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U.S. Citizenship  
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FILE:

Office: BUFFALO (ALBANY) NEW YORK Date:

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 Officer-in-Charge (OIC), Buffalo, New York, 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 [REDACTED] is a native of Guyana and citizen of Canada who was found inadmissible to the United States pursuant to section 212(a)(2)(B) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(B), for having been convicted of two or more offenses (other than purely political offenses) with an aggregate sentence to confinement of five years or more. [REDACTED] is the husband of a naturalized citizen of the United States. He seeks a waiver of inadmissibility under section 212(h) of the Act. The OIC concluded that the applicant failed to establish extreme hardship would be imposed on a qualifying relative, and denied the Application for Waiver of Excludability (Form I-601). *Decision of the OIC*, dated July 28, 2005. Counsel submitted a timely appeal.

The AAO will first determine the applicant's inadmissibility under section 212(a)(2)(B) of the Act. This section states that:

Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

As shown by the record, the applicant has the following convictions:

- September 29, 1983 – false pretenses under \$200, suspended sentence and probation for 12 months
- October 4, 1983 – public mischief, \$200 or 10 days; fail to appear in court, \$100 or 5 days consecutive
- July 19, 1984 – possession of stolen property over \$200, discharged
- January 29, 1985 – theft under \$200, \$35 or 5 days (other charges were dismissed or withdrawn)
- February 18, 1988 – theft over \$200, 5 months and restitution \$7,348.90; false pretenses under \$200 (2 counts), 15 days on each charge consecutive sentence and consecutive
- February 22, 1988 – fraud over \$1,000, 3 months consecutive to sentence serving and probation 1 year; fail to appear in court

The AAO finds that the record reflects that the applicant was convicted of two or more offenses; however, it does not reflect that the aggregate sentences to confinement were five years or more. Thus, the OIC erred in finding the applicant inadmissible under section 212(a)(2)(B) of the Act.

The applicant is inadmissible, however, for having been convicted of committing a crime involving moral turpitude under section 212(a)(2) of the Act, which 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.

The applicant's theft conviction constitutes a crime involving moral turpitude. *See, e.g., U.S. v. Esparza-Ponce*, 193 F.3d 1133, 1135-37 (9<sup>th</sup> Cir. 1999) (petty theft under California law involves moral turpitude).

Section 212(h) of the Act provides a waiver for having committed a crime involving moral turpitude. It states, 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 . . .

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 OIC denied the waiver application on July 28, 2005, and the applicant is appealing the OIC's decision. More than 15 years have passed since the applicant's most recent conviction on February 22, 1988. Thus, the crimes involving moral turpitude for which the applicant was found inadmissible occurred more than 15 years prior to his 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 indicates that the applicant married his wife, [REDACTED] on May 2, 2003. The 2003 tax records reflect that the applicant was unemployed in 2003. The Form G-325 indicates that he has been a self-employed developer since 1996. The record contains letters attesting to the applicant's character. The AAO notes that the applicant has not been

charged with any additional crimes since the convictions which occurred more than 15 years ago. The record therefore indicates that the applicant's admission to the United States will not be contrary to the national welfare, safety, or security of the United States; and that he has been rehabilitated.

The applicant must also establish that the favorable factors in his application outweigh the unfavorable factors. The favorable factors are an approved I-130 petition, the affidavit from his wife, the five letters that attest to the applicant's good character, his self-employment, and the passage of more than 15 years since the commission of crimes. The unfavorable factors are the applicant's commission of crimes and his periods of unauthorized presence in the United States. The AAO finds that the applicant has established that the favorable factors in his application 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.