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U.S. Department of Homeland Security
Citizenship and Immigration Services
Administrative Appeals Office MS 2090
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U.S. Citizenship
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Services

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FILE: [REDACTED] Office: BALTIMORE Date: APR 20 2009

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

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 District Director, Baltimore, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Guyana who was found to be 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 been convicted of crimes involving moral turpitude. The applicant 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.

The district director concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated September 15, 2006.

On appeal, counsel for the applicant contends that the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act. *Brief from Counsel*, dated October 17, 2006. Specifically, counsel asserts that the applicant's convictions were for crimes in furtherance of a single episode and thus they should be treated as a single offense. *Brief from Counsel* at 1. Counsel asserts that, as the applicant has been convicted of only a single offense, his criminal activity falls under the petty offense exception and he is not inadmissible. *Id.* In the alternative, counsel contends that the applicant has established that his permanent resident mother and U.S. citizen child will experience extreme hardship if the applicant is compelled to depart the United States. *Id.* at 3.

The record contains a brief from counsel; documentation regarding the applicant's criminal activity; medical documentation for the applicant's mother; a copy of the applicant's birth certificate; a copy of the applicant's passport; a statement from the applicant; copies of documents in connections with the applicant's daughter's education; a copy of the applicant's daughter's birth certificate; a statement from the applicant's mother; a copy of the applicant's mother's permanent resident card; a copy of the applicant's marriage certificate; copies of documents relating to the applicant's employment and taxes, and; a report on conditions in Guyana. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(2)(A) of the Act states in pertinent part, that:

- (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.
- (ii) Exception.-Clause (i)(I) shall not apply to an alien who committed only one crime if-

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- (II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

Section 212(h) of the Act provides, in pertinent part, that:

- (h) The Attorney General [now Secretary, Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraphs (A)(i)(I) [or] (B) . . . 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
- (1) (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 [now the Secretary of Homeland Security (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 the applicant was charged with two counts of violating Maryland Code Article 27 § 464(c) for Sexual Offense/Fourth Degree. On September 5, 1991, a judge entered an order of probation before judgment for both counts, sentencing the applicant to three years of probation. Accordingly, the applicant was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act for having been convicted of crimes involving moral turpitude.

Counsel contends that the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act. *Brief from Counsel*, dated October 17, 2006. Counsel asserts that, pursuant to the authority of the decision of the Board of Immigration Appeals in *Matter of Adetiba*, 20 I&N Dec. 506 (BIA 1992), the applicant's convictions were for crimes in furtherance of a single episode and thus they should be treated as a single offense. *Brief from Counsel* at 1. Counsel asserts that, as the applicant has been convicted of only a single offense, his criminal activity falls under the petty offense exception and he is not inadmissible. *Id.*

Upon review, the applicant has not established that his two offenses should be considered a single offense for the purpose of determining inadmissibility under section 212(a)(2)(A)(i)(I) of the Act. While the applicant's conduct that led to two charges for Sexual Offense/Fourth Degree occurred during the same incident, the applicant has not shown that these two offenses should be treated as a single conviction as part of a "single scheme of criminal misconduct," as contemplated by *Matter of Adetiba*.

In *Matter of Adetiba*, the Board of Immigration Appeals (BIA) addressed whether an applicant's criminal convictions were pursuant to a single scheme of criminal misconduct for the purpose of determining deportability under section 241(a) of the Act. *Matter of Adetiba* at 506. The BIA did not identify a "single scheme rule" that applies in the context of determining inadmissibility under section 212(a)(2)(A)(i)(I) of the Act. The applicant has not established that such a doctrine applies regarding an assessment of his criminal convictions in light of section 212(a)(2)(A)(i)(I) of the Act.

It is further noted that the applicant was charged with two separate infractions under the same section of Maryland law, rather than two crimes where one constitutes a lesser offense of the other. As the applicant was charged with two separate counts under the same section of law, it is evident that the court determined that the applicant committed two separate acts of criminal misconduct. As the applicant has been convicted of more than one crime involving moral turpitude, he is not eligible for the "petty offense exception" found in section 212(a)(2)(A)(ii) of the Act. Based on the foregoing, the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The applicant was also convicted of Simple Assault in the District of Columbia on February 10, 1998. There is evidence in the record to show that the applicant's simple assault charge was related to an incident of domestic violence. Specifically, as part of his sentence he was compelled to attend a domestic violence counseling program. The record does not state the section of law under which the applicant was convicted for simple assault. However, District of Columbia Official Code § 22-404 defines assault when no aggravating circumstances are involved, with a maximum sentence of a fine of not more than \$1,000 or imprisonment of not more than 180 days, or both. The section does not contain any references to domestic violence or the perpetrators relationship to the victim of the assault. It is noted that the District of Columbia does not have a statute that specifically criminalizes the assault on one's spouse or other domestic relation.

