that the favorable factors in his application outweigh the unfavorable factors. The applicant has an approved Form I-130. The record reflects that he has a steady work history and pays taxes. It indicates that he has a close relationship with his wife and children, and financially supports his family. The record contains positive letters of recommendation about the applicant. The negative factors in the case are the applicant's conviction under Cal. Penal Code § 288(a) in 1988, his initial entry without inspection in the United States, and his periods of unauthorized presence. The AAO finds that the favorable factors here outweigh the unfavorable factors. The 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 met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained and the application is approved.