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U.S. Citizenship
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H2 #2

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **APR 10 2008**

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director of the California Service Center in Laguna Niguel 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 Cuba 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). The applicant sought a waiver of inadmissibility under section 212(h) of the Act, which the director denied, concluding that the applicant failed to establish extreme hardship would be imposed on a qualifying relative. *Decision of the Director*, dated March 24, 2006. The applicant submitted a timely appeal.

The AAO will first address the finding of inadmissibility.

The relevant statutory provisions are as follows.

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 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines “conviction” for immigration purposes as:

A formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where –

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.

Section 212 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 March 20, 1989 the applicant plead guilty to a crime of moral turpitude, Passing Worthless Checks in Florida, and that adjudication of guilt was withheld and the applicant was placed on probation. The director stated that withholding of adjudication in Florida is a conviction for immigration purposes, and he consequently, and correctly, found the applicant inadmissible under section 212(a)(2) of the Act. The director found that the applicant failed to establish the "extreme hardship" requirement to a qualifying family member under the waiver at section 212(h) of the Act.

On appeal, counsel contends that the applicant does not have to establish the waiver requirement at section 212(h) of the Act, but is eligible for a waiver under section 212(h)(1)(A) of the Act. The AAO agrees. For a waiver under section 212(h)(1)(A) of the Act, a 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 of status 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 adjudicated.

With the case here, the district director denied the applicant's waiver application in 2006, and the applicant is appealing that decision. The activity for which the applicant is inadmissible, the conviction of Passing Worthless Checks, occurred in 1989, which is more than 15 years prior to the applicant's application for adjustment of status, which is a considered a continuing application until its final adjudication.

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 contains a letter dated January 31, 2006 from a friend of the applicant who has known him for 13 years. This letter conveys that the applicant is honest, trustworthy, and reliable and a positive member of society.

The record conveys that the applicant has serious health problems: coronary artery disease, myocardial infarction, hypertrophic cardiomyopathy, diabetes mellitus type 1, hyperlipidemia, diabetic neuropathy and nephropathy. The letter from the Social Security Administration indicates that he is receiving supplemental security income payments.

Based on the documentation in the record, the AAO finds 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 has been rehabilitated. The record reflects that the applicant completed the probation imposed for the conviction and paid restitution to the victim. The record does not indicate any additional crimes have been committed since the prior conviction, which occurred in 1989. The AAO finds the record conveys that the applicant has been rehabilitated.

The applicant has established that the favorable factors in the application outweigh the unfavorable factors. The applicant entered the United States in February 11, 1969, when he was nearly three years old. The applicant has a pending Form I-485 Application by Cuban Refugee for Permanent Residence. The record reflects that he worked from 1986 to 1987. It shows that he is presently disabled and has serious health problems. The record contains a positive letter of recommendation about the applicant. The negative factor in this case is the applicant's conviction. The AAO finds that the favorable factors outweigh the unfavorable factors. The 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.