There is ample legal precedent to support that a conviction under a domestic violence statute constitutes a crime involving moral turpitude. *See Grageda v. INS*, 12 F.3d 919 (9th Cir.

1993)(finding that the applicant committed a crime involving moral turpitude due to his conviction under California Penal Code § 273.5(a) for willful infliction of injury upon a spouse); *Matter of Tran*, 21 I&N Dec. 291 (BIA 1996). However, the AAO must look to the statute that defines the crime of which the applicant was convicted to determine if it involves moral turpitude. In the present matter, although the record contains documentation that suggests that the applicant was convicted of assault due to an incident of domestic violence, the statute under which he was convicted is limited to simple assault with no aggravating circumstances. The conviction document does not describe the applicant's actions that led to the conviction, such as who he assaulted. Simple assault, without aggravated circumstances, has not been deemed a crime involving moral turpitude for the Board of Immigration Appeals. See *Matter of E*, 1 I&N Dec. 505 (BIA 1943); *Matter of B*, 5 I&N Dec. 538 (BIA 1953). Based on the foregoing, the record does not support that the applicant's conviction for simple assault constitutes a crime involving moral turpitude, such that it further gives rise to inadmissibility under section 212(a)(2)(A)(i)(I) of the Act.

In examining whether the applicant is eligible for a waiver, the AAO will assess whether he meets the requirements of section 212(h)(1)(A) of the Act. The applicant's most recent crime of moral turpitude for which he is inadmissible involved his conduct on or before September 5, 1991. As this conduct took place over 15 years ago, he meets the requirement of section 212(h)(1)(A)(i) of the Act.

The record does not reflect that admitting the applicant would be contrary to the national welfare, safety, or security of the United States. Section 212(h)(1)(A)(ii) of the Act. While the applicant was sentenced for two counts of Sexual Offense/Fourth Degree, his conduct occurred over 17 years ago. The record does not reflect that the applicant has engaged in similar conduct since his prior sentence.

The record shows that the applicant was convicted of simple assault on February 10, 1998. The record reflects that the assault was in connection with an incident of domestic violence. Yet, the applicant participated in a domestic violence counseling program involving numerous counseling sessions, which he completed on or about August 31, 1998. The record does not reflect that that applicant has engaged in domestic violence in over 10 years, since his conviction and counseling program.

The applicant has not engaged in criminal behavior in over 10 years. The applicant has not been a public charge in the United States. Accordingly, the applicant has shown that he meets the requirement of section 212(h)(1)(A)(ii) of the Act.

The applicant has shown by a preponderance of the evidence that he has been rehabilitated. Section 212(h)(1)(A)(iii) of the Act. As discussed above, there is no evidence that he has engaged in criminal activity in over 10 years. The record shows that he has conducted himself well during the last 10 years, including purchasing property in the United States, working and paying taxes, and providing emotional and economic support for his U.S. citizen mother and daughter. The record does not reflect that the applicant has a propensity to engage in further criminal activity. Accordingly, the applicant has shown that he meets the requirement of section 212(h)(1)(A)(iii) of the Act.

Based on the foregoing, the applicant has shown that he is eligible for consideration for a waiver under section 212(h)(1)(A) of the Act.

In determining whether the applicant warrants a favorable exercise of discretion under section 212(h) of the Act, the Secretary must weigh positive and negative factors in the present case.

The negative factors in this case consist of the following:

The applicant was sentenced for two counts of Sexual Offense/Fourth Degree, and simple assault related to domestic violence.

The positive factors in this case include:

The applicant has family ties to the United States, including his U.S. citizen daughter and permanent resident mother; the applicant has not been convicted of a crime since 1998, in approximately 10 years; the applicant owns property in the United States; the applicant works and pays taxes; the applicant provides support for his U.S. citizen daughter and permanent resident mother, and; the applicant expresses remorse for his criminal activity.

The AAO does not condone the applicant's prior criminal activity. However, the positive factors in this case outweigh the negative factors.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met his burden that he merits approval of his application.

ORDER: The appeal is sustained.