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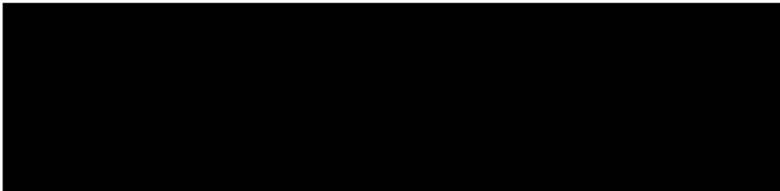


FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **DEC 16 2008**

IN RE: Applicant: [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)i

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 black ink, appearing to read "John F. Grissom".

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The waiver application will be approved. The matter will be returned to the director for continued processing.

The applicant is a native and citizen of Australia. The record establishes that the applicant was convicted of multiple counts for the offense of “Worthless Checks” and was ordered to pay restitution based on a 1984 arrest. The applicant was thus deemed to be inadmissible for having committed a crime involving moral turpitude 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). In August 2006, the applicant filed a Form I-601, Application for Waiver of Ground of Excludability (Form I-601), seeking a waiver pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with her U.S. citizen and lawful permanent resident daughters.

The 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 accordingly. *Decision of the Director*, dated August 29, 2006.

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:

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
- (2) The Attorney General (Secretary), in his discretion . . . has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

In support of the appeal, counsel for the applicant first contends that the applicant's conviction is not for a crime involving moral turpitude and as such, she is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act. As counsel asserts:

The offense of 'worthless checks' in Tennessee falls under Section 39-14-121 of the Tennessee Criminal Code.... By the terms of this statute, a person may be convicted of this offense through a showing of either 'fraudulent intent' or through 'knowingly' committing the crime. As such, 'fraudulent intent' is not an essential element of this offense because it is not required for a conviction under this statute....

Brief in Support of Appeal, dated October 20, 2006.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). In this case, counsel has provided the wording of section 39-14-121 of the Tennessee Criminal Code, as quoted above; however, upon further review, said wording became effective November 1, 1989. As the applicant's conviction occurred in 1984, it has not been established that the statutory language for the offense of "Worthless Checks" as it read in 1984 does not amount to a crime of moral turpitude.

Nevertheless, as the above-referenced conviction was for a crime which occurred more than fifteen years ago, the AAO finds the analysis as to whether the applicant's qualifying relatives would suffer extreme hardship if the applicant were removed to Australia unnecessary, as a waiver of inadmissibility is available to the applicant under section 212(h)(1)(A) of the Act. The record does

not establish that the applicant's admission to the United States would be contrary to the national welfare, safety, or security of the United States. Moreover, the record indicates that the applicant has not been convicted of any crimes since 1984, which indicates rehabilitation.

To further support the applicant's rehabilitation, the applicant provides a letter. As she states:

I was arrested in 1984 in Tennessee on five counts of writing bad checks. It was a one time terrible mistake of mine and I made sure that I paid the full restitution to the person that was affected by my negligence. I only had to appear in court one time before the judge.... I was never sent to jail for this offense and only told to pay restitution.

Since then, I have never had any further problems with the law because I learned my lesson. It was a mistake that I regret and I have never repeated. I am now building a successful business in the US and establishing myself as an outstanding member of the community.

I feel terribly sorry for what I have done 22 years ago and I hope that this will not affect the future of my family.... I am a single mother of two daughters and both of them are living in the United States. My daughter, [REDACTED] is a US citizen.... My other daughter, [REDACTED], is a Lawful Permanent Resident.... It's just the three of us and we have no other immediately family in the U.S. My only granddaughter, [REDACTED] (3 years old) also lives in the U.S. and I cannot imagine not being part of my children's and grandchildren [sic] life growing up in the US....

Affidavit of [REDACTED] dated August 7, 2006.

The record reflects that the applicant meets the requirements for a waiver of inadmissibility under section 212(h)(1)(A) of the Act. Further, the AAO notes that the applicant's daughters, one who is a U.S. citizen and one who is a lawful permanent resident, would suffer as a result of their separation from the applicant. 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. In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y*, 7 I&N Dec. 582 (BIA 1957).

In evaluating whether . . . relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the

alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

See Matter of Mendez-Morales, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, “[B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country. “ *Id.* at 300. (Citations omitted).

The favorable factors in this matter are the applicant's U.S. citizen and lawful permanent resident daughters, the applicant's U.S. citizen grand-child, the hardships that the qualifying relatives would face if the applicant were not present in the United States, the applicant's long-term care of her daughters as a single parent, business ownership, community ties, and the passage of more than 24 years since the violations that lead to her conviction. The unfavorable factors in this matter are the applicant's criminal conviction and her unauthorized presence and employment in the United States.

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

In proceedings for application for waiver of grounds of inadmissibility under section 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 application approved.

ORDER: The appeal is sustained. The waiver application is approved. The director shall reopen the denial of the Form I-485 application on motion and continue to process the adjustment application